Brexit: Should Parliament be able to overrule the referendum?

Parliamentary sovereignty is the hallmark of British democracy. Forged in the furor of the civil war and the glorious revolution, and enshrined in the 1689 Bill of Rights, the rule confirms the supremacy of Parliament over the courts and Queen. Empowered by custom, judicial consent and constitutional convention, Parliament is imbued with "the right to make or unmake any law whatever".[1] It is a power which cannot be abrogated or amended by any other person or institution. It is that power which enables Parliament to overrule the EU referendum.

The only permissible limits on parliamentary authority are those imposed by Parliament itself, and even they can be repealed by subsequent Parliaments.[2] One example of a self-imposed limitation is the *European Communities Act* 1972, by which Parliament gave effect to the Treaty on the European Union ("TEU") and voluntarily "accord[ed] supremacy to rules of Community laws in areas to which they apply".[3] By virtue of the act, Parliament willingly subordinated UK law to EU law, and the act remains in force until such time as a subsequent Parliament expressly chooses to repeal it.[4]

In the wake of the referendum, the executive pledged to initiate the process of leaving the EU by triggering article 50 of the TEU without an act of Parliament. The Prime Minister suggested that it could do this using the "royal prerogative", a set of residual powers reserved to the monarch by common law and delegated to the executive. However, in a November 2016 judicial review, Lord Chief Justice Thomas held that triggering article 50 requires parliamentary approval.[5]

Whilst the decision is currently subject to appeal, his judgment upheld the principle that the royal prerogative cannot override parliamentary sovereignty. This means that it can only be used in situations where its exercise would not alter existing law, as set out by Lord Coke, challenging the unfettered authority of James I in the 1611 'Case of Proclamations':

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[1] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics, 1915) at 3-4.
[2] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.
[3] *R v Secretary of State for Transport, Ex parte Factortame Ltd and Others (No. 2)* [1990] 3 WLR 818 (Lord Bridge) at 659.
[4] *Thoburn v Sunderland City Council* [2003] QB 151 (DC) at 63.
[5] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at 94.

> "… *the King by his proclamation… cannot change any part of the common law, or statute law, or the customs of the realm*."[6]

This ruling was reinforced by the 1689 Bill of Rights, which stated that the "*power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal*", and affirmed in the case of *The Zamora*[7].

In the judicial review, the government argued that the royal prerogative could be used to trigger article 50, as it permits the executive to withdraw from treaties without parliamentary approval.[8] However, withdrawal from the TEU goes beyond an exercise of treaty-making powers. It directly affects the operation of domestic legislation and abrogates individual rights, such that it is impermissibly in breach of Lord Coke's ruling. If withdrawal takes place, the 1972 act may technically remain on the books, but its effect would be invalidated and overridden by the actions of the executive. It is therefore not for the government to trigger article 50, but for Parliament, if it so chooses. And it is free to choose.

If Parliament is called upon to implement the result of the referendum, its hands are by no means tied. The vote was instigated by the *European Union Referendum Act* 2015, which did not make the referendum legally binding and did not specify the consequences of its outcome. In passing it, Parliament did not constrain itself to any action.[9] The result was merely an indication of which choice the majority of the electorate preferred.

That preference cannot make law. The UK is not governed by popular mandate, but by representative democracy. Politicians are elected to represent their electorate, to exercise judgment on their behalf and to make decisions on the basis of what they believe to be in the best interests of the nation. They are agents and decision-makers, not merely conduits for public opinion. Ultimately, as Dicey observed, "the electors can in the long run always enforce their will", because Parliament is answerable at the ballot box. However, that does not mean that voters can or should bind their representatives to a particular course of action.

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[6] *Case of Proclamations* [1610] EWHC KB J22.
[7] *The Zamora* [1916] 2 AC 77 at 90.
[8] *Miller* (n5) at 30-31.
[9] *Miller* (n5) at 106-107.

The choice to leave the EU therefore rests with individual parliamentarians. While some may argue that the referendum result creates an obligation for Parliament as a whole to vote leave, that approach misconceives the institution – it is not just a single body acting for the state, but a collection of individuals, each bearing unique values and beholden to different stakeholders. They must not be swayed by the tyranny of the majority, but consider the best interests of their individual constituents and the nation as a whole.

Ironically, parliamentary sovereignty was the rallying cry of the 'Brexiteers'. Angered by the impact of EU edicts on British courts, in November 2015 the official Leave campaign released a statement calling for the public to "vote to leave the EU to ensure law-making power returns to our sovereign national parliament".[10] Now, many of the same people who campaigned for sovereignty are outraged at the possibility that it could permit Parliament, at its discretion, to remain. The suggestion, in court and in the media, that Parliament can choose which course to take has been met with furious accusations of political bias. However, at its heart, the supremacy of Parliament and its power to overrule the referendum is not a political or emotional question, but a legal and a constitutional one.

The suggestion that triggering article 50 would restore sovereignty also reveals a fundamental misunderstanding of the relationship between the UK and the EU. The truth is, Parliament never stopped being sovereign. The constitution of the UK has not changed. It was Parliament which decided to subject itself to EU law in 1972, and Parliament has always had the power to repeal that legislation. Whether to do so is a choice that cannot be forced upon it by a referendum or subverted by a desperate executive. The decision to leave must remain, not a royal, but a parliamentary prerogative.

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(997 words)

[10] LEAVE EU (@LeaveEUOfficial). "READ: Statement from our co-founder, @Arron_Banks on today's High Court ruling re: #Brexit and Article 50." 3 November 2016, 11:30. (Tweet).