Triggering Article 50

Courts, Government & Parliament

David Abulafia
Jonathan Clark
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Sheila Lawlor (Ed.)
Robert Tombs

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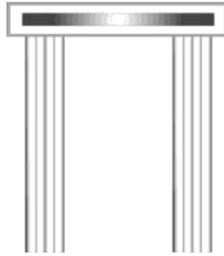

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Introduction
Parliament and the Popular Will: Where Power Lies

Sheila Lawlor

The ruling by the Divisional Court that parliament, not the government, should trigger Article 50 is now being considered by the Supreme Court. For some people the intervention of the courts in the decision by voters to leave the EU (one which the government promised to honour in a referendum on which parliament had voted), seems unwelcome and unnecessary. Unwelcome because it apparently blurs the line between the judges, whose job they see as being to interpret the law, and the politicians, who are elected to make it: to muddle the supposed separation of powers as generally understood. Such a separation puts the judiciary above the political fray, and it may explain why judges are amongst the most trusted professions, whereas the unfortunate politicians are trusted even less than estate agents. Others see the courts decision as a victory for parliamentary democracy, but they fail to understand the basis for that parliamentary power.[1]

Of course, a major matter of politics such as leaving the EU, is bound to raise important legal questions including the particular question about the use of prerogative power, as well as stimulating discussion about where sovereignty does or should lie. These questions will be considered in the next chapters in their legal and historical context.

There is, however, a general point raised by the referendum and the legal question about its authority. In the past the question of where authority lay had no fixed answer. But by the early 20th century when mass democracy had begun in Britain, political leaders emphasised that parliamentary authority derived from the popular will and that was gauged in different ways.

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1 Professor Kenneth Armstrong, Centre for European Legal Studies Cambridge, comments that for some people the ruling 'is a victory for parliamentary democracy. For others, unelected judges stand in the way of the UK's withdrawal from the EU. If the Supreme Court gets the final say voters may still wonder whether their voice matters at all ...'
http://www.cam.ac.uk/research/news/brexit-high-court-ruling-on-article-50-explained

This chapter will consider the wider question about what people believe to be true about the system in which they participate. Though a political matter, it relates also to the question of where power in our system lies and is perceived to lie, to what people expect and believe they have a right to expect, given their participation in this democracy. That understanding has developed over centuries. It left its mark on Britain's democratic evolution particularly in the 20th century after the coming of the full parliamentary franchise.[2] As a result British voters have a number of beliefs about what their democracy involves and how it operates. One of the questions raised by the current challenge is whether, if such perceptions are not taken account of by the courts (or the politicians), there will not be problematic consequences for Britain's system of government and its parliamentary authority. What may seem to be a technical matter of law about the exercise of prerogative power, in fact undermines the basis for the stable functioning of the democratic system.

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One such belief has been that Britain's system of government is unique and the result of a long tradition of freedom and increasing involvement over centuries by people in determining the laws under which they were governed. This view is founded on the idea that political power derives from the people; it is for this reason that, particularly at times of crisis, the forum for the nation and its people is parliament.

This long involvement with, popular interest in and knowledge of policy and politics was thought to go with a scepticism about politics and politicians – evident from the reports of election meetings, the illustrations and caricatures in the press. The question for Britain's most successful leaders in the early years of mass democracy was how that involvement, including a tradition of scepticism and constraint could be exploited in the interests of the stability and success of Britain's mass democracy (and their own political success). How could Britain avoid the demagogic or populist politics that undermined stable or free government in continental countries in the decades leading to war in 1939? Britain's most successful leaders in the first half of the 20th century therefore

[2] The participation and tradition of participation in the laws governing how they were ruled is discussed in my *Ruling the Ruler – Parliament, the People and Britain's Political Identity*, which refers in greater detail to some of the points discussed in this chapter.

sought to respond to and encourage that scepticism and constraint by promoting political stability through a system based on parliamentary government under a universal franchise. As a result, Britain's brief experiment with populist politics under Lloyd George was ended by a Conservative rebellion under Stanley Baldwin in 1923 opening the way for the new Labour Party to replace the Liberals as the main party of opposition.

The contrast then between the system of government on the continent and in Britain was drawn in bold colours. Seen in this light, this was a country in which such autocratic systems of government were alien because they denied the freedoms with which people here had grown up. Parliament was held up as the national forum, its legitimacy the result of MPs being freely elected. This as Baldwin rarely tired of pointing out, was in contrast with the totalitarian arrangements emerging on the continent with dictatorships of the left and right in the Soviet Union after 1918, Italy from the 1920s and Nazi Germany in the 1930s or else the political instability undermining freedom, property rights and stability in other countries.[3]

Whether or not any of it was true is not the point. It was a view which shaped a view of Britain and its institutions, one devoted to and which protected freedom, stability and the rule of law in the decades of turbulence on the continent. Parliament mattered; it was of central importance but only because it was founded on the popular will.

Moreover, even for those leaders who most respected it, parliament was not seen as the only forum for the expression of popular will. Both Baldwin and Churchill, great parliamentarians though they were, recognized that leaders needed to communicate directly with the people. In an age of mass democracy each exploited set piece speeches and broadcasts to shape, reflect and lead political opinion, to which neither, as the child of an MP, was a stranger since his earliest years. For each, the strength and uniqueness of the system derived from the tradition of freedom and the expression of the popular will.[4] That

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[3] The theme recurs in Baldwin's speeches throughout the 1920s and 1930s, e.g. Baldwin, *Our Inheritance*, 19 June 1926, pp 16-22, London 1928, (1938 edn).

[4] 'It is the country that returns you; it is the country that will judge you' as Baldwin reminded MPs, 4 Dec. 1924, *On England*, p.73, London 1926.

popular will must be respected and politicians guard against raising false hope, for people would become 'very angry' if let down.[5] Popular will was seen both to be the foundation of *and to limit* the power of parliament.

The referendum has now emerged as a tool for discovering this popular will on matters of central importance to the nation. In the past, the same result was sometimes achieved by leaders who were able to discern it, and were willing to act in areas where the majority view in parliament diverged from that of the people (as sometimes expressed from the 19th century onwards by intense, occasionally passionate involvement by huge numbers of people) Take, for example, the movement to repeal the corn laws in the early decades of the 19th century, or the causes which united the groups founding the Labour party in the 20th century. Neither of these movements was proportionately represented in the parliaments of the time, but there were leaders with the courage, as well as the political cunning, to ensure that the voice of those on whom parliamentary and government power rested was heard. The referendum in June gave unmistakable proof of the popular will and the means for its direct expression. Parliament may be the forum for the nation in time of crisis, but as MPs and ministers have always known, it has never been the only one for engaging or expressing the popular will.

[5] Churchill during World War 2 in the discussions on reconstruction rarely tired of warning ministers against raising false reconstruction hopes. Baldwin, after winning the 1924 election told the crowds in the Albert Hall he would not promise heaven on earth.

Triggering Article 50 and the Independent Judiciary

Peter Crisp

The judiciary of this country has an enviable reputation, certainly compared to the United States and many other nations. A headline in the *Daily Mail* suggesting that three High Court judges are enemies of the people is risible and to be deplored. Nonetheless recent events show we must be wary of any politicisation of the bench if this reputation is to be preserved.

