

Brexit and the Courts: The Uncertain Fate of Constitutional Referendums in the UK

The shock experienced at the Brexit vote result on 24 June 2016 was soon followed by the anxiety of uncertainty. Implementing the vote would reveal itself to be a far more complicated, and contested, affair than its promoters had anticipated. It would take a months-long legal battle to settle the question of whether the UK Government could invoke Article 50 of the Treaty of the European Union without parliamentary approval. It would take even longer, and be even more painful, for the negotiations around exit and the future relationship of the UK with the European Union (EU) to advance.

This article seeks to tell the story of the Brexit referendum and the constitutional litigation that followed it. It will do so drawing on comparative material regarding the regulation of constitutional referendums as well as their implementation and litigation around contested votes elsewhere. In so doing, my hope is that the story will appeal to an international audience in general, and to an Italian one in particular. Given Italy's own vast experience with constitutional referendums, including some on deeply contested questions, looking at the UK experience will hopefully prove enriching (Barbera and Morrone 2003). I also hope this approach will manage to transcend the specificities of the British context and bring into relief the unavoidable uncertainties and tensions inherent in any such binary choice. Whether it be questions of secession, constitutional reform or ceding sovereignty to supranational institutions, constitutional referendums have both promoters and detractors and continue to animate scholarship on whether and how they can be used to settle constitutional questions (Tierney 2012).

Ultimately, my argument in this chapter will be that the EU referendum in the UK, and the Brexit process more generally, have revealed the many uncertainties underpinning the UK constitution accumulated over recent decades. These unsettled norms go to the core of the legal system and regard: the status of EU law under UK law; the scope and limits of judicial power; the place of referendums, and popular sovereignty as their foundation, within the constitution; and the weaknesses inherent in the latter's lack of codification. I will also show, however, that these types of problems are not confined to the idiosyncratic British context. They emerge wherever the voice of the people is sought to be approximated by way of referendums, and acted upon in order to bring about constitutional upheaval.

The article proceeds as follows: Part 1 discusses the legislative context in which referendums have taken place in the UK, revealing the ambiguous place they have held in the constitutional landscape. Part 2 maps out the Brexit referendum process: the legislation preceding the vote, the franchise and campaign rules, and the results themselves. Part 3 discusses the constitutional litigation that followed the referendum. It will primarily focus on the *Miller* judgment of the Supreme Court¹. Finally, the article concludes that a great deal of uncertainty remains in the aftermath of the referendum, partly due to the specific manner in

¹ R (*Miller*) v Secretary of State for Exiting the European Union [2017] UKSC 5.

which it was regulated but also due to the uncertain place of popular sovereignty in the UK constitution.

1. THE REGULATION OF REFERENDUMS UNDER UK LAW

The UK is a representative democracy, in which the use of referendums has been sparse throughout the years. It has only been recently that we have seen a rise in the recourse to the people, at both the regional and national level. Prior to the EU membership referendum in 2016, only two national referendums had been held in the UK: one on continuing membership in the European Community in 1975 and one on changing the electoral system in 2011 (the so-called «AV referendum» after the alternative voting system the electorate was called to vote on). At the regional level, there has been more experience with referendums, although these have revolved around issues of devolution, support for a peace treaty and independence². By far the most extensive use of referendums has been at the local level, on issues to do with local council arrangements and the introduction/retention of mayors³. A recent study counted 61 such local referendums held between 2001 and 2016 (Owen 2016). While their ability to «increase[e] citizen engagement with the local democratic process» has been challenged (House of Lords Select Committee on the Constitution 2010: §140), there is no denying that local referendums have been a far more familiar occurrence in the UK than national or even regional ones.

