

The EU Referendum: Who were the British People?

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I. INTRODUCTION

In order to neutralise the threat posed by the United Kingdom Independence Party in the 2015 general election, David Cameron, then Prime Minister, promised an in-out referendum on UK Membership of the European Union. This promise was made at a time when opinion polling pointed to another coalition.¹ That made this an easy promise to make; if he was returned to Downing Street, it would be on the coat tails of his Liberal Democrat partners and the promised referendum would have been a red line in any coalition negotiations.

The 2015 election produced a surprisingly definitive result, and we now live in the Brexit age. The British people have spoken and we are to leave the European Union. But who are the British people? Or indeed, who were “the people” who spoke on the 23rd June 2016?

Defining the franchise for a constitutional referendum, defines the constitutional sovereign to be consulted on the question. That is significant, and worthy of consideration, particularly where it appears that the government made a series of choices *against* its own interests in defining that Sovereign, and where the definition was, in part at least, expressly upheld by the judicial branch.²

There are approximately 700,000 British expatriates living in the EU and 3.3 million EU citizens living in the UK all of whom were disenfranchised. The leave campaign ‘won’ the referendum by 1.3 million. It is impossible to say how each block would have voted. Some would not have cast their vote,³ and, of course, no group votes entirely homogeneously, but given their direct dependence on EU law for their residency rights, there is a high likelihood that those blocks may have supported continued membership, or at least including them in the franchise would have influenced the result.

This piece will examine the consequences that flow from defining the franchise in any given constitutional referendum, before considering the choices made in relation to the June 2016 Brexit poll. It will then examine the decisions of the Divisional Court and the Court of Appeal in upholding those choices. In doing so it will try to determine what if anything, these political and legal decisions can tell us about the political nature of the UKs constitutional order.⁴

II. REFERENDUMS, POLITICS, THE FRANCHISE AND SOVEREIGNTY

Referendums superficially invite the people themselves, unfiltered via their representative institutions, to make a direct choice on a given political question.⁵ In recent years, there has been an emergent trend in British politics to deploy them for questions of “constitutional significance.” For example, on devolution,⁶ on the introduction of a new voting system and on the coherency of the United Kingdom itself. However, it is also worth noting that hugely significant constitutional change has transpired over the same period without plebiscites. For example, the introduction of a basic

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¹ See *inter alia*, Nicolas Watt, “EU Referendum: In-Out choice by end of 2017, Cameron Promises” *The Guardian* (London, 23 January 2013).

² *Schindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, see further below at VI.

³ Philip Tether, “The Overseas Vote in British Politics 1982-1992.” (1994) 47(1) *Parliamentary Affairs* 73

⁴ Keith Ewing, “The Resilience of the Political Constitution” [2013] 14(12) *German Law Journal* 2135

⁵ See, *inter alia*, Stephen Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72(3) *MLR* 360, see also Rivka Weill, “We the British People” [2004] *Public Law* 380.

⁶ Colin Munro, “Power to the People” [1997] *Public Law* 579

catalogue of fundamental human rights,⁷ the creation of the Supreme Court⁸ and the fixing of Parliamentary terms.⁹ Immediately then, this hints at a lack of coherent constitutional logic underpinning the deployment of these tools. Both of the major governing parties have approached significant constitutional reform via directly democratic and Parliamentary routes, with no apparent pattern.

While referendums are appealing as constitutional mechanisms for involving the people directly in constitutional reform, there are serious questions over their capacity to confer genuine legitimacy to a decision.¹⁰ There are many aspects of the process that can be manipulated to suit the ends of the government of the day. Tierney identifies this as the problem of “elite control” over the democratic process.¹¹ This control allows the authorities to manipulate the referendum to suit their political agenda. In particular, Tierney highlights the problem which is caused when the executive Branch can effectively dominate this process with no meaningful interventions from the legislative.