During a discussion with a law student recently Brexit came up and, inevitably, the government's appeal to the Supreme Court over the mechanics of triggering Article 50 of the Treaty of Lisbon. Can the government rely on the Royal Prerogative or does it need a vote in Parliament to give formal notice of its intention to leave the European Union? To put it another way, does notifying the European Council fall within the prerogative powers of the Crown in the conduct of foreign relations or rather is it the case that the prerogative cannot be used in such a way as to effectively frustrate or at least substantially undermine an Act of Parliament?

The student was engaged, enthusiastic, almost excited about the Supreme Court hearing, partly because it brought to life our famously unwritten constitution in all its glorious complex nuances and subtleties. But it is also difficult to overstate how remarkable and important it is that we were able to watch the Supreme Court Article 50 hearing online. This surely is real, open justice. It is like watching legal history being made.

That the whole country can see our Supreme Court in action, hearing a truly landmark case of constitutional importance, with an unprecedented 11 justices hearing the appeal, is something of which we can be proud. Given the often inaccurate and sometimes shoddy, almost sensationalist coverage of the case in the press of the High Court judgment, how powerful for a layperson to be able to experience the appeal to the Supreme Court live, to be able to judge for themselves rather than relying on, say, the *Daily Mail* for their information and understanding.

In my law school's library, the copies of A V Dicey's Law of the Constitution are well-thumbed and even defaced with marginalia. This is as it should be. Dicey's seminal work is compulsory reading for students of constitutional law. It sets out simply and succinctly the concept of parliamentary sovereignty, meaning that Parliament is the supreme legal authority in the UK.

In many countries, the legislature is limited by a formal written constitution in the laws it can or cannot make. The Supreme Court of the United States can declare laws passed by the legislature to be unconstitutional and therefore invalid. The classic view in this country is that Parliament is not subject to any legal limitation and that our courts have no power to declare laws duly passed by Parliament invalid. In Dicey's celebrated dictum, 'In theory Parliament has total power. It is sovereign.' (That our highest court is called the Supreme Court is a misnomer: it is not a supreme court in the way the United States' is.)

In early November, Lady Hale, Deputy President of the Supreme Court, gave a speech in Malaysia which covered much of this ground. In her speech, entitled 'The Supreme Court: Guardian of the Constitution?', she explained to her audience that the British constitution is '…different from most other constitutions in that (at least as we have always been taught) its governing principle is that sovereign power is not distributed between the three branches of government [i.e. executive, legal and judicial] but resides solely in Parliament (or strictly, the Queen in Parliament). Parliament can make or unmake any law. Whether there are any limits to that is contested, as we shall see.'

However, Baroness Hale went on to ask 'whether it would be enough for a simple Act of Parliament to authorise the government to give notice, or whether it would have to be a *comprehensive* [emphasis added] replacement for the 1972 Act.'

This question had not been raised in the High Court and although Baroness Hale did no more than float a question that had been publicly discussed, and did not express any opinion one way or the other, nonetheless many saw her speech as unwise. This was tacitly acknowledged by Lord Neuberger who appeared gently to reprimand his deputy when he told a reporter that in general, 'judges shouldn't discuss cases we're about to hear'. However, he stood by Lady Hale's fitness to

sit. ‘We have taken an oath to decide cases according to the law,’ he explained, ‘and if we don’t do that we’re not worthy of the name of judges.’

To be fair, Lady Hale is certainly not the first Supreme Court Justice to cause a political stir. In 2013, for example, Jonathan Sumption raised controversial though fundamental questions about the European Court of Human Rights in a speech on the limits of the law (also delivered in Kuala Lumpur).

The politicisation of the judiciary is not yet upon us but this case has put the reputation of the judiciary and their personalities on the front pages of our newspapers. In the United States earlier this year, the US Supreme Court Justice Ruth Ginsberg openly criticised the candidature of Donald Trump. Although she later regretted her comments that she felt emboldened to do so reveals the publically political role judges play in that country.

In something of an anomaly, the Justices of the High Court of Australia are involved in the State Opening of the Australian Parliament as deputies of the Governor-General. At one such State Opening, in an overheard conversation someone asked who they were. The reply came back, ‘Not sure, ushers I think’.

One lesson we might take from the events surrounding the Article 50 case is that for this country, surely we should value judges who are quasi-anonymous, whose party-political views are not discernible let alone known, a judiciary who the public can trust for its impartiality.

Making Constitutional Change
A Matter for the Courts or the Commons?

David Howarth

Miller v Secretary of State for Exiting the European Union - The Arguments

Before oral argument began in the Divisional Court in *Miller* (*R (Miller and De Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768), the consensus of academic and professional opinion was that the government would win. The orthodox view was that the UK government possessed an undoubted prerogative to make and to withdraw from international treaties without needing a prior Act of Parliament. Gordon Brown's foray into constitutional reform had slightly restricted the government's power to ratify new treaties, in the form of the Constitutional Reform and Governance Act 2010, but that applied only to any agreement the government might eventually make under Article 50 of the Treaty of European Union, not to giving notice to withdraw. But half way through oral argument in the Divisional Court something happened that made opinion shift sharply towards expecting the government to lose. The Attorney-General, Jeremy Wright MP, appearing in person for the government, announced:

> 'My Lords, we do not argue that an Article 50 notice can be revoked, and we invite the court to proceed on the basis that a notification under Article 50(2) is irrevocable'.

The government had done something very odd. It had thrown away one of its best arguments, namely that since an Article 50 notice could be revoked before the end of the two year negotiation period, a notice did not in itself result in anyone losing any rights. Jeremy Wright went on to make the perfectly respectable if complex point that revocability should not matter either way, since even if the government had a unilateral power to revoke, the government would still be claiming a unilateral power to decide whether to exit the EU without the authority of an Act of Parliament. But the damage had been done - why fall back to the last line of defence before defending the first?

And then a perhaps even more odd decision by the government's lawyers emerged. An important aspect of the applicants' case was that invoking article 50 would take away rights granted to UK citizens in the UK arising out of EU

regulations. EU regulations unlike Directives which have to be transposed into UK law before becoming legally effective, create rights and duties directly in UK law. Section 2(1) of the European Communities Act 1972, through which these regulations become enforceable in the UK without further action by parliament, says:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect …. in the United Kingdom

The applicants claimed that if the UK left the EU rights and duties under EU regulations would no longer 'arise' under the Treaties, because the treaties would no longer apply to the UK, and so all these rights would disappear immediately in a puff of smoke. But that is not the only way to read the section. Another way is to say that when these rights and duties were 'given legal effect in the United Kingdom' they became UK law unless and until repealed by Act of Parliament. On that interpretation, invoking article 50 cannot be accused of taking these rights away since they remain in force after Brexit. But instead of arguing for this interpretation, the government's counsel agreed with the applicants that they would be lost. His only defence was that they could be reinstated as part of the 'Great Repeal Bill' Theresa May had promised the Conservative Party Conference in October, a very weak argument since the government cannot guarantee that parliament would pass such a bill. Yet again the government failed to put its best foot forward. In the Supreme Court, while clarifying its argument in other ways, the government repeated the very same moves.

Why did the government fail to make arguments that would help it to win its case? We will perhaps have to await the participants' memoirs to obtain direct evidence. All we can do at this stage is speculate. But it is striking that in both instances political reasons exist for the choice the government made. In the case of revocation, admitting that an article 50 notice is revocable would hand a political victory to the enemies of Brexit. If an article 50 notice can be revoked by the UK unilaterally, anti-Brexiteers might still hope for a dramatic change in public opinion and a general election or a second referendum that might reverse the result of the first. But if an article 50 notice is irreversible that hope must die.