In terms of the legislation governing the conduct of referendums, and indicating the status of their results, the UK offers a mixed picture. The overarching statute governing their use at the national level is the Political Parties, Elections and Referendums Act (PPERA) 2010. PERA lays out rules for setting the referendum question, registering official referendum campaigns, permitted participants, donations and campaign funding. It established the Electoral Commission as an independent regulatory body tasked with overseeing the conduct of referendums and auditing campaign spending. PERA also establishes a Chief-Counting Officer with overall responsibilities for running referendums and Counting Officers to administer them locally. What PERA does not do, however, is set out the detailed rules necessary for the conduct of individual referendums, notably their date, the franchise to be used or whether the result is to be binding or consultative only.

The latter are issues dealt with via statutes passed in preparation for holding a given referendum. Thus, in the case of the AV referendum held in 2011, the UK Parliament passed the Parliamentary Voting System and Constituencies Act 2011. The Act gained Royal Assent in February 2011, less than three months before the referendum was to be held, a fact conducive to uncertainty according to both the Venice Commission's Guidelines on Referendum and the Electoral Commission itself⁴. The Act set out the referendum question

² The full list of regional referendums includes: a 1973 referendum on Northern Ireland sovereignty; a 1975 referendum on Scottish devolution; a 1979 referendum on Welsh devolution; a 1997 referendum on Scottish devolution; a 1997 referendum on Welsh devolution; a 1998 referendum on the Greater London Authority; a 1998 referendum on support for the Northern Ireland Belfast Agreement; a 2011 referendum on Welsh devolution; and the 2014 Scottish independence referendum.

³ These referendums are held on the basis of two statutes: the Local Government Act 2000 and the Localism Act 2011.

⁴ The Venice Commission recommends that amendments to fundamental aspects of referendum law not be made during the year prior to the vote. See European Commission for Democracy Through Law (Venice Commission (2007): §20. See also Electoral Commission (2011): 2.21-2.27.

and indicated the binding nature of the result. It established the process to be followed, including setting the referendum date (5 May 2011) and the franchise⁵. The latter was to be the same franchise as that used for parliamentary elections in accordance with the Representation of the People Act 1983 and the Representation of the People Act 2000. Thus, the minimum voting age was set at 18; citizens of Commonwealth nations resident in the UK could vote but not those of non-Commonwealth European Union Member States; British citizens having lived abroad for longer than 15 years were also ineligible to vote. Ultimately, the turnout for the referendum was a little over 42%, 68% of whom voted against the change of electoral system.

In the case of the Scottish independence referendum of 2014, the process was put in motion by a political agreement between the Government in London and the Scottish Government – the so-called «Edinburgh Agreement», signed on 15 October 2012. An Order was later passed by both the Westminster and the Scottish Parliaments, enabling the latter to legislate regarding the conduct of the referendum. The Scottish Independence (Franchise) Act became law in August 2013 and the Scottish Independence Referendum Act in December 2013. The former for the first time extended the franchise to 16 and 17 year olds. It also tied eligibility to vote in the referendum to that used for Scottish Parliament and local government elections – thus, unlike in the AV referendum, EU nationals resident in Scotland were also eligible to vote. Conversely, Scots living outside Scotland were not. The relevant legislation was also passed earlier than that regulating the AV referendum had been, in a move later praised by the Electoral Commission for providing greater certainty in the run-up to the vote (Electoral Commission 2014: 2.46). The outcome of the referendum vote was closer than many had anticipated but ultimately rejecting independence, with 55% voting No. The conduct of the referendum, however, as well as the 84.6% turnout – the highest ever for an election or referendum in the UK – have made it into a model of referendum good practice both nationally and abroad (Tierney 2017; see generally McHarg *et al.* 2016).

These two precedents to the Brexit vote – the AV referendum the closest prior national referendum, and the Scottish independence vote the immediate predecessor – yielded numerous lessons on how to ensure the referendum process and its outcome would be, and would be perceived to be, as democratic as possible. Among these lessons were: the need to legislate well in advance of the vote, to give time to the relevant authorities to prepare as well as to provide certainty as to the overall process; the need for a clear referendum question that voters would understand; the need for a clear and robust role for the Electoral Commission as an impartial overseer of the process; and the need for a clarity of the post-referendum process, setting out unambiguously what status the vote would have. As will be seen, not all of these lessons were reflected in preparations for the June 2016 vote.

