

The Legal Loophole that Defies Democracy in Britain

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Global Research, February 11, 2019

[Brexit Shambles](#) 15 January 2019

Region: [Europe](#)

Theme: [History](#)

A legal loophole - that has seemingly escaped the public purview in Britain - means that the UK is now caught in a legal lacuna, brought about by the illegal practices adopted by numerous Leave campaigns.

The words 'democracy' and 'undemocratic' are being branded of late in a similar vein as the political soundbites that have clogged-up mainstream dialogue regarding Brexit since the referendum in 2016. The phrase 'the will of the people' has become annoying white noise to those who increasingly oppose Brexit being implemented; at the same time, its meaning has become the antithesis to the reality.

The illegal infractions surrounding the referendum campaign are stark evidence that the outcome was anything but the 'will of the people'. In the meantime, no one can define what Brexit actually means after two-and-a-half years of political backbiting and with no coherent plan materialising from the mire. Certainly, the passage of time has challenged the legitimacy of the 'will of the people' rhetoric, but, still, Britons are continuously feed the line at the breakfast and dinner table with their daily newspaper, whilst many are concerned by its right-wing connotations each and every time we turn on the news.

The country has seemingly forgotten that the UK has a representative democracy where - through the principle of Parliamentary Sovereignty - elected citizens are instructed by the people to deal with the country's affairs and are held accountable for their performance at General Elections. That is how our democracy has functioned for centuries. Over the last few decades there has been genuine concern that the Executive - with a large majority - can run roughshod over Parliamentary Sovereignty and replace the very foundation of our constitution with executive supremacy. During the Brexit shambles we have been able to witness this phenomenon in real-time with dismay, whilst the rest of the world sit down with a bucket of popcorn and watch the entertainment.

The meaning of 'democracy' has been distorted since the summer; particularly since the revelations contained within the May and July Electoral Commission reports, which informed the British public that Vote Leave (fronted by Boris Johnston and Michael Gove), amongst others, broke a number of electoral laws. The burden of proof during those investigations was to the criminal burden of proof, meaning the infractions were criminal and found beyond reasonable doubt. At any other point in British history the election would have been voided under electoral law and a rerun ordered.

A legal loophole - that has seemingly escaped the public purview in Britain - has allowed our democracy to be bought by criminal activity. This absurdity stems from the 2016 referendum lacking the requisite legal status to be voidable, a status one would expect ordinarily to be afforded to a vote that changes the constitution, legal order and removes

individuals' fundamental rights and freedoms. However, the referendum was never intended to be binding. That much is clear from the European Union Referendum Act (EURA) 2015, in which the provisions were silent regarding any legal obligation triggered by the referendum result.

2015 - Minister for Europe, David Lidington, confirms the 2016 referendum will be advisory and therefore non-binding.

UK constitutional lawyers accept the proposition that referendums do not generally establish legally binding obligations upon the Executive to implement their results, unless it is unequivocally expressed in Statute. Indeed, the absence of provisions in the EURA unambiguously stand out against the Northern Ireland Act 1998 and the Parliamentary Voting and Constituencies Act 2011, which did generate legally binding obligations. Essentially, if Parliament intended for the outcome to be binding it, had the statutory model to ensure it was a 'mandatory' ballot with implementing obligations on Parliament.

The uncommunicativeness of the EURA - notwithstanding the Briefing Paper for the Bill - meant we can/could only infer that the referendum was 'advisory', until the courts confirmed it was incapable of triggering Article 50 in and of itself. In other words, no legal obligations flowed from the result and, therefore, the implementation of Brexit can be viewed as purely political. From the outset, the premise of a purely political strategy existing in a vacuum that separated high policy from the law and constitution, where the courts and legislature were excluded, set the scene for the constitutional crisis we are witnessing today.

A consequence of the advisory nature of the consultation exercise equates to both the courts and the Electoral Commission being powerless to overturn the outcome and/or void the result, despite it being procured by 'corrupt and illegal practices' as defined by the Representation of the People Act (RPA) 1983. For that reason, the UK is now caught in a legal lacuna where a blemished (unlawful) election result is politically binding Parliament and dictating the future of the country. The justification for this legal absurdity can only be traced to what is - in legal terms - a bare promise made to the electorate in a [leaflet](#) that the result would be implemented. That promise has no bearing in law.

