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Referendums are now part of our democracy - if judges reverse them, we are in a dangerous place

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'Remember, remember the Fifth of November" some of us chant on this day. The rhyme goes on about how Guy Fawkes wanted to blow up the King and Parliament: "Threescore barrels of powder below/ Poor old England to overthrow." We do things differently nowadays. For "barrels of powder" read "QCs arguing".

The legal confusion about how to trigger Article 50 has left both sides in the Brexit story striking some odd attitudes. The Leavers – of whom your columnist is one – look as if they are saying that Parliament should not have the power of decision over Article 50. Yet it was they who spoke so often about recovering parliamentary sovereignty.

Guy Fawkes captured CREDIT: UNIVERSAL HISTORY ARCHIVE/UN/REX /UNIVERSAL HISTORY ARCHIVE/UN/REX

The Remainers, many of whom have devoted more than 40 years to undermining our national independence, have suddenly decided to uphold the rights of our sovereign Parliament. Human rights lawyers who have argued for entire careers that Britain's home-

grown tradition of rights is grossly inadequate for the modern world have gone all gooey about the Bill of Rights of 1689 and the limits it sets upon the royal prerogative.

Personally, I have particularly enjoyed watching Lord Kerr of Kinlochard stepping forward to speak for England. John Kerr, former UK Permanent Representative to the European Union, former head of the Foreign Office, billed by the BBC as the "author" of Article 50, is known by former colleagues as "Machiavelli" (with emphasis on the "Mac", Lord Kerr being Scottish). He is a man of great charm and brilliance. I have always profited from my conversations with him about the life of Lady Thatcher. But I must admit that I had never before seen him as the defender of this nation's ancient liberties.

Now The People's Kerr explains that Article 50 is not irrevocable, and every possible opportunity must be given to Parliament and electors to vote again. Come to think of it, I don't know why I am surprised: it would be entirely in character for the inventor of the device for leaving the EU to have so drafted it that it forces us to stay.

Having read the legal arguments, I can see both sides. Professor John Finnis, for Policy Exchange's Judicial Power project, says the Divisional Court is simply wrong to state that the cancelling of treaties which affect the rights of British citizens in this country must be done by statute: look at double-taxation treaties.

On the other hand, I am impressed by Richard Howell, the brilliant young legal expert for Vote Leave during the campaign, who predicted to me two months ago that the court would decide as it has now done. Despite his support for Leave, he thinks it is hard to deny that the European Communities Act of 1972 did indeed change the domestic rights of British subjects: it would therefore be an abuse of the royal prerogative to alter these rights without statutory authority.

The truth is we are in deep waters here, for the same reason as we have always been out of our depth in the EU. The method of entering the EEC more than 50 years ago was by accession to international treaties which were then spatchcocked into our law. Through what lawyers call "direct effect", this process has ever since imposed thousands of Brussels Directives and Regulations upon us which Parliament cannot prevent. For more than half a century, therefore, we have been governed by an exercise of the prerogative much wider and more absolute than anything since the 17th century.

Our courts let that happen. Yet now, as Lawyers for Britain point out, when we try to trigger our right to leave, using the same prerogative, they tell us that the Government is abrogating our rights. I don't doubt the High Court is sincerely interested in upholding the law. But I do doubt that the judges are alert to this imbalance. Having followed careers in which "Europe" was a given, they do not notice the radical lack of clarity and of liberty which this hybrid of diplomatic treaty-making, parliamentary legislation and orders issued from Brussels has imposed upon us.

Here's the solution, according to Alice-in-Wonderland euro-logic. Why not, as we are still entitled, take our Article 50 problem to the highest authority of the body we have recently voted to leave? Why not lay ourselves prostrate before the European Court of Justice in Luxembourg, ensuring delay for at least a further decade and well-paid work for hundreds of fine, upstanding lawyers?

Since I hear no takers on either side for the above wheeze, let us try to reduce this matter to the issue which the High Court almost brushed aside. We have had a referendum, and we voted to leave.

The judges are right that the Referendum Act does not explicitly make its result mandatory. But here we enter a realm where the constitutional matters more than the purely legal. So far as I know, there is no mandatory provision that the winner of a British general election

must form the Government. It is not a matter of law. Yet it would be a disaster if this constitutional convention were not observed.

So it is with this referendum. The court quoted the great constitutionalist A V 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.” That is right: judges cannot rely on opinion polls or sniffing the wind. But the framers of the Act of Parliament which provided for the referendum, and was voted for nearly six to one by MPs, declared its purpose: the result would settle the question. It is worth remembering how David Cameron thumped this message home. He said that, if Britain voted to Leave, he would immediately trigger Article 50.

Gina Miller speaks outside the High Court CREDIT: REUTERS/TOBY MELVILLE/REUTERS/TOBY MELVILLE

MPs agreed to hand the decision from the normal place where such things are decided – Parliament – directly to the people. That was the whole point. There have been three nationwide referendums in this country, and nine others within its constituent parts, starting with the Northern Ireland border poll in 1973. Some people don’t like them, but they have become an important part of our constitution. If judges airily wave them away as “advisory”, they may be technically correct, but they are dismissing the democratic process.

It is obviously not a disaster for the rule of law if an Act of Parliament is used to trigger Article 50. Maybe this should have happened in the first place. But it is a disaster if the perception grows up that the rule of lawyers overrides the will of the people once Parliament deliberately asked the people what they wanted. The term “lawfare” has come into use recently. It well describes the growing habit of well-connected lobby groups to “sledge” the democratic process. Those pursuing this action about Article 50 are doing just that, knowing that delay will make it easier for them to prevent us leaving the EU. This is

politics via the courts. Too many judges fall for this, because it flatters their sense of importance and independence.

Next month, for the first time, the entire Supreme Court will sit together for the appeal. The court will be sitting in judgment on how the elected government should give effect to the biggest popular decision in our history. I do hope the 11 judges realise what a dangerous moment this is.