

THE FAILURE OF THE 2016 REFERENDUM

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Continual reference is made in parliament and elsewhere to the result of the June 2016 referendum on membership of the EU as being “the will of the people” and that the “result of the referendum has to be respected”. It is even suggested that it would be a denial of democracy not to enact the referendum result. Based on this, some of the 450 Members of Parliament who have previously voted for remaining within the EU have even voted in parliament against their deeply held conviction that the United Kingdom should be member of the EU.

Whatever else the referendum was, it was certainly not a decisive public vote on the question set out on the ballot paper and it was clearly not an untrammelled decision by electors on objective arguments put before them within the legal limitations of the Act governing the referendum. Even the claim that it was the highest vote cast in any British election is flawed. The turnout was 72.2% - ie 5.5% lower than at the 1992 general election and a huge 12% lower than at the 1950 general election. Even the total vote of 17.4 million votes cast for Leave was barely 41,000 higher than the vote at the 1975 referendum on the EU, when there were six million fewer electors on the register.

These figures have an additional significance in that, given the close result of the referendum, there is an argument that a more entrenched majority should be required for a result to be regarded as a legitimate indication of the electorate’s wishes on a change of such momentous importance. There is a precedent for such a provision in that the Scotland Act 1978, governing the referendum on Scottish devolution, contained a provision that the result would not be effective unless it exceeded 40% of the electorate. The “Yes” vote failed to reach this threshold, as did the Leave vote in June 2016, which achieved the support of only 37.2% of the electorate - far from a resounding vote to change the status quo.

It is worth noting also that Nigel Farage clearly regarded a 52-48 majority as too narrow to be legitimate as he stated on 16 May 2016 that such a narrow majority for Remain would be “unfinished business” and that he would campaign for a second referendum. He would only regard a “two-thirds to one-third” vote as ending the argument. (Daily Mirror, 16 May 2016). If an individual as focussed on Brexit as Nigel Farage did not regard a 52-48 result as definitive, why should Members of Parliament?

Constitutional status

Whether as a convenient excuse or as a genuine belief, the concept of the June 2016 referendum on the EU as the democratic will of the people has become lodged like shrapnel in the minds of far too many politicians. It begs the question, of course, as to whether any referendum, and particularly one with a simplistic binary, yes/no, question, can ever provide a definitive answer to any complex political question. Even so, in its own terms, this referendum was defective. First and foremost, the referendum was advisory and not binding. The definitive

advice from the House of Commons Library on this is contained in its Briefing Paper 07212, section 5, page 25, of 3 June 2015 – a full year before of the referendum:

European Union Referendum Bill 2015-16

..... it does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions. The referendums held in Scotland, Wales and Northern Ireland in 1997 and 1998 are examples of this type, where opinion was tested before legislation was introduced. The UK does not have constitutional provisions which would require the results of a referendum to be implemented, unlike, for example, the Republic of Ireland, where the circumstances in which a binding referendum should be held are set out in its constitution.

This statement by the House of Commons Library was backed up by the Supreme Court in its judgement of 24 January 2017 on the application by Gina Miller for Judicial Review on the status of Article 50. The Court stated that the “effect of any particular referendum must depend on the terms of the statute which authorises it,” and noted that, whereas all other referendums - on devolution and on the voting system - neither the 1975 nor the 2015 Acts on referendums on the EU “made provision for any consequences of either possible outcome.” (Paras 116 to 125.)

The point is often made that David Cameron stated that implementation of the referendum result would be required. This is not the legal situation and no individual, not even the Prime Minister, is above the law or the constitution. Consequently there is no statutory requirement for parliament formally to act on the result. It is odd that Members of Parliament would choose to follow the opinion of a former Prime Minister who rapidly abandoned his post after the vote, rather than that of the House of Commons Library and the Supreme Court.

Leave case miss-sold

Remain supporters have not said that those who voted Leave were somehow fools or were gullible to do so. Only Brexit supporters allege this for their own purposes. What we are saying is that they were miss-sold the Leave case. The case on both sides was extremely complicated, as has been ably demonstrated by the intricacies of the negotiations over the past two and a half years, and, fortunately, we have a clear precedent that takes the view that the individual cannot be expected to understand all the technicalities of a complicated case which will in due course harm them. This relates to Policy Protection Insurance (PPI) and its massive mis-selling. It appears that over 12 million clients were miss-sold PPI. No-one has said that these bank clients were fools and should have known better. On the contrary, they have been compensated - to the extent of some £5 billion. Perversely, the miss-selling of the Leave case in the referendum has been dealt with in precisely the opposite way: those harmed by it have been rewarded by having an illegitimate result accepted, and the culprits, who carried out the fraud, have been rewarded. MPs and Peers who are still acting on this miss-selling are themselves being grossly misled.

