

## Thanks to Gina Miller, Parliament is again supreme. But now MPs must fear the people's wrath



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Gina Miller won the case, but she cannot stop Brexit CREDIT: ANDY RAIN/EPA

Well done Gina Miller. Not only has [she won a famous legal victory](#) but she has clarified what the June 23 referendum was all about. For many who voted to leave the European Union it was about restoring control and sovereignty to our nation.

So perhaps it was not what Mrs Miller intended, but [the case before the Supreme Court](#) has made a reality of Brexit. It can now proceed with the full wind of the law and Parliament in its sails. The very people who for decades were utterly indifferent to the fact that our Parliament had been emasculated by its self-imposed subservience to supra-national institutions have given it a new lease of life.

By challenging Brexit in order to stop it she has supercharged it. Remainers have become the great defenders of the sovereignty they previously wanted to see pooled.

Mind you, for a legal hearing of such constitutional magnitude it ended with something of a whimper. The Supreme Court reasserted what most people had always thought to be the

case – that the Government cannot change the law by executive fiat. Indeed, even the Government never argued that it could.

What was at issue was whether triggering Article 50 [amounted to a change in the law](#). But so much of our legislation is tied up with EU membership that once the Attorney General, Jeremy Wright, had accepted that the departure procedure was irrevocable he was going to lose. His only point was that this was a treaty matter and therefore fell within the scope of an executive prerogative, but the judges did not agree (or rather, eight of them didn't; the fact that three justices found for the Government shows this was not as clear cut as many had assumed).

What is less easy to explain is why the Remain side also accepted that triggering Article 50 was an irrevocable act. Arguably, Lord Pannick QC had to make this point to win his legal case, but politically it means that any Remainer hope of thwarting Brexit has been scuppered. [The main parties](#) too have declined to stand in its way, accepting that, to all intents and purposes, the June 23 referendum was the moment when we decided to leave. This is an important constitutional point that the court has not really addressed.

The majority ruling observed that the Referendum Act 2015 did not contain any instruction to the Government to act upon its outcome – unlike the referendum on proportional voting in 2011. But the politicians have reached their own conclusions, as indeed they should have done long ago rather than waiting for a court to tell them their job. It speaks volumes about the diminution of Parliament since we joined the European Economic Community that it is no longer capable of acting as the sovereign body it is supposed to be. Indeed, the constitutional question that arises from this farrago is whether we are any longer a representative democracy. Much has been heard about the “will of the people” in this debate, and we used to accept that this will was exercised through our elected representatives in Parliament.



Is Parliament going to cede more ground to referendums? CREDIT: TOBY MELVILLE/REUTERS

After all, it is not the case that the majority in a referendum automatically wins: it depends on the legislative basis of the referendum. In 1979, there was majority support for Scottish devolution, but it never happened because the law stipulated that the backing of 40 per cent of all voters was needed and that threshold was not achieved.

The fact is that while 17.4 million people voted for Brexit last June they represented just 36 per cent of the total electorate, so to say that “the people have spoken” is incorrect. A third of them have, and nearly one third voted the other way. If we are to rely increasingly on referendums, therefore, this needs to be addressed in law so that future votes require, say, 40 or 50 per cent of the entire electorate to vote in a particular way before proceeding.

There was no attempt to insert a threshold into the 2015 legislation primarily because the Government never thought they would lose the vote. This would not matter if it was accepted that a referendum was just advisory to Parliament, or, in the immortal words of [Kenneth Clarke](#), nothing more than a gigantic opinion poll. But if that were really the case then the overwhelming Remain majority in Parliament would surely have argued that since they were not bound by the June 23 outcome they considered it to be in the interests of the country to stay in the EU. That, after all, is what most of them argued during the campaign. To change their minds because 36 per cent of the electorate said otherwise makes little sense unless the politicians no longer consider themselves to be the custodians of a representative democracy but ciphers for the popular will expressed through direct votes.

That is a significant development of our constitution. As the court stated: “The referendum did not change the law in a way which would allow ministers to withdraw from the European Union without legislation. But that in no way means it is devoid of effect... It has already shown itself to be of great political significance.” Indeed it has.

True, there may be hurdles for the Bill to negotiate, especially the Lords. Is there a majority for staying in the single market or the customs union, both of which Theresa May has ruled out, and can their vote be maximised in an amendment, if anything substantial is even possible with such tightly drawn legislation? Dozens of Tory MPs would have to join with a unified Opposition to impose conditions that the Government could not accept, thereby inflicting a defeat. Yet even though this is their only chance of stopping Brexit, there is no sign of such a revolt. Moreover, most Tory Remainers welcomed Mrs May’s speech last week and will be under massive pressure to back her.

A few months ago, it looked as if the Supreme Court would give the pro-Remain majority in Parliament a chance to stop Brexit. But the political consequences of thwarting the referendum result are so toxic that the opposition has melted away. Although Mrs Miller and the Remain side were delighted with this ruling, it is the Brexiteers who should celebrate. As David Davis said in the Commons, there is no going back.

