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Who Should Trigger Article 50? Constitution experts say neither the Courts nor Parliament should have the last word on Brexit, in new Politeia publication

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The Supreme Court has now ruled by a majority of 8 to 3 that an Act of Parliament is needed before the government triggers Article 50.

In Politeia's new publication, *Triggering Article 50, Courts, Government and Parliament*, lawyers and historians consider some of the legal, constitutional and historical question raised by the case and the ruling:

The authors consider:

- **Where does sovereignty lie? What role should parliament play?**
- **How should the courts approach politically controversial matters such as Brexit?**
- **What implications are there for the functioning of Britain's democratic system?**

Where does sovereignty lie? Professors Jonathan Clark and Robert Tombs explain that different institutions at different times have appeared to be sovereign – the monarch (later prime minister), parliament (both houses), the courts of law – but never just parliament - and the people have always played a role. They explain that:

- Who had 'the final say is a reality of history and politics ... as much as a question of law or constitutional theory. The test of who is sovereign is who would ultimately be obeyed that .. would not necessarily be the House of Commons, which made itself ... detested the last time it assumed sovereignty in the 1640s-50s ...' (Robert Tombs)
- The idea 'that Parliament was ever simply "sovereign" is ... an historical myth ... a bad foundation for law'. Constitutionally it is a grey area, which may now be seen by the courts as an opportunity for the courts to expand the role of the judiciary. (Jonathan Clark)

What role should parliament have? Professor David Abulafia welcomes Brexit as a vote which will restore the position of parliament:

- '... after years during which prime ministers have not always paid as much attention to parliament as they might have done...the backing of parliament gives added strength to the British government in its dealing with....champions of the "European journey".' (David Abulafia)

How should the courts approach politically controversial matters such as Brexit? Two academic lawyers, **Professor Peter Crisp** and **David Howarth**, a Cambridge academic lawyer and former Liberal Democrat shadow attorney general reflect on the implications, legal and constitutional. They suggest that:

- Judges should keep their political views to themselves and cultivate the anonymity which characterises, for instance, the New Zealand bench. (Peter Crisp)
- The courts are not the best place to decide constitutional questions. Such change should only take place after extensive consultation and attempts to build consensus. Litigation is not the most suitable preparation for this. (David Howarth)
- The courts lack a full range of points of view – 'they only hear what is in the interests of the parties that they hear' and the views not in court are ignored, with the central issues being ignored as in the present case. (David Howarth)

What implications are there for the functioning of Britain's democracy? Politeia's director, **Dr Sheila Lawlor**, also a historian, explains that the question of where authority lies came to have a fixed answer for voters and their political leaders by the 20th century. By then parliamentary authority was seen to derive from the popular will, which made for a system unique in its stability and freedom. That perception matters as much today and should be respected.

- The 'popular will was seen to be the foundation of *and to limit* the power of parliament'. (Sheila Lawlor)

Two things are certain. The referendum is a new and powerful factor for ascertaining the people's will, and Brexit will help restore parliament's role in the future.

The Referendum. The authors conclude that the referendum has brought new meaning to the expression of the popular will. It may not be the only expression of that will, and there will almost certainly continue to be uncertainties, constitutional and political, about where power at any given time lies.

In the end, though, the courts should leave to Caesar what is for Caesar. As David Howarth concludes:

- '... politics, history and law are different, no matter how intertwined they might appear. Those who want to bring about change in the British constitution should stick to politics.'

The themes will be discussed at a launch event on Tuesday 24th January, 6.45-7.45pm at the East India Club, 16 St James's Square, London SW1Y 4LH.

Speaking will be **Graham Brady MP**, Chairman, 1922 Committee, **Jonathan Clark** (via Skype), **Peter Crisp**, **David Howarth**, **The Rt Hon John Redwood MP** and **Robert Tombs**. Journalists are welcome to attend. If you would like to attend please email secretary2@politeia.co.uk with your name, email, role, organisation and a daytime telephone number.

**Triggering Article 50, Courts, Government and Parliament* by David Abulafia, Jonathan Clark, Peter Crisp, David Howarth, Sheila Lawlor and Robert Tombs is published by Politeia, 14a Eccleston Street, London, SW1W 9LT.

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Note to editors – Politeia's past contributors include academic and specialist speakers and politicians (e.g. The Rt Hon Boris Johnson MP, The Rt Hon David Davis MP, The Rt Hon Michael Gove MP, The Right Hon Liam Fox MP and the Prime Minister, The Right Hon Theresa May MP).

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