

was the Brexit referendum legitimate, and would a second one be so?<sup>1</sup>

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### **Abstract**

This article suggests that common arguments questioning the legitimacy of the first Brexit referendum prove flawed, as do certain others supporting the legitimacy of a second referendum. A different case for a second referendum is offered, that would have added to the legitimacy of the first, but the opportunity for which has now passed. Nevertheless, it might be legitimate to overturn the first referendum through a normal parliamentary process should there be a significant level of Brexiteer among the public, or a general election supporting a change of policy.

### **INTRODUCTION**

The Brexit referendum has been distinguished by an absence of loser's consent on the *Remain* side, and a parallel insistence that the result reflected the expression of 'the people's will' against the elite minority on the *Leave* side. If the former dispute the legitimacy of the referendum and increasingly demand a second in the hope of reversing it, the latter retort that to dispute the first is itself illegitimate and a denial of popular sovereignty.<sup>2</sup> This short piece rehearses the normative arguments underlying each of these arguments. It leaves to one side the strictly legal and practical arguments, except to the extent they impact on the distinctly normative view of the legitimacy of either referendum.

The analysis below adopts the dominant account of legitimacy among contemporary normative political theorists, and understands it as largely a matter of process rather than outcome (Buchanan 2002). On this account, a legitimate procedure is one that operates in a fair and impartial manner with regard to the different views and interests of the parties concerned. A majoritarian democratic process offers a paradigm case of such a legitimate procedure. As is the case within most constitutional democracies, the outcomes of even a legitimate process can be subject to certain side constraints, notably the need to uphold various individual rights. However, these constraints can be conceived in processual terms

as originating in a requirement to consider all involved as entitled to have their views and interests treated with equal concern and respect. (cite Christiano on content independent account of legitimacy)

From this perspective, many criticisms of the legitimacy of either the first or a possible second referendum prove flawed in shaping their arguments in the light of the outcome they favour. However, a successful procedural argument needs to be justified in general terms that could potentially legitimate an outcome one does not support. A balanced review of the arguments suggests neither side has an entirely knockdown case, so that neither the first nor a second referendum may be entirely legitimate or illegitimate, although for practical reasons time may already have run out for a second.

## **WAS THE FIRST REFERENDUM LEGITIMATE?**

Two sets of arguments have figured prominently in questioning the normative legitimacy of the first referendum.<sup>3</sup> The first set of arguments question the legitimacy of any referendum, and hence of the need for a second. On this view, it would suffice for the result to be overturned in an election or even a parliamentary vote. Advocates of this position view referenda as populist rather than genuinely democratic mechanisms, which invoke a mythical 'will of the people'. They contend that the justification for democracy rests on any demos consisting of a plurality of individuals who reasonably disagree, with a democratic process providing a fair mechanism for arriving at a collective decision that is neutral between the views people may hold and so can treat them all impartially. A majority decision so conceived reflects at best the preferred option among various alternatives of most of those entitled to vote. In most cases, as in the case of the Brexit referendum, where the majority of 51.89% on a participation rate of 72.21% represented just 37.4% of the electorate, it only reflects a plurality of those eligible to vote.

Consequently, there was no sensible way to suggest that the result reflected the 'will of the British people'. Indeed, the devolved regions argued that the UK included at least four demoi: those of Scotland, Wales and Northern Ireland, as well as England. A case could even be made for suggesting that London, with a population almost as large as that of Scotland and Wales combined and devolved powers of its own, represented a fifth demos. Of these five, only two: Wales and England (minus London), voted to leave the EU.

A number of subsidiary arguments are presumed to follow from this general point. First, these critics note how in a general election,

where voters indirectly influence the programmes of political parties and can directly choose between them, the EU issue has never been sufficiently salient to be an election winner. From the democratic point of view of getting a sense of where the majority preference lies, referenda have the normative disadvantage of falsely isolating one issue from its impact on others. Balanced against, and contextualised within, other issues, as is the case in a general election, leaving the EU would not necessarily command even a plurality of votes in most constituencies. For example, UKIP only managed to win one parliamentary seat at the last general election, largely on the back of the popularity of the incumbent MP, while Eurosceptic campaigns by the Conservatives in the 2001 and 2005 elections had been largely ineffectual. Second, a referendum makes it hard to revise a policy in the light of changing circumstances and experience, or to hold decision-makers to account when their initiatives fail. Instead of incremental adjustments that reflect people's evolving preferences, voters can express themselves at best only very sporadically.