Despite numerous court decisions (e.g. in Miller and Webster) unequivocally asserting that the referendum cannot be the lawful decision to leave the EU, it is seemingly hard for the general public to accept that the 2016 referendum was intended to satisfy little more than 'part' of the necessary conditions for the UK to Brexit in accordance with its own constitution and ultimately the Decision to leave the EU was made unilaterally by the Prime Minister. Despite the flaws of the European Union Act 2011, which failed to address how referendums should settle fundamental changes to the UK's own internal constitutional arrangements, the EURA 2015 did provide that a referendum formed part of the constitutional - therefore legal - requirements to leave the EU.

That said, the requirement for that referendum to be lawful, free and fair is an obvious prerequisite for the democratic process and in the absence of legitimacy (proven beyond reasonable doubt) the UK has yet to satisfy that statutory requirement at this point in time. Unless the EURA is repealed or amended the need for a referendum essentially continues, if the UK is to leave in accordance with the constitution.

FUNDAMENTALLY, THE UK HAS YET TO HOLD A LAWFUL, FREE AND FAIR REFERENDUM BECAUSE THE LEGAL VALIDITY OF THE 2016 REFERENDUM WAS IMPAIRED BY THE CORRUPT AND ILLEGAL PRACTICES ADOPTED BY NUMEROUS LEAVE CAMPAIGNS.

That means the EU institutions have been dealing with an illegitimate negotiating partner for two-and-a-half years and perhaps explains why the EU27 have hardened their stance since the Electoral Commission reports were published in 2018. It must be reiterated that Article 50 TEU stipulates that Member States must decide and notify the EU of its intention to leave 'in accordance with its own constitutional requirements'. The criminal offences committed during the referendum prevent the UK fulfilling its legal obligations under the EU Treaties it has ratified. As the legal expression says, 'fraud unravels everything'.

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The EU and the rest of the world are aware the referendum result was unsafe, the fact is regularly reported in foreign media and by academics, for instance, Professor Robert Patman of Otago University has stated on national news in New Zealand that Vote Leave, which goes to the heart of the Cabinet, committed the biggest 'electoral irregularity since the 19th Century'. Accordingly Britain runs the risk of 'being seen as a Banana Republic' by ineffectually dealing with the numerous illegalities discovered by the Electoral Commission, which cheated the democratic process.

Professor Robert Patman - Otago University

In the UK, however, a strange but dangerous undertone has developed where any suggestion that the referendum outcome should be challenged is unceremoniously discredited as being 'undemocratic'. Where journalists across the globe state that British democracy has been shaken and are asking whether the UK is still free and fair, British politicians are maintaining any form of referendum rerun goes against 'the will of the people' and would create mistrust in democracy amongst the electorate - in spite of the statutory requirement contained within the ERA for a lawful, free and fair referendum.

Palpably, any such claims are the antithesis of democracy and the democratic process in the face of a fraudulent vote, but those claims continue get a disproportionate amount of the media spectrum and go unchallenged by British journalists. The referendum defies the democratic principles of accountability and transparency. Whilst the world looks on at a democracy bought by criminals, the implications and validity of the crimes committed have yet to sink in with a significant proportion of the British people.

Many challenge the authority of the Electoral Commission as a law enforcement agency who are - nevertheless - legally empowered to investigate and impose sanctions in relation to the provisions contained within the Political Parties, Elections, and Referendums Act 2000.

Some still maintain the offences committed are mere 'allegations', despite the finding of guilt, fines imposed and the courts rejecting the appeals. Consequently, we are endorsing a collective rejection of the rule of law and missing the perfect opportunity to break the political deadlock in Parliament over Brexit - without a backlash from the electorate - by

simply following the law of the land. As things stand, the British democracy is being usurped by allowing the unlawful referendum result to stand. If this is not confronted squarely by parliamentarians and the British people we stand to lose much more than membership of the EU and international respect; we stand to lose our democratic principles by being politically bound by a legal lacuna.

While it is all too easy to be sardonic about the events that we have watched unfold following the result of the referendum, we must remember that we are ominously close to the Brexit endgame, as the sands in the Article 50 hourglass rapidly disappear grain-by-grain.

Parliament has reached an impasse over Brexit. The governing Party, which has thrived since 1812 on a perception for having pragmatic politicians pursuing measured incremental change – and who axiomatically resisted ideological ‘revolution’ – are now pursuing a dogmatic policy and dealing with matters unrealistically, in a way that is based on ideological rather than practical considerations that are best for Britain. This is causing frustration in Parliament and in the public domain on both sides of the dichotomy regarding the UK’s membership of the EU. It is somewhat ironic that the ‘take back control’ mantra – that was so successfully utilised by the Leave campaign – has now been adopted on a more accurate and genuine guise. The message has become much better suited to Parliament taking back control to prevent the UK’s economic demise and standing on the world stage. Regardless, taking back control is what Parliament must do in order to return to the status quo ante the referendum.

