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Referenda as a Threat to Democracy and Constitutionalism: a Few Lessons from the ‘Brexit’ Vote

Abstract: The use of referendums as a way to complement representative democracy can pose fundamental risks to the democratic system of decision making, where the question on ballot paper lacks clarity either due to the complexity of the issue to be decided, or to poor phrasing. Another set of risks relate to the challenges of ensuring high standards of veracity, transparency and accountability in an era where illicit use of digital technology might influence voters. Potential partisan capture of the process is yet another example of a systemic threat to manipulate the vote.

These types of risks came into sharp focus during and in the aftermath of the UK ‘Brexit’ poll on the 23 June 2016. I use this unique case study to discuss a selection of issues that emerged from the referendum vote under the UK’s uncodified constitution, and to evaluate the place of referenda in political decision-making in constitutional democracies more generally.

Keywords: referendums - design and risks, constitutional matter, Brexit

Introduction

The need for the use of referenda in representative democracies has never been fully accepted.¹ Opponents stress the seriousness of potential risks to democracy and constitutionalism that can occur when the essential standards of design and

1 In the global context, referenda are used with increasing frequency in a diverse range of countries. See, for instance, Qvortrup, M., 2018. The Paradox of Direct Democracy and Elite Accommodation: The Case of Switzerland. In *Consociationalism and Power-Sharing in Europe* (pp. 177-196). Palgrave Macmillan, Cham. By choosing to focus on institutionally stable democracy such as the UK, I hope to offer a more meaningful analysis, as this relatively narrow focus allows for a more in-depth investigation without the need to consider a wide range of factors.

regulation, as well as of the process itself, are found wanting. Proponents point to the unquestionable value of allowing the direct democratic process to be used in a narrow class of constitutional decision-making, as a way of bolstering legitimacy of Parliamentary democracy with a dose of peoples' power. These dilemmas came into sharp focus during and in the aftermath of the UK 'Brexit' referendum. Almost two years after the vote, the debacle remains far from settled, as it represents a unique case study for evaluating the place of referenda in political decision-making in representative democracies.

1. Risk factors in the design of the UK Brexit referendum

The absence of constitutional matter in the UK constitution

The leading rationale for using referendums is to settle some of the most fundamental constitutional questions faced by a state.² That requires a high degree of clarity on what kind of issues could be considered as possessing the essential characteristic of 'constitutionality'. Codified or written constitutions are the main and necessary, though not always sufficient, reference framework for deciding this. Under the UK's uncodified constitutional system, there is no such clarity.³

Yet, the crucial importance of clear delineation of the parameters of constitutional issues from any other political question of the day matters in at least two respects; pragmatic – referenda are time-consuming and expensive to run; and, more crucially, the designation of 'constitutionality' should protect the decision on issues from the vagaries the partisan politics to ensure that decisions in such matters are guided by public/state interest and do not fall victim to partisan contest of popularity.

The UK proved to be particularly vulnerable to such a risk: blurring of delineation of constitutionality of a matter under consideration and, more crucially, the weak regulation of referendums under the UK's uncodified constitution, arguably led to

2 The Independent Commission of Referendums stated that 'although there is broad consensus that referendums should be held on "constitutional issues", there is lack of cross-party agreement on what should be considered a "constitutional issue"'. See full report available on: Full report available at: http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendumshttp://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendums (access 22.10.2018).

3 In 2010 the House of Lords Constitution Committee was tasked with considering the problem of an absence of definition of what is a 'constitutional matter'. Disappointingly, it suggested that this should come down to the Parliament's decision on case-by-case bases, rather than be determined any specific set of parameters. See Debates, Parliamentary. "House of Lords." *Official Reports. Fifth Series* 114 (2010). This matter is further complicated by the legally non-binding character of constitutional referendums in the UK, in order to respect the Supremacy of the Parliament.

partisan capture and can be linked to widespread manipulation of the electorate by campaign of misinformation. Let us consider these issues in turn.

The legal and political status of the UK's EU membership has not been clearly defined as 'constitutional'. Even though the European Communities Act 1972, which regulates the accession of the UK to the EU has been described as a 'constitutional statute' already in *Thoburn*,⁴ and more recently confirmed in *Miller*,⁵ this designation does not affect the legislative and political Supremacy of the Westminster Parliament.⁶ This limitation was never likely to help remove the potential for manipulation of Brexit referendum process for political ends, mainly due to adversarial party politics that dominates the UK Parliament, which operates as 'elected dictatorship'; system of whip-enforced, majority-party decision-making.⁷ The suggestion of the Supreme Court that 'the article 50 [TEU] process must and will involve a partnership between Parliament and the Executive'⁸ suggests that this is an issue of fundamental importance for the constitutional order of the UK, which requires cross-party cooperation – a call which so far has been largely ignored by Theresa May's government.⁹

The existing evidence strongly suggests that a number of aspects of the UK Brexit referendum were affected by manipulations and distortions not just in the Parliamentary politics.¹⁰ The lack of rules on who, and under what conditions, can call for a referendum in the UK further increased the potential for malpractice.

