

Brexit: Should Parliament be able to overrule the referendum?

"You can't put the toothpaste back in the tube." HR Haldeman

Referenda are subversive to the constitutional structure of the United Kingdom. They threaten Parliamentary sovereignty by compelling action. They are deeply unsatisfactory tools of policymaking, reducing complex issues to a Yes/No question. They enable a cacophony of opinion and a vacuum of credibility where demagogy is validated and expert opinion discredited. Non sequiturs and straw men abound. And yet politically and morally they possess a significance which is impossible to ignore. Parliament has been put in an unenviable position where it must examine the nature of our representative democracy.

It is of paramount importance to note that the question here is not whether Parliament should overturn the referendum, but whether it should have the ability to do so. The essential tension is whether Parliament should have the legal, moral and political authority to overrule. This is an urgent concern because the result was contrary to the views of most Parliamentarians. Any Parliamentary vote on this issue will therefore pit the expressed opinions of individual Members of Parliament - who overwhelmingly supported Remain - against the demonstrable view of the public. Parliament must either accept that its legal supremacy is de facto overruled by the referendum, or it must explicitly reject a clear expression of public opinion. The fundamental basis of British representative democracy - Parliamentary sovereignty - is challenged.

There is a robust case for Parliament possessing the legal authority to overrule the referendum result. The ERA 2015 was non-binding and even if the terms stipulated that formal legal proceedings should begin, no Parliament can be bound by the actions of its predecessors. By definition Parliamentary sovereignty - a fundamental tenet of Constitutional Law in the United Kingdom - overrules all competing sources of law. In any case, Parliament will need to be consulted before Article 50 is triggered, as confirmed by Lord Thomas LJ, Sir Terence MR and Sales LJ (subject to the upcoming judgement in the Supreme Court). However, Parliament does not exist in a legal vacuum and the conclusion of legality belies the question whether Parliament should be able to overrule in practice.

While overruling the referendum result is legally possible, to do so in reality would be unconscionable. Politically and morally Parliament is effectively precluded from exercising its ability to overrule the referendum. To do so would spark a constitutional crisis, with Parliament pitting its sovereignty against the popular sovereignty conferred by the 'direct democracy' of the referendum. Further, this would epitomise the stereotype of a narrow Westminster elite ignoring the demonstrable will of a clear majority of the general public, a factor which significantly contributed to the Leave vote itself.

The suggested de facto binding of Parliament is deeply unsatisfactory. It is indeed ironic given that much of the referendum campaign was fought on the promise of 'taking back control', Parliament

may now be forced into acting against its wishes. But is better than weakening the faith of British voters in their institutions. Liberal democracies rely on numerous institutional pillars, of which Constitutional Law is but one. It is of equal or greater importance that people trust in their other institutions, including their political system. It is unacceptable to ostensibly offer people a choice only to later renege on the offer after that choice is made. To paraphrase Lord Hewart CJ, it is of fundamental importance that justice should not only be done, but should be seen to be done.

This is not to say that Parliament should lose the legal ability to reject referendums. This de jure ability safeguards Parliamentary sovereignty, which underpins the United Kingdom's unwritten constitution. However, it is strictly consistent with constitutional principles and would prevent the further erosion of faith in other essential institutions.

Looking ahead, it is appropriate for Parliament to forcefully challenge future proposals for referenda as being subversive to the essential constitutional makeup of the United Kingdom. Parliament should not consent to have its authority undermined by plebiscites and should recognise such efforts as being an abrogation of responsibility. It should acknowledge that any proposal for referenda would give a result which effectively politically and morally compelled Parliament to act a particular way. This is particularly threatening when the majority of members of Parliament publicly campaign for one side.

Further, in addition to being a constitutional challenge, using referenda as policymaking or decision-making tools is deeply misguided. Complex questions - such as the nature of the UK's relationship with the European Union, underpinned by 43 years of shared lawmaking - cannot be effectively reduced down to a single Yes/ No question. Conflation of issues of importance and irrelevance are enabled, with the potential to skew results on the basis of unrelated topics. Where rules require a simple majority, issues which closely divide voters can mean a low proportion of the electorate determine major changes in the country's direction (in the referendum, 37% of the total electorate voted Leave).

Regardless of the legality of the ability of Parliament to overrule, once a referendum has occurred it is imbued with a political and moral significance which is impossible to ignore. It is this that subverts and challenges the principle of Parliamentary sovereignty. In order to maintain this principle it is right that Parliament retains the legal ability to overrule referenda. However, given that Parliament cannot morally overrule the Brexit referendum result, it must now effectively hold its nose and rubber-stamp it. Doing so is unsatisfactory. But is better than any alternative course of action. By agreeing to a referendum for an issue on which it was decided, Parliament ran the risk of backing the wrong side. It did so, and must now live with the result. Parliament should seek to block all future referenda from occurring. It must recognise that they are poor evaluators of policy and risk subverting the keystone of the constitution of the United Kingdom, Parliamentary sovereignty.