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Referendums: The First-Best Form of Democracy or a Means of Crude and Divisive Majoritarian Rule?

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'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving, you, if he sacrifices it to your opinion.*'

Edmund Burke.[1]

Throughout the 1970s, there were a series[2] of constitutional referendums[3] relating to the make-up of the UK. To some extent, these can be considered 'ideal' representations of referendums: each posed a question of growing significance to the relevant sector of the population and returned convincing results for the status quo. They addressed and, crucially, settled, at least for a generation, their respective constitutional questions.

Fast-forward to 2017 and referendums on similar constitutional questions are having a dramatically different effect. Taken together, the 2014[4] and 2016[5] referendums represent a massive constitutional and democratic crisis in the UK. The dissatisfaction, outrage and even heartbreak caused by the Scottish independence campaign and the Brexit decision continue to spread as tremors from each referendum shake up the foundations of Britain's unitary constitution. In particular, Brexit has re-ignited the independence movement in Scotland and threatens to help fan the flames of nationalism throughout the other constituent parts of the UK.

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[1] Edmund Burke, *The Works of the Right Honourable Edmund Burke (Vol I)* (London 1854) 447.

[2] Northern Ireland Sovereignty Referendum 1973; European Community Membership Referendum 1975; Scotland Devolution Referendum 1979; Wales Devolution Referendum 1979.

[3] A type of direct democracy, through which citizens are given the opportunity to vote directly on initiatives: sometimes also referred to as plebiscites. Since referendums are effectively the epitome of direct democracy in modern society, the terms direct democracy, referendums and plebiscites will be used interchangeably throughout this letter.

[4] Scottish Independence Referendum, 18 September 2014.

[5] European Union Membership Referendum, 23 June 2016.

They appear to have acted like ploughs: ripping through the very foundations of British politics and stirring up extreme political and emotional sentiments. The fact that some consider themselves to be quite justified in regarding a second Scottish independence referendum as essential for self-determination, while others feel equally vindicated in claiming that a second European Union referendum would be a direct affront to democracy suggests that referendums settle nothing, instead inciting further debate, resulting in more and more questions.[6]

These questions are numerous and wide-ranging, probing into the substance of arguments for and against independence or EU membership, but perhaps the most prominent are the questions concerning the referendum as an institution and its position within British politics and the UK constitutional arrangement. When one considers the volatility of the British political landscape following these recent plebiscites, it certainly seems competent to question the desirability, and perhaps even the viability, of future referendums.[7] Indeed, journalist Amol Rajan suggests that the Brexit process has highlighted the 'inherent flaws in referendums'.[8]

One of the key functions of a referendum must be that it should settle the issue that it is held to address. However, there is a wealth of incontrovertible evidence that referendums do very little to effectively settle an issue. The Scottish independence referendum was held almost three years ago and returned a seemingly convincing result: a 10% cushion for the Better Together side. Yet, the wounds inflicted during that debate remain as ripe as ever: division over the independence question is still rife north, and indeed south, of the border. Certainly, it is evident that the issue is far from being settled: only hours after the results were announced, the streets of Edinburgh and the feeds of social media were filled with protestors deeply dissatisfied with the result. This dissatisfaction, stoked further by the apparent commitment of the UK Government to a 'hard-Brexit', has led to the Scottish Parliament recently voting in favour of revisiting the question.[9]

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[6] Hestermeyer describes the number of legal questions alone arising from Brexit to be 'breathtaking'. Holger Hestermeyer, 'How Brexit Will Happen' (2016) 4(1) Journal of International Arbitration 429, 430.

[7] This is especially so following the recent Scottish Parliament vote for a second independence referendum.

[8] Amol Rajan, 'Don't Call for Another Referendum - They Cause More Problems than they Solve' *The Independent* (13 October 2016) <http://www.independent.co.uk/voices/brexit-eu-referendum-second-ballot-will-cause-more-problems-amol-rajan-a7359186.html> accessed 5 April 2017.

[9] BBC News, 'Scottish Parliament Backs Referendum Call' *BBC News* (28 March 2017) <http://www.bbc.co.uk/news/uk-scotland-39422747 > accessed 30 March 2017.

If possible, it seems that the European issue has proved even more divisive than Scottish independence: this is probably attributable to the nationwide scope of the 2016 referendum and the very narrow margin of the vote. Instead of settling the EU debate, the referendum wreaked havoc across the UK: it stirred up conflict between Scottish nationalists and unionists, inspired widespread racism, and provoked intense constitutional debate in the courts, the media and Parliament.

It seems, then, that any contention that a referendum can settle an issue is dubious at best. It must be asked, then, why should they be included within our political process? This question is usually, if not exclusively, met with some variant of the argument that referendums are the purest form of democracy. They are desirable because they give every citizen an equal vote on a matter of importance, thus enhancing our democracy. Indeed, referendums are often termed as a 'first best' form of democracy, for which representative, or parliamentary, democracy[10] acts as a 'second best' substitute.