The initial instance of manipulative behaviour could be ascribed to the then Prime Minister, David Cameron, when he attempted to strengthen his position among the Conservative backbenchers, and, by fending off the threat of UKIP, to

4 See Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, paras 37-47.

5 The Supreme Court in *Miller (R v Secretary of State for Exiting the EU)* 2017 UKSC 5) refers to the 1972 ECA as 'constitutional' and as having 'constitutional consequences'.

6 The European Communities Act 1972, the legal basis for the accession of the UK to the EU, is considered 'constitutional', along a handful of other Statutes only. Such recognition is mainly due to the *de-facto*, time limited entrenchment - until the Parliament expressly repeals such acts.

7 This is how Lord Hailsham's famously described the British system of Parliamentary politics in the Richard Dimpleby lecture, BBC, 14 Oct.176.

8 *Miller* judgement, n. 5 above, at p. 95.

9 After suffering the biggest defeat in the Commons over the EU Withdrawal Agreement on the 15 Jan. 2019, the PM appeared to seek a cross party talks. However, this offer was perceived as an empty formality by the opposition party. See for instance: <https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-theresa-may-brexit-talks-cross-party-withdrawal-agreement-a8735561.html> <https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-theresa-may-brexit-talks-cross-party-withdrawal-agreement-a8735561.html> (access 23.01.2019).

10 The best known is the promise of £350 million to go to the NHS instead of the EU. Another is the use of Turkey as a source of potential migration on Turkey's acceptance into the EU. See for instance: <https://www.theneweuropean.co.uk/top-stories/boris-johnson-caught-out-over-lies-about-turkey-in-channel-4-interview-1-5857836> <https://www.theneweuropean.co.uk/top-stories/boris-johnson-caught-out-over-lies-about-turkey-in-channel-4-interview-1-5857836> (access 19.01.2019).

bolster the standing of the Conservatives as the governing party.¹¹ The containment of UKIP's growing popularity within a traditional Conservative electoral base was also to serve as a way to appease Eurosceptics within his party. Arguably, David Cameron forced the EU membership decision and was able to set the date for Brexit referendum in an arbitrary fashioning reflecting his own political agenda.¹²

The setting of the referendum question creates another potential risk of manipulative behaviour. The Political Parties, Elections and Referendums Act 2000 (PPERA)¹³ imposes a duty on the Electoral Commission to test intelligibility and 'neutrality' of the question – to avoid leading phrasing.¹⁴ The question on the ballot paper of the 2016 EU membership referendum appears clear and neutral. Closer examination reveals, however, that the question was in fact far from either of these two standards, particularly in the specific context of the UK. I suggest that the meaning of neither continuing EU membership nor the consequences of leaving were intelligibly explained to the electorate, who were asked to express their views on precisely these issues. Nor, for that matter, was there even any basic information about the EU provided to the wider public.¹⁵ This neglect clearly violated the core standard

11 E. Kuźelewska, B. Puchalska, Two British Referenda on the EU, Two Different Directions of Travel, "Athenaeum. Polskie Studia Politologiczne" 2017, no. 57, p. 82.

12 R. Inglehart, P. Norris, Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash. *HKS Faculty Research Working Paper No. RWP16-026*. RWP16-026, 2016, 1–57. The European Union Referendum Act 2015 only requires a four-months notice period for any change of the procedural rules.

13 See also EU Referendum Act 2015. The Act made additions and amendments to the framework set out in PPERA to establish a regulatory framework for a referendum on the UK's membership of the EU. For a full overview of the regulatory framework see Electoral Commission *Report on the regulation of campaigners at the referendum on the UK's membership of the European Union held on 23 June 2016*, March 2017. Available at: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdfhttps://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdf (access 19.01.2019).

14 Compare the most recent Code of Good Practice on Referendums published by the Council of Europe (Venice Commission). Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-eht](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-eht)[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e) (access 19.01.2019).