When evaluating these arguments, it is important to distinguish between policy, constitutional and constitutive referenda (Tierney 2012: 14). These arguments are particularly telling in the case of policy-referenda, they are less so in the case of constitutional and, especially, constitutive referenda. Policy referenda assume an already constituted polity and regime, within which the various members of the demos agree to disagree about a range of issues. In such cases, isolating one issue from many could be regarded as failing to take into account the different rankings of a range of issues and of their interconnections that people might have. By contrast, certain constitutional and all constitutive issues are different. There may be other, liberal constitutional, reasons for arguing that a moral issue, such as abortion, ought not to be subject to a vote in the first place but rather be viewed as a right associated with woman's autonomy. However, this argument obviously favours one of the positions in contention, and from a democratic point of view abortion could be seen as a matter on which there is reasonable disagreement from a plurality of moral perspectives but that is nevertheless both sufficiently discreet and important to be deserving of a distinct vote (Waldron 1999: 112, 227). The case is even clearer with constitutive issues – that is, matters relating to the very existence and contours of the polity and its people, as in referenda regarding secession, or the character of its regime, as when a referendum is used to approve a new constitution. In these cases, the issue is a comprehensive one – whether a given group of people wish to form a demos or to settle their disagreements according to a given set of rules and procedures. In these cases, the standard arguments favouring a 'normal', constituted, democratic process, such as a general election, do not arise because what is at stake is whether such a

procedure is itself appropriate. In such cases, it is more fitting to talk of popular sovereignty than in debates around policy because the vote relates to whether the individuals wish to form a demos of a sovereign polity or not (Tierney 2012: 296).

It might be argued that the EU referendum was as much about policy as polity, and hence was not truly constitutive. Certainly, the official *Remain* campaign defended their position in such terms in stressing the economic disadvantages of leaving the EU. However, the official *Leave* campaign stressed the constitutive issue of 'Taking Back Control'. Seen in this light, the referendum becomes much more defensible, and parallels similar uses of referenda elsewhere and in the UK with regard to the possible secession of Scotland from the UK. Moreover, its procedural legitimacy ultimately rested on the commitment to hold it forming part of the governing Conservative Party's general election campaign, while the form it took, discussed below - including the threshold for passing and the composition of the electorate - was legitimised by Parliament via a due legislative process.

Even if the legitimacy of holding a referendum on this issue is granted, a second set of arguments come into play regarding its conduct. It has been argued that the campaign involved considerable misrepresentation by the *Leave* campaign, such as the notorious claim that membership cost the UK £350 million a week that could be spent on the National Health Service (NHS), and was too short given the technical issues involved, so that ordinary citizens lacked the information and time to evaluate them fully. The vote also has been seen as too close to be decisive; with critics claiming it ought to have required a super-majority. Meanwhile, EU citizens resident in the UK were said to be excluded unfairly from the vote, as were the younger generation of 16-18 year olds, who would bear most consequences of Brexit and overwhelmingly opposed it.

Although all these points carry some weight, none – either singly or collectively - can be regarded as strong enough to delegitimise the referendum. Misleading information and spin abound in most elections. The electorate expects it and has access to plenty of alternative sources, not least an impartial public broadcaster in the BBC that ran a fact-check web site during the campaign. Although those supporting *Remain* level this complaint, their campaign was as much at fault as *Leave*'s in exaggerating the dire economic consequences of Brexit (for a balanced account of the campaign, see Clarke, Goodwin and Whitely 2017: Ch. 3).<sup>4</sup> Moreover, Britain's membership of the EU has been debated with increasing intensity for the past 40 years – with people's views remarkably stable over time (Clarke, Goodwin and Whitely 2017: Ch. 4).

It can hardly be maintained that the electorate had too little time to become informed.

Super-majority thresholds are often required for constitutional and constitutive referenda. For example, the 1979 referenda on devolution in Scotland and Wales required the approval of at least 40% of the eligible electorate rather than just a majority of those who voted, a threshold they failed to meet - as did the Brexit referendum, as I noted above - although it was achieved by the 1975 referendum, which had a lower turn out (64.62%) but a higher majority in favour (67.23%). The argument favouring such criteria is that the (constitutional or quasi-constitutional) infrastructure of a polity should be relatively stable, particularly in those respects where it matters greatly for some members (perhaps a minority) in the society: for example, they have built their lives around the assumption that it will remain in place. Putting part of that infrastructure up for a 50-50 vote is like playing dice. This may be because there will always be some who vote against the status quo on the basis of frustration with the government on any front or because those affected will not realize, until it is too late, how badly they will be affected. For any such reason there will always be noise in the system, so to speak.<sup>5</sup> I think this is an important consideration and will return to it in the next section dealing with a second referendum. However, I think a super-majority is an illegitimate way to address this point. For a super-majority violates a basic democratic and liberal norm that decision-making processes should be impartial and neutral between views in order to be fair (May 1952). Super-majorities entrench the status quo and may consequently lock in inefficient or unequal measures that generate injustices (Schwartzberg 2013).