However, the extent to which peripheral, and in some cases utterly irrelevant, issues can dominate the whole debate was made clear during the EU referendum: the most notable being the exaggerated immigration issue. Furthermore, Lord Fraser of Carmyllie has stated that referendums often act only 'as a barometer of the attractiveness of the political party at any given time',[11] and the agenda in a referendum campaign will generally be set by the prevalent political forces:

> 'The arsenal of direct democracy is an institutional weapon used by organised interests, including political parties and interest groups, for their own interests, and not for the people as such'.[12]

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[10] Simply put, in a parliamentary democracy representatives are elected to make decisions on behalf of the people.

[11] House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (HL Paper 99, 2009-2010) 19.

[12] ibid 17 (Uwe Serdult). See also David S Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (Harcourt 2000).

In this way, it is possible to consider referendums as tactical devices to be unleashed at the discretion of the government of the day.[13] Some have gone so far as to proclaim referendums to be 'the Pontius Pilate' of British politics[14] and even the Iron Lady famously described them as 'a device of dictators and demagogues'.[15] The 1975 European Communities referendum is a good example of such strategizing: it has been described as a 'constitutional outrage' in that 'it was wholly to do with holding the Labour Party together'.[16]

One aspect of direct democracy that is all too often glossed over is the way in which referendums allow the majority to override the rights of the minority. Indeed, the very premise of a referendum is that populist sentiment will overpower the wishes, interests, and, inevitably, the rights of the losing side, no matter how close the result. This 'mob-rule' mentality certainly helps to explain the intense division that is now widespread across families and communities throughout the UK: when complex issues are boiled down to binary 'yes or no' choices, and the decision of the majority of a population is enforced upon the whole of that population, the result is that millions of citizens are effectively disenfranchised. This is the brutal truth of a referendum. Once the idealistic façade that referendums are brilliant examples of pure democracy is challenged, it becomes clear that the end result will always be that one segment of the population, sometimes as low as 51%, is triumphant in victory, while another segment, sometimes as high as 49%, is desolate in defeat. Such a process is clearly not tenable for decision-making in modern, liberal democracies. Like most ideologies, democracy is lethal if left undiluted.

Therefore, representative democracy, the so-called 'second-best' form, has emerged as the dominant model. It acts as a filter that guards against descent into forms of populism and prevents political systems from descending into crude majoritarianism. In Parliament,

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[13] John G Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (Chicago University Press 2004) 53.

[14] Samuel E Finer (ed), *Adversary Politics and Electoral Reform* (Anthony Wigram 1975) 18.

[15] Ian Buruma, 'The Referendum Charade' (*The Strategist*, 10 March 2016) <https://perma.cc/T7QZ-P599> accessed 6 April 2017. She was quoting Attlee, who observed that Hitler, Mussolini and Napoleon would use referendums to give legitimacy to decisions they had made: see Philip Goodhart, *Referendum*, (Tom Stacey Ltd 1971) on the use of referendums by governments to legitimize policies.

[16] House of Lords (n 10) 17.

representatives act in the best interests of all their electors, not just the majority, and if they perform inadequately, they can be duly replaced.

Despite the above, it is becoming clear that referendums are here to stay. Thus, the UK in practising both forms of democracy, direct and representative, is posing the inevitable question, 'if the people vote one way, their representatives another, who should prevail, who is sovereign?'[17]

The judiciary has had little trouble in providing the legal answer to this question, by reiterating the principle of parliamentary sovereignty[18]. It also seems that the legislature, through its backing of the Article 50 bill, has determined the political answer to be that there is a duty for representatives to vote according to the will of the people. However, despite the triggering of Article 50, we are a long way from seeing any clear picture of what the UK's exit from the EU will look like, and it has been determined that Parliament will vote again on the terms of the forthcoming Brexit 'deal'.[19] Thus, it remains to be seen whether the people's representatives will continue to act simply as conduits of their will and vote strictly per the referendum results [20] or whether they will rely on Burke's formulation of the inherent duty of a representative to exercise their judgement to best serve all the people, even if that requires them to vote for a Brexit deal that may not best reflect the result of the referendum. Of course, it must be noted that the width of the EU referendum issue, and the binary nature of the question it posed, means that any Parliamentary vote on a Brexit deal will face uncertainty as to the extent to which it is either confirming or betraying the 2016 vote.

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[17] ibid 20.

[18] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

[19] The Guardian, 'May to Put Brexit Deal to MPs before it goes to European Parliament' *The Guardian* (7 February 2017) <https://www.theguardian.com/politics/2017/feb/07/theresa-may-agrees-to-let-mps-vote-on-brexit-deal-head-off-tory-revolt > accessed 30 March 2017.

[20] Many argue that do anything other than vote according to the referendum results would be undemocratic, but see Anthony C Grayling, 'Referendums, Elections and Democracy' (*New College of the Humanities,* 8 July 2016) <https://www.nchlondon.ac.uk/2016/07/08/referendums-elections-democracy> accessed 4 November 2016. The author argues that to vote blindly in line with the referendum result would be profoundly undemocratic as it would be to betray the processes of the UK as a parliamentary democracy.

Considering all of the above, the only thing that seems clear is that these concerns could have been avoided if referendums were not a part of the UK's constitutional settlement. However, regardless of the merits of the arguments for and against the referendum as an institution, it seems undeniable that 'the people are no longer prepared to accept a democracy where they vote once every four or five years and then leave everything to their political leaders'.[21]

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[21] House of Lords (n 10) 11.