Another political problem is that the interpretation of the Treaty of European Union is ultimately a matter for the Court of Justice of the European Union. If revocability or its opposite were to form part of the court's decision in *Miller*, that would raise an issue for the CJEU to decide. Not only would a reference to the CJEU infuriate the pro-Brexit media it would also inevitably lead to the government missing its self-imposed March deadline for invoking article 50.

The political reasons for the decision not to argue for the narrowest possible interpretation of section 2(1) of the European Communities Act 1972 are more difficult to discern. One possible candidate, however, is that the narrow interpretation would turn Mrs May's vaunted Great Repeal Bill into a damp squib. If invoking article 50 makes no difference to citizens' substantive rights, all that the bill could do is tidy up a number of procedural and jurisdictional loose ends, for example deciding which UK institutions would take over the role of European institutions in matters such as competition law.

The other side proceeded on a very different basis. David Pannick, for the applicants, seems not to have taken into account the political consequences of arguing against revocability. The fact that irrevocability would constitute a disaster for the anti-Brexit forces does not seem to have restrained him in the slightest. The other parties took the same view. Similarly on the issue of the scope of section 2 of the European Communities Act, the applicants argued for an interpretation that maximised the destructive effect of an article 50 notice, the better to argue that the prerogative power could not have such an effect.

Constitutional Change, Courts and Parliament

Why is this important? Its significance is that it illustrates one of the main reasons for thinking that courts are not the best places for making great constitutional changes. Courts only hear what it is in the interests of the parties that they hear. The views of those not in court are ignored. In *Miller* no one in court argued for revocability of article 50 notices and no one argued that leaving the EU would not destroy vast swathes of rights created under section 2(1).

Gina Miller, the lead applicant in the case, suffered abuse on the basis that she was setting out to frustrate Brexit, but the anti-revocability argument her counsel propounded makes frustrating Brexit more difficult, not easier. A fully-fledged

anti-Brexit position would have been rather different. Equally the position of future governments who might want their prerogative powers fully preserved regardless of any political damage to the current government was not represented in court.

The lack of a full range of points of view is not the only reason illustrated by *Miller* for doubting the wisdom of using courts to make fundamental constitutional changes. Constitutional change should only take place following extensive consultation and attempts to build consensus, but one can think of few more unsuitable processes for building consensus than litigation, especially litigation fought out at breakneck speed under pressure from an artificial political deadline.

Moreover, the argument that the courts are able somehow to sense a fundamental shift in public opinion about the place of referendums in our system misjudges to an extraordinary degree the capacity of courts to make such judgments. The judicial review process has little room for testing historical and social scientific claims and certainly made no room for it in *Miller*.

Even if judges could legitimately draw conclusions about long term changes in public opinion, what should they do about it? The public's opinions, like those of newspaper editorial writers, need not be consistent or coherent. In fact they are often the opposite. In the law, in contrast, consistency is the first and highest virtue. Moreover, courts understand their own limitations as structural reformers, knowing that they lack the means to devise and to implement systematic reform. Declaring new fundamental constitutional rules such as the superiority of referendums over parliament will have consequences the judges know they cannot foresee or control. It is certainly true that a constitutional system whose basic allocations of power are unpopular will face problems, but courts are not among the institutions best placed to work out what to do instead.

In the end, 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.

IV
Where does Sovereignty Reside?

Jonathan Clark

On 23 June 2016, the United Kingdom effectively left the European Union: the referendum was a primary act of sovereignty. At first sight, this sentence will be dismissed as merely incorrect, ignorant of and inconsistent with the UK's constitution. Its argument was implicitly rejected by three senior judges sitting in the Divisional Court in London,[1] ruling on 3 November 2016 that the government needed some form (left undefined) of parliamentary approval before it could lawfully trigger Article 50 of the Treaty on European Union (inserted there by the Treaty of Lisbon, 2007) to begin Brexit.[2] It was to be expected, thought some, that the government would not receive such approval from a Parliament in which Remainers still outnumbered Leavers, and it is still widely believed that 'Parliament' (in current implication, the Lords and Commons but not the Crown) has the last word. But the constitutional position is in key respects disputed, and a major political crisis is the possible outcome. How could that be? What are referenda, and what can they do?

Why the constitution was never fixed

The judges and the Remainers relied on the doctrine of 'the sovereignty of Parliament', and the expression is a commonplace. Yet this idea is itself an historical construct, not an eternal truth. It was classically expressed in 1885 by that leading constitutional lawyer Albert Venn Dicey (1835-1922), who was recently cited again in the Divisional Court. He had famously contended that 'The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.' Dicey's arguments, invoking such legal giants as Sir William Blackstone (1723-80) and Sir Edward Coke (1552-1634), proved lastingly influential, at least in shaping widespread assumptions.

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[1] The Lord Chief Justice, Lord Thomas of Cwmgiedd; the Master of the Rolls, Sir Terence Etherton; and Lord Justice Sales. This chapter is not to be read as a critique of these individuals, but as an exploration of the different perspectives on constitutional questions of the disciplines of law and history. It was written before the hearings on the same issues in the Supreme Court on 5-8 December 2016.

[2] https://www.judiciary.gov.uk/wp-content/uploads/2016/11/judgment-r-miller-v-secretary-of-state-for-exiting-the-eu-20161103.pdf, hereafter cited as 'The Judgment of 3 November 2016'.

In this vision, judges merely interpret the law that Parliament passes; judges (the lawyers assure us) are thus rightly unelected and unaccountable. Whichever way the courts decide, for lawyers the legal position is always clear. The lawyers are (rightly) the winners. To say otherwise is to undermine 'the rule or supremacy of law'.[3]

Dicey was, however, not a neutral observer or an Olympian theorist but a committed Liberal Unionist. Contrary to his teaching on parliamentary sovereignty in 1885, in his edition of 1914 he looked for extra-parliamentary ways of preventing leaders who 'can control the party machine' from forcing Irish Home Rule through Parliament in defiance of what he believed was 'the possible or certain will of the nation'.[4] In this he failed, for parliamentary politics then trumped both law and populist political involvement.

For historians, great constitutional crises (like the civil war of the 1640s, or the Revolution of 1688, or the American Revolution) happen in legal grey areas. Indeed they happen because there *are* legal grey areas. The notion of an 'unwritten constitution' really only responded to the reality that certain areas of law were ill-defined because they were the sites of continuing political conflict. Brexit, in turn, revives old questions of sovereignty exactly because those fraught questions were never completely resolved. The nineteenth-century genre of 'constitutional history' once depicted British constitutional change over centuries as the wise accumulation of clearly-definable right answers, as if they were a wall built stone by stone against tyranny and ending in certainty. Historians of political thought and of political action have moved far from those Victorian assurances. They now show us that final agreements are never reached, that outcomes are always ambiguous, and that the tide of events does not flow in only one direction.

Sovereignty is therefore not like a gold bar, which resides in the vaults of one bank or another. Sovereignty can be discerned only by outcomes. It is a matter of opinion who or what holds it, and opinions have long been both diverse and in conflict.

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[3] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885; 8th edn., London, 1927), pp. 37, 83, 135, 141, 179, 402, 406.
[4] Ibid., pp. c-ci.

