

Brexit: Should Parliament be able to overrule the referendum?

On June 23 2016, 33 million people walked into voting booths, and 52% of them voted for the United Kingdom to leave the European Union. Then, nothing happened. Five months after the vote, arguments rage, both in the popular press and learned journals, on whether Parliament is bound by the referendum and whether it can, and should, overrule its result. It has been said that the referendum is merely advisory and that parliamentary sovereignty – a concept formerly much in vogue among Eurosceptics, but now co-opted by Remainers in their quest to stop Brexit – means that MPs should take the final decision. Strictly as a matter of law, these propositions are correct. However, given the way in which the British constitution, particularly in relation to Parliament, has evolved in recent centuries, Parliament should defer to the referendum result, even though the majority of its members may prefer to remain in the EU.

The Legal Position

Despite claims to the contrary, the text of the European Referendum Act 2015 makes it obvious that the referendum was not a binding one. All the Act does is to oblige the Secretary of State to hold a referendum on a day before the end of 2017, and to make regulations for the vote; nothing in the Act binds Her Majesty, her Ministers, or Parliament to act on the result of the referendum.

By way of contrast, the 2011 Act under which that year's AV referendum was held *did* bind the Government to amend the Representation of the People Act if the Yes side prevailed. Moreover, given the Divisional Court's recent ruling in the *Miller* litigation (assuming it is upheld), Parliament can overrule the referendum's result through simple inaction, by refusing to give the Crown the power to trigger Article 50. Finally, it is trite law that Parliament is sovereign – i.e. it can do as it damn well pleases. That is the bedrock principle of the British constitution, and even if Parliament did intend for the 2015 Act to be binding, it can always have a case of buyer's remorse, and decline to follow the result. Hence, there is no doubt that legally, Parliament can overrule the referendum, for it was merely 'consultative' insofar as Parliament took note of the result but is not bound by it. The vote on June 23rd, then, is legally nothing but a very expensive version of a YouGov poll.

But...Really? The Nature of Parliamentary Sovereignty in the 21st Century

It may be lawful for Parliament to overrule the referendum, but the real question is whether it should be able to, and there are very sound constitutional reasons why it should not. As is well-known, Parliament is constituted of the Sovereign, the House of Lords and the House of Commons. In former times each could defeat legislation at will, but the great democratic revolutions of past centuries have fundamentally altered that state of affairs. The Sovereign has not withheld royal assent in the last three centuries, while the Lords' veto power was extinguished by the Parliament Acts of 1911 and 1949.

Given the disappearance of the Sovereign's and the Lords' veto powers, parliamentary sovereignty has become *de facto* synonymous, in the British constitutional order, to sovereignty of the House of Commons. No doubt the phrase would have sounded strange to lawyer in former times and to the more orthodox constitutionalists among us, but even sceptics will readily admit the Commons' undisputed pre-eminence over the rest of Parliament today. Indeed, during the pre-Brexit parliamentary debates, David Cameron and others repeatedly stressed that 'this House of Commons is sovereign' which, though incorrect as a matter of constitutional theory, reflects reality better than the orthodox vision of the tripartite Parliament.

The House of Commons emerged as the dominant part of Parliament because it possesses a democratic legitimacy that the Queen and Her Lords both lack. Every five years or so, Parliament is dissolved, and every MP must either stand down or offer themselves to be judged by their constituents. Whether one thinks of an MP as a trustee – as Burke and Mill did – or as a delegate of their constituents, the fact remains that the ultimate source of power of the House of Commons is in the hands of the voters, a notion further reinforced by the introduction of recall elections in 2015. In other words, unlike a peer who sits in Parliament as of right, an MP has no right to sit unless his constituents, at regular intervals, allow him to do so.

Hence, having called upon their constituents to express directly their opinions on the European Union, it would be most unwise for Parliament to ignore the referendum's outcome. For the notion of parliamentary sovereignty, when stripped down to its core, is not so different to the sovereignty of the British people. At every

election, the latter places that sovereignty in the hands of its elected representatives to exercise it on their behalf, but that is never more than a temporary, usufructuary, arrangement, subject to constant renewal. No doubt this talk of popular sovereignty sounds distinctly American – and it is true that Parliament can in theory abolish elections, thus cutting the people out entirely – but unless that happens, in which case we will enter a new world not worth discussing, Parliament should obey the wishes a majority of voters expressed in the referendum, just as MPs abide by the results of general elections, even if they may not like the outcome.

The chief direction of the constitutional struggles of the last centuries – first against the Crown, then the limited franchise, and finally the Lords – has been to give as great of a say as possible to the British people in the manner in which Parliament exercises its powers. It would be perverse to go into reverse gear under the cloak of parliamentary supremacy simply because most MPs don't like the referendum's result.

989 words