Finally, the first referendum excluded from the electorate both non-British EU citizens resident in the UK and 16-18 year olds, although both had been included in the Scottish Independence Referendum of 2014. Critics of this exclusion argue that it excluded those most directly affected by the proposal. They note that while those aged over 66, many of whom may never have to live with the consequences of their vote, divided 66-34 pro-*Leave*, the excluded younger generation, whose future will be profoundly shaped by Brexit, were 72-27 pro-*Remain* (Clarke, Goodwin and Whitely 2017, p. 155). Again, these are important objections. However, to carry the argument, these exclusions must be regarded as so unreasonable as to invalidate the referendum. However, I think a reasonable justification can be given for them.

A distinction can be made between who can be legitimately included in making a decision, and the side-constraints that might arise with regard to those affected by a decision. In the case of a constitutive referendum, which concerns the very shape of the demos, a reasonable

case can be made for restricting the decision to citizens. On the stakeholder account of political rights and obligations (Baubock 2015), the claim to being a citizen of a given sovereign political community belongs to those whose freedom and rights are inherently linked to the collective self-government and flourishing of this polity over time. This argument links citizenship rights to the performance of civic and social duties and a commitment to the political community and its members, including to future generations. On this view, rightful inclusion in the demos depends on assuming the obligations entailed by long-term membership of a community, not least by naturalising as a citizen of the host country.<sup>6</sup> That said, EU citizens are certainly affected by the decision, and for any Brexit deal to be legitimate it should also be constrained in ways that acknowledge their legitimate expectations regarding their rights to remain – as the EU negotiators have justifiably insisted.

With regard to the votes of the elderly vis-à-vis the young; there is a certain arbitrariness in deciding the age of majority. However, 18 is currently the European norm and not unreasonably so given it aligns with the end of compulsory school education in most states as well. Cohort injustices are possible, and some have even suggested disenfranchising the elderly from voting on certain issues (Van Parijjs 1998). Still, the elderly tend to have children and grandchildren, so are not entirely without any concern for securing the interests of future generations, while a severe economic downturn as a result of Brexit is most likely to arise in the short term and directly affect their pensions and access to health care.

## **WOULD A SECOND REFERENDUM BE LEGITIMATE?**

Even if the first referendum was legitimate, that does not mean a second one would not be justified as well. I start with two common but ultimately unconvincing arguments (a good overview of the debate can be found in Wheeler 2018), before turning to a third that I contend has greater normative merit.

A first argument holds that if it was legitimate to revisit the 1975 referendum, then surely the same can be said of 2016. I agree – the question is when would it be legitimate to do so? In the case of a policy referendum, it seems reasonable to revisit the decision in a relatively short time, as would be the case with ordinary legislation. However, with constitutive and constitutional referenda, which concern the basic political and legal framework, there is a need for continuity of a kind associated with the rule of law, whereby individuals can plan ahead. In these cases, it seems more appropriate to have a once in a generation

vote, along the lines Thomas Jefferson (1984: 1402) advocated for ratification of the United States constitution. After all, both the EU and the composition of the UK demos were very different in 2016 from what they were in 1975, making a new say justified. Neither has changed today from the 2016 vote, and popular support for a second referendum seems minimal at best, with many antagonistic to the idea (Clarke, Goodwin and Whitely 2017: 215).

Some retort that the first referendum failed to specify the type of Brexit that was to be negotiated, and that a second referendum would address this issue. However, this proposal proves harder to operationalize in a coherent manner than its proponents acknowledge. First, could a second referendum on the negotiations be legitimately organised? At the time of writing there are just 14 months to go before we leave the EU. The Electoral Commission (2016: 11, 15) recommends that legislation on the conduct of a referendum should be passed at least 6 months before the campaign starts and that the campaign itself should last at least 10, and possibly 16, weeks. That suggests the rather unlikely scenario whereby the UK will have reached a deal in the next 6 months. Meanwhile, critics have a point in noting that the requirement that the 'deal' be subject to a second referendum to go through might bias the negotiations towards the EU offering a particularly 'hard' Brexit. Of course, that depends on what the question and its consequences would be. If the question was: 'Do you accept the withdrawal agreement?' would a 'no' vote mean to leave without a deal and revert to WTO rules, to return to the negotiations – but is there time to do that, or to remain by unilaterally revoking the triggering of Article 50? If the latter, can that be done if the first referendum was legitimate? And, say the EU wants to renegotiate the terms of the UK remaining, for example by cancelling the UK's infamous rebate, would acceptance of that deal require a third referendum?