Clearly Parliament is Sovereign in the UK, but equally clearly, the executive branch is dominant over proceedings there, and the government of the day is, subject to Parliamentary politics, able to impose its will. To illustrate that Tierney suggests that referendums in the UK tend to be deployed for party political, rather than grand constitutional reasons. He argues that the Labour lead referendum on membership of the EEC clearly was politically motivated in order to avoid a serious split in the Parliamentary party. Similarly, devolution referendums in the late 1970s and the AV referendum in 2011 were staged for political purposes.¹² Similar trends can be identified in Ireland, with a coalition government using the device of a constitutional convention and then referendums as a mechanism for effectively kicking politically difficult issues into touch.¹³ In this regard, the Brexit poll then becomes a part of this tradition which belies the campaign rhetoric of sovereignty and the British people “settling their own destiny”.¹⁴ It was a gamble taken by Mr Cameron to neutralise a political threat that ultimately backfired spectacularly.

There are often overblown claims that staging a referendum is an act of a Sovereign People making their own decisions; however, that is not guaranteed. The question of who “the people” entitled to choose are always remains open. Again, Parliament, in its role as the constitutional gatekeeper has control over this, bestowing referendums at times and on issues of its choosing, upon a “people” subject to its definition.¹⁵

Setting the franchise is therefore hugely significant. Choosing those entitled to vote determines the sovereign to be consulted. Sovereignty is therefore not an absolute. As with any other element of electoral democracy, political choices determine the so-called “sovereign”. As such, sovereignty is as politically malleable as any other part of the decision making process.

With this in mind, the cloak of democratic legitimacy in which a decision made by referendums is clothed could be quite threadbare. Take for example the last Northern Ireland border poll conducted

⁷ Human Rights Act 1998.

⁸ Constitutional Reform Act 2005.

⁹ Fixed Term Parliament Act 2011.

¹⁰ Bledwyn Davies, “Democracy and Constitutional Change” (2015) 36(3) *Liverpool Law Review* 277, Levy, R. ““Deliberative voting”: reforming constitutional referendum democracy”, [2013] *Public Law* 555

¹¹ Stephen Tierney, “Direct Democracy in the United Kingdom: reflections from the Scottish independence referendum” [2015] *Public Law* 633, 637.

¹² *ibid*, at 637-638.

¹³ Davies (n 10) 293

¹⁴ Christopher Hope, “Boris Johnson Hails Brexit Victory” *Daily Telegraph* (London, 24th June 2016).

¹⁵ Tierney (n 11) 637, see also Tierney (n 5).

by the UK Government in 1973. The result was apparently overwhelming. Remaining in the Union registered 98% support of a superficially adequate 59% turnout. *Prima facie* then an impressive endorsement of the place of Ulster in the Union; but this tells only part of the story. Although there was no institutional disenfranchisement, there was a mass boycott of the poll by the Catholic minority population; only 1% of that population are believed to have taken part.¹⁶ Whether this boycott was a political statement, or, as was claimed contemporaneously, aimed at avoiding violence is, to an extent, irrelevant. It significantly undermines the “legitimacy” of the referendum result, but a degree of psephological analysis is required to unpick that. On its face, the result remains clear, giving it a strong façade of legitimacy. Scratch the surface and the legitimacy conferred becomes much weaker.

This has knock on effects. A device designed to legitimize change can very quickly lead to deep divisions in the society which employed it. Referendums are, overwhelmingly binary. They ask effectively a “yes/no” question. Should Scotland become an independent country? Should the UK remain a member of the EU? There is very little room for interpretation, or for shades of grey. They are polarising political events and can have significant consequences. Not least of those consequences is to alienate a percentage of the population which can entrench political views and, where the decision is significant or irrevocable lead to a feeling of disenfranchisement amongst the “losers”.

This must necessarily be worse where an individual, or sector of the population whose rights are uniquely affected by the outcome of the referendum in question have been disenfranchised by a political choice made by the constitutional gatekeeper. In this and other ways, a device which is expressly designed to legitimise a political decision can lead to deep-seated division in a populace.¹⁷

Even where a referendum is explicitly advisory, as they usually are in the UK, they have significant political ramifications. A government, having called a referendum, risks getting a mandate from the people which runs contrary to its preferred outcome. That same government is then forced to implement a change which it neither desired, nor approved of. They are, as Mr Cameron has very recently discovered, an extraordinarily risky business.