There are a number of elements in the miss-selling. First is bribery. A key statement that continued to be shamelessly exploited by the Leave campaign during the referendum campaign despite independent and respected bodies denouncing it, was the lie that the UK was paying £350 million per week to the EU. This figure, shown to be incorrect, was seized on by the three newspapers which were one-sided cheerleaders for a Leave vote, the *Daily Mail*, *The Sun* and the *Daily Express* and repeated ad nauseam. It was even suggested that this sum would be spent on the NHS if the UK left the EU. Of course, there has been no sign of this transaction since the vote, indeed, it has been contradicted by the government. Most unusually, it was also rejected in forthright terms by letters on 21 April 2016 from Sir Andrew Dilnott, Head of the UK Statistics Authority. Members of Parliament should accept that the miss-selling of the Leave case seriously skewed the referendum result.

Immigration lies

Next is the immigration lie. This was even more cynical given the widespread concern about immigration. One outrageous statement was that there were 76 million Turks waiting at the door to enter Britain. This invention was deliberately and cynically used to alarm a significant number of voters fearful, rightly or wrongly, of any threat of mass immigration. The prospect of Turkey joining the EU is far distant, indeed, with the present Turkish President and government becoming more Islamic, plus its extreme response to the attempted coup, it is probably further away than when the process first started. In any case the entry of every proposed new country can be vetoed by the UK or by any other existing EU member.

Another example of the blatant exploitation of electors' fears was the use by Leave.eu of a poster showing a queue of non-white migrants and refugees who were in fact crossing from Croatia to Slovenia. The only prominent white face had been obscured by the caption. Nigel Farage later claimed that this poster "won the referendum because it kept us focussed on the danger of open borders," (*Yorkshire Post*, 20 October 2018).

In any circumstances such tactics are distasteful and cynical but in the context of a referendum on a crucial question that would determine the country's future, they are completely unacceptable. It is hardly surprising that they had a decisive influence on the outcome. We do not need to accept arguments by Remain supporters as we can take the words of Leave campaign organisers. Dominic Cummings, Campaign Director of Vote Leave, wrote in *The Spectator* in January 2017: "Would we have won without immigration? No. Would we have won without £350m/NHS? All our research and the close result strongly suggests No."

Arron Banks, the financier behind Leave.eu and Nigel Farage, was even more explicit. A six page interview by Martin Fletcher in the *New Statesman*, (14 October 2016), reported that "Leave.EU focussed relentlessly and often outrageously on immigration." Arron Banks said:

We always knew the referendum would come down to two things - the economy on the In side and immigration on the Out side, and that if you could keep the subject on immigration you would win.

The polling evidence is also conclusive. Lord Ashcroft's election day poll of 12,369 voters found that "One third (33%) [of leave voters] said the main reason was that leaving "offered the best chance for the UK to regain control over immigration and its own borders." The British Social Attitudes survey, published in June 2017 similarly showed that the most significant factor in the Leave vote was anxiety about the number of people coming to the UK. Anecdotal evidence from campaigning outside a Leeds supermarket found a significant number of Leave voters expressing their opposition to immigrants in more colourful and extreme terms.

Matthew d'Ancona wrote a whole article on this issue in *The Guardian*, (Let's be honest about what's driving Brexit: bigotry, 3 December 2018). It is clear that for a significant number of Leave voters the referendum, and certainly enough to swing the final result, the referendum was focussed on immigration, and the actual question on the EU was simply a vehicle for their prejudice. In the face of all the evidence, why, therefore, should Members of Parliament continue to assert that the referendum expresses the will of the people on Britain's membership of the EU and has to be accepted?

Deceit

We also had Leave propaganda masquerading as an official communication. This deliberate deceit is particularly outrageous. On the eve-of-poll large numbers of voters received an individually addressed leaflet through the Royal Mail which was deliberately designed to appear to come from the Electoral Commission or the official Returning Officer, whereas in reality it came from the Leave campaign. It was headed "Official information about the Referendum on 23 June 2016", with the next line reading "Referendum Communication." It proceeds to describe the leaflet as "This document" and presents "The Facts" as if they were objective items of information, even though it leads with the £350 million per week lie and follows with the queue of countries purporting to be waiting to join. The defective Act governing the conduct of the referendum did not provide any powers for the Electoral Commission to prevent or even to sanction even such a deliberate tactic to mislead the electorate. It is yet another piece of evidence which demonstrates that the result of the referendum should not be regarded as the will of the British people.

