

What does the Supreme Court's ruling mean for British parliamentary sovereignty?

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The Supreme Court ruled that Theresa May needs to ask Parliament for its consent to notify of the UK's intention to leave the EU. But she should also work closely with Parliament once the negotiations have started.

In the course of the referendum campaign Brexiters claimed that the principle of the supremacy of EU law made the British parliament irrelevant in law making. They said the UK should therefore leave the EU and take back control of its laws. But after the British people voted on June 23rd 2016 to leave the EU, it soon became clear that Brexiters only wanted Parliament to have a say when it suited their political ends. During the Conservative Party Conference in Birmingham in October 2016, Prime Minister Theresa May said that she had no need to consult Parliament before triggering article 50 of the Treaty on European Union (which provides a legal path for a member-state to leave the EU). She announced that she would initiate the process of leaving the EU by the end of March 2017.

Britain's Supreme Court disagreed with the prime minister's view of her powers. In a landmark ruling on January 24th, the court decided (by a majority of 8 to 3) that May could not ignore Parliament as she made her plans to take the UK out of the EU. During the proceedings, the government claimed that it could rely on the so-called royal prerogative, which authorises ministers to conduct foreign affairs, including concluding and withdrawing from international treaties. But the Supreme Court held that the government's decision to trigger article 50 could deprive UK citizens of fundamental rights that they were granted under the 1972 European Communities Act. Removing such rights would require another act of Parliament, which would authorise the government to notify the EU of Britain's decision to leave. The court sided with May, however, in saying that the devolved administrations in Scotland, Wales and Northern Ireland did not have a veto on the triggering of article 50. So what does the ruling mean, if anything, for Theresa May and for her plans to trigger article 50 by the end of March 2017? Will Parliament try to overturn the result of the referendum?

At first sight, the government seems to be pressing ahead, unconcerned about a parliamentary revolt. After the Supreme Court delivered its ruling, David Davis, the Secretary of State for exiting the EU, promised that the government would comply with the verdict and introduce a bill to authorise the start of divorce talks with the EU-27. The Commons should pass this easily. Most MPs have said repeatedly that they accept the vote of the British people. According to Sky News polls, 51 per cent of Britons support leaving not only the EU but also the single market. Voting against the bill could be political suicide, particularly for Labour MPs in constituencies that voted for Brexit. Keir Starmer, Labour's shadow Brexit secretary, confirmed on January 24th that the party would not seek to obstruct the triggering of article 50 by voting against the bill. Some Labour MPs, representing constituencies which voted heavily to remain, are likely to join MPs from the Scottish National Party and the Liberal Democrats in opposing the bill; but there are too few to

defeat the government. The Conservative Party has a working majority in the House of Commons, and the government will use the party whip (if it needs to) to ensure victory.

That does not mean, however, that May has nothing to worry about. The government fears that parliamentarians might try to give themselves more say in how the UK leaves the EU. The government wants therefore to put forward a short bill, designed to limit the ability of Westminster to amend it. But the Institute for Government, an independent think-tank, argues that “there’s no such a thing as an unamendable bill of this type”. Parliamentarians should be able to table amendments as long as they are “relevant to the subject matter of the bill”.

Keir Starmer has already announced that Labour will seek amendments which would, among other things, enhance the role of Westminster in scrutinising negotiations with the EU-27 in Brussels. This is a sensible demand which could gain cross-party support in Parliament; Sir William Cash, chair of the Commons EU scrutiny committee, wrote to Davis on January 25th to say that select committees (including his own) “expect to be provided with information on the government's desired outcomes, and factual analyses of the position on, for example, possible legal arrangements.”

Theresa May and David Davis have repeated the mantra that they will inform Parliament about the government’s strategy and the progress of the talks only in so far as it does not undermine Britain’s negotiating hand. Theresa May conceded at Prime Minister’s Questions on January 25th that the government would publish a white paper setting out its plans for Brexit negotiations. But the government has argued that negotiations will be harder to conduct if its opening position is made public, and it will be reluctant to share sensitive information about the talks with Westminster. This is not unreasonable: the exit talks, like all international negotiations, will require a delicate balancing act, reconciling the confidentiality of negotiating positions with effective parliamentary scrutiny.

But keeping parliamentarians in the dark would be a big mistake. Withdrawing from the EU is not comparable to any other negotiations Britain has conducted – not even its pre-1973 accession negotiations with the European Economic Community. Brexit will have implications for the British economy, for British expatriates and for EU citizens who have made Britain their home; parliamentarians should be able to keep a close eye on the government as it prepares for its divorce talks with Brussels and when it negotiates its terms.

Theresa May has rightly, if belatedly, accepted that the speech she gave at Lancaster House is not enough for parliamentarians to properly scrutinise the government’s negotiating objectives. Beyond the white paper, as the talks progress she should offer briefings to MPs and peers on so-called Privy Council terms, whereby participants promise not to reveal the information they receive. The European scrutiny committee has complained in the past that briefings behind closed doors undermine the government’s accountability to the Commons. But MPs should accept that restrictions on what can be released publicly may be the price of getting the government to be more frank.

Once the negotiations with the EU-27 have started, British ministers will have little time to update parliamentarians on the progress of talks in Brussels. The government could instead make a reading room available, where parliamentarians could view (but not remove or copy) documents that set out the British negotiating position. In doing so, the UK would follow the precedent set in the negotiations on the Transatlantic Trade and Investment Partnership (TTIP). After the US and the EU had agreed in December 2015 that the TTIP negotiations should be more transparent, Britain

opened a reading room where parliamentarians could view consolidated texts setting out both the EU and American positions.

Westminster should not forget either that the European Parliament will also have to approve the final withdrawal deal. MPs should do more to exploit existing channels of co-operation with their British colleagues in the European Parliament. British MEPs often understand the EU decision-making process better than their colleagues in London. They could help Westminster understand the EU institutions' red lines in the talks. British parliamentarians should also make contact with MPs who lead other national parliaments' work on Brexit, and learn more about other member-states' concerns. MPs and peers should use this knowledge to try to dissuade the British government from taking steps which could alienate either EU institutions in Brussels or other member-states.

David Davis argued that the negotiations themselves would not be “a black box out of which a treaty drops at the end”. The government now has a chance to prove it meant what it said. When it introduces its article 50 bill, the government should offer Parliament more oversight of the Brexit talks. If there is anything positive to come out of the British referendum, it is that Westminster is paying more attention to the EU than it has before. For decades, EU affairs attracted little attention in the House of Commons and pro-EU MPs did too little to debunk the myths about the EU that eurosceptics spread. Now, the prospect of Brexit is giving the elected representatives of the British people another chance to contribute to shaping Britain's relationship with the EU. Theresa May, who in her Brexit speech stressed that what distinguished the UK from the rest of the EU was “the principle of parliamentary sovereignty... the basis of our unwritten constitutional settlement” should be urging MPs on, not stonewalling them.

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