

LET'S NOT TALK ABOUT BREXIT

*on the Practice of Referendum and its Compatibility with the British
Principle of Parliamentary Supremacy*

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Abstract

Parliament reigns supreme in the United Kingdom. This constitutional balance that the Government has been trying to disrupt for countless years, particularly through its prerogative powers, is not without finding a new "adversary" with the practice of referendum. Indeed, as supreme as it may be, can Parliament ignore the will of the people as expressed in a referendum? And if it cannot, what must we conclude from this constitutionally speaking, especially since the referendum initiative is essentially governmental? Could Westminster have denied the result of the Brexit in 2017? Was the latter binding toward it? If so, what should we conclude from this?

Résumé

Le Parlement règne suprême au Royaume-Uni. Cet équilibre constitutionnel que le Gouvernement essaie, ce depuis d'innombrables années, notamment au travers de ses prerogative powers, de perturber n'est pas sans trouver un nouvel "adversaire" avec la pratique du référendum. En effet, aussi suprême soit-il, le Parlement peut-il ignorer la volonté du peuple telle qu'exprimée lors d'un référendum ? Et s'il ne le peut, que doit-on en conclure constitutionnellement, d'autant que l'initiative référendaire est essentiellement gouvernementale ? Westminster aurait-il pu, en 2017, dénier le résultat du Brexit ? Ce dernier était-il contraignant à son égard ? Si oui, que doit-on en conclure ?

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Referendums are part of both French and British constitutional traditions although not under a similar status. While the Constitution of the Fifth French Republic establishes an elaborate referendum status as the legacy of a bicentennial practice that made and unmade the Republics¹, the British constitutional rules remain laconic on this relatively new mechanism.

The practice of referendum under the Fifth Republic remains associated with its use made during De Gaulle's presidential term. The first president of the Fifth Republic used this mechanism four times, two of them as quasi-plebiscites: first in 1962 with success and second in 1969 with failure, leading to his eventual resignation². Since then, the use of referendums has been moderate and always justified by pressing political issues, namely the European integration (1972, 1992 and 2005), the status of New Caledonia (1988) and the length of the presidential term (2000). The successive presidents seemed to make a scarce use of this constitutional mechanism and preferred to bypass it by resorting either to the regular parliamentary process or to its extraordinary form in Congress³. In the United Kingdom, the question does not arise in these terms. While the French executive tends to favour Parliament in order to bypass a referendum decision-making process, the British executive seems to use referendums in order to "short-circuit" Parliament, which in the United Kingdom reigns supreme.

The first British national referendum was held in 1973 on the question of the independence of Northern Ireland⁴. Since then, ten national referendums have been held. Apart from the "Alternative Vote" referendum, which dealt with the electoral system⁵, six

¹ Since the Revolution, twenty-four national decisional referendums were held in France. Nine of them were held under the Vth Republic (without taking into account the 1958 referendum whereby the Constitution of the Vth Republic was adopted).

² In 1961 and 1962, De Gaulle used the referendum in order to decide whether or not Algeria should become autonomous (1961) then independent (1962). In 1962 again, he used the referendum in order to revise the constitutional status of the president of the Republic, namely its election by a direct universal suffrage, and eventually to strengthen his institutional influence within the new Fifth Republic. In 1969, he used it a last time under the pretext of an institutional reform of the Senate and local authorities in order to overpass his political weakness due to the events of May 1968, which led to a failure and eventually his resignation.

³ Following the negative outcome of the 2005's referendum on the "European Constitution", Nicolas Sarkozy preferred to ratify the Lisbon Treaty, a quasi-similar version of the 2005's project, through Parliament rather than by referendum.

⁴ March 1973 (held in Northern Ireland) referendum on whether Northern Ireland should remain part of the United Kingdom or join with the Republic of Ireland to form a united Ireland (remain). The use of referendum on the independence of Ireland was already discussed in the past during the Irish Home Rule movement but remained purely speculative, A. Dicey, "Ought the referendum to be introduced in England?", *Contemporary Review*, 1890, vol. 57, p. 2890.

⁵ 5 May 2011 (held nationwide): referendum on whether to change the voting system for electing MPs to the House of Commons from first past the post to the alternative vote (no).

referendums were about devolution principles⁶, two were about membership of the European Communities/Union⁷, one was about peace in Ireland⁸ and two on the independence of constituent nations, namely Northern Ireland and Scotland⁹.