III. THE EUROPEAN UNION REFERENDUM ACT 2015: DEFINING THE SOVEREIGN

Having established that the award of the franchise determines the sovereign to be consulted, and that the creation of that sovereign is a political choice, we must necessarily now investigate the way in which those choices were made in the “Brexit” referendum.

The European Union Referendum Act 2015, section 2 outlines those entitled to vote, and takes as its base point entitlement to vote in a UK Parliamentary Election.¹⁸ It then makes some specific extensions to that enfranchisement. In particular it extends it to Peers entitled to vote in local or European elections,¹⁹ to citizens of Gibraltar²⁰ and to Commonwealth and Irish Citizens resident in the UK.²¹

Using general elections as a starting point is worthy of note because of the effect of that decision. First, enfranchisement in a general election is defined by s.1 of the Representation of the People Act 1983 as being a registered voter, not otherwise barred from voting, who is a commonwealth or Irish

¹⁶ http://news.bbc.co.uk/onthisday/hi/dates/stories/march/9/newsid_2516000/2516477.stm all websites cited in this piece were last accessed 27/9/16

¹⁷ Tierney (n 5) 380.

¹⁸ Section 2(1)(a) EU Referendum Act 2015.

¹⁹ Ibid s.2(1)(b).

²⁰ Ibid s.2(1)(c).

²¹ Ibid s.2(2).

citizen of 18 years of age. S.1(3) of the Representation of the People Act 1985 further clarifies that in order to register as a voter in a UK Parliamentary Election a British Citizen must have been resident in the UK within the last 15 years- the so-called 15-year rule. Significantly, that limitation would therefore also apply to the Brexit referendum. This limitation clearly has an impact on UK citizens who are exercising their rights under EU Law to reside freely in the territory of other Member States.

Immediately, therefore, by cross-referring to that franchise, those under the age of 18 are excluded from the referendum. Clearly, this is a different view than that taken by the Scottish Government in the independence referendum staged in 2014. Section 3 of the Scottish Independence Referendum (Franchise) Act 2013 enfranchised anyone over 16 years of age registered as a local elector in Scotland.²² In a sense, the Westminster Government cannot be criticised for defining the sovereign in the EU referendum in the same way as the people who elect the sovereign Parliament. That said, this is a different process. The overwhelming majority of 16-18 year olds who miss the opportunity to vote in a given general election will have the opportunity to vote in the next election 5 years later. In a constitutional referendum which makes a potentially irrevocable decision, excluding them from the sovereign decision maker becomes a degree more difficult to justify. By any reckoning, as an age group, they will have to live the longest with the consequences of that decision. They are also the demographic most likely to take advantage of the opportunities provided by EU citizenship, in particular, free movement rights and the EU's ERASMUS programme.²³

It should be understood however, that Mr Salmond's 2013 decision to extend the franchise to the young was no more a constitutionally motivated choice than the decision to exclude them this time around. Post referendum polling supports a belief that young voters were more likely to support independence, although perhaps not by the margins some had imagined.²⁴ The decision by the Westminster government to exclude this age group from the Brexit poll is particularly strange, given that the government's official preference was a remain vote and that this demographic was widely expected to vote remain. Again, this appears to have been a political calculation, not directly related to the outcome of the referendum, but to the control of the right wing of the Conservative Party and to avoid the appearance of attempting to skew the referendum result to the government's advantage.²⁵

The Parliamentary franchise being the starting point has another important consequence. Article 20 of the Treaty of the Functioning of the European Union (TFEU) grants the status of Citizen of the European Union to anyone who holds the nationality of a Member State of the EU. Article 22(1) TFEU then confers on all Citizens of the Union resident in a host State the right to vote in domestic municipal elections. They are not entitled under the terms of the Treaty to vote in national elections. Using Parliamentary voting entitlement as the starting point for the EU referendum therefor excluded European Citizens resident in the UK, whose rights would be most affected by the referendum, from voting in it. Again, this might be a defensible political choice, but the Scottish Government chose differently in 2014; EU citizens resident in Scotland were included in the franchise to determine the

²² Or on a young voter register established for the purpose by s.4 of that act. See also, Stephen Tierney, "Legal Issues surrounding the referendum on independence for Scotland" (2013) *European Constitutional Law Review* 359 at 363, Heather Green, "First Steps to devolving the franchise: voting age and fast-tracked powers" (2015) 19(2) *Edinburgh Law Review* 239.