The European Union Referendum Act 2015

In any normal circumstances one can expect the law governing our democracy to be robust and fit for purpose. This Act clearly was not in that it gave the Electoral Commission no powers to regulate the conduct of the campaign, nor even to annul the vote if it adjudged it to have been grossly manipulated. In particular there was no equivalent clause in it to Section 106 of the Representation of the People Act 1983 which governs the conduct of parliamentary elections. This section forbids false statements of fact in relation to the personal character of a candidate. The provision is far from nugatory in that it was successfully used in 2010 by the Liberal Democrat candidate in the Oldham East and Saddleworth constituency to challenge the election of the Phil Woolas, the Labour candidate elected. Woolas was found guilty, deprived of his seat and barred from public office for three years.

Matthew Elliott is on record as stating that, had there been an equivalent clause 106 barring false statements of fact in the referendum, the Leave campaign would not have been able to use the slogans and false statements that it relied on for victory.

The only matter that the Electoral Commission did have powers over was campaign expenditure, including its sources. It has been forthright in its actions on finance, in particularly fining Leave.EU £70,000 for breaches of the law. Moreover, and particularly serious, the Leave.EU Chief Executive was reported to the police for possible criminal offences. Presumably the Electoral Commission took such actions because it believed that the infringements of campaign finance regulations, and the possibility of police action, could have had an influence on the referendum result, further undermining its legitimacy. It is not just the Leave.EU campaign that has been fined: the official Vote Leave campaign has also been fined for overspending the legal limit. The Electoral Commission has stated that the evidence it possesses suggests that the Leave campaigns' overspending goes well beyond the amounts already detailed.

One has to assume that the gross overspending by the Leave campaign groups was calculated to increase the Leave vote otherwise there is no point in doing it. If it did so illegally it may well have been that illegality that wiped out the slight leave majority. Indeed, an e-mail from Steve Baker of Conservatives for Britain on 13 February 2016 to key supporters included the statement, "It is open to the Vote Leave family to create separate legal entities each of which could spend £700k: Vote Leave will be able to spend as much money as is necessary to win the referendum".

The Franchise

In the 2014 referendum on Scottish independence, 16 and 17 year olds were enfranchised. All the evidence is that they took this responsibility very seriously. By what logic was it determined that they could express their opinion on the unity of the United Kingdom but not on the UK's continued membership of the EU, which arguably will affect their future as much or even more than the integrity of the UK?

The other group with a particularly direct interest in the outcome of the referendum is that of the 4 million or so EU residents in the UK but they too were not allowed to vote. Surely at least those EU citizens who have shown their attachment to the UK by registering to vote in the UK at local and European Parliament elections should have been allowed to vote in the referendum?

The disenfranchisement of these two groups reduces still further the possibility of the referendum being legitimate as representative.

The 2017 General Election

Despite having been adamant that she would not call a premature general election, Theresa May suddenly announced an election only two years into her term of office even though she had a working majority in parliament. She specifically called the election on 18 April 2017 to

provide Britain with “a strong and stable leadership to make the most of the opportunities Brexit brings for hardworking families.” She asked for a “strong hand through Brexit”, (Conservative Manifesto.) Theresa May specifically saw the election as an electoral test for the Brexit case. As such it failed, and in fact support for the Conservatives declined during the campaign and she lost her majority in the House of Commons. At the time of the calling of the election on 18 April one opinion poll reported that the Conservatives had touched 50% - double Labour’s rating. By polling day seven weeks later, the Conservative vote had declined to 43% and Labour had risen to 41%.

Equally significant within the context of the general election being a verdict on Brexit, UKIP, the most pro-Brexit party, began the campaign on around 10% but ended it on a mere 2%. Clearly there was no enthusiasm for Brexit a year after the referendum. Is this not further significant evidence that it would now be appropriate, with all the evidence of the interminable negotiations of the past two and a half years and the failure to produce an agreement that will secure the support of the House of Commons, to have a further vote?

Precedent

If the UK were to hold a further referendum on EU membership it would be the third EU country to hold a second referendum after a “No” vote. Denmark voted “No” to the Maastricht Treaty in June 1992. After negotiating certain opt outs, a second referendum was held in May 1993 which voted “Yes”. In Ireland in 2001 the electors voted against the Treaty of Nice. Then, following the negotiation of a number of opt outs, a further referendum in October 2002 voted “Yes”. In each case there were political developments between the two referendums so that the electorate were faced with a somewhat different proposition. The same would be true in the UK, with the further and better particulars in our case demonstrating over the past two and a half years serving to demonstrate the virtual impossibility of negotiating a satisfactory divorce from the EU that can secure the support of the House of Commons.

Conclusion

Whatever arguments are used for supporting Article 50, there is no sustainable case for regarding the result of the June 2016 referendum as at all mandatory on Members of Parliament, or even as representative of the British people’s opinion on the question posed. Only if a Member of Parliament wishes to shelter behind this fallacy should it be prayed in aid; otherwise each MP should use his or her own judgement on this crucial issue of the UK’s place in Europe.

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