

# Judges should have stayed out of the Brexit process. It's up to the Supreme Court to fix their mistake

## TELEGRAPH VIEW

6 NOVEMBER 2016 • 10:00PM

This country is governed by the rule of law but this is not the same as the rule of judges. The judiciary interprets the law passed by Parliament in the light of the constitutional precedents set down over the centuries. If these laws were clear-cut and the precedents obvious we would not need courts, lawyers – or even judges, heaven forbid.

It is because they are open to interpretation that the [High Court's ruling last week on who can trigger the process to bring about Britain's exit](#) from the EU has proved so controversial.

The judgment reached by Lord Thomas, the Lord Chief Justice, Sir Terence Etherton, the Master of the Rolls and Lord Justice Sales was patently contestable because the Government has decided to appeal to the Supreme Court. It is by no means inconceivable that the 11 judges who sit in the highest court in the land could reach a different conclusion. Would they then be attacked by those who have supported the High Court's ruling for undermining democracy?

Judgments are routinely overturned by higher courts either because they have erred in law or are otherwise flawed. The judges whose rulings are set aside don't like it but it is an occupational hazard. No doubt the criticism of a higher court may be less publicly bruising than getting a battering in the newspapers; but it is more professionally painful, as the admonition of peers always is.

This is the context for the hoo-ha that has greeted last week's ruling. Inevitably – and as the Divisional Court should have foreseen – their ruling has become a political grenade to be tossed between the various factions in the Brexit debate. Those who favoured leaving the EU smelled a rat, and some accused the courts of being complicit in a plot to undo the decision of the people in the referendum.

Talk of a conspiracy is fanciful: in our view the court interpreted the constitutional position of the executive vis-à-vis Parliament as the judges saw it, but did so erroneously. That is a conclusion we are entitled to reach. Newspapers, MPs, and anyone else for that matter, have a right to criticise the ruling and to examine the background of the judges involved. No one is challenging their independence, merely their wisdom.

Perhaps they feel aggrieved by some of the comments made by ministers about the "unacceptability" of the ruling, given the separation between the executive and the judiciary. But ministers in our system are also Members of Parliament and they, too, are entitled to express a view on a court judgment without being accused of behaving like Robert Mugabe.

[In recent years, the advance of "judicial activism"](#) has made rulings against ministers commonplace. If it is perfectly fine for the courts to knock back unlawful executive action – often with scathing remarks about the minister – they cannot then expect to be immune from criticism from the other direction.

In a free society and a healthy democracy, robust differences should be aired. Judges are surely able to withstand personal criticism without whingeing about their independence being under threat. It isn't; and no one, least of all this newspaper, is suggesting that it should be.

The days of name-calling that have followed the ruling have demonstrated how contentious it was. If the judges had not appreciated it would be, then they are either naive or have not been following recent political events very closely.

Therefore, the court's ruling could well have had a direct bearing on whether the referendum result is acted upon; indeed, many Remainers, from City traders to Guardian columnists, have expressed their hopes that this would be the upshot of the judges' decision.

Arguably, the High Court has interfered in the proceedings of Parliament, which is beyond their competence. To say as much is not to impugn their motives or accuse them of a conspiracy, but to disagree, and to urge the Supreme Court to reverse the decision.

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