A General Election at present will not solve Brexit. Essentially, the important issues that have been placed on the backburner since the referendum will likely take centre stage during a General Election – especially if Jeremy Corbyn has a say – and we risk Brexit itself becoming superfluous to the manifestos the political parties are trying to sell. Whilst dealing with those essential issues is long overdue, clearly we must resolve Brexit first and stop the deadlock it has caused in the House of Commons. There is a strong argument that, if we want to solve Brexit, a General Election right now is akin to putting a plaster on a broken leg.

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A People’s Vote could settle what the country currently thinks – based on what the people know now – or, if it is dressed properly, to vote on the Prime Minister’s ‘deal’ (on the outside chance that it passes through Parliament). However, there are clear difficulties with another bite at the cherry. Not least, the potential for further divisions in the public another referendum may cause. There has been much scaremongering about civil unrest and threats of riots if Parliament vote down Theresa May’s deal and trigger a People’s Vote. Inflammatory talk about the treachery of such an act is, of course, worrying but we must nonetheless question the probability of any potential civil unrest if Parliament either forces a referendum or stops Brexit in its tracks by revoking Article 50. The country certainly cannot allow itself to be held to ransom by threats from ‘fascist thugs’, particularly when the UK has some of the most robust anti-terrorism laws in the world.

We must also bear in mind the added fact that the Withdrawal Agreement is not actually the ‘deal’. The deal is, at least, two years down the road following negotiations regarding the

Framework for the Future Relationship with the EU. For that eventuality to happen the UK still has to leave the EU and it must enter a transition period to conduct the necessary negotiations. It is only at the point of signing that Treaty that we will actually know what the 'deal' will entail. Voting now on a deal that does not yet exist, therefore, is - at best - a waste of time and arguably an exercise in futility. Accordingly, another referendum can only realistically serve as another consultation at the present time. That also comes with its own dangers. Palpably there is the real threat of a repeat of cyber technologies being used to influence voters via social media. Such tactics have already changed the result of the 2016 referendum and helped Donald Trump get into the White House. Although a People's Vote may yet become an inescapable option, the potential for the UK's democracy being hijacked once more must be considered.

At the end of the day Parliament is sovereign and the option to revoke Article 50 is on the table. With sovereignty, Parliament has the power to simply revoke Article 50 and wipe the slate clean with the EU. As Jeremy Corbyn himself has said, 'all options must be on the table'. Revoking Article 50 is arguably the path of least resistance and the best chance not to further divide the country. Such a course of action would signal that Parliament has indeed taken back control and, instead of British citizens being able to blame the 'other side', accountability for decision-making returned to those elected to shoulder the responsibility for important decisions that affect us all. This would at least mean that British citizens can return to pointing the finger at parliamentarians, instead of one another again, in line with our representative democracy.

Decisions of constitutional significance - those that change the legal order and remove individual rights - should never be 'delegated' to the people, especially without a coherent plan and the necessary legislation to effect the changes in place beforehand. It is unprecedented for referenda to be used in the manner the 2016 EU referendum was used: it asked a simple binary question and then used the answer as a mandate to pursue a political policy that - as yet - had not been devised, despite the outcome being procured by corrupt and illegal practices. It is customary for there to be two (or more) rounds of referenda to decide constitutional matters in other countries - in direct democracies citizens play an active role in forming law. But those countries have tried and tested methods of using referenda in their democratic process. In Britain, we simply introduced a referendum into an indirect, representative democracy, which is simply not suitable for one-off, winner takes all vote. Even Jacob Rees-Mogg said before the event that the UK should have two referendums - the second on whether the people agreed with the 'deal'.

Ordinarily two referenda is a sensible course to take, but can we honestly trust the outcome following the widespread infractions of the 2016 referendum? Ironically a second referendum is now being vilified by many (including Rees-Mogg) as an attack on democracy and an attempt to subvert the 'will of the people', despite the fact that it should have been voided following the Electoral Commission findings of criminal activity. It would be an extra injustice if the referendum result takes the UK out of Europe and later the National Crime Agency and Metropolitan Police seek further prosecutions of those behind the criminal activity during the referendum campaign. Putting that potential retrospective injustice aside, it must be made clear that after leaving the EU the UK would have to re-enter the union via the Article 49 procedure, which can take many years to complete. In addition, the UK would have lost all of its current concessions as a result. The magnitude of leaving the EU under such circumstances is seemingly lost in the milieu of chaos that follows the Brexit saga.