The people always had a role of some kind, expressed in the medieval notion of 'the community of the realm'; popular approval was powerful in general, weak in particulars. At coronation ceremonies the (carefully selected) congregation was liturgically asked if it would have a particular individual to be king, and dutifully acclaimed him; but however token, this performance symbolised the truth that the tenure of monarchs (and, today, of heads of the executive) is uncertain in the face of popular revulsion. Uncertain, but seldom easily undone: in 1688 popular opinion was divided between James II and the invading William of Orange, and the Dutchman seized the throne by trickery more than by any popular acclaim. 'Popular opinion' is impossible to measure; but it can more accurately be sensed when it is defied by those in office. Such circumstances evoke an older and only partly occluded tradition of political argument in the British Isles, contending that sovereignty ultimately resided with 'the people'.

The monarch as an individual always had authority, legally known as the royal prerogative; but some monarchs claimed to be absolute, others claimed only to be limited monarchs, others again failed to articulate any coherent explanation of their powers. The role of monarchs changed over centuries, but in so far as their authority passed to the Prime Minister, the authority of the executive was never fully defined. It continues to change, ministry by ministry, Prime Minister by Prime Minister.

The two Houses of the Westminster Parliament long had a role; but even there, MPs have sometimes boasted of their accountability to their constituents, sometimes of their principled independence; some were placemen, others sturdy critics of ministerial corruption. Today, the large number of salaried ministerial and junior ministerial appointments calls in question any simple analysis of Parliament as the sole repository of sovereignty, an institution mounting an independent and effective check on the executive. The executive, too, carries much weight. At the present juncture in UK politics, much is made of the idea of 'parliamentary sovereignty' by overt or covert partisans of continued UK membership of the EU; but their present usage would carry more credibility if the Remainers in the Lords and Commons had campaigned to resist the steady draining away of Westminster's authority to Brussels since 1 January 1973. In reality, they did nothing: 'parliamentary sovereignty' is a political slogan, not a constitutional verity.

The courts of law also grew to exercise substantial power, but they were never free from political interference and could never be apolitical. On one interpretation, Parliament is still the High Court of the kingdom, as it was in the middle ages even after the law courts divided from the bureaucratic entourage of the monarch: in theory, Parliament can still try alleged offenders by the ancient procedure of impeachment (still a usable procedure in the United States Congress). The sole and arbitrary power of the judiciary in the field of law cannot be taken for granted. Everything changes.

From at least the sixteenth century, a powerful doctrine emerged that sovereignty resided with that legal fiction, 'the Crown in Parliament'. All states employ legal fictions (one such in the US today ascribes sovereignty to 'We the People'), but such constructs tend to change their practical meanings over time. This image of 'the Crown in Parliament', too, did not explain the relative powers of King, Lords and Commons. Their relative positions continued to fluctuate, and what were once thought of as decisive turning points in history prove, on further historical research, to have been anything but that. William III, after the Revolution of 1688, ruled in an authoritarian manner as James II had done before it. The idea that the Revolution of 1688 clearly and lastingly settled the question of the royal prerogative[5] does not survive historical research.

From the 1720s an English opposition discourse, inaccurately ascribed to Montesquieu, spoke of the 'separation of powers' and 'checks and balances'. But these metaphors did not solve the problem since separation could not be proved, and since balances or imbalances could not be measured: this misconception therefore fuelled conflict more than resolving it. The doctrine does not hold today: ministers regularly circumvent Parliament, seeking to rule by Statutory Instruments as monarchs once sought to rule by Proclamations. Parliament often tamely acquiesces.

The Referendum: an expression of 'the will of the people'?

The idea that Parliament was ever simply 'sovereign' is, then, an historical myth, and so a bad foundation for law. Long neglected, the idea of parliamentary sovereignty has now been revived as political rhetoric. But rhetoric is not a

[5] The Judgment of 3 November 2016, paras 26, 28.

reliable guide to political realities. This is especially controversial since a new procedure has arrived on the scene: the referendum.

Dicey, whose great book was first published in 1885, first wrote of the referendum in a new Introduction to the edition of 1914, but only as 'a foreign expression derived from Switzerland', a practice which might possibly be applied in future, and even then meaning, in his account, only a popular 'veto' on Bills already passed by both Lords and Commons.[6] But in 2016 the referendum appeared on the political stage in the UK with a far larger meaning, a primary exercise of popular sovereignty in circumstances in which the political class had been unable to solve a problem. We may love it; we may loathe it; but we cannot now escape it.

Like all great constitutional innovations, it was an unanticipated consequence of tactical needs. Harold Wilson's referendum in 1975 on EU membership was seldom thereafter appealed to as a precedent. But the referendum in 2011 on adopting the Alternative Vote system in general elections, the referendum in 2014 on Scottish independence, and the referendum in 2016 on EU membership together wrought a silent, unplanned revolution, for in each case it might reasonably be argued that the electorate got it right where the political class had collectively failed. A means now exists of giving expression to what can plausibly be called 'the will of the people'. With a tiny parliamentary majority, Theresa May has tactical reasons for talking up that interpretation, and has done so forcefully.

Remarkably, many MPs within a few months came round, however reluctantly, to saying that they respect the will of the electorate (even if they seek covertly to frustrate it). The Labour majority in the Lords has professed no intention of mounting a direct confrontation, rightly foreseeing corporate suicide if they frustrate the verdict of 23 June. Without planning, without debate, a new reality has come into existence: referenda may ultimately trump parliamentary votes. But would referenda trump Supreme Court judgments?

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[6] Dicey, *Law of the Constitution*, pp. xci-c. Dicey in 1914 was hopeful that the referendum would be 'a strictly conservative institution' at a time when 'Coalitions, log-rolling, and parliamentary intrigue are in England diminishing the moral and political faith in the House of Commons', p. xcviii. He did not live to see the institution adopted in its present form.

Lawyers, meanwhile, have been brought up with the old orthodoxy of parliamentary sovereignty, derived from nineteenth-century, Whiggish political history. Lawyers have no pressing need quickly to adapt to political change. Yet they have slowly changed, not necessarily helpfully, for the Divisional Court hearings in October 2016 showed certain remarkable and noteworthy features evocative of European practice. Lawyers will assess that court's proceedings and the anticipated judgment of the Supreme Court in January 2017 in legal terms. From the viewpoint of an historian, certain issues stand out.

Where does power lie? How the Divisional Court sought to expand the role of the judiciary

First, the three judges ruled that EU membership conferred on UK citizens certain rights, and that those citizens could not be deprived of those rights without primary legislation.[7] But this argument would apply equally against all executive acts, all of which confer rights on UK citizens or withdraw rights (a declaration of war will even deprive many of them of the right to life); the argument has not previously been raised in an attempt to block such executive action in the field of foreign policy. Nor have UK judges defended the rights (for example, rights concerning democratic self-government) of which UK citizens were deprived by entry into the EU on 1 January 1973, and which an exit from the EU would now restore. By neglecting these lost rights, it might seem to the electorate at large that the judges inadvertently became political partisans, themselves preferring one political option over the other.

All depends, then, on an historical question: whether the UK's entry into the EU on 1 January 1973 was by executive action (based on the Crown's right to enter into treaties) or by legislation (namely the European Communities Act 1972, which on one interpretation only enacted legal changes consequent on the signature of the treaty). Merely to invoke Dicey's aged principle of parliamentary sovereignty does not settle this question, since by 'Parliament' was historically meant 'the Crown in Parliament', that is, a sovereign exercising the royal prerogative.[8]

[7] The Judgment of 3 November 2016, paras 32, 37, 64, 92.