²³ Tom Helm, "EU Referendum: Poll Shows Young Voters Could Hold Key in June Vote" *The Guardian*, (London, 2nd April 2016).

²⁴ Ashcroft Polling, Post-Referendum Scotland Poll, available at <http://lordashcroftpolls.com/wp-content/uploads/2014/09/Lord-Ashcroft-Polls-Referendum-day-poll-summary-1409191.pdf>.

²⁵ Oliver Wright, "EU Referendum: David Cameron to Deny EU Migrants and Under 18s the Chance to Vote" *The Independent* (London, 24th May 2015).

constitutional future of Scotland. Paradoxically this means that they would be enfranchised for the purposes of determining the independence of a Sovereign Nation of which they were not nationals, while disenfranchised in a process for determining whether their country of residence could be in a position to unilaterally withdraw from the organisation on which their rights of residence depend. It is of course possible to argue that it was constitutionally inappropriate to extend this particular franchise to non-Britons, but that argument holds less credence when measured against the Scottish decision. This becomes even less credible when one considers the ability of Commonwealth citizens to vote in this plebiscite, but not EU ones.²⁶

There can be no constitutional rationale for this change. There can be no argument that it is inherently more appropriate for EU citizens to be considered a part of the Sovereign for the purposes of determining the independence of one of the constituent nationals of the United Kingdom than for them to be consulted on ongoing membership of the EU. This simply must be a political calculation, and again, it is not a control imposed by the elite to skew the referendum in their favour, it was a political calculation which hindered their capacity to achieve their desired result at the cost of ameliorating their political flanks. That the Treaty does not require the UK to extend the franchise in any nationwide election does not prevent them from doing so. It remains a political choice. So we still have evidence of Tierney's elite control but here that control is being exercised in an interesting way. Rather than skewing the referendum in the elites' favour, the Government had to balance two competing political considerations; on the one hand, securing its political base, against on the other, winning a referendum.

IV. LAW AND HIGH POLITICS: *SCHINDLER V CHANCELLOR OF THE DUCHY OF LANCASTER*

One of the above disenfranchisements was challenged before the UK Courts. A group of British expatriates sought to challenge the application of the 15-year rule to this referendum on the grounds that it infringed their free movement rights in EU Law

A. The Divisional Court

The first instance claim was heard in *Schindler v Chancellor of the Duchy of Lancaster*.²⁷ The Court considered two key issues. First, did this disenfranchisement engage EU law? Secondly, if it does, is it a restriction on EU free movement rights.²⁸

On the first issue, the Court conducted a thorough assessment of whether or not such a national measure which disenfranchised a free moving citizen in a national referendum engaged EU law at all. They first followed the Court of Appeal ruling in *Preston*²⁹ and held that it was not enough to simply reject the claim, as the defendants tried to do in *Schindler* solely on the basis that the award for the franchise was exclusively within the competence of the Member State.³⁰

The Government advanced a somewhat novel argument; that *Preston* could be distinguished from *Schindler* on the grounds that the referendum effectively amounted to asking the British people whether to engage Article 50 TEU. Article 50, so the argument went, allowed Member States to leave

²⁶ S.2(2)(a) European Union Referendum Act 2015.

²⁷ *Schindler and MacLennan v Chancellor of the Duchy of Lancaster and the Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin).

²⁸ *Ibid* [17].

²⁹ *R (Preston) v Wandsworth London Borough Council* [2013] QB 687.

³⁰ *Schindler* (n 27) [19].

the EU “in accordance with their own constitutional requirements” which allowed the UK full discretion to establish and enforce those requirements.³¹

Again, the Court dismissed that argument. It found, it is submitted correctly, that the existence of exclusive national competence to act does not preclude the possibility that the manner in which that competence is exercised could infringe EU rights.³² It noted that the ECJ has found this to be the case even in fields which would be regarded as core elements of national sovereignty, including, for example, the grant or withdrawal of nationality.³³