In reality, any consideration paid to the notion that Parliament taking back control or a second referendum reversing the 2016 result being undemocratic is nonsense. In fact, both are the opposite; that is democracy in action. With claims from the Prime Minister that Parliament risks 'harming democracy' if MPs vote down her 'deal' or in demanding a second referendum they 'disrespect' people who voted for Brexit, misses the point that democracy is organic and did not stop on 23rd June 2016. One could be forgiven for thinking that the Prime Minister has seemingly forgotten what democracy and respect mean, particularly as British democracy is centred upon Parliament sovereignty and respect should entail respect for the rule of law. Nothing could be further from the truth than the democratic process running its course as being undemocratic.

There have even been suggestions that MPs who are plotting to seize back control of Brexit negotiations are undertaking 'a very British coup'. The Sunday Times even suggested that such a move would 'plunge the country into a constitutional crisis'. Such a suggestion outwardly overlooks a very important fact: the legislature (Parliament) and the judiciary have been the traditional guardians of the constitution for centuries. Their role is to ensure that the Executive do not abuse their powers. Accordingly, if those limbs of the constitution are powerless to ensure the rule of law and democracy are upheld – at any given time – there is a constitutional crisis.

Where the government of the day relentlessly pursues implementing a policy derived from an unlawful mandate, whilst, at the same time, ignoring the corrupt and illegal practices that delegitimised that mandate in the first place, the legislature and judiciary should have the mechanisms to curtail Executive abuses of power. The same should be able to be said about the judiciary, but attempts to bring the Executive into line through the courts over Brexit so far have been thwarted by statutory time restraints on judicial review proceedings.

The aftermath of the referendum is evidence enough that it is a bad idea for Parliament to shirk responsibility and a terrible way to govern the UK; particularly as the constitution is not geared for referenda. It is safe to say that holding the referendum is the reason why we are in this mess. If we have to hold another, it will be merely to give parliamentarians the justification (they think they need) to proceed with revoking Article 50. There is no legal or constitutional requirement that prevents Parliament from revoking Article 50, Parliament is sovereign and cannot be bound by previous Parliaments. Unless our democratic process and constitution are amended to enable referenda properly they should be assigned permanently to Room 101.

Having said that, if Parliament deem it necessary for another referendum on EU membership, it is essential that it be legislated for appropriately this time. It must have the customary safeguards (such as minimum threshold and a full franchise) to be legitimate and, most importantly, the campaigns must be conducted legally.

The term 'force majeure' – meaning 'superior force' – has often come to mind over the last year and may possibly come into play in Westminster in the near future. Force majeure is generally seen in contract law to describe a clause that prevents someone from performing their obligations under a contract owing to a chance occurrence or unavoidable accident (such as an 'act of god'). In other words, when an extraordinary event happens or events are taken beyond the control of a contracting party performance is suspended for the duration of the force majeure. Force majeure also comes under international law when an unforeseen event takes matters beyond the control of a state and it makes performing

international obligations materially impossible.

The term – or at least the concept – is becoming increasingly relevant to current proceedings in Parliament and the government's inability to implement Brexit. Brexit is undoubtedly an extraordinary event and the circumstances which surround it have become seemingly unmanageable for the Executive. Certainly, if the Prime Minister cannot get the Withdrawal Agreement through Parliament and motions tabled by backbenchers begin to take precedence over government business, Theresa May and her government will have lost the capacity to govern. When all is said and done, if the Prime Minister loses the vote on Tuesday, events would have spiralled out of control and the notion of a 'meaningful vote' will take on an entirely new meaning.

'THE WORLD IS LOOKING AT BRITAIN AND THE USA TO SEE IF DEMOCRACY CAN FIGHT BACK'

The state of UK governance is quickly becoming absurd with the rest of the world looking on in both disbelief and obvious concern. The right-wing movement that continues to sweep across western democracies – fuelled by the success of Brexit and the election of Donald Trump – threatens peace and stability in the near future. With numerous elections looming (including for the EU Parliament itself) the world is looking at Britain and the USA to see if democracy can fight back and not be overwhelmed by dangerous ideology seeking to buy democracy and undermine the peace that has been won since the end of World War II through projects like the European Union.

Parliament must be bold. The majority of MPs must be aware that the referendum result was procured by corrupt and illegal practices and that it should have been voided and rerun. Cross-parliamentary cooperation is needed to bring the illegality out into the open and declare that Parliament simply cannot allow the 'advisory' nature of the referendum to be a loophole that thwarts the rule of law and democratic process.

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