

Brexit: Should Parliament be able to overrule the referendum?

“A device for dictators and demagogues”

In the UK, unlike in many countries, the legal and political status of a referendum is a complicated and controversial issue. Parliament decides when drafting a referendum bill whether to make the result legislative or consultative only. The June 23 referendum was consultative only, because the referendum bill that enacted it, the European Union Referendum Act 2015, made no provision to give it automatic legislative force. Had Parliament intended for the vote to be binding, it would surely have included a provision to make it so, as was included in Section 8(1) of the Parliamentary Voting System and Constituencies Act 2011. There is nothing in *Hansard* to suggest Parliament intended for the 2015 Act to have a similar provision.

Moreover, according to A. V. Dicey’s classic conception of Parliamentary sovereignty, Parliament cannot bind itself or future Parliaments under any circumstances.¹ Dicey’s conception has been upheld by leading scholars, and has also been reiterated in *obiter dicta* by leading members of the judiciary, for example in the *Jackson* case by Lady Hale and Lords Bingham and Hope.² Indeed, Lord Bingham described Parliament’s supremacy as the “bedrock of the British constitution”, as it has been since the Bill of Rights 1688.³ There is of course some debate about limitations to Parliamentary supremacy, but few disagree that Parliament can override almost any decision, provided explicit intent has been demonstrated, and this includes the referendum result.

Thus Parliament is legally *able* to overrule the referendum, but this does not answer the question of whether it *should* be able to. 51.89% of the electorate voted to leave the EU, so if Parliament’s role is to fulfil the will of the majority, then evidently it should not be able to override the referendum. However, the UK is a representative democracy, not a direct democracy. Referenda have no automatic legal standing and are held so infrequently for clear reasons.

Clement Attlee famously described referenda as “alien to all of our traditions”, and as a “device for dictators and demagogues”, which “has only too often been the instrument of Nazism and Fascism”.⁴ These words were repeated by Margaret Thatcher in 1975 at the time of the EC referendum. They are to be taken quite literally: Mussolini and Hitler both exploited referenda to give a superficial veneer of democratic legitimacy to nightmarish populist regimes that were soaked in propaganda.

¹ Dicey, A. V., *The Law of the Constitution*, edited by J. W. F. Allison (OUP, 2013).

² [2006] 1 AC 262 at [9], [104], [105], and [159].

³ *Ibid.*, at [9].

⁴ “Herding Cats: How referendums can go wrong”, *The Economist* (17 October 2015).

Referenda are inherently problematic because they are so vulnerable to populism, captive interests, and the ochlocracy that Aristotle warned was the greatest threat to democracy. James Madison, having studied Aristotle, thus described direct democracy as the “tyranny of the majority”. The very purpose of a constitution, according to Aristotle’s classic conception as well as Montesquieu’s theory, is to distribute power among citizens such that no group is subject to tyranny, and the common interests of the citizenry are protected.

Tyranny of the 51% is the antithesis of that purpose, because it can concentrate power in a slim majority of the electorate at the expense of the rest of the citizenry. Precisely the reason modern representative democracy evolved was to countervail the tyrannical and populist tendencies of majoritarianism.

The deficiencies of direct democracy have only been exacerbated in the age of free online news circulating in the echo chambers of social networking websites. Such free news is often fake or propagandistic and bankrolled by private interest groups and even by the governments of hostile nations. Algorithms are also being used with increasing effectiveness to precision-target susceptible voters with articles based on their browsing history. Thus the scope for majoritarian populism to be stirred up by private interest groups has never been greater.

Aristotle made another important observation about the weakness of direct democracy. As Alan Ryan phrases it, “the talent for political rule is not widely distributed”, but, on the other hand, “people who do not possess the talent for political rule can recognise its presence in others”.⁵ We elect our politicians to make decisions on our behalf, because we do not have the time or expertise to analyse individual political decisions in sufficient detail to come to a nuanced and balanced conclusion.

Thus the duty of our MPs is not simply to convey the message of the referendum to Parliament in an unthinking exercise of majoritarianism. It is their duty to apply their expertise to make decisions in the best interests of the nation as a whole, and not just the narrow majority of the electorate.

This cannot be determined fully until the terms of our exit have been negotiated. If the negotiated deal were to entail the removal of freedoms, rights, and economic opportunities that would harm the nation as a whole, or harm vulnerable groups throughout the nation, it would be the duty of Parliament to override the referendum and vote against the deal.

⁵ Ryan, Alan, *On Politics* (Penguin, 2013) p. 92.

Moreover, the most recent poll in the *Financial Times* shows 56% of the UK would vote to remain in the EU if another vote were held now.⁶ This highlights precisely why referenda are so flawed and why the doctrine of Parliamentary supremacy is so important: it gives Parliament the flexibility to respond to changing circumstances, rather than binding itself to commitments that may no longer make sense.

Finally, the referendum gave no indication as to what kind of exit was sought. Key questions of detail went unasked and unanswered. Polls suggest citizens want both full access to the single market and limits on immigration — but what if both cannot be achieved? Even traditional allies like Denmark are signalling unwillingness to cut any kind of deal that is favourable to the UK. It cannot be left to leaders of the Executive branch of the state to pick and choose these terms according to *their* preferences. As events develop over the coming year, Parliament will need to exercise its constitutional function of checking and challenging the Government on our behalf, and they must exercise their best judgement to do so, even if it means overriding the referendum.

Word Count: 1000.

⁶ Wagstyl, Stefan, “Support for EU rises since Brexit vote, survey shows”, *Financial Times* (21 November 2016).