

To Brexit or not to Brexit? A Preliminary Analysis

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Abstract

This study sets to analyse the impending constitutional question of enforcing or disregarding the result of Britain's EU membership referendum. For this reason, this article is divided into three parts. First, the Brexit question needs to be answered in relation to the constitutional principle of parliamentary sovereignty. Any referendum represents a challenge to Westminster's legislative supremacy. At the same time, Parliament serves the people that elected it and symbolises the very notion of democracy, while important constitutional questions, such as Britain's relationship with the EU, require popular consultation. Second, the procedure of leaving the EU depends on which institution has the prerogative to trigger Article 50 of the Lisbon Treaty. Third, there are questions regarding the impact that Brexit could have on the future of Scotland and Northern Ireland within the UK.

Keywords

Brexit; United Kingdom; referendum; EU withdrawal; sovereignty

1. Introduction

The question of Britain's withdrawal from the European Union was at the centre of a great political debate in the months ahead of the 2016 referendum. However, in the aftermath of a vote that was quite narrow, yet clearly in favour of leaving the EU, this question should have changed to how, rather than if, Britain will exit. Instead, a wide range of unfit reactions worsened the uncertainty that unsurprisingly hit the pound and the financial markets. While some EU officials urged Britain to speed up the leaving process¹, others have dismissed the outcome, subsequently calling upon the UK to hold another referendum or even to disregard the popular vote. Further adding fuel to the fire, the First Minister of Scotland threatened to veto the withdrawal or do virtually anything to keep her country in the EU², in what seems to be a

1 Matthew Karnitschnig, „Martin Schulz urges UK to formally file for divorce”, *Politico.eu*, <http://www.politico.eu/article/martin-schulz-urges-uk-to-formally-file-for-divorce-brexit-article-50-european-parliament/>, last accessed on 18 December 2016.

2 Hortense Goulard, „Nicola Sturgeon could call second Scottish independence referendum in 2017”, *Politico.eu*, <http://www.politico.eu/article/nicola-sturgeon-could-call-second-scottish-independence-referendum-in-2017/>, last accessed on 18 December 2016.

limited understanding of the full extent and functioning principles of both devolution and democracy, to say the least.

Thus, the question leaves the field of politics and enters legal ground. Although the leaving process will most probably follow the provisions that were set out in Article 50 of the Lisbon Treaty, the aforementioned reactions pose an important question: is HM Government bound in any way to carry out the result, or are there any legal means of elusion? On the surface, this question may seem shallow. Yet on a constitutional level, it would be difficult to find a clear and undisputable answer. Ultimately, is it a constitutional obligation to implement the referendum result, or is it a matter of purely respecting popular will and democracy?

2. A Question of Sovereignty

To provide a suitable answer to the question of how to implement a referendum result, we need to analyse whether or not the EU referendum is legally binding. Those who consider it to be advisory have argued that the principle of Parliamentary Sovereignty prevents the direct implementation of such a vote. Consequently, an Act of Parliament would be necessary in order to fulfil the result. But can Parliament disregard a referendum result by not legislating in the desired manner? After all, parliamentary supremacy is in place essentially for the sake of democracy. An answer to this issue depends on aspects described in the following sections.

2.1. Legal and Political Sovereignty

The supremacy of Parliament can be regarded as *Legal Sovereignty*.³ Thus, Parliament is Sovereign in legislating matters, wielding supreme power over all British laws. But the separation and balance of powers is still observed as a underlying principle of most, if not all contemporary democracies, and so is the case of the United Kingdom. It is a well-known fact that any legislature is functionally bound to serve the political mandate that was bestowed upon it by the people who elected it, so there is also a *Political* form of *Sovereignty* that is complementary to its legal counterpart.⁴