2. THE BREXIT REFERENDUM PROCESS AND ITS IMMEDIATE AFTERMATH

The 2016 referendum was preceded by an increasingly polarised debate on the country's membership in the EU. It was not only years of the European Union being demonised in certain parts of the UK media, but also political discourse that blamed it for any number of

⁵ The referendum was held on the same date as election to the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly, and to local government in parts of England and across Northern Ireland.

real or imagined failures⁶. On the political front, an early warning sign was a motion debated in the House of Commons on 24 October 2011 on holding a referendum on continued membership⁷. The vote saw the biggest post-war rebellion at the time, with 81 Tory MPs voting in favour of holding such a referendum. This revealed the growing Euroscepticism within the Conservative Party and foretold of the British Prime Minister's increasingly smaller manoeuvring space on Europe. Thus, when in January 2013 David Cameron made a speech confirming Government plans to hold an in-out EU referendum following the next general election, it could not have come as a complete surprise (BBC News 2013). The Conservative win at the May 2015 general elections set the wheels in motion both to renegotiate the country's relationship to the EU and to hold the referendum. The former culminated with a renegotiation package agreed on in February 2016 (BBC News 2016b). The latter would end up being held on 23 June 2016.

In the run-up to the Brexit vote, Parliament passed the European Union Referendum Act 2015. The Act provided some answers, such as what question would be posed to the public⁸, the referendum period⁹, permitted participants and permitted expenses and donations. The Act also clarified what franchise was going to be used. It would include: UK and Gibraltar residents who were British, Irish and Commonwealth citizens, in accordance with the provisions of the Representation of the People Act 1983 and the Representation of the People Act 2000. The franchise was thus going to be the same as for parliamentary elections and was less inclusive than many had hoped. On the one hand, and following the positive experience in Scotland, there had been a push, including in the form of an amendment by the Lords, to expand the franchise to 16 and 17 year olds – a move that would have ultimately included an additional estimated 1.6 million voters¹⁰. On the other hand, the Act excluded both EU citizens residing in the UK (a group who, again, had had the right to vote in the Scottish referendum) as well as UK citizens having resided outside the UK for longer than 15 years. The former are estimated to around 3 million people, while the latter number around 1.2 million (BBC News 2016a). The latter also mounted a legal challenge of their exclusion from the referendum franchise, claiming that rather than being expats, they were simply British citizens exercising their EU and UK citizenship rights (Croft 2016)¹¹. Their claim was unsuccessful.

The 2015 EU Referendum Act was also notable for what it did not cover. First, and despite amendments to the contrary tabled during the Bill's passage through Parliament, the Act did not include any requirement for a qualified majority or regional threshold¹². This would be

⁶ On the collapse of media support for the EU project in the UK, see Startin (2015) and Daddow (2012).

⁷ House of Commons Debates 24 October 2011, Column 46.

⁸ The Referendum question was: «Should the United Kingdom remain a member of the European Union or leave the European Union?» and the available answers were: «Remain a member of the European Union» and «Leave the European Union».

⁹ This would ultimately be 15 April–23 June 2016.

¹⁰ The Government blocked this move claiming it would raise the costs of holding the referendum by an estimated £6 million. See BBC News (2015). On the estimated impact of the non-inclusion of 16 and 17 year olds, see Helm (2016).

¹¹ See the full decision here: *Shindler and MacLennan v Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin) (later upheld by the UK Supreme Court in May 2016).

¹² See House of Commons, Notices of Amendments given up to and including Thursday 16 July 2015, European Union Referendum Bill, amendment NC3, which would have required a double-majority for the referendum

politically problematic once the map of the vote was clear: despite 51.9% of the overall voters opting to Leave the EU, Scotland and Northern Ireland returned majorities in favour of Remain (a 62% majority in Scotland and a narrower but still significant 55.8% one in Northern Ireland). These divisions fuelled talk of another independence referendum in Scotland which, while shelved by First Minister Nicola Sturgeon after the early general election in 2017 in favour of focusing on Brexit negotiations, has not definitively been taken off the table (Bews 2017).