While it is indisputable that the referendum line adopted since the 1970s seems to respond to a need to address the delicate question of sovereignty, it appears in fact that the origin of each referendum is a political gamble rather than a will to let British citizens decide on these fundamental questions. In 1975 for instance, when the Prime Minister Wilson held the referendum on the British membership of the European Communities, it was less for engaging a debate on the role of the United Kingdom in Europe (the accession had happened three years before) than a necessity to escape a political quagmire. As a quasi-plebiscite, the 1975 referendum permitted to control the political debate and to divert attention from the fall of the bipartisan antagonism at Westminster, the internal dissension of the Labour party and the vivacity of the Irish and Scottish movements of independence. An even more striking example can be found with David Cameron. The Conservative Prime Minister used three times the referendum as a political gamble, the first two being successful but not the last one. David Cameron's use of referendum was only a matter of political strategy. His objective was to take his political opponents short by making the people rule against them. Thus, the Alternative Vote (2011) was driven, apart from the necessity to comply with his coalition agreement with the Liberal-democratic party, to demonstrate the relevance of the Conservative party's position regarding the voting system against its own coalition partner and the 2014 referendum on the Scottish independence was driven by the necessity to quickly respond to the victory of the Scottish National Party (SNP) in Scotland by demonstrating that the Scottish electorate would not approve secession from the United Kingdom. Those two referendums were successful for

⁶ March 1979 (held in Scotland): Scottish devolution referendum on whether there should be a Scottish Assembly (40 per cent of the electorate had to vote yes in the referendum, although a small majority voted yes this was short of the 40 per cent threshold required to enact devolution); March 1979 (held in Wales): Welsh devolution referendum on whether there should be a Welsh Assembly (no); September 1997 (held in Scotland): Scottish devolution referendums on whether there should be a Scottish Parliament and whether the Scottish Parliament should have tax varying powers (both referendums received a yes vote); September 1997 (held in Wales): Welsh devolution referendum on whether there should be a National Assembly for Wales (yes); May 1998 (held in London): Greater London Authority referendum on whether there should be a Mayor of London and Greater London Authority (yes); March 2011 (held in Wales): Welsh devolution referendum on whether the National Assembly for Wales should gain the power to legislate on a wider range of matters (yes).

⁷ June 1975: UK Membership of the European Community referendum on whether the UK should stay in the European Communities (yes); June 2016: UK Membership of the European Union referendum on whether the UK should remain a member of the European Union or leave the European Union (leave).

⁸ 22 May 1998: Northern Ireland Belfast Agreement referendum on the Good Friday Agreement (yes).

⁹ September 2014 (held in Scotland): referendum on whether Scotland should become an independent country (no).

David Cameron in the sense that the British citizens voted against the Liberal or SNP proposals giving eventually to his government more political strength and legitimacy. However, the bet turned to a complete failure with the referendum on the membership of the European Union, known as Brexit. Hoping to take advantage of the growing power of anti-European movements, David Cameron proposed the referendum on Brexit to strengthen his political design. Advocating for Remain, the unexpected response of June 2016 marked however the end of his political career.

This opportunistic use of referendums echoes the lack of constitutional framework for this practice¹⁰. However, we can deduce two constitutional customs in regard of the principle of the parliamentary sovereignty: first, referendums must be authorised by an Act of Parliament and second, they are by principle consultative, not decisional. Indeed, as far as a government may use a referendum in order to defend a given political line, the ultimate level of decision-making remains the Parliament¹¹. In other terms, the government cannot short-circuit Westminster in the decision-making process, unless the latter agreed to be so. As the supreme legal authority of the Kingdom, Westminster is the only one able to limit its own sovereignty through Acts of Parliament¹². Consequently, it remains free to approve or not the holding of a referendum as well as to determine its modalities, especially whether or not its outcome will be legally binding. So far, no referendum has been held under a decisional clause.