15 The morning after the vote Google trend reported a spike in searches for 'What is the EU?' followed by 'What is Brexit?' See: <http://fortune.com/2016/06/24/brexit-google-trends/http://fortune.com/2016/06/24/brexit-google-trends/> Although these two spikes are not necessarily indicative of a widespread lack of knowledge about the EU and Brexit, the two years that elapsed since the vote exposed a serious degree of ignorance about the EU prevalent in the UK's government, Parliament, and the media. See: 'I work in Brussels alongside Brexit negotiators and I find it incredible how little the UK government understands about' at: <https://www.independent.co.uk/voices/brexit-latest-news-eu-talks-brussels-uk-theresa-may-a8416076.html><https://www.independent.co.uk/voices/brexit-latest-news-eu-talks-brussels-uk-theresa-may-a8416076.html> (access 24.10.2018).

of national referendums, confirmed recently by the Independent Commission on Referendums report.¹⁶

It is reasonable to assume that the vast majority of British voters simply did not know what the EU is and what the impact was of EU membership on the UK.¹⁷ The potential consequences of leaving the EU were even more obscured due to their very unpredictable nature, but more so, because of a lack of any projections studies, which would consider a number of different possible case scenarios.¹⁸

2. The EU in British media and political discourse surrounding the Brexit referendum

The prevailing ignorance in the UK of all things related to EU can in large measure be explained either by the lack of coverage of the EU in the UK media or by misleading type of coverage, focussing on ‘bend bananas’ and other ‘Euro-myths’ that dominated the media stories, long before the Brexit vote.¹⁹ The little reporting that was to be found in the UK papers was so strongly anti-EU that it resulted in distortions and misconceptions rather than informative coverage. There were some exceptions, such as *The Independent* and *The Guardian*, but the circulations of these titles has always been relatively small, and the frequency of reporting from the EU very low.²⁰

One of the more aggressively anti-European papers is *The Sun*, a Rupert Murdoch title, which is said to have a huge influence over the UK electorate. *The Sun*, and the Murdoch empire more generally, is widely considered as determining the final outcome of elections in the UK – the clearest example of such influence. With a circulation of 2.5 million (down from 3.5 million in 2003) *The Sun* is by far the most popular of the British tabloids, followed by *The Daily Mail*, at just under 2 million. By comparison, the quality broadsheet *The Guardian* sells only just over 200 thousand copies a day on average.

All in all, the British public have either been not informed at all about the EU and what it does, or have been misinformed – the only stories that seemed to have made

16 See n. 2.

17 Exceptions to this are students, lawyers, academics, and civil servants who possess professional knowledge and expertise in this field.

18 Many commentators point out the very rushed triggering of Article 50 TEU by Theresa May without first commissioning such studies.

19 <http://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/bendybananas.html><http://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/bendybananas.html> (access 19.01.2019).

20 The United States focus has always been much more visible in the UK's media. Even major European events are often ignored. There was no mention of recent anniversary of German reunification (3 Oct.) in the UK media.

it into the UK's media were those about wrongly curved bananas and insufficiently straight cucumbers.²¹ Another type of coverage fed to the public were stories about national sovereignty that was allegedly under constant threat from Brussels, particularly after the ratification of the Maastricht Treaty of the EU.

It is highly likely that the media have decisively influenced the public perception of EU-related matters.²² Hence, it can be suggested that British media have been successful in infecting the British public with Euroscepticism of an aggressive variety. A contributing factor was the UK politicians' tacit acquiescence to the hostility in the UK media's style of reporting on Europe. Another was the unavailability of any competing coverage of European matters on European level. The British people were never informed about what the EU is and what it does. Instead, they were fed a diet of sustained one-sided Euro-bashing.²³

All in all, it is clear that the general British public had not been encouraged or enabled to gain even a basic understanding of the complex matter that is the UK's membership of the EU, neither by the media, nor was such encouragement likely to come from the government or MPs. The EU was always considered a 'toxic' or 'poisonous' issue in the UK political discourse, hence discussing the EU was avoided as it could bear negatively on the prospects of political career.

This situation was not helped by a very weak grasp of even the basic knowledge on the nature of the EU, the Single Market and the Customs Union by the UK government and the MPs; they were exposed by the public debate taking place since the vote.²⁴ As late as October 2018 most of the publicly expressed views and opinions by the leading political figures clearly demonstrated the embarrassingly poor knowledge and understanding of a number of core, pertinent aspects of the EU's functioning.²⁵

21 '...the way the media covers an EU political development is more prevalent and relevant to the public than often considered in the literature' in O. Dursun-Ozkanca, *European Union Enlargement and British Public Opinion: The Agenda-Setting Power of the Press*, "Perspectives on European Politics and Society" 2011, vol.12, no. 2, pp. 139-160.