Parliamentary sovereignty is a fundamental feature of the UK Constitution, which in turn is uncodified and flexible. This means that any Act of Parliament can change the Constitution, without any other requirements frequently observed in other states with rigid, written Constitutions. Consequently, it can be said that Westminster's supremacy could, in theory, dismiss the results of a referendum. Likewise, a referendum is considered to be a challenge to parliamentary sovereignty.⁵ British constitutionalist A.V. Dicey suggested that a referendum is equal to a 'people's veto' that can restrain Parliament from passing 'any important Act which does not command the sanction of the electors'.⁶

2.2. Representative and Direct Democracy

While in theory, it would be plausible for Parliament to dismiss the outcome of a referendum, in practice it is an entirely different and difficult issue. Britain

3 Alex Carroll, *Constitutional and Administrative Law* (Pearson, 2015), 96.

4 Carroll, *Constitutional and Administrative Law*, 96.

5 R. L. Bortwick, 'What Has Happened with the Sovereignty of Parliament', in Laura Brace and John Hoffman (editors), *Reclaiming Sovereignty* (Pinter, 1997), 39, *apud* İlker Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law* (Springer, 2015), 161.

6 Matt Qvortrup, *A Comparative Study of Referendums: Government by the People* (Manchester: The University Press, 2005), 47.

is, by all means, a representative democracy, and the principle of Parliamentary Sovereignty is solid proof of this. Likewise, a referendum is a form of semi-direct democracy. But does this mean that referendums undermine representative democracy? A. V. Dicey argued that the introduction of certain elements of direct democracy would serve to reduce abuse from the system of representative government but nevertheless warned against the broad use of referendums.⁷ Instead, referendums should be used as exceptions from the general rule of representative democracy, as suggested by Sartori.⁸ On the word of Marshall, referendums can be seen as instruments for reducing the 'dangerous absolutism' of Parliament.⁹ All the same, should their result be binding on a Parliament? Coincidentally, this question was subject to a House of Lords Report that gathered the subsequent responses from the academic community.¹⁰

Arguing that Parliament should be bound by referendums rather than reducing their role to a merely advisory one, Professor Gallagher pointed out that 'an indicative referendum is little more than an expensive opinion poll'.¹¹ This argument is shared by several others, including the Constitutional Court of Romania, which overturned a law that disregarded a referendum result which in reality has yet to be enforced by Parliament.¹² However, it should be reminded that while the Constitution of Romania explicitly identifies the people as the sole depositary of sovereignty, the British Constitution is based on the principle of parliamentary sovereignty, as already discussed.

According to others, referendums should be non-binding on a Sovereign Parliament. But although they are legally advisory in this context, some have come to the conclusion that they are politically binding, nevertheless. As stated by Professor Setälä, 'it would be very difficult [for Parliament] to ignore' the outcome of a referendum.¹³ Dr. Blick added to this, stating that the 'political pressure would be immense'.¹⁴

Nevertheless, we have previously shown that parliamentary sovereignty can pose a threat to the enforcement of a referendum result as it enables Westminster to ignore the vote, at least in theory. However, there are certain ways to overcome this absoluteness. Firstly, Parliament can pass a law that comes into effect only after a referendum is held. Secondly, Parliament can agree to be bound by the result of a referendum at the same time it passes the legislation securing such a vote.¹⁵

7 Qvortrup, *Comparative Study*, 46.

8 Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Macmillan, 1997), 165.

9 Geoffrey Marshall, *Constitutional Theory* (Oxford: The University Press, 1971), 42-43, *apud* Şen, *Sovereignty Referendums*, 167.

10 House of Lords Select Committee on the Constitution, *Referendums in the UK* (HL 2009-10, 99 – I).

11 *Referendums in the UK*, 44-45.