[8] The Constitutional Reform and Governance Act 2010 created a new power in the House of Commons to block the ratification of future treaties, but did not change existing prerogative rights in

Second, it might also seem to historians that the judges implicitly claimed a right to mandate parliamentary procedure, a position not easily squared with professed respect for parliamentary sovereignty. In their judgment they neglected the fact that the Opposition could on several occasions after 23 June (for example, in Opposition Day debates or by Early Day Motions) have secured a vote on a motion to disavow the verdict of the referendum of 23 June, or to prevent the government from triggering Article 50, but had not done so. The judges' implicit claim therefore bespeaks a novel degree of judicial activism, and one arguably indebted to the traditions of the European Court of Justice rather than of the English common law.

Third, the judgment of 3 November showed the judges devising (citing only two precedents, from as recently as 2003 and 2014) a new category, a 'constitutional statute', to be interpreted by the judiciary according to what the judges take to be 'constitutional principle'.[9] Such a new approach gave the judges much scope to rule on what constituted 'the usual constitutional principle',[10] but they did so in ways arguably dependent on conventions of judicial activism more at home in the EU. The judges ruled that the 2015 Referendum Act could not be interpreted to supply 'a statutory power for the Crown to give notice under Article 50', since 'That Act falls to be interpreted in the light of the basic constitutional principles of parliamentary sovereignty and representative democracy which apply in the United Kingdom, which lead to the conclusion that a referendum on any topic can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation in question.'[11] Very clear language to the contrary was however contained in the Conservative Election Manifesto of 2015, in ministerial advocacy of the Referendum Bill during its passage through Parliament, and in the government's leaflet, distributed to all UK households, urging participation in the referendum of 23 June 2016, which contained the apparent promise: 'This is your decision. The Government will implement what you decide.'

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withdrawing from or terminating treaties, which is the point now at issue. See especially Lawyers for Britain, 'The referendum result is binding', http://lawyersforbritain.org/referendum-binding.shtml.

[9] The Judgment of 3 November 2016, paras 43, 44, 82, 83.

[10] The Judgment of 3 November 2016, para 84.

[11] The Judgment of 3 November 2016, paras 105, 106.

Fourth, the judges were persuaded that a request to exit the EU was irreversible, so that EU rights would be lost at the moment that Article 50 was invoked.[12] In this they were misled by the ingenious metaphor of Lord Pannick, QC, that triggering Article 50 was like firing a gun at someone: the bullet could not be recalled.[13] But this image is inconclusive even in a criminal trial for murder (the bullet might miss, or deliver only a slight wound; the murder occurs only at the moment when the bullet fatally strikes the victim). It is inapplicable to an ill-defined and historically unprecedented political process in which everything is open to negotiation, and inconsistent with the text of Article 50, which explicitly provides for the possibility of a negotiated extension, without limited duration, of the two-year notice period. Even if primary legislation in Parliament is required (which is disputed), it could be passed at the end of the negotiation, and would not be required before the negotiation had begun.

Fifth, the judges disregarded any claim of the referendum to be overriding. They argued that 'It is agreed on all sides that this is a justiciable question which it is for the courts to decide.'[14] But this is not agreed, even among lawyers, for what is now at issue, and undecided, is the force and authority of referenda. The Conservative Party fought the 2015 general election with a manifesto commitment to provide for a referendum, now mandated by the European Union Referendum Act 2015, and to accept its result; that Act did not define the referendum, in the words of the Remainer MP Ken Clarke, as an 'opinion poll'.

Sixth, the judges argued in familiar terms that 'the Crown in Parliament is sovereign' so that 'There is no superior form of law than primary legislation, save only where Parliament itself has made provision to allow that to happen. The E[uropean] C[ommunities] A[ct] 1972, which confers precedence on EU law, is the sole example of this.' But if this conception of parliamentary sovereignty were valid, it is, to say the least, noteworthy that the judiciary in general had done so little since 1 January 1973 to resist this 'sole example' which eroded Parliament's powers and arguably terminated its sovereignty. Instead, the three judges on 3 November 2016 merely produced a contradictory statement, 'Parliament has power to repeal the ECA 1972 if it wishes', where their argument in the previous

[12] The Judgment of 3 November 2016, para 10.
[13] The Judgment of 3 November 2016, para 17.
[14] The Judgment of 3 November 2016, para 5.

paragraph had abandoned this very claim.[15] Since Parliament has not repealed the ECA, but the referendum of 23 June 2016 has implicitly done so, the judges' position failed to take account of constitutional change.

They quoted Dicey: 'The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament'.[16] But that is exactly what may now have changed: a new means of expressing the will of the people has, arguably, come into being. Otherwise, on the judges' interpretation of the law, the UK would be unable of its own volition ever to exit the EU. That is the clear implication of the many legal rulings on the supremacy of EU law delivered by UK courts since 1973, and rehearsed again by the three judges. On 3 November 2016 they ruled that by the ECA 1972 'Parliament legislated to give force and effect to EU law … in priority to all [UK] primary legislation, *past or future*' (italics added).[17] If so, the UK is trapped.

It may also be trapped under Article 267 of the Treaty on the Functioning of the European Union, which provides that a national court from which there is no domestic appeal (for example, the UK Supreme Court) must refer a debate on the interpretation of EU law (for example, whether an invocation of Article 50 can be withdrawn after it is made) to the Court of Justice of the European Union. In such cases, the CJEU would become judge and jury in its own cause, and the EU would become a prison camp from which only the referendum offers the UK an escape route.

Seventh, the judges, in arguing that prerogative powers only exist where specifically provided for by the common law, quoted the Bill of Rights (1689).[18] But this did not declare illegal the royal power in general to dispense with laws or the execution of laws, but only that power 'as it hath beene assumed and exercised of late', that is, by James II in his attempt to secure religious toleration by prerogative in the face of parliamentary resistance to the repeal of discriminatory

[15] The Judgment of 3 November 2016, paras 20, 21, 38.

[16] The Judgment of 3 November 2016, para 22. But the judges contravened this very principle by appealing to 'a clear briefing paper to parliamentarians' interpreting in advance the meaning of the proposed Referendum Act 2015, para 107.

[17] The Judgment of 3 November 2016, para 53.

[18] The Judgment of 3 November 2016, para 28.

statute law.[19] The Declaration of Rights, passed as an Act, was itself a political compromise, ambiguously drafted and passed when no majority was possible for a longer or clearer list of rights. 'Rights' are, to historians, abridgements of practice, not timeless principles against which practice can be judged.

The judges concluded: 'This court does not question the importance of the referendum as a political event, the significance of which will have to be assessed and taken into account elsewhere.'[20] But that was just what they had done. That is why the referendum matters: it threatens to resolve the questions that many in the political class long wished to leave unresolved.

Why referenda matter: the wider historical picture

What, then, can referenda do? When must they be held? Who can trigger them? Can they override 'human rights'? How do they relate to the judiciary, to the Westminster Parliament, and to the devolved governments? Nobody knows; and I predict that like all major constitutional issues, no definitive and permanent answers will ever be possible. But the genie has been let out of the bottle, and from an historical point of view the result of the 2016 referendum was remarkable not least because the bourgeois intelligentsia were not just unhappy to have lost; they were outraged, indignant that on 23 June they were symbolically repudiated by something they could hardly define. They believe they have been personally and deeply affronted, and, arguably, are right to think this. But invoking 'constitutional principle' does not solve their problem. A changed reality has thus given new prominence and meaning to a derogatory adjective in politics: 'populist'.