22 J. E. Fossum, and P. Schlesinger, *The European Union and the Public Sphere: A Communicative Space in the Making?* (in:) J.E. Fossum, P. Schlesinger (eds.), *The European Union and the Public Sphere: A Communicative Space in the Making?* Routledge, Oxon: Routledge 2007, p. 20.

23 *Ibidem*.

24 See for instance <https://www.express.co.uk/news/politics/1029843/Brexit-news-Theresa-May-Brexit-negotiations-Chequers-EU-Ivan-Rogers-Boris-Johnson>, <https://www.express.co.uk/news/politics/1029843/Brexit-news-Theresa-May-Brexit-negotiations-Chequers-EU-Ivan-Rogers-Boris-Johnson>, <https://www.theguardian.com/politics/2018/may/24/uk-stop-blather-face-reality-brexit-trade-ivan-rogers> (access 23.10.2018).

25 This EU ignorance continues in the camp of Brexiters led by the European Research Group. This powerful group failed to produce their own plan for Brexit beyond vague calls for Canada ++, an arrangement that is neither feasible nor economically viable for the UK. See also n. 11 above.

3. Secrecy of the UK-EU negotiations

From the beginning of the process of negotiating the post-Brexit relationship with the EU, Theresa May defended the secrecy of the talks. According to her, this was needed not to weaken the UK's negotiating position. There was to be no 'running commentary' on the talks. Nor, it seems, was any debate allowed (even in the Parliament) on the potential impact of the outcome of such negotiations. The Government's own series of reports and impact studies were not made available to MPs or the public. Only during the last two months did the Government start to publish the so called 'technical notes', whose aim is to help prepare the UK for the potential no-deal Brexit.²⁶

These notices, however, are simply not sufficiently detailed to be of any real help in the post-Brexit planning, but they serve to outline the scope and complexity of the potential impact on almost every aspect of the UK economy.

The approach taken by the UK government contrasts unfavourably with the actions taken by Scottish government in preparation for the Independence Referendum in 2014. The Scottish Government published a White Paper of 670 pages, 'Scotland Future', in the form of a guide to what an Independent Scotland was likely to look like.²⁷ No document of that kind was published by Theresa May's government.

All in all, this level of secrecy surrounding the most serious constitutional matter that can have a profound and long-lasting impact on most aspects of peoples' lives is deeply undemocratic and goes against most basic standards of constitutional conduct. As such, it can lead to questioning the legitimacy of the referendum, which in turn risks further deepening the divisions between the 'leavers' and the 'remainers'.

As argued by Tierney, 'the narrowness of the result emphasises the importance of Parliament playing a full role in informing and scrutinising the implementation of the referendum result'.²⁸ It is obvious that Parliament not only failed in that duty, but that it was kept in the dark by the Government. The saga of the non-existent impact assessment reports that the Government was refusing to publish for months, is a testimony to that failure.²⁹

26 <https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal><https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal> (access 23.10.2018).

27 <https://www.gov.scot/resource/0043/00439021.pdf><https://www.gov.scot/resource/0043/00439021.pdf> (access 23.10.2018).

28 S. Tierney, 'Was the Brexit Referendum Democratic?' U.K. Const. L. Blog (25th July 2016) (available at: <http://ukconstitutionallaw.org><http://ukconstitutionallaw.org>) (access 24.10.2018).

29 See the following: <https://www.independent.co.uk/news/uk/politics/labour-brexit-reports-government-theresa-may-uk-keir-starmer-economy-impact-urgent-question-a8185231.html><https://www.independent.co.uk/news/uk/politics/labour-brexit-reports-government-theresa-may-uk-keir-starmer-economy-impact-urgent-question-a8185231.html>;<https://www.independent.co.uk/voices/david-davis-brexit-impact-assessments-parliament-sovereign->

4. Standards of verity in the referendum campaign

A number of blatant lies and false statements were made during the Brexit referendum campaign. Such misrepresentations were allowed to persist and to shape popular understanding of some of the most pertinent issues related to the nature of the UK's membership of the EU.³⁰ Yet, making false statements in the referendum campaign is not an offence under the UK law. Should it be? There is a strong democratic and public interest argument for such a recognition, as argued by Doherty.³¹ Otherwise, decisions of constitutional magnitude will remain vulnerable to lies and distortions to a much greater degree than decisions about buying a second-hand car – where the contract law protects potential buyers from the harmful effects of misrepresentation. Regardless of how complex and challenging, there must be a way of protecting the electorate, hence the national interests from most obvious, blatant lies. As the Brexit campaign showed, relying on the so-called free media is not enough.³² The Electoral Commission is a body best placed to police the boundaries between fact and fiction, and should have semi-judicial powers to impose injunctions and demand retractions. Arguably, this could have prevented the worst and loudest lies that were spread by mainly the Leave campaign.³³

ty-will-of-people-a8080326.htmlhttps://www.independent.co.uk/voices/david-davis-brexit-impact-assessments-parliament-sovereignty-will-of-people-a8080326.html ; https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8128https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8128 (access 24.10.2018).