12 In 2012, the Constitutional Court of Romania ruled that a 'consultative referendum' (i.e. advisory) is nonetheless binding on Parliament even though it is not a mandatory referendum. The Court considers that the difference between these types of referendums are only at a level of implementation, meaning that an advisory referendum cannot come into force until the corresponding legislation is passed, while a mandatory referendum is held for the very enforcement of a certain effect, such as the approval or repeal of a modified Constitution, or the impeachment of the President. See Decision no 682 of the Constitutional Court of Romania, 27 June 2012, as cited by Anthony Murphy, 'Reforma constituțională în România după referendumul din 2009' *Sfera Politicii*, 188 (2016): 16, n. 15.

13 *Referendums in the UK*, 45.

14 *Referendums in the UK*, 45.

15 *Referendums in the UK*, 45.

2.3. Referendums on Constitutional Matters

Notwithstanding the aspects discussed above, there is some debate surrounding referendums that are held to settle down constitutional issues. It has been argued that referendums are preponderantly used by dictators as instruments to justify their authoritarian regimes. Furthermore, critics have pointed out several biases of referendums, which include *inter alia* the dominance exerted by the ruling majority in setting the question and the timing, combined with the natural tendency to disregard minority views and to use such votes as tactical devices. Thus, should referendums deal with constitutional questions?

In line with previously discussed aspects, it is desirable that people are able to express their opinion on constitutional changes as these are certain to have an impact on the future of the state, as well as in their lives. While it is difficult to determine the exact nature of a constitutional issue that can be settled through a referendum in the absence of a written constitution, some fundamental issues have been found to require a popular vote. Questions regarding the abolition of the Monarchy or the withdrawal from the European Union are believed to fall within this category.¹⁶

While presently there is no ground to conclude that a referendum can take precedence over parliamentary sovereignty, the common practice of holding referendums could turn into a constitutional convention. It has been suggested that this could very well be the case, as the three conditions for a constitutional convention appear to have been met.¹⁷

Nevertheless, all referendums held at national level in the United Kingdom (with the exception of the 2011 referendum) to this date have been on constitutional issues that relate to the transfer of sovereignty. Such questions have been concerned with the transfer of power to separate bodies, either devolved, elected authorities in London and the constituent countries of Britain, or to the European Union.¹⁸

3. A Question of Procedure

In the particular case of the EU Referendum, the House of Commons has recognised, through a motion passed in December 2016, the main aspects that concern the Brexit process, including an amendment proposed by the Government, as shown below:¹⁹

That this House recognises that leaving the EU is the defining issue facing the UK; notes the resolution on parliamentary scrutiny of the UK leaving the EU agreed by the House on 12 October 2016; recognises that it is Parliament's responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union; confirms that there should be no disclosure of material that could be reasonably judged to damage the UK in any negotiations to depart from the European Union after Article 50 has been triggered; and calls on the Prime Minister to commit to publishing the Government's plan for leaving the EU before Article 50 is invoked, consistently with the principles agreed without division by this House on 12 October; *recognises that this House should*

16 *Referendums in the UK*, 27.

17 Şen, *Sovereignty Referendums*, 170.

18 Şen, *Sovereignty Referendums*, 161; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution. Process, Politics and Democracy* (Bloomsbury Publishing, 2015), 343.

19 HC Deb 07 December 2016, vol 618, col 333-336.

respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further calls on the Government to invoke Article 50 by 31 March 2017.

With respect to the above quoted motion, it would seem that the core issue facing the UK would now be *how* to leave the EU, rather than *if*. However, the main problem that made this motion possible in the first place is whether if the Government can trigger Article 50 on its own, using the Royal Prerogative, or if a vote in Parliament is required. This constitutional issue was very recently subject to judicial review, in the *Miller & Anor, R v The Secretary of State for Exiting the European Union* case. In its initial decision, the England and Wales High Court agreed with the claimant and argued that the Crown cannot exercise its Prerogative unless it does so based on an Act of Parliament, concluding that „the Secretary of State does not have power under the Crown’s prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union“.²⁰ The aforementioned defendant appealed this decision, with a final ruling set to be given by the Supreme Court.²¹

Regardless of this final ruling, the question of implementing Brexit sits primordially in the political will of the Executive and Legislative bodies of Britain’s constitutional system. At the same time, the legal ramifications of this process will probably clarify the full extent of both Parliament’s and HM Government’s powers.