In this way the scene is set for a constitutional confrontation and a culture war potentially more momentous than the last such clash, the 'Peers versus the People' crisis of 1909-11. Just as that crisis resulted in a fundamental redefinition of the powers of the House of Lords, so the Divisional Court's judgment of 3 November 2016 and the forthcoming judgment of the Supreme Court, unless it reverses the previous judgment, may result in a fundamental redefinition of the powers of the judiciary in key respects.

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[19] Lois G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore: Johns Hopkins Univ. Press, 1981), p. 296.

[20] The Judgment of 3 November 2016, para 108.

This prospect was brought closer by the decision of the Supreme Court on 18 November 2016 to allow intervention in its forthcoming hearings in December by the Scottish and Welsh Governments, so raising the prospect that the Supreme Court might, in its judgment, give either devolved administration a veto over the Westminster Government's invoking of Article 50. Just as the House of Lords acted in 1909-11 with the best intentions, so now the Divisional Court and the Supreme Court act similarly. But such actions are capable of triggering a constitutional crisis of major proportions. In this case, the crisis would be all the greater following the adoption of the procedure of the referendum.

Nor is this issue likely to go away. That prolific Edwardian author G. K. Chesterton is nowadays remembered most for two lines of doggerel verse: 'For we are the people of England / That never have spoken yet.' Perhaps they finally have. In the age of the internet, they may find that they can speak more often. The referendum of 23 June 2016 was still conducted by counting paper votes by hand. But this ancient practice cannot last: referenda will become steadily easier to organise online. More issues could be listed over which the representative system or the courts have acted to block democratic choice, not to facilitate it. It can hardly be imagined that the constitutional relations of parliament, the executive and the judiciary will be untouched by this sea change, only the beginning of which we have yet witnessed.

In a longer historical perspective, a pattern becomes evident. The self-abnegation of the Westminster Parliament through membership of an EU that was steadily acquiring the competences of a state created a vacuum. Two institutions now seek to fill it: the courts, expressing a tradition of judicial activism, and the referendum, expressing a tradition of popular sovereignty. The outcome is impossible to predict. But of one thing we can be sure: Dicey is dead.

'Brexit means Brexit': Who Decides?

A matter of history and politics as much as law or constitutional theory.

Robert Tombs

The Prime Minister's pithy statement appeared at first to have settled the matter. But since then prominent and influential voices have cast doubt on both the substance and the form of the government's policy. Their broad argument is that parliament or the law courts should if not overrule (though some have argued even that) at least circumscribe and interpret the verdict of the referendum, which can only be advisory and not decisive. The presumption, sometimes explicit, is that a referendum is illegitimate or at least inferior as an expression of political choice, and that it is contrary to our long constitutional history which has made parliament sovereign. Hence, parliament should not only make the final decision as to whether Brexit does mean Brexit, but that it should also dictate the policy and strategy of the government in negotiating with the European Union. Evidently, this is not simply a matter of abstract constitutional theory. Its significance comes from the belief that most MPs deplore the referendum result and would box the government into a corner in which it would only be able to negotiate a limited form of 'Brexit'. Much therefore turns on the frequently expressed claim that parliament (essentially the House of Commons) is sovereign.

Who or what is sovereign - who or what has the final say - is a reality of history and politics as least as much as a question of law or constitutional theory. The test of who is sovereign is who would ultimately be obeyed. This is a test we must hope never to have to apply, because to do so would imply political and constitutional breakdown. We might all have our own hypotheses of who or what might command obedience in such a crisis, but it seems to me that it would not necessarily be the House of Commons, which made itself generally detested the last time it assumed sovereignty in the 1640s-50s. Fortunately, in a normally functioning democratic nation like ours, sovereignty - or to be more precise the exercise of sovereign powers - is divided between the institutions that compose the State.

The idea that parliament is sovereign owes much to the 'Whig interpretation' of our history which made its core theme conflict between Crown and Parliament. The recent High Court judgment on the power to trigger Article 50 of the Treaty

of Lisbon reflected this interpretation. It cited the views of the 17th century lawyer Sir Edward Coke and the Victorian constitutional authority A.V. Dicey. Coke was a courageous if cantankerous defender of the Common Law against the attempts of James I and VI to introduce into England from Scotland and Europe ideas of sovereignty based on Roman Law. The irony hardly needs to be underlined: Coke, whose mind was 'as nearly insular as a human being's could be',[1] was defending what he saw as ancient English rights and freedoms against foreign encroachment. Moreover, he saw these rights as immemorial, and embodied in the Common Law, not in parliamentary statute.

Separate Powers

So what does 'parliamentary sovereignty' really amount to historically? Dicey makes it clear that it applies solely to legislation: parliament can 'make or unmake any law whatever' and its statutes cannot be overridden by any other authority.[2] Let us leave aside the separate question of whether this legislative sovereignty has been curtailed by adherence to the European Union and by the European Convention on Human Rights. Parliamentary sovereignty clearly does not mean executive authority or judicial authority (since trial by parliament was abolished): it means the supreme authority to make laws, 'neither more nor less', in Dicey's words. It does not imply therefore that parliament can or should direct every sphere of government. Nor does it mean that what in Britain is termed the 'royal prerogative' - in this case the negotiation of international treaties - is merely an archaic feudal relic. Most democratic countries accept the idea of a 'separation of powers' between executive, legislative and judicial institutions. This principle was most famously defined by the French philosopher Montesquieu in the 1740s.[3] His idea, influenced by British practice at the time, later became the foundation of the United States constitution and influences the practices of most modern states. British government has never conformed exactly to Montesquieu's model, but broadly speaking it does separate powers. The Crown governs, through ministers, but since the Glorious Revolution of 1688 it does not legislate.[4] Parliament

[1] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1987) p 56

[2] A.V. Dicey, *The Law of the Constitution* (1885) quoted in Colin Turpin and Adam Tomkins, *British Government and the Constitution* (Cambridge University Press, 2011) p 58

[3] Charles-Louis de Secondat, baron de Montesquieu, *L'Esprit des Lois* (1748)

[4] That is, it cannot create primary legislation, though it can - and within the EU increasingly does - formulate delegated legislation in the form of regulations.

legislates, but since the fiasco of the Puritan Commonwealth - when the House of Commons claimed to be sovereign and it became high treason to deny its 'supreme authority' - it does not govern: hence it cannot, for example, give orders to the civil service or the armed forces. The Courts interpret and apply the law, but (at least under the English tradition defended by Coke) they do not create law.

The executive thus has its proper sphere: in a word, it governs, under the law. It is accountable for its actions, both to parliament and to the public, but accountability implies independence: it does not take instructions on policy from parliament, but defends its policies and either wins or loses the support of parliament and the electorate on the basis of what it has done and promises to do. The 'Whig' interpretation of history - an avowedly partisan account - saw the executive (the Crown) as the source of tyranny. In fact, it has been at least as much the defender of liberties against 'over-mighty subjects'. The Common Law that Coke extolled as the embodiment of the people's liberties was the creation of the Crown and its judges.