- 30 The blatant lies of the Leave campaign are still taken as the truth by nearly a half of the British public according to *The Independent*, 27 Oct. 2018: <https://www.independent.co.uk/news/uk/politics/vote-leave-brexit-lies-eu-pay-money-remain-poll-boris-johnson-a8603646.html>https://www.independent.co.uk/news/uk/politics/vote-leave-brexit-lies-eu-pay-money-remain-poll-boris-johnson-a8603646.html (access 24.10.2018). See also: <https://www.independent.co.uk/infact/brexit-second-referendum-false-claims-eu-referendum-campaign-lies-fake-news-a8113381.html>https://www.independent.co.uk/infact/brexit-second-referendum-false-claims-eu-referendum-campaign-lies-fake-news-a8113381.html (access 24.10.2018).
- 31 M. Doherty, 'Should Making False Statements in a Referendum Campaign Be an Electoral Offence?', U.K. Const. L. Blog (4th Jul 2016) (available at <https://ukconstitutionallaw.org/>) (access 23.10.2018).
- 32 The role of the media as the Fourth Estate holding the government to account was seriously undermined by their private ownership and editorial policy agendas. Other factors, such as political correctness and the perceived need to avoid accusations, pose yet another series of challenges to the ability of the media to successfully play that role.
- 33 It is obvious that establishing an offence of this kind would be very challenging, as pointed out by Doherty. See n. 21.

5. Other factors in Brexit referendum campaign

Other factors that very likely influenced how the UK electorate voted remain unconfirmed, but also difficult to dismiss. The improprieties in financing the Leave campaign³⁴ and the alleged interference of Cambridge Analytica³⁵ add to the picture of secrecy and lack of accountability.

Conclusion

The use of referendums in representative democracies is widely accepted as an important element of a democratic system of governance. However, in order to fulfil its democratic promise and to prevent referendums from turning into a threat to democracy and constitutionalism, a number of criteria and requirements must be satisfied:

The issue to be settled by a referendum must be of unqualified most fundamental, constitutional type.

The referendum (including the timing) must never be driven by partisan political agenda – as it was the case with the Brexit vote.

The referendum question must be clear not just in a narrow, formal sense. The substance of the phenomena that are at the centre of the referendum question must be recognised as being capable to be comprehended by the electorate. I suggested that the EU, and the nature of the UK's EU membership appears as too complex an issue which requires an expert knowledge to be fully grasped.

There should be agreed high standards of veracity, transparency and accountability in the way the referendum campaign is conducted. The potential for creating an offence of deception and misrepresentation, specific to referendums should be considered. The Electoral Commission, or a similar body, should be equipped with the power to demand retractions of false statements and/or clarification, as well as a judicial power to punish offenders, by, potentially banning their participation in the official referendum campaign.

34 <https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/leave.eu-fined-for-multiple-breaches-of-electoral-law-following-investigation><https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/leave.eu-fined-for-multiple-breaches-of-electoral-law-following-investigation> (access 25.10.2018).

35 <https://uk.reuters.com/article/uk-facebook-cambridge-analytica-britain/lawmakers-publish-evidence-that-cambridge-analytica-work-helped-brex-it-group-idUKKBN1HN2GV><https://uk.reuters.com/article/uk-facebook-cambridge-analytica-britain/lawmakers-publish-evidence-that-cambridge-analytica-work-helped-brex-it-group-idUKKBN1HN2GV> (access 25.10.2018). See also: <https://www.theguardian.com/politics/2018/nov/21/vote-leave-loses-legal-challenge-over-brex-it-spending-breach><https://www.theguardian.com/politics/2018/nov/21/vote-leave-loses-legal-challenge-over-brex-it-spending-breach> (access 19.01.2019).

The full impact assessment of the potential case-scenarios related to the implementation of referendum results should be provided before the vote is put to the electorate.

The process of implementation of referendums should be fully transparent.

The above are just a small number of essential requirements that must be considered in designing a referendum if the risks to democracy and constitutionalism are to be mitigated. The UK referendum on the EU membership in June 2016 showed that necessity very clearly.

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