Having established in principle then that EU Law could be engaged by the EU Referendum Act 2015, the court then went on to determine whether, having engaged EU law, section 2 did in fact constitute a restriction on those rights. The court was not persuaded that it did. The Claimants had argued that the 15 year rule could be seen as “a penalty against citizens of the UK who have exercised their rights of free movement in EU law and, as such, violates their rights as EU citizens.”³⁴ In dismissing this argument the court considered a number of key authorities both from EU and domestic law. It started with the CJEU decision in *Tas-Hagen*³⁵ which establishes that in order to demonstrate that a given measure constitutes a restrictive penalty, it must be possible to illustrate that the measure “is liable to dissuade...[EU citizens]...from exercising their freedom to move”³⁶. In deciding whether s.2 of the 2015 Act constituted such a restriction, the court considered itself bound by the decision of the Court of Appeal in *Preston*:

“In practice the claimant's assertion about the potential effect of the 15 year rule on free movement is very difficult to demonstrate by any means, because it does not square with ordinary human experience. In the course of crowded human lives over a period of 15 years inevitable uncertainties, unknowns and contingencies make it impossible to arrive at a reliable or credible conclusion that the rule could deter free movement. No legal test, whether formulated in terms of “probability”, or “likelihood”, or “capability”, or “liability”, or “real possibility”, addresses the basic difficulty that what is asserted in the claimant's case is too speculative, remote and indefinite to establish a case.”³⁷

The claimants in *Schindler* attempted to distinguish *Preston* on the ground that a referendum and a general election were significantly different, but the Court was not persuaded. In fact, it felt that the possibility that one day there might be a referendum on EU Membership was even more remote and thus even less likely to play on the mind of a free moving citizen. Considered in that light the divisional court makes a persuasive case, but it could also be argued that a referendum on this issue is much more likely to play on the mind of a free moving citizen. A UK national will exercise their directly effective free movement rights in the full expectation that they will continue to apply to them. If the UK ceases to be a Member State of the EU, then Article 18 TFEU will cease to apply to UK citizens and thus they will lose their EU citizenship. It is intimately connected to their current status. In any event on that basis the Court refused the claimants application for judicial review.

³¹ *Ibid* [23].

³² *Schindler* (n 27) [24]. The Court was able to cite a significant line of authority from EU law to support that finding including (Case C-192/05) *Tas-Hagen* [2006] ECR I-10451 and (Case C-135/08) *Rottmann* [2010] ECR I-1449 among others.

³³ *Rottmann, ibid.*

³⁴ *Schindler* (n 27) [27]

³⁵ *Tas-Hagen* (n 32)

³⁶ *Ibid*, [30] and [32]

³⁷ *Preston* (n 29) [80], per Mummery LJ.

B. The Court of Appeal

Undaunted, the claimants appealed that decision.³⁸ The Master of the Rolls and Elias LJ³⁹ dismissed the appeal but in doing so went further than the Divisional Court had gone, dismissing the assertion that Section 2 of the 2015 Act fell within the scope of EU law in the first place.

The Master of the Rolls argued that in allowing Member States to withdraw from the Union in accordance with their own constitutional requirements, Article 50 TEU was not intended to be read subject to fundamental principles of EU law. He argued in particular that

“It is one thing for Member States to agree that, while they are members of the EU, they will not infringe EU law and to that extent will accept what might be described as a loss of sovereignty. It is quite a different matter for them to agree that they may only decide to withdraw from the EU if they can do so without infringing EU law.”⁴⁰

Elias LJ takes a similar but different position based on an interpretation the European Communities Act and the ruling of the House of Lords in *Factortame*;⁴¹

“I doubt whether, purely as a matter of domestic law, Parliament would have intended section 2(1) to apply so as to give primacy to EU law where the very question in issue is whether the UK should remain bound by EU law. The effect of section 2(1) is to bind the UK to the rules of the club whilst it remains a member; but I do not think it can have been intended to bind the UK to those rules when the very question is whether it should be bound by those rules.”⁴²

It is, again, possible to present a contrary position. Article 50 of the TEU is European Union Law. As an Article of the Treaty, its application and interpretation must necessarily be an issue of European Law, subject to the application of its general principles and the inherent limitations imposed by its other core requirements.⁴³ Moreover, it is worth noting that an advisory referendum on leaving the EU is quite distinct, both politically and legally from deciding to engage Article 50. Current indications are the Article 50 will not be triggered until some 9 months after the Brexit vote.⁴⁴

