

The Article 50 ruling means Parliament must not merely rubber-stamp Brexit with a three-line bill

blogs.lse.ac.uk/brexit/2016/11/17/the-article-50-ruling-means-parliament-must-not-merely-rubber-stamp-brexit-with-a-three-line-bill/

17/11/2016

*The High Court has ensured the government cannot trigger Brexit without parliamentary approval, write **Dimitrios Giannoulououlos, Geoffrey Nice QC, Ben Chigara, Julian Petley, Ignacio de la Rasilla and Katja Sarmiento-Mirwaldt**, on behalf of the [Britain in Europe](#) think tank. If the Supreme Court upholds the ruling, MPs and peers now have a responsibility to scrutinise the government's plans and not merely rubber-stamp a legislative act with a three-line mandate for triggering Article 50.*



The [High Court's historic judgment on Article 50](#) – *R (Miller) v Secretary of State for Exiting the European Union* – struck a potentially fatal blow to the government's plans to initiate the process of departing from the EU without giving Parliament the right to vote on them. If, as reports suggest, a [three-line Bill](#) is currently being drafted to quickly authorise the government to trigger article 50 if the judgment is upheld, the parliamentary process enabled by *Miller* puts an onus on MPs and peers to prevent it.

It is, of course, difficult to predict whether the High Court's ruling will stand scrutiny at the Supreme Court. Some constitutional law commentators have [identified weaknesses](#) in the reasoning of the Court. Others take the [unanimous nature](#) of *Miller* or the fact that it was written as 'a single judgment of all three judges' as factors that make it [difficult to overrule](#).



Statue in St Stephen's Hall, Houses of Parliament. Photo: [UK Parliament](#) via [parliamentary copyright](#)

[Much will depend](#) on whether the government is prepared to [withdraw the concession](#) it made at the High Court that triggering article 50 is irrevocable (and face the risk of a referral to the Court of Justice for the European Union for a preliminary ruling on this complex question of EU law). It is worth emphasising here that shortly before *Miller* was handed down, the Belfast High Court rejected a challenge very similar to it, precisely on the basis that triggering article 50 was revocable. This development [arguably presents the Supreme Court with two competing interpretations to choose from](#).

So there is all to play for at the Supreme Court. The High Court's ruling still provides a resounding confirmation that it is the sovereignty of Parliament, as opposed to executive powers exercised by the Prime Minister on behalf of the Crown, that reigns supreme in the UK constitutional landscape. The Court underlined – at para [86] – that there was a 'powerful constitutional principle that the Crown has no power to alter the law of the land by use of its prerogative powers', and this was 'the product of an especially strong constitutional tradition' which had 'evolved through the long struggle ... to assert parliamentary sovereignty and constrain the Crown's prerogative powers'. It quoted – again at para [86] – Lord Browne-Wilkinson in *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513, 552, to emphasise that

'[t]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.'

The judgment gives equal attention to the constitutional principle of representative parliamentary democracy to rebut the Royal Prerogative argument. It draws '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'. It then adds that '[n]o such language is used in the 2015 Referendum Act', and, further, that the Act 'was passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only'.

The Court goes so far as to suggest that 'Parliament must have appreciated that the referendum was intended only to be advisory' as a vote in favour of withdrawal 'would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union'.

It is quite striking that the Court goes to such lengths to emphasise the advisory nature of the Referendum, considering that the Secretary of State did not contest this point. In doing so, it drives the point home that triggering article 50 under the Royal Prerogative would undermine the parliamentary process that has made triggering it possible in the first place, namely by legislating the 2015 Referendum Act.

The High Court judgment also puts the executive on the back foot in its efforts to prevent Parliament from playing an active role in the [long and complicated](#) process of [disentangling ourselves](#) from over 40 years of EU legislation. Only a few days before the judgment, the former Attorney General, Dominic Grieve QC MP, commented that 'the government [would] have to resort to a massive number of Henry VIII clauses [secondary legislation] to give it the maximum power and flexibility without Parliament's involvement'. *Miller* now requires Parliament's direct involvement, changing this dynamic entirely.

By triggering article 50 without Parliament's intervention, the government would undo, by the sheer exercise of its prerogative powers, EU law rights introduced into domestic law by the European Communities Act 1972. At the very least, it would seek to amend our constitution. Constitutions, particularly 'unwritten' ones, are, of course, not immutable for all time. But any amendments require adherence to the secondary rules of recognition on constitutional reform (established procedural formalities for effecting changes to the constitution) if they are to have any binding legal force. What the High Court judges did was to require that these secondary rules of recognition be respected.