Second, the 2015 Act did not give any indication of the nature of the referendum result – whether it was going to be considered consultative (advisory) or binding – nor of the precise steps to be taken following the vote. As we have seen above in the case of the AV referendum, Parliament was free to bind itself to the referendum result and it would certainly have improved legal certainty to clearly state, ahead of the vote, what its significance would be in law. The 2011 referendum Act had stipulated not only the procedure to be followed in the event of a Yes vote, but also the exact amendments to be made to the relevant legislation. Not doing so in the 2015 Act left the door open to contestation, with some seeing in the advisory nature of the referendum – confirmed by the Divisional Court in its *Miller* judgment and also included in a parliamentary briefing paper to MPs before the vote – a way out of giving effect to the vote¹³. In the end, the Supreme Court stated that, whereas political statements regarding the nature of the referendum result were not law and while it could not by itself change the law, this did not make it «devoid of effect»: «It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance»¹⁴.

The vote's «great political significance» indeed placed Members of Parliament, a majority of whom had opposed Brexit, in a difficult position. An important proportion found themselves representing constituencies that had voted Leave and were thus torn between their duty to represent their electorate and their conscience. A starker illustration of the tension that sometimes exists between the trustee and the delegate model of representation could hardly be imagined¹⁵.

Furthermore, the ambiguities inherent in the referendum question meant that, following the vote, the political terrain could be seized by so-called ‘Hard Brexiteers’: those wishing not only for the UK to leave the EU, but also for it to leave the single market and customs union. They interpreted a Yes/No choice on membership as meaning cutting ties with the EU more extensively than voters had perhaps envisioned¹⁶. Thus, while many quickly adopted the mantra that «the people have spoken» and Brexit needed to happen, few in the political realm

vote to be validated: an overall majority of votes together with a majority in each of the four constituent nations of the UK.

¹³ The Divisional Court drew «the conclusion that a referendum on any topic can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation in question» and found that the 2015 Act had contained no such language but was, moreover, «passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only.» *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), §106-107. The briefing paper in question is: House of Commons Library (2016).

¹⁴ *Miller* supra 1, §124.

¹⁵ On these diverging models of representation, see Pitkin (1967).

¹⁶ Evidence does suggest that the main driving concerns of voters were identity-related, tied to immigration, and economic, tied to the financial crisis and perceptions of instability within the EU. See Curtice (2017).

were willing to state openly that the vote had actually not been one on the terms of leaving¹⁷. The debate on what shape the UK's relationship to the EU should take following Brexit would crystallise in 2017, especially during battles around the terms of the European Union (Withdrawal) Bill. In this way, post-referendum developments, crippled by a government in disarray and marred by the ambiguity of the question itself, highlight how ill-suited the referendum mechanism can be in laying an issue to rest. Instead of providing a definite and clear answer regarding the UK's relationship to the EU, the referendum set in motion a process that only further divided British society.

Finally, the Brexit vote was held on the basis of legislation that had been criticised, and continues to be criticised to this day, as effectively disenfranchising a significant portion of the country's residents and citizens. The difference with the Scottish independence referendum franchise was not simply one of size but of the nature of the political community deemed worthy of representation in the vote. In constitutional theoretical terms, the basis for representation was not the directly affected principle – one that would have recognised the interests of EU citizens resident in the UK and of UK ones resident in EU countries were directly at stake and entitled them to a vote – but a more formal and restrictive one¹⁸. This move renders the question of the franchise open to perceptions of government manipulation and prevented the emergence, after the vote, of so-called «losers' consent» – the willingness of the losing side to accept the result on the basis of perceptions of fair rules of the game¹⁹. It has been argued that this is precisely what happened after the vote, with a percentage of the population feeling alienated and disenfranchised (not least due to the irrevocable nature of the decision) (Davies 2016: p. 326).

