

Brexit: should Parliament be able to overrule the referendum?

Parliament can do everything – except overrule a referendum? In strict law, parliamentary sovereignty admits of no exceptions¹. Nevertheless, each generation delights to imagine some. The list of exceptions has varied over time – De Lolme could not stomach a sex change, Leslie Stephen the massacre of blue eyed babies. But everyone agrees that exceptions exist; the question is whether overruling the Brexit referendum is one of them. De Lolme and Stephen imagined *moral* constraints to parliamentary sovereignty. These are not really in point; the popular press aside, overruling the referendum is not a sin. Dicey, however, suggested a *democratic* constraint; the legal principle of parliamentary sovereignty is subject to the constitutional convention of popular sovereignty². The referendum, then, constitutes an exception to parliamentary sovereignty if (a) constitutional convention subordinates parliamentary to popular sovereignty and (b) the referendum was a legitimate exercise of popular sovereignty.

Constitutional Conventions

The British Constitution is a mixture of principle and precedent; as Jennings appositely put it, 'precedents create rules because ... they are implied in the principles of the Constitution'³. A constitutional convention, then, is a custom, not legally enforceable, but which gives effect to a constitutional principle. No one contests that the fundamental principle of the Constitution is democracy⁴. What those who advocate (a) dispute is whether parliamentary democracy always gives effect to the democratic principle, namely, that the will of the people should prevail.

¹ Affirmed most recently and pertinently in *R (Miller & De Santos) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), para. [20], 'Parliament ... can change the law of the land in any way it chooses.'

² See Dicey, A.V., *An Introduction to the Law of the Constitution*, 8th Edition (London: 1915), p.285 – 'Parliament ... shall, in the long run, give effect to the will of ... the true political sovereign of the State, the majority of the electors'.

³ Jennings, W.I., *Cabinet Government*, 3rd Edition (London: 1959), p. 13

⁴ *Ibid.*

This is a very old dispute – its roots lie in nineteenth century political struggles. Those who oppose (a) will agree with Asquith that 'the House of Commons is ... [the] mouthpiece of the popular will.'⁵ The popular will always prevails – if the people disagree with Parliament, they replace it at the next election. By contrast, those who advocate (a) will agree with Lord Salisbury's claim that 'the nation is our master ... the House of Commons is not'⁶. Authority, logic and precedent are on Lord Salisbury's side. Every constitutional authority, from Bagehot to Bogdanor has agreed that in some cases Parliament can frustrate the popular will⁷. Their logic is sound; sometimes the people cannot change policy by electing a different Parliament. We now have a string of referendum precedents; on Europe, devolution, the electoral system, Scottish independence and Europe again. Some of these policies enjoyed cross-party support, while others were effectively irreversible in the medium term. In either case, had Parliament taken these decisions, the people could not have reversed them by electing a different party majority. For this reason, (a) is the correct view – as Bogdanor puts it, there are precedents 'amounting to a constitutional convention'⁸ that Parliament must submit to a referendum on fundamental constitutional questions.

The Referendum: Advice or a Mandate?

Does this constitutional convention apply to the Brexit referendum? There is no doubt that Brexit is a fundamental constitutional question. But some dispute (b); *this* referendum was not an exercise of popular sovereignty, it was advice. Geoffrey Robertson QC argues that the Referendum Act 'said nothing about the result being binding'⁹, so Parliament is entitled to ignore it. The argument can be further elucidated. As the High Court noted in *Miller*, the Act was passed against the background of a 'clear briefing paper'¹⁰ affirming that the referendum was *not* legally binding. Parliament could have made the referendum

⁵ Cited in Bogdanor, V., *The People and the Party System: The Referendum and Electoral Reform in British politics* (Bath: 1981), p.32

⁶ Cited in Weston, C.C., *The House of Lords and Ideological Politics: Lord Salisbury's Referendal Theory and the Conservative Party 1846-1922* (:1985), p.71

⁷ See, *inter alia*, Bagehot, *The English Constitution* (Cambridge: 2001), p.62, Dicey 1915 p.288, Bogdanor 1981, p.76

⁸ Bogdanor 1981, p.76

⁹ Geoffrey Robertson, *How to stop Brexit: get your MP to vote it down*, The Guardian, 27 June 2016

¹⁰ *Miller* at para. [107]

binding, following the precedent of the AV referendum¹¹. It could have provided that Article 50 would be triggered by a Leave vote or given the Government a statutory power to this effect. It did not do so – Parliament intended and the people knew that the referendum was advice.

This argument is dubious. It is true that the referendum was not binding. But it is untrue that Parliament *chose* not to make the referendum binding, rather it believed this was impossible in any true sense. Implementing Brexit requires an Act of Parliament¹². To be truly binding the referendum would have to bind Parliament as well as the Government. A series of jurists, from Jennings to Friedman, have suggested that this is possible. Parliament can impose 'manner and form' requirements on itself¹³ – in this case, they would provide that Parliament cannot overrule the referendum without holding another. But the referendum briefing paper makes clear that Parliament disagreed; 'the UK does not have constitutional provisions ... [to] require the results of a referendum to be implemented'¹⁴. If Parliament did not believe the referendum could be binding, the fact that it was not tells us nothing about Parliament's intention. We must take the 2015 Conservative Manifesto at face value; the present Parliament intended to 'respect the outcome' of an exercise of popular sovereignty¹⁵. The advocates of (b) are thus correct; the referendum was not advice, but a mandate.

Popular Sovereignty: A Shield or a Sword?

The referendum was an exercise of popular sovereignty; as such, it constitutes an exception to parliamentary sovereignty. As noted above, this is not unprecedented. But the present situation is novel – previous referendums (for instance, the devolution referendums of the 1970s) *prevented* Parliament from

¹¹ Parliamentary Voting and Constituencies Act 2011 (c.1), ss. 8 and 9

¹² This is without prejudice to whether an Act of Parliament is necessary to trigger Article 50, as leaving the EU involves repeal of the European Communities Act 1972.

¹³ See Jennings, W.I., *The Law and the Constitution* (London: 1952), O. Dixon, "The Law and the Constitution" (1935), W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950-1951) and the remarks of Lord Steyn in *Jackson v Attorney General*. See Lord Hope's remarks in *Jackson* for the opposing view, in agreement with the referendum briefing paper.

¹⁴ House of Commons Library Briefing Paper No.07212, 3 June 2015, *European Union Referendum Bill 2015*, p.25

¹⁵ Conservative Party Manifesto 2015, p.72

pursuing a policy. Not for nothing did Dicey describe the referendum as a 'people's *veto*'¹⁶; a shield to protect the people from the excesses of their representatives. But the Brexit referendum is a sword; it compels Parliament, for the first time in history, to implement a policy it disagrees with. This situation opens up a constitutional Pandora's Box. How can MPs be held accountable by their constituents for implementing a policy they think unwise? How can Westminster impose Brexit upon Scotland, in the teeth of the Sewel Convention, when a majority of MPs campaigned against it¹⁷? The solution, of course, is for the people to return a Parliament committed to Brexit at a general election. The referendum arose due to a failure of parliamentary democracy. It is ironic that the people now find they need a Parliament to implement the result.

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¹⁶ Dicey 1915, p.cix

¹⁷ This problem has become more serious due to s. 2 of the Scotland Act 2016, which gives statutory recognition to the Sewel Convention. Per *Thoburn v Sunderland City Council* and *H v Lord Advocate*, that Act is likely a constitutional statute, further entrenching the Convention.