Political Constitutionalism and Referendums: The Case of Brexit

Abstract

The UK's political constitution rests on the checking and balancing operations of a representative system in which parliament is sovereign. By contrast, referendums are often considered instances of popular sovereignty. Critics condemn them as populist appeals to a singular will of the people that risk majority tyranny, supporters believe they allow citizens to check and balance the elitism of politicians. Such arguments lay behind the criticism and praise of the Brexit referendum. This article argues that while the criticism is justified when referendums form an alternative to representative democracy, they can usefully supplement such a system provided they are embedded within and constrained by it. So conceived, the Brexit referendum can be regarded as consistent with political constitutionalism. Yet, this conception challenges claims that it represented the sovereign will of the people. The result remained subject to ratification by a sovereign parliament and could be legitimately overturned by that body.

Keywords Political constitutionalism, checks and balances, referendums, populism, representative democracy, Brexit

The British referendum on leaving the EU has attracted much controversy regarding the legitimacy of both the process and the handling of the result. Predictably, those who agree with the result have tended to view it as a supreme democratic and constitutive act, while those who disagreed have questioned both its democratic and constitutional validity, seeing it as exemplifying the worst characteristics of populism. Here I discuss one version of this latter critique: namely, the compatibility of referendums generally - and this referendum in particular - with political constitutionalism.

A key feature of the UK's legal and political system is typically claimed to be that it possesses a political rather than a legal constitution (Griffith 1979; Tomkins 2005: 1-6; Loughlin 2013: 11-12; Sumption 2019: 76). A legal constitution is standardly associated with an entrenched legal document, that

codifies certain individual rights, the rules of the political process, and the role and relations of the main legal and political institutions. This legal constitution provides a 'higher' law, that frames the operation of politics and allows politicians and public servants to be held accountable and obliged to abide by the terms of the constitution via the courts by citizens and other individuals who are subject to their authority. Instead, a political account of constitutionalism designates an approach that locates the constitution in the character and design of the political system and the modus operandi of its component political processes (Bellamy 2007; Gee and Webber 2010). According to this political conception, there can be no higher laws other than the laws that emerge from a duly constitutive and constitutional political process. Instead, citizens can hold governments and the administration accountable via democratic, political institutions. In the British case, such political accountability occurs indirectly through elections and directly by elected parliaments and the need for the government to abide by existing laws and to govern and legislate with the support of a plurality of the population and a majority of MPs (Griffith 1979; Tomkins 2005: 1-10).

A central component of the British political constitution, therefore, is the doctrine of the sovereignty of parliament (Ewing 2013: 2118; Gordon 2019: 133-37). On this account, it is the representative and parliamentary process that gives the democratic system its constitutional qualities. However, despite the UK having held 11 referendums since 1973 – mainly on devolution - this doctrine is often viewed as incompatible with referendums given their justification standardly rests on an appeal to popular sovereignty. Indeed, it has been viewed as 'paradoxical' (Bogdanor 1994: 34) that A. V. Dicey, whose *Introduction to the Study of the Law of the Constitution* (1915 [1885]: Part II, ch. 13, 402, 405) offers the *locus classicus* of the doctrine of parliamentary sovereignty, became the first to advocate the referendum in Britain (Dicey 1890).

Unsurprisingly, perhaps, the Brexit referendum has given rise to two divergent and opposed criticisms of political constitutionalism and its relationship to referendums in general and that on Brexit in particular, each made in contrary ways by critics and supporters of that referendum. On the one hand, referendums – and especially the Brexit referendum – have been seen as at odds with the political constitution, which involves a form of democracy possessing constitutional qualities that is only found in representative systems based on free elections between competing parties (Bellamy 2007). Critics of referendums view this incompatibility positively, regarding referendums as a disfigurement of democracy (Urbinati 2019), that deny the pluralism and tolerance of true democratic decision-making through emphasizing the existence of a mythical and singular people's will (Weale 2018). By contrast, advocates of referendums have seen this potential incompatibility negatively, as an indication of political constitutionalism's elitism and failure to provide sufficient space for citizen participation through more truly democratic avenues (Tierney 2013). On the other hand, political constitutionalism has been considered as encouraging populism. Critics of referendums allege that it prioritizes democracy over constitutionalism, which necessarily takes a legal form. As a result, it offers no adequate check on exercises of 'executive dictatorship' that take a populist turn by asserting that any government possessing a stable majority can be 'judge in its own cause', effectively able to make and interpret the law as it wishes (Hailsham 1978: 127; Pettit 1999: 176). By contrast, advocates of referendums consider them as a truer form of political constitutionalism, offering an opportunity for the direct expression of popular political sovereignty on which the legitimacy of parliament's legislative sovereignty ultimately rests (Tierney 2013).

This article puts to one side the strictly legal issue of the compatibility of the referendum with prevailing