Does our history then support the view that ultimately parliament is sovereign, and hence superior to the popular will, especially when expressed through the extra-parliamentary channel of an 'advisory' referendum? A weighty and often quoted view is that of the 18th century Whig politician Edmund Burke, in a speech to his Bristol constituents, in which he denied that he was required to accept their instructions when acting as their MP.[5] It was, he said, his duty to serve them but not to obey them if his conscience and judgement differed from theirs. This was partly inspired by his proper insistence that MPs were not simply representatives of sectional interests, but had to act in the national interest. But we should not take Burke as an unconditional defender of the sovereignty of MPs. He accepted the power of the Crown as legitimate and necessary. He supported the claims of the American resisters against parliamentary sovereignty. He praised the 1688 'Glorious Revolution' as a popular act to protect the 'fundamental, unquestionable laws and liberties' of the nation, which even parliament had no right to give away - 'the house of commons cannot renounce its share of authority.'[6] What might he

[5] Edmund Burke, 'Speech to the Electors of Bristol' (3 Nov. 1774)

[6] Edmund Burke, *Reflections on the Revolution in France*, ed. Conor Cruise O'Brien (Penguin Classics, 1986), p 105 p 113

have thought of it over-ruling the expressed will of the people in order to 'pool sovereignty' in EU institutions?

Governing by Popular Consent

Direct popular participation in crucial political acts has been part of our history since time immemorial. Until the twentieth century, not all could participate equally, but acceptance that popular consent was necessary to legitimate authority has always been a foundation of our governance. In Anglo-Saxon times there was a 'council of the English people', and the 1008 law code was issued 'on the decree of the English council'. The later medieval concept of 'the community of the realm' meant not only the barons, bishops and knights who sat in parliaments, but merchants, craftsmen, yeomen, and in some circumstances everyone. I am not referring to illegal riotous acts - of which of course there are many, including the 1381 peasants' revolt and the Suffragettes - but to popular participation in a national political process, albeit often an improvised one. When Edward II (one of England's worst kings) was deposed in 1327 it was with the support of what a chronicler called 'the whole community of the realm', and 'a great multitude of people,' who attended sessions in Westminster Hall. The crowd was literally given a voice, shouting for Edward to be replaced.[7] It also had a voice at coronations, when it acclaimed new monarchs - a reminder that monarchy has always had an elective element, dependent on popular acceptance. Even though this became symbolic, symbols recall important truths: who could doubt today that the legitimacy of our monarchy derives from the will of the people - as it has done since the 1660 Restoration? When the Glorious Revolution replaced James II with William of Orange in 1688, it was preceded by numerous county and town meetings of citizens, sometimes bearing arms, which forcefully expressed popular rejection of James.[8] A special Convention Parliament was summoned, as it had been at the Restoration of Charles II, to legalize the necessary constitutional change. Parliaments, whether specially summoned or not, were instrumental in some of these great events; but parliaments were acting to put the will of the nation into law, not claiming a separate or independent sovereignty. We no longer have to rely on popular tumult or armed meetings to express our will on fundamental political questions: we now have referendums. As Jonathan Clark

[7] J.R. Maddicott, *The Origins of the English Parliament, 924-1327* (Oxford University Press, 2010) pp 360-63
[8] Steve Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009) pp 238-43

points out, this is a new element in our constitution, whose implications have yet to be digested.

Does this mean that the people, not parliament, the Crown or the courts, are the true sovereign, the ultimate source of authority? I would say - as a historian, not a constitutional lawyer - that it does: the people do not govern, or legislate, or interpret the law, but they are the ultimate source of the authority of those who do. The idea that parliament itself, in some hermetically sealed manner, holds ultimate sovereignty on the grounds of its superior wisdom is a strange perversion of our history and of common sense. But we do not have to go so far as to proclaim the sovereignty of the people, if we find that a step too far. The consent of the people is a more modest and familiar concept. Expressed in a variety of ways, this consent has always been regarded as necessary for legitimate government. The June referendum showed that the majority of the people no longer consented to government within the European Union. It would be a foolhardy parliament or law court that ignored this fact.

VI

Sovereignty, Parliament and the Supreme Court

David Abulafia

An Uncertain Terrain

This chapter aims to navigate a route through the very treacherous terrain created by the case being considered by the Supreme Court. Or rather, it is an attempt to survey the terrain from the air as a historian interested in the constitutional dimension to the case, making no pretence to legal scholarship, nor indeed to expertise in the history of the British parliament. Discussion of the question has not been marked by logic, and the judges can at least be expected to contribute some of that, so long as Lady Hale can find the right page in her documentation (she was having difficulties). However, the extraordinary insults hurled at the High Court justices who found against the Government confirm that understanding of the political and constitutional dimensions to their decision has been crude – which is of a part with the behaviour of all too many on both sides of the referendum debate before 23 June.

Here, 'the sovereignty of parliament' will be understood to mean the power of parliament to govern the country without outside interference. Equally, the independence of the highest courts of law from external interference can be seen as a key characteristic of a sovereign nation. A self-governing colony such as Gibraltar is therefore not sovereign, as its defence and foreign affairs are controlled from outside its territory; nor, despite an overwhelming vote to the contrary within the territory, can its citizens escape from the overall British decision to leave the EU. We can compare this with the relationship between Great Britain and the EU: the rights of intervention assumed by the European Court of Justice, the effectively automatic incorporation of EU law, qualified majority voting, and the lack of full control over the movement of labour are not just constraints on British sovereignty; their basis is the argument that sovereignty should actually be *pooled* among the countries of the EU as part of a continuing process of European integration: the 'European project'. None of this compares, however, with the mild constraints and limited obligations imposed by the great majority of bilateral treaties; even NATO does not significantly impinge on sovereignty, as one can come and go (as the French have demonstrated in the past); and in any case the purpose of the alliance is precisely to defend the

sovereignty of its members, many of whom are individually too weak to resist the Russian bear. NATO cannot impose legislation on members or over-ride their existing legislation. By contrast, the EU has involved a massive surrender of sovereignty; that is a fact, not a fantasy, the fulfilled ambition of committed Europeanists.

As this saga has developed, the Remainers have become the great defenders of parliamentary sovereignty over Article 50; and some Leavers have been arguing for a concept of the will of the people that sets aside the principle of parliamentary sovereignty, granting the entire electorate the right and power to decide whether Great Britain should retain its membership of the EU. At the moment, then, everything is topsy-turvy, inside-out and back-to-front. This essay can be read as a plea for consistency, not least among Leavers. It is true that the opportunity to choose whether Britain should remain within the EU was conferred on the people by parliament, when an act was passed that demanded a referendum by the end of 2017. But, as the judges in the Supreme Court have already indicated, the act did not explicitly bind the government to change the law; it was only advisory, and in this sense it differed from the earlier national referendum on the AV system of voting, which (had the new proposals been carried) would have changed the law. That said, no government in a country that regards itself as a democracy can simply ignore the statement of popular will that was made on 23 June. At the same time, it is true that the majority was not enormous; this was no landslide, and, again, no government in a democracy can wisely ignore the substantial number of people who voted to stay in the EU, even if we can reasonably conclude that very many of them are Eurosceptic to quite a high degree, and few of them are enthusiastic Europhiles.