3. BREXIT AND CONSTITUTIONAL LITIGATION

One of the most remarkable post-referendum developments, from a constitutional point of view, was the *Miller* case. A full account of the run-up to the litigation and the detailed arguments goes beyond the scope of this article²⁰. In what follows, I highlight key aspects, of both the case and the context in which it was decided, that I hope will illuminate its significance in UK constitutional law.

At the heart of the case was the question of who had the authority to invoke Article 50 of the Treaty on the European Union, whereby the UK would formally notify the EU of its intention to leave. In UK constitutional terms, the question was whether this was something the Government could do, on the basis of its long-established prerogative power in the area of the conduct of foreign affairs, or conversely, whether Parliament needed to have the final say. The latter position was defended by those who believed Brexit would involve legislative change, including a loss of citizens' rights, which could not (and should not) be effected by executive prerogative²¹. This argument was rooted both in the terms of the European Communities Act 1972, the statute giving effect to EU law in the UK, and in the broader

¹⁷ Even fewer were those willing to continue to oppose Brexit even while accepting that the referendum result had been clear. See Weale (2017).

¹⁸ For an exploration of the incongruities and uncertainties deriving from the EU referendum's franchise, see Shaw (2017).

¹⁹ On perceptions of government manipulation through the franchise rules, see Tatham (2016). On losers' consent, see Tierney (2017), pp. 54 and 207.

²⁰ A comprehensive such account may be found in Barber *et al.* (2017).

²¹ For the blog post first laying out these arguments, see Barber *et al.* (2016).

observation that, in a parliamentary democracy, it is the legislature that should decide how to interpret and implement the referendum vote, not the Government. Opponents of this view, however, argued that the sole aim of the 1972 Act had been to give effect to the UK's obligations under EU law as they from time to time arose and that invoking Article 50 would in no way mean Parliament's will would be frustrated²².

The case made its way, first, to the Divisional Court, which on 3 November 2016 issued its judgment²³. The Court unanimously found in favour of the claimants. It held that the 1972 Act was a constitutional statute immune from implied repeal and that the Government did not have the power to remove the series of rights that would be lost upon exiting the EU: «unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers»²⁴. While rigorously rooting its decision in constitutional principle, the Court was also careful to clarify that it was solely concerned with answering a pure question of law; it was not taking a position vis-à-vis the merits of leaving the European Union, which was a political question.

These stipulations did nothing to prevent the backlash against the judgment. The right-wing press denounced the Divisional Court justices as «enemies of the people» and a number of key Brexiteers openly declared their fear that the referendum result was in danger of being overturned (Boffey (2016)). The same press would also launch personal attacks against individual Supreme Court justices, who were to hear the appeal in the *Miller* case in December 2016. The final judgment, rendered on 24 January 2017, explained in even stronger terms that the Court was solely concerned with the legal issues raised in the case, and not with any political questions regarding the wisdom and terms of withdrawal²⁵. Again, the justices clarified, they were not looking to question in any way the referendum result or its implementation, but merely to determine the extent of the Government's and Parliament's respective powers.

In a 8-3 decision, a majority of justices again found in favour of the claimants. While upholding the Divisional Court judgment, however, the Supreme Court's central point was novel: it involved recognising EU law as a separate source of law in the UK, one which the executive could not remove by prerogative power²⁶. In other words, the 1972 Act had established a new legislative route in the UK legal system and as such, repealing or removing the object of that statute – a fundamental legal change – could only be done by Parliament²⁷. This line of argumentation appeared as uncontroversial to those who had argued that legislative involvement was required before pulling the Article 50 trigger²⁸. Sceptics, however, including Lord Reed, author of the lengthiest dissent in the case, were not convinced. To him, EU law was «not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law but depends on the ultimate rule of recognition»²⁹. This combined with other arguments³⁰

²² For an outline of this position, see Elliott (2016).