4. A Test for the Union

The vote was hailed by former PM Cameron as being ‘one of the biggest democratic exercises in [Britain’s] history’.²² Despite some early predictions, the final result showed that a majority of voters were in favour of leaving the EU. At the same time, the narrow margin of the win arguably showed a division among the constituent countries of the United Kingdom: people in England and Wales predominantly voted to leave the EU, while those in Scotland, Northern Ireland, London and Gibraltar mostly voted to remain. In this regard, Brexit can be seen as a test for the Union. Thus, is there any legal ground for Scotland and Northern Ireland remaining in the EU? Interestingly or not, these questions sparked debate about the possible sovereignty changes that could be made in relation to London and Gibraltar.

Accordingly, this part of our study will deal with the effects that Brexit could have on the constitutional and territorial framework of the United Kingdom. Can the EU referendum serve as a catalyst for Scotland and Northern Ireland seceding from the United Kingdom? Knowing that the EU referendum concerns the entire UK as a sovereign state, several aspects have been discussed in the following sub-sections.

4.1. The Scottish Question

Following the EU referendum, the devolved authorities of Scotland argued that their country is taken out of the EU against its will. However, while it is true that nearly two-thirds of those that voted in Scotland opted to remain in the EU, this fact is irrelevant to the leaving process, nor should it affect Scotland’s relationship with the rest of the UK, which was settled in the 2014 Scottish independence

20 [2016] EWHC 2768 (Admin), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html>

21 UKSC 2016/0196

22 HC Deb 27 June 2016, vol 612, col 22.

referendum. In addition to this, calls to protect Scotland's relationship with the EU are rather absurd because such a relationship does not exist. Any ties between Scotland and the EU fundamentally depend on Britain's membership of the EU in its capacity as a sovereign nation.

In regards to the 'Scottish Question', three particular issues should be discussed. First, can Scotland veto Britain's EU withdrawal? Second, can Scotland remain an EU member if the rest of the UK does not, if it lacks statehood? And finally, could Scotland's independence secure its place in the EU?

4.1.1. Scotland's veto on Brexit

The mere prospect of a veto exercised by the Scottish Parliament on UK's withdrawal from the EU is appalling. Not only would such a measure prove to be ineffective, but it could also have very dangerous echoes across Britain. First, it would be outlandish to suggest that a devolved assembly could hold back Westminster from legislating in matters concerning UK's status as a member of the European Union, as Britain's relationship with the EU is a reserved matter of Parliament.²³ Second, it would be inappropriate to attempt to block Parliament from enforcing the will of the majority. While some of the Scottish voters are understandably upset about being taken out of the EU despite their vote, it is as well the case of most of the English and Welsh voters that probably would be incensed of being kept inside the EU against their will.

Thus, we ask ourselves, can Scotland block Britain from leaving the EU? From a legal point of view, the answer is negative, at least in the current constitutional framework. Beyond this, there is no legal provision prohibiting Parliament from seeking approval on Brexit from all constituent countries of the UK and even ignoring the result on such grounds. However, this would be a politically-driven approach that could nevertheless annoy and dismay voters across Britain who opted to leave. As such, Scotland's veto can and should be rejected on the basis that Scottish people voted on the question of the entire UK's future in relation to the EU, and as a result, only at a UK level should the overall majority of votes matter.