These difficulties are compounded by the simple fact that the majority of MPs and peers wished Great Britain to remain within the EU, even if a good many, including the new Prime Minister, have indicated that they intend to honour the outcome of the referendum; indeed, a constant refrain has been the wish to make Brexit work, picking up the argument that Great Britain can flourish as a hub of world trade that looks outwards to all continents, not excluding Europe. The recent vote about Article 50 in the House of Commons was a vote on a resolution and had no legislative force; but it clearly demonstrated that Conservative MPs and a considerable number of Labour ones who would have preferred to stay

within the EU understood that there was no point in waving the banners of a defeated army of Remainers. Saying that is not to deny the mischievous intentions of those who brought the case against the Government: the aim was not just to ensure that Article 50 could not simply be invoked by use of the royal prerogative; it was clearly part of a campaign to render the decision to leave the EU politically and constitutionally impossible, one way or another. Such attitudes can also be identified in calls for a second referendum. But, as has been seen, to overturn the decision made on 23 June would count as the highest form of political irresponsibility. It might, indeed, give rise to violence on the streets; the ugly side of the debate has already been made visible in utterly unacceptable verbal and physical attacks on migrants from Poland and elsewhere.

Disengagement from the EU – Continuing the Process

Exactly what this means for the process of Brexit is, and has to remain, unclear. It is not simply a question of a supposed choice between 'soft' and 'hard' Brexits, whatever those adjectives are intended to signify. Nor is it simply a question of the Government sensibly refusing to say too much about terms of divorce that will have to be argued over long into the night, and that will inevitably involve some compromises – unless, of course, the fanatical Europhiles led by M. Juncker refuse to give any ground at all. Neither is the problem eased by the fatuous refusal of Eurocrats to begin, at least in public, negotiations with Great Britain before Article 50 has actually been invoked; it has even been suggested that serious trade negotiations between Britain and the EU can only begin when Britain has actually left the EU. It is clearly in the best interests of all 28 members that serious discussions get under way as soon as possible, Article 50 or no Article 50. 'Negotiation' is, after all, a broad concept. To which one might add: negotiations with countries outside the EU should certainly proceed, whether Brussels assents or not. Mrs May has not even been invited to the Christmas dinner of the EU leaders, and has been excluded from discussions on other occasions – while Great Britain remains a paid-up member of this crumbling empire. If Great Britain, still a full member, is treated this way even before Article 50 has been invoked there seem to be no reasons why we should be so utterly British and politely abide by rules created to make our life difficult.

In that sense, Article 50 should be treated as a stage in a continuing process of disengagement between Great Britain and the rest of the Union. It is true that the

clock starts ticking when it is invoked, but regarding it as the start of the process is unhelpful. The British public has spoken, and that happened six months ago. The question that then arises is the constitutional force of the decision made by the British public. It has been suggested that we are witnessing a secular shift in the *locus* of sovereignty away from parliaments and towards popular opinion, away from representative democracy and towards reliance on the will of the electorate. This shift, it might be argued, has taken place in different countries in different ways: it brought the radical Left to power in Greece, and it brought the Right to power in the United States – except that we all know that these term Left and Right are no longer much use to us (just look at the social policies of the *Front National*). The argument would then be that populism is the political order of the day, and that it can and should be harnessed by democratic governments. Jeremy Corbyn, with his affection for political action outside the parliament where he has spent decades irritating the MPs of his own party as well as of other parties, might well agree, even if his *populus* is strangely limited to card-carrying members of the Party, which suggests some nostalgia for old Soviet ways. The Trades Unions might well agree, not least those railway unions that have made the life of commuters in southern England such a misery; memories are conjured up of those Labour years long ago when the TUC treated itself as the third house of parliament.

Britain's Representative Democracy

Yet we possess a political system that is not based on the vagaries of this sort of direct democracy. What has evolved in Great Britain, and has been passed on to parliaments across the world, is representative democracy; in other words, sovereignty lies in a parliament of periodically elected representatives who are trusted to make political decisions and to pass laws. They are not 'mandated', to use the term beloved of student unions that command elected members of their executive to press ahead with substituting *Ze* for *He* and *She*, or removing objects deemed colonial and imperialist (this was also Zac Goldsmith's mistake in attempting to win a mandate to oppose the new Heathrow runway). It should be noted that the representative system we operate is very different to the way democracy functions in the United States, where the head of state retains an extraordinary amount of power and where the executive does not hold membership of Congress (although the Vice-President, who often has a good deal of time on his hands, functions as Speaker in the Senate). There, despite the

principle of the separation of powers, the independence of the judiciary is limited by the simple fact that members of the Supreme Court are appointed for life at the political whim of the President.

Although fears have been expressed that the Supreme Court in London, or indeed the High Court before that, might appear to be meddling in politics, the rather tedious pleading in the Supreme Court has shown, if anything, that Great Britain places real value on the principle of the rule of law. There are legal questions that need to be answered, concerning the effect of Brexit on the rights of British citizens within the rest of the EU, and concerning the nature of the royal prerogative. They are being addressed within the framework of the Common Law, a legal system that in many respects sets Great Britain apart from most other European states. Whoever came up with the idea that an appeal against a decision by the Supreme Court against the Government could be placed before the European Court of Justice deserves the prize of Joker of the Year, though in a way it is a good reminder of the limits on sovereignty that we have had to suffer as a member state of the EU.

The very precise legal questions before the Supreme Court are not the concern of this essay. This essay is, instead, concerned with the argument that the vote in favour of Brexit was intended to restore the sovereignty of parliament, and that it is therefore appropriate for parliament to play a significant role in the process of Brexit: agreeing, as has already happened, that Article 50 will in due course be invoked, expecting to have the right to criticize the terms that are agreed, and most definitely having the exclusive power to revoke the European Communities Act of 1972. To say this is not to say that every idea about how to obtain the best terms for Brexit has to be laid before parliament. One might, though, expect the arguments for a gradual withdrawal, said to be favoured by the Chancellor of the Exchequer, to be set alongside more radical alternatives, and examined in close discussion. If anything, this will re-invigorate the Commons after years during which Prime Ministers have not always paid as much attention to parliament as they might have done. In fact the sight of serious deliberations in parliament about these matters should awaken the Brussels Eurocrats to the fact that they are not simply negotiating with a government in the hope that it will become pliable – as in effect happened with the terms David Cameron brought back from Brussels.

The backing of parliament gives added strength to the British government in its dealings with sometimes obstreperous champions of the 'European journey'.

My surprising conclusion is that Gina Miller and her colleagues have actually done a favour to the Brexit process. After a referendum campaign in which arguments contained more bluster than substance, and during which some of us were told not to use the word 'sovereignty' as it is rather long and far too abstract, we need some clarity about the limits of the royal prerogative, about the nature of parliamentary sovereignty, and about the nature of sovereignty in general in an era of globalization. Those of us who saw the restoration of that sovereignty as a noble aim will surely understand that a series of parliamentary resolutions and a body of legislation concerning Brexit provide the best means to make parliament sovereign again. Whatever the legal arguments, it is *morally* right that a parliament that has now accepted the reality of Brexit should have the final say.

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Although the prime minister has made clear that the government will trigger Article 50 by the end of March to start the process of leaving the EU, the Supreme Court is considering whether parliamentary approval must first be sought.

The judgement, expected within weeks, has already been the focus of intense debate. Should judges play such a pivotal role in a matter of politics? Can the prerogative power be used here as for foreign treaties? Where does sovereignty in Britain's Constitution lie? Does parliament have authority, irrespective of the explicit wishes of people in whose name it governs?

In *Triggering Article 50: Courts, Government and Parliament*, historians and lawyers consider the questions raised by the case, the historical precedents and the lessons to be drawn from the law itself.

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