²³ *Miller* supra 1.

²⁴ *Ibid.*, §84.

²⁵ *Miller* supra 3, §3.

²⁶ *Ibid.*, §80. For an overview of the other arguments put forward by the Supreme Court, see Barber *et al.* supra 20, pp. 14-25.

²⁷ *Ibid.*, §§82-83.

²⁸ Barber *et al.* supra 20, p. 16.

²⁹ *Miller* supra 1, §224.

led some commentators to note that Lord Reed's dissent could have been written long ago, as it took no account of the supremacy and other unique features of EU law, features which UK courts had themselves recognised (O'Brien 2017).

One argument put forward by the majority judgment in *Miller* that surprised commentators invoked the constitutional magnitude of the changes that were to be brought about by invoking Article 50. It would be bad precedent, the judges opined, for such a monumental impact to be brought about purely by executive decision-making:

It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone³¹.

While this may seem a reasonable position, and one that more squarely addresses the bigger picture that was at stake in the case, it was also one that was rooted on dubious ground. Barber *et al.* have referred to this argument as «perhaps...unnecessary distraction» which, while adding interest and importance to the judgment, was not needed given the soundness of the other arguments in favour of the majority's view³². In other words, however appealing, there appears to have been little grounding for the majority's position. What is equally true, however, is that any future constitutional litigation that brings a similar argument now has the *Miller* judgment in its corner as precedent. Furthermore, the majority's explicit invocation of this argument was likely also done in recognition of the sheer impact that Brexit would have on the constitutional landscape of the UK, one that they hoped would not get lost in the minutiae of constitutional litigation.

On one aspect the justices were in agreement, however: the interpretation of the Sewel convention, the political rule requiring the Westminster Parliament not to normally legislate on devolved matters without the devolved units' consent. The Governments of Northern Ireland, Scotland and Wales intervening in the case had not argued for an outright veto, but did claim the convention meant they would have to be consulted during the process of giving effect to Brexit³³. The Supreme Court, however, did not find these arguments compelling. It ruled that the convention remained a political rule despite having been put on statutory footing in the Scotland Act 2016 (section 2) and that it was not for the Court to police the boundaries of the convention³⁴. The Court did this despite the fact that the devolved governments had asked it to find that the convention was engaged, not that it had been breached, as a way to recognise the serious implications Brexit would also have on devolved matters. As such, the judgment in *Miller* rather quickly dispensed with the devolution aspects

³⁰ Other important arguments put forth by Lord Reed in his dissent were that the 1972 Act had not removed the executive's prerogative in the area of treaty-making, including leaving the EU ones, and that the Act merely created a conduit through which rights could flow into UK law, but did not create them itself.

³¹ *Miller* supra 1, §81.

³² Barber *et al.* supra 20, p. 19.

³³ The Northern Irish case had been complicated by the addition of references in two cases to the proceedings, *McCord* and *Agnew*. At stake in these was interpreting the requirement in Article 1 of the Northern Ireland Act 1998, that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people of Northern Ireland. See Reference by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review, UKSC 2016/0201 and Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review, UKSC 2016/0205.

³⁴ *Miller* supra 1, 136-151, 177-178, 242, 243, 282.

raised without recognising the impact on devolved competences and rights that leaving the EU would have.

To many observers, the *Miller* litigation was of the highest constitutional significance: it touched on key principles of the British constitution, clarified the nature of and relationship between different sources of law, and re-established the equilibrium between key institutions. However, its immediate impact appears lesser, given the speedy adoption of the EU (Notification of Withdrawal) Act 2017 and the unimpeded progression of the Government's Brexit timetable. The case's importance may nevertheless revolve around the judgment's clarification of longstanding constitutional principles; it may also be one that further nudges UK courts towards playing a more central role in the development of constitutional law (Young 2017: p. 295).