4.1.2. The reverse-Greenland scenario

Another proposal to solve the 'Scottish Question' would be for Scotland to retain its place in the EU while the rest of the UK leaves.²⁴ Such a scenario would be based on Greenland's withdrawal from the EU while Denmark continued as a member. Although some may think of this event as sufficient precedent for Scotland's continued membership of the EU, there is a fundamental difference between these two cases. The main problem is that Greenland left the EU as a result of a referendum being held there, as it is an autonomous dependency of Denmark geographically located outside the conventional boundaries of Europe and there was also a strong demand for such a vote. Meanwhile, the United Kingdom voted as a whole to leave the EU, hence the question put on the ballot. Due to these circumstances, a so-called reverse-Greenland scenario is unlikely and definitely not based on a precedent.

Moreover, the proposed settlement would be complex and unprecedented. Although some exceptions exist even in the case of Britain (e.g. Isle of Man is not part of EU, despite being situated between Great Britain and Ireland and its status

²³ Scotland Act 1998 sch 5 pt 1 para 7(1) explicitly provides that foreign affairs – including UK's relations with the European Union and its institutions – are reserved matters of Parliament.

²⁴ Kristy Hughes, „Scotland and Brexit – Outlook Worsens as Options Narrow“, *European Futures*, The University of Edinburgh, <http://www.europeanfutures.ed.ac.uk/article-4110>, last accessed: 18 December 2016.

as a Crown dependency²⁵), it would be a serious precedent for most of a unitary state (in terms of population and GDP), including the central government, to leave the EU, while the rest of the country remains a member. The chances for the political drive for such an ambitious (and unnecessary) plan to be found within the EU and Britain are bleak.

4.1.3. Second Scottish independence referendum

The First Minister of Scotland claims that a second independence referendum would be 'highly likely' if it were to be the only solution to maintaining her country's relationship with the EU. Needless to say, this is clearly a personal political ambition rather than a serious and rational solution to the Scottish Question.

Constitutionally speaking, a second Scottish independence referendum in such a short time lapse would prove to be a grave precedent. It would be against the very idea of democracy to hold a vote after another only for the desired outcome to be met if it ever will. Politically, it would be a failure that serves no interest other than the increasingly erratic behaviour of the Scottish National Party. The slim chances of Scotland joining the EU after gaining statehood undermine any attempts whatsoever at independence. The process itself would take several years, from applying for candidate status to the vote on accession. After that, it is highly likely that EU member countries confronted with secessionist movements, such as Spain²⁶, will veto an enlargement that includes an independent Scotland. From this perspective, a second Scottish independence referendum would have nothing to do with the issue of EU membership.

4.1.4. Scotland's involvement in Brexit negotiations

For the reason that Scotland's EU membership is highly unlikely, if ever achievable, a more viable aim for the Scottish Government would be to work together with HM Government on common negotiation goals that might ultimately secure most of the interests guaranteed to an EU member, but short of genuine membership. Any interest Scotland may have to pursue EU membership should be addressed by the central government. In any case, it would be silly for any constituent country of the UK, let alone Scotland, to prefer EU membership over the strong historic, cultural and commercial ties it has with the rest of Britain, due to the Union.

Scotland's interests should be discussed with HM Government, which in turn should take on the duty of negotiating such issues with the EU. If Britain can provide certain guarantees and secure most of the desired advantages, the Scottish Question would be answered in a more constructive and practical manner for all parties involved, including the EU, while avoiding unnecessary constitutional changes.

4.2. The Case for Irish Reunification

Could the Brexit vote revive support for a United Ireland? A number of politicians from both sides of the border certainly think so. From a legal point of view, the Good Friday Agreement of 1998 positively provides for a border poll in the event that both sides of the Northern Irish conflict consent to this. The official policy of the UK in respect to Northern Ireland has been, at least for the past few decades,

²⁵ While not part of the UK or the EU *per se*, the Isle of Man is, however, treated as a part of the UK for VAT purposes, in accordance with Protocol 3 to the Act of Accession, part of the United Kingdom's 1972 Treaty of Accession. For Protocol 3, visit <https://www.gov.im/media/624101/protocol3relationshipwiththeeu.pdf>.