The Supreme Court agreed with the conclusions of the Court of Appeal to the extent that it refused leave to appeal further. Although in refusing leave they assumed that the 2015 Act did engage EU law, they were nonetheless satisfied that there was no possibility of establishing any infringement of EU movement rights.⁴⁵

It is interesting that neither the Divisional Court, nor the Court of Appeal felt it was necessary to seek clarification on this matter from the CJEU, particularly given that there was disagreement between the two Courts. One can only assume it is because they agreed on their finding that even if section 2 of the 2015 Act were within the scope of EU law, it did not constitute a restriction. That may be true,

³⁸ *Schindler* (n 2)

³⁹ With the agreement of King LJ.

⁴⁰ *Schindler* (n 2) [16].

⁴¹ *R v Secretary of State for Transport (ex parte Factortame)* (no.2) [1991] 1 AC 603.

⁴² *Schindler* (n 2) [58].

⁴³ See *inter alia* (Case C-438/05) *International Transport Workers Federation v Viking Line* [2007] ECR I-10779, (Case C-341/05) *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

⁴⁴ Jessica Elgot “Theresa May to Trigger Article 50 by end of March 2015” *The Guardian*, (London, 2nd October 2016).

⁴⁵ Lady Hale, <https://www.supremecourt.uk/news/permission-to-appeal-decision-24-may-2016.html>.

but it is submitted that the decision to leave the EU is of such constitutional importance to both the UK and to the EU itself, that a reference to the CJEU on the issue may have been appropriate.

Clearly, the decision of the judiciary may have had an impact on the referendum, although it is worth noting that historically the number of registered overseas voters for Parliamentary elections tends to be relatively low, that may not have been the case for a referendum on an issue which so directly affected those citizens' rights.

It is also submitted that it would be quite wrong to think that any alternative outcome would have amounted to judicial interference in the democratic process. It is the appropriate role of the judicial branch to ensure the other branches of government act within their respective constitutional remit. Defining the franchise is a legal as well as political choice, and the judicial branch could have legitimately questioned it. Choosing to not to do so is still a choice.

In this regard, the final paragraph of Elias LJ's there is perhaps a hint at the real reasoning at play:

"In my judgment, the construction of Article 50 adopted by the Master of the Rolls, with which I entirely agree, simply recognises the political reality that EU law can have no part to play in the decision whether a state chooses to remain in the EU."

Whatever the legal positions the root of the issue is political. As Elias LJ reminds us, there are very significant political realities at play here. While the defining of the Sovereign is a legal, as well as political issue, the judicial branch have clearly decided that the political considerations outweigh the legal.

V. CONCLUSIONS

For political gain, Cameron not only conceded the referendum, but also significantly hampered his ability to win it by defining the sovereign decision maker so narrowly, and excluding a number of groups who have a clear interest in voting to remain.

In many ways, the EU referendum is an archetypal example of elite control; even if that control was exercised to the elites' detriment in the campaign itself. Referendums are frequently used to defer politically difficult choices. This one mostly succeeded in taking the issue out of the 2015 general election, but the choices made meant that the Government found the referendum significantly more difficult to win. The politics of this decision are significant, and they will have seismic and lasting effects on the constitution. Even the intervention of the judicial branch, arguably the least political of the three branches of government, was conscious of the politics at play. Leaving the EU changes the shape of UK Constitutional law, and indeed virtually every other field of UK law. Government will be working almost exclusively on Brexit for many years to come. In terms of raw politics, it is difficult to remember the country this polarised.

In the end though, it appears that referendums, and this referendum in particular, could be seen as the ultimate manifestation of the political constitution. There is clearly no inherent constitutional or legal logic underpinning which constitutional questions are put to a plebiscite. AV and EU Membership were, boundary reform will almost certainly not be, although the ramifications for the domestic political system may be almost as severe. Instead, they are used for purely political purposes; to cement coalition agreements, or to neutralise politically difficult discussions, usually within or on the fringes of parties of government. The political constitution allows the constitutional sovereign to be politically defined, for good or ill.