4. CONCLUSION

Long before the Brexit referendum, commentators had observed that the mechanisms for constitutional change under the UK constitution would become more constrained, not only by Parliament and the courts, but also by the people (Oliver and Tomkins 2000: p. 357). The latter became a reality in the form of an increased recourse to referendums. However, as the discussion above has shown, there continues to be a great degree of uncertainty or, depending on one's perspective, flexibility surrounding mechanisms for constitutional reform in the UK.

The failure to further codify the use of such mechanisms may be attributed to a distinctly British confidence in flexible and open-ended legislative tools and in a distrust of (if not outright opposition to) codification of constitutional norms³⁵. In the case of referendums, we have seen that this flexibility translates into an absence of an overarching statute that would codify all rules applicable to referendums, whether local or national. The piecemeal regulation of referendums in the UK may not be problematic in itself but it does create difficulties when it is incomplete and ambiguous, as was the case with the EU Referendum Act 2015.

A possible lesson to be drawn, therefore, is that where there are legislative lacunae or uncertainty regarding the conduct or implementation of referendums, the likelihood of litigation increases. The courts will be brought in to clarify the existing law and interpret any ambiguous provisions. This may mean, and the UK case demonstrates this, that courts will be thrown into hugely politicised debates and may find themselves having to defend their role as impartial arbiters of the rules of the game. If the rules themselves do not make provisions for major contingencies – at the very least, for the possibility of either side carrying the referendum vote – the courts may inevitably have to intervene.

We have also seen that, despite the rule of recognition of the UK constitutional system being parliamentary not popular sovereignty, the degree to which a referendum can truly be said to remain consultative will depend on the context. In the deeply divided context of the Brexit vote, what legally was an advisory vote quickly became a non-negotiable decision that political actors could oppose only at high personal and political costs. The aftermath of the vote has thus illustrated how referendum results can take on a force of their own and carry a great deal of political legitimacy irrespective of their nominal status remaining consultative.

³⁵ See analysis in Melton *et al.* (2015).

If nothing else, the EU referendum in the UK has left open more questions than it has answered and has shaken the UK constitution to its core.

REFERENCE LIST

Barber, N., T. Hickman and J. King (2017), *Reflections on Miller*, in *The UK Supreme Court Yearbook*, Vol. 8, p. 1.

Barber, N., T. Hickman and J. King (2016), *Pulling the Article 50 «Trigger»: Parliament's Indispensable Role*, in *UK Constitutional Law Blog*, 27 June.

Barbera, A. and A. Morrone (2003) *La repubblica dei referendum*, Bologna, Il mulino.

BBC News (2016a), *Reality Check: How Many EU Nationals Live in the UK?*, 8 July.

BBC News (2016b), *EU Reform Deal: What Cameron Wanted and What He Got*, 20 February.

BBC News (2015), *EU Referendum: Votes at 16 Plans «Blocked»*, 7 December.

BBC News (2013), *David Cameron Promises in/out Referendum on EU*, 23 January.

Bews, L. (2017), *Nicola Sturgeon Suggests Second Scottish Independence Referendum Could Be Held in Next Four Years*, in *The Independent*, 9 October.

Boffey, D. (2016), *Brexit High Court Decision Means Nothing Has Been Ruled Out*, in *The Observer*, 6 November.

Croft, J. (2016), *High Court Hears Expat Challenge to Brexit Vote*, in *Financial Times*, 20 April.

Curtice, J. (2017), *Why Leave Won the UK's EU Referendum*, in *Journal of Common Market Studies*, Vol. 55, No. S1, p. 19.

Daddow, O. (2012), *The UK Media and 'Europe': From Permissive Consensus to Destructive Dissent*, in *International Affairs*, Vol. 88, No. 6, p. 1219.

Davies, B. (2016), *The EU Referendum: Who Were the British People?*, in *King's Law Journal*, Vol. 27, No. 3, p. 323.

Electoral Commission (2014), *Scottish Independence Referendum: Report on the Referendum Held on 18 September 2014*, December.