²⁶ Dave Keating, „Spain could veto independent Scotland, says minister“, *Politico.eu*, accessed: 18 December 2016, <http://www.politico.eu/article/spain-could-veto-independent-scotland-says-minister/>.

to acknowledge that any future change in the status of this territory should be subject only to the decision of its inhabitants. The Republic of Ireland has since adopted the same stance, removing lasting territorial claims from the Constitution. But beyond this point, the issue enters the tricky field of politics.

Northern Ireland is currently governed by a devolved administration in a power-sharing system between British unionists and Irish nationalists.²⁷ At the moment, the largest party in the Northern Ireland Assembly is the Democratic Unionist Party, which also supported the Brexit vote in the referendum. Understandably, it is highly unlikely that the DUP would agree to a border poll. Their coalition partner, however, Sinn Fein, is clearly known for its enduring rhetoric in favour of Irish reunification. In lack of support from both the DUP and Sinn Fein, the prospect for such a referendum in Northern Ireland is dim.

However, the referendum result in Northern Ireland reached judicial review in similar fashion to the *Miller & Anor, R v The Secretary of State for Exiting the European Union* case. Consequently, the Northern Ireland High Court abstained from addressing issues that were being examined by the High Court of England and Wales in the aforementioned case, yet all other issues invoked in the *McCord, Re Judicial Review* case were dismissed.²⁸ Nevertheless, this judgement was referred to the Supreme Court by the Attorney General²⁹ and the Court of Appeal for Northern Ireland.³⁰

Consequently, the issues that will now be addressed by the Supreme Court relate to the matter of whether the Northern Ireland Act 1998, the Belfast Agreement and the British-Irish Agreement require the passing of an Act of Parliament for the validity of any notice given by the Government of Britain's intention to leave the European Union, in accordance with the provisions of Article 50 (2) TEU. The applicant also asks whether the consent of the Northern Ireland Assembly would be required in the event that such an Act of Parliament would need to be passed, as well as the issue of exercising the Royal Prerogative.

5. Conclusions

Whether Parliament should respect or ignore the referendum result is ultimately a question of sovereignty. The vote cast by the British electorate in the referendum is equal to the vote that legitimated the current membership of Parliament. In this regard, Parliament should not be seen as sovereign *per se*, but rather as a deliberative body that is temporarily delegated to enact legislation in the name and interest of the people it represents. For this reason alone, should Parliament respect the democratic result of the EU referendum. Though Britain's leaving process has yet to commence due to some aforesaid legal challenges, at this stage Prime Minister Theresa May arguably commands the majority required to pass any necessary legislation in the Commons, as already shown in a previous section.

On the other hand, the referendum result raises significant questions concerning the UK's territorial unity, with a re-emergence of secessionist agendas in Scotland and Northern Ireland. In this respect, the Scottish question poses a greater threat to the Union than the prospect of Irish reunification. The current status of Northern Ireland as part of the UK is to be preserved indefinitely, as long as the unionists and secessionists do not agree on holding a border poll. While Scotland's

²⁷ Eamonn O'Kane, *Britain, Ireland and Northern Ireland since 1980: The Totality of Relationships* (London and New York: Routledge), 178.

²⁸ [2016] NIQB 85 (<http://www.bailii.org/nie/cases/NIHC/QB/2016/85.html>)

²⁹ UKSC 2016/0201 (<https://www.supremecourt.uk/cases/uksc-2016-0201.html>)

³⁰ UKSC 2016/0205 (<https://www.supremecourt.uk/cases/uksc-2016-0205.html>)

secessionist movement did not gather enough support in the 2014 Scottish independence referendum, the SNP, however, keeps pursuing it, going as far as threatening to hold a second independence referendum if this would be the only way to protect Scotland's relationship with the EU. Beyond the obvious absurdity that lies in such an argument, the UK's withdrawal negotiations should yet look to secure any reasonable interest of the Scottish Government and work closely with the devolved authorities of Scotland in order to properly answer any legitimate concern.

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