In seeking to take away rights Parliament has put into law, the government was adopting an overreaching interpretation of the Royal Prerogative which went against modern constitutional law trends, and not just in the UK. Constitutions in Europe, for instance, are replete with emergency brakes, such as parliamentary qualified majorities, even when anticipating far less significant constitutional change than that which Brexit will bring.

Still, we must not lose sight of the fact that the judgment is about parliamentary power, a 'pure question of law' – not

the outcome of the referendum itself, as the opinion of the Court clearly declares from the outset. Parliament can shape the form of Brexit, but will not stop it from happening, and there is much force in the [argument](#) that in the end it may 'serve merely to place a parliamentary stamp of approval' on Brexit.

Furthermore, there is a grave risk that the public might perceive this judgment as an attempt to usurp the will of the people, especially when encouraged to do so by sections of the national press. The Daily Express called the High Court judgment 'the day democracy died', the Daily Mail called the judges 'enemies of the people', whilst the Daily Telegraph described it as 'the judges versus the people'. This full-frontal assault on our judicial establishment calls into question these papers' understanding of (let alone commitment to) the principle of separation of powers, which is one of the hallmarks of a properly functioning modern democracy.

Despite all this, we are confident that the irony of the government wishing to bypass Parliament over a referendum that was – at least partially – about restoring sovereignty to Parliament will not be lost on citizens, including Leave voters. The government is well aware that a majority of MPs and peers are pro-European, and may well fear that Parliament, given the chance to vote, might not make the 'right' decision. However, we should remember that parliamentarians have been quite unanimous in emphasising that they have to respect the referendum vote, even though neither they nor Parliament as a whole is legally obliged to do so.

But respect for the referendum vote must mean something more than just [giving the government a carte blanche](#) to negotiate Brexit in Brussels. [MPs should have the right](#) to make 'at least a preliminary decision on some of the big, knotty questions that Brexit raises'. True, what they authorise is going to be 'somewhat speculative', as the [final form of the deal will be determined at the end of the negotiations](#). However, MPs and peers may be able to draw a number of red lines that must not be crossed. If they come to the view that there is only so much of ('hard' or 'soft') Brexit that the government should be allowed to pursue, they can take measures to ensure that it does not go any further. The parliamentary process enabled by *Miller* arguably now allows them to do so.

In fact, the deputy president of the Supreme Court, Lady Hale, has suggested the Court might have to go beyond simply determining whether it is Parliament that has the power to trigger article 50. It might also have to decide what the form of the bill triggering article 50 might be. Taking the unusual step of commenting extra-judicially on a pending case, she noted that an important question for the Court will be ['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 replacement of the \[European Communities\] Act'](#).

The upshot of the issue is that unless the Supreme Court overturns the High Court's judgment, Parliament must accept it has power in this matter, and exercise it with judgement – not slavishly follow a line for party political reasons, or because they fear the media will whip up public feeling against them. The decision to trigger article 50 may be the most important MPs and peers will ever take. [History will judge them harshly](#) if they allow anything except intelligence and concern for the British people to guide them.

The outcome of the advisory referendum was not, and is not, a dictator's fiat nor a suicide pact endorsed by the British people. Parliamentarians must understand that and find the courage to battle populism and honour their lifelong commitment to the democratic process.

We are optimistic – despite the failure of either the Prime Minister or the justice minister Liz Truss to swiftly condemn the anti-judiciary onslaught in the media – that the principle of separation of powers will be respected: in other words, the three branches of government will continue to check on each other, and parliamentarians will be allowed to do more than rubber stamp a legislative act with a three-line mandate for the government. The Article 50 ruling puts an onus on parliamentarians to stop that happening.

This post represents the views of the authors and not those of the Brexit blog, nor the LSE.

[Dr Dimitrios Giannouloupoulos](#) is Director of [Britain in Europe](#) and a Senior Lecturer at Brunel University.

Professor Sir Geoffrey Nice QC is a barrister. He worked at the International Criminal Tribunal for the Former Yugoslavia – the ICTY – between 1998 and 2006 and led the prosecution of Slobodan Milošević, former President of Serbia.

Ben Chigara is Professor of Law at Brunel University.

Julian Petley is Professor of Screen Media at Brunel University.

Dr Ignacio de la Rasilla is a Senior Lecturer at Brunel Law School.

Dr Katja Sarmiento-Mirwaldt is Senior Lecturer in Politics and History at Brunel Law School.

- Copyright © 2015 London School of Economics