Electoral Commission (2011), *Referendum on the Voting System for UK Parliamentary Elections: Report on the May 2011 Referendum*, October.

Elliott, M. (2016), *On Why, as a Matter of Law, Triggering Article 50 Does Not Require Parliament to Legislate*, in *Public Law for Everyone*, 30 June.

European Commission for Democracy Through Law (Venice Commission) (2007), *Code of Good Practice on Referendums*, CDL-AD(2007)008.

Helm, T. (2016), *EU Referendum: Youth Turnout Almost Twice as High as First Thought*, in *The Observer*, 10 July.

House of Commons Library (2016), *European Union Referendum Bill 2015-16*, Commons Briefing papers CBP-7212, 3 June.

House of Lords Select Committee on the Constitution (2010), *Referendums in the United Kingdom*, 12th Report of Session 2009–10, HL Paper 99.

McHarg, A., T. Mullen, A. Page and N. Walker (2016), *The Scottish Independence Referendum: Constitutional and Political Implications*, Oxford, OUP.

James Melton, Christine Stuart and Daniel Helen (2015), *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes*, London, The Constitution Unit, March.

Pitkin, H. (1967), *The Concept of Representation*, Berkeley, University of California Press.

O'Brien, P. (2017), *All for Want of a Metaphor: Miller and the Nature of EU Law*, in *UK Constitutional Law Blog*, 30 January.

Oliver, P.C. and A. Tomkins (2000), *Constitutional Change in the United Kingdom* in M. Andenas (ed.), *The Creation and Amendment of Constitutional Norms*, London, British Institute of International and Comparative Law, p. 319.

Owen, L. (2016), *Never Mind the Ballots: Referendums in the UK*, London, Institute for Government, 20 June.

Shaw, J. (2017), *The Quintessentially Democratic Act? Democracy, Political Community and Citizenship in and after the UK's EU Referendum of June 2016*, in *Journal of European Integration*, Vol. 39, No. 5, p. 559.

Startin, N. (2015), *Have We Reached a Tipping Point? The Mainstreaming of Euroscepticism in the UK*, in *International Political Science Review*, Vol. 36, No. 3, p. 311.

Tatham, A.F. (2016), *The Legitimacy of Discriminatory Disenfranchisement? The Impact of the Rules on the Right to Vote in the Remain/Brexit Referendum*, in *Perspectives on Federalism*, Vol. 8, No. 1.

Tierney, S. (2017). *The Scottish Independence Referendum: A Model of Good Practice in Direct Democracy?* in Saskia P.R., Y. Welp and L. Whiteheadet (eds.), *Let the People Rule? Direct Democracy in the Twenty-First Century*, Colchester, ECPR Press, p. 77.

Tierney, S. (2012), *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford, OUP.

Weale, A. *The Democratic Duty to Oppose Brexit*, in *Political Quarterly*, Vol. 88, No. 2, p. 170.

Young, A. [2017], *R. (Miller) v Secretary of State for Exiting the European Union: Thriller or Vanilla?*, in *European Law Review*, p. 280.

ABSTRACT

This article seeks to tell the story of the Brexit referendum and the constitutional litigation that followed it. It does so drawing on comparative material regarding the regulation of constitutional referendums as well as their implementation and litigation around contested votes elsewhere. Ultimately, the chapter argues that the EU referendum in the UK, and the Brexit process more generally, have revealed the many uncertainties underpinning the UK constitution accumulated over recent decades. These unsettled norms go to the core of the legal system. They concern: the status of EU law under UK law; the scope and limits of judicial power; the place of referendums and popular sovereignty within the constitution; and the weaknesses inherent in the latter's lack of codification. Rather than being confined to the idiosyncratic British context, however, such problems are shown to emerge wherever the voice of the people is sought to be approximated by way of referendums, and acted upon in order to bring about constitutional upheaval.

KEYWORDS

United Kingdom; referendums; Brexit; European Union; judicial review; democracy

QUALIFICATION

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