As long as the Parliament has "the right to make or unmake any law whatsoever; and [that] no person or body is recognised by the law as having a right to override or set aside [its] legislation"¹³, it remains always free to undo whatever limitation it agreed on. For instance, if the Parliament agreed to delegate its law-making powers to the institutions of the European Union, it did so through an Act of Parliament, namely the European Communities Act 1972, an Act it can withdraw as it sees fit. Unsurprisingly, this ability was not without raising difficulties in the wake of the referendum on Brexit. Indeed, the government intended to implement the result, namely by triggering the Article 50 of the Treaty on European Union, without going

¹⁰ The Political Parties, Elections and Referendums Act 2000 provides a technical framework of referendums to be held in the United Kingdom, however it does not provide relevant elements as to its status.

¹¹ A. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 8th ed, 1915, p. 38.

¹² We can isolate four limitations to Parliamentary sovereignty: 1) the respect of fundamental rights as stated in the Human Rights Act 1998, 2) the independence of the UK Supreme Court as stated in the Constitutional Reform Act 2005 which put an end to the judicial function of the House of Lords, 3) the principle of devolution whereby Westminster delegated some of its prerogatives to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and the London Assembly, and 4) the membership to the European Union as enacted by the European Communities Act 1972.

¹³ A. Dicey, *op. cit.*

through a parliamentary procedure. To this extent, it argued that its prerogative powers allowed it to act in this way¹⁴. However, if indeed the government was entitled to notify the European Union of the British withdrawal, such a notification would have rendered the 1972 Act ineffective as it acts as a "conduit pipe"¹⁵ between European and British law, leading to an indirect violation of the principle of parliamentary supremacy¹⁶. In consequence, the Supreme Court prevented in January 2017 the government from acting as planned and let the MPs decide on whether or not authorising the government to notify the European Union¹⁷.

The Supreme Court's decision stirred up all sorts of considerations ranging from constructive criticism¹⁸ to denunciations of conspiracies since it gave the impression of depriving the referendum from any legal value¹⁹. However, if it is true that the 2016 referendum had no legal value for the reasons hereupon exposed, the Supreme Court was not to blame. It considered no more than the question of which constitutional body was competent and, on what ground, for implementing the result, but not the result in itself²⁰. By deciding that the Parliament remained the ultimate decision-making body with regard to the decision to leave the European Union, thus preventing the government to act on a sort of mandate conferred by the result of the referendum, the Supreme Court merely reaffirmed a principle already well rooted in the British constitution, namely the supremacy of Westminster. Even though it remains a question of common sense that the Parliament would politically never decide against the referendum's

¹⁴ The government argued that it was competent according to its prerogative power to conduct the British foreign affairs, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. This attempt to bypass a vote in Parliament in light of a clear vote offered by referendum was analysed by A. Blick as an attempt to assert a new constitutional doctrine based on the idea of a mandate given by the people to the government to implement the decision taken by referendum, the "May Doctrine", A. Blick, "Taking back control? The EU referendum, parliament and the 'May Doctrine'", *The Federal Trust for Education and Research*, 2016.

¹⁵ J. Finnis, "Brexit and the Balance of Our Constitution", *Policy Exchange*, 2016; *Miller, ibid.*, §§ 65-69; §§ 78-80.

¹⁶ *Miller, ibid.*, § 67-68.

¹⁷ *Miller, ibid.*, § 83. Eventually, the Parliament confirmed the outcome of the referendum and empowered the government to give notice to the European Union in March 2017 (royal assent), through the European Union (Notification of Withdrawal) Act 2017.

¹⁸ *Miller, ibid.*, per Lord Reed (dissenting) spec. § 177, per Lord Carnwath (dissenting) spec. § 259.

¹⁹ Following the first *Miller* judgement given by the High Court in November 2016 against the government, [2016] EWHC 2768 (Admin), the Daily Mail had accused in headline the High Court's Justices of being the "enemies of the people".

²⁰ As clearly stated by the Supreme Court:

"It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society".

in *Miller, ibid.*, § 3.

outcome, it remains that, legally speaking, it would not be bound by its result insofar as it did not agree to be so. Yet, the Parliament remains politically accountable toward its electorate. Past governments were well aware of this delicate position and did not hesitate to use the referendum to their advantage. If it is certain that Parliament cannot politically neither refuse the holding of a referendum nor its outcome, then the government enjoys a significant political advantage with this mechanism within a constitutional tradition marked by Westminster's supremacy. The practice of referendums would therefore have a bright future ahead of it.