

Brexit: Should Parliament be able to overrule the referendum?

'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'

Constitutional law since the EU referendum sometimes seems to have gone through the looking glass. Brexiteers who campaigned for parliamentary sovereignty now argue that the royal prerogative after a referendum can trump statutory rights; and supporters of the EU who have long disparaged parliamentary sovereignty proclaim it as the centrepiece of the constitution. Behind this stands the question: which is to be master – people or parliament? If the people, then surely the referendum cannot be overruled; if parliament, then surely it can be.

It is clear as a matter of law that Parliament is able to overrule the referendum. This flows from the principle of parliamentary sovereignty, under which Parliament has 'the right to make or unmake any law whatever', in the words of A. V. Dicey, quoted approvingly in *R (Miller) v Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin.) [22]. Parliament could, therefore, ignore the referendum. Indeed, it would not have to change the law to do so. The EU Referendum Act 2015 merely provided for a referendum to be held: it did not specify the consequences of the result. By contrast, when Parliament last provided for a UK-wide referendum – on the Alternative Vote system – it imposed a duty on the relevant minister to bring that system into force in the event of a 'Yes' vote: Parliamentary Voting System and Constituencies Act 2011 s.8(1). Even this could have been undone by further primary legislation. Referendums are only held by parliamentary authority; and their results may be ignored or reversed by that same authority. In law, therefore, it is clear that the will of Parliament trumps the will of the people.

This might seem undemocratic, but the alternative is arguably more so. The only mechanism that could prevent Parliament from reversing a referendum would be a court which could strike down statutes inconsistent with a referendum result. That would be possible under a codified constitution. It is also a theoretical possibility under Sir Stephen Sedley's model of the UK constitution, which rejects Dicey's approach in favour of 'a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts'. The courts could, on this view, take it upon themselves to review statutes for compatibility with fundamental principles such as the rule of law or, in the case of a referendum, the democratic will. Just as Sir Edward Coke CJ said in *Dr Bonham's Case* (1609) 8 Co. Rep. 113b that a statute 'against common right and reason' was void, so the courts might now say that a statute against a democratic decision was void.

Yet there is no appetite for such an approach. Although there are dicta that support *in extremis* the upholding of the rule of law over an Act of Parliament (notably by Lord Steyn in *R (Jackson) v Attorney General* [2005] UKHL 56 [102]), there is nothing to suggest a willingness to elevate referendum results to this status. Moreover, to do so would be to undermine Parliament – an institution dominated by the democratic House of Commons – and to draw the judiciary into highly political territory.

There are also practical disadvantages to making a referendum result irrevocably binding. An unforeseen and fundamental change in circumstances after a referendum – for instance the outbreak of war – might make the implementation of a vote

obviously undesirable. If Parliament was bound by a referendum, then it could not respond to such events with flexibility.

So must we answer Humpty Dumpty by declaring that it is Parliament, not the people, which is to be master? The former Lord Chancellor Kenneth Clarke has described the referendum as an ‘opinion poll’, while the court in *Miller* termed it ‘advisory’. This is correct in the narrow legal sense that the result does not bind Parliament. But it is wrong in a wider constitutional sense for two reasons. First, a Parliament that refers a question to the people without seriously intending to implement the result does so in bad faith: to refuse to honour the vote would therefore be to bring Parliament into disrepute. Second, in a democratic society, Parliament is politically (if not legally) the servant of the people. A referendum result is therefore not mere advice, but rather an instruction or decision. As the government told the voters in its referendum leaflet: ‘This is your decision. The government will implement what you decide.’

This analysis is consistent with the orthodox conception of parliamentary sovereignty. It is often forgotten that Dicey himself identified two types of sovereign in the UK constitution. Parliament is the legal sovereign: its word is the supreme law. But the electorate is the political sovereign – the source of Parliament’s authority and the power to which it must ultimately defer. So while Parliament has and should have the legal power to overrule the referendum, it would surely be unconstitutional for it to do so except in the direst of circumstances.

A final thought. The silence of the Referendum Act on the consequences of a ‘leave’ vote was in retrospect a mistake. The precedent of the AV referendum should have been followed. The EU Referendum Act should have imposed a duty on the prime minister to send, on a date of his or her choosing, a notification under Article 50 of the Treaty on European Union. This would have empowered the government to give effect to the referendum result, thereby avoiding the legal uncertainty surrounding Article 50; and it would have meant that the will of Parliament (as expressed in the Act) coincided with the will of the people. It is to be hoped that next time Parliament enacts a referendum, it will provide, if possible, that the result should have automatic legal consequences. This would at once confirm the sincerity of Parliament in asking the question and the gravity of voters’ responsibility in answering it. It would also ensure that the legal sovereign and the political sovereign were at one, whatever the people decided.

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