An alternative and more principled argument for a second referendum, that also meets the reasoning behind a super-majority but in a way more consistent with democratic norms, is as follows. In his novel *The Life and Opinions of Tristram Shandy Gentleman* (1762: Vol VI, Ch. XVII), Laurence Sterne has Shandy, the novel's narrator, report, misremembering Herodotus on Persian customs, that the ancient Goths of Germany took major decisions twice: first drunk and second sober, with only those drunken resolutions that met with sober approval being acted on. Shandy remarks that his father was much taken with this argument but being teetotal adapted it to involve discussing important domestic matters with his wife on the first Saturday night of the month and then on the following Sunday morning, referring to these two deliberative occasions as his 'beds of justice' (Waldron 2016: 76, 327 n. 29). Adapting this argument, it can be maintained that, for the reasons given

earlier, decisions involving changing the very rules of the political game deserve to be considered especially carefully. At the same time, such consideration ought to respect democratic norms and allow all views to be fairly weighed and expressed. Balancing passionate frustration with the possible inadequacies of the *status quo* against reflective consideration of the consequences of changing it, potentially for an even worse arrangement, reflects a well established deliberative norm of ‘hearing the other side’ that informs adversarial debate in Parliament and the Courts as well as normal elections. Indeed, Sterne’s ‘two bed’ argument has been employed to justify bicameralism, in which the second chamber acts as a scrutiny chamber, and could be equally employed to allow for judicial review (Waldron 2016: 77). This argument responds to the common criticisms of the first referendum while meeting the requirement noted at the start that an argument from legitimacy must reflect general considerations that derive from the general reasoning underlying constitutional democracy rather than being *ad hoc* arguments that reflect one’s view of the issue the referendum sought to decide. However, to not fall foul of the counter-arguments given above, a second referendum of this kind should have been called before triggering Article 50 – allowing a period of reflection prior to taking that momentous step. Sadly, we have run out of Brexit time (Armstrong 2017).

## CONCLUSION

This brief article has rejected arguments claiming the first referendum was illegitimate and suggested those commonly employed for supporting a second referendum might be so. Meanwhile, the moment has passed for a potentially legitimate second referendum. As someone who voted *Remain*, I find this conclusion distressing. But maybe it does not matter. In the UK parliament is sovereign and referenda advisory, while the narrow, passionate, first referendum has not been legitimised by a second, reflective, referendum. If buyer’s remorse was sufficiently widespread, it might be legitimate for a government with parliamentary support to pull back from Brexit and certainly to soften it. However, as yet there are few signs of Bremorse and little likelihood of it’s emerging any time soon, if at all. Given 401 of the UKs 632 constituencies voted *Leave* (Clarke, Goodwin and Whitely 2017: 227, 213), this scenario appears both unlikely to be viewed by MPs as politically feasible and of dubious legitimacy without a massive shift in public opinion in the near future and the endorsement of a general election.

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## Notes

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<sup>2</sup> E.g. see reactions to the Government's defeat in the Commons on 13/12/2017 in which Parliament insisted on a vote on the Brexit deal, in which the Foreign Secretary Boris Johnson tells the Press the vote will not 'frustrate the will of the British people'.  
<https://www.theguardian.com/politics/blog/live/2017/dec/14/brexit-eu-summit-commons-defeat-not-going-to-stop-brexit-says-government-politics-live>

<sup>3</sup> For a clear account of both, although he combines the two arguments, see Grayling 2017, Appendix 1: Brexit, pp. 189-97.

<sup>4</sup> See too the report of the Electoral Commission, on the campaign (2016: 50-53), which rejects the need for a 'truth' Commission (2016: 3).

<sup>5</sup> I am grateful to Philip Pettit for the formulation of this point.

<sup>6</sup> Long-term resident EU citizens should be able, as at present, to become citizens of their host state with relative ease after a reasonable period of residence – which is 5 years within the EU. But it also is justified that unless they are prepared to make the commitment to acquire this status they should be excluded from voting in national elections. See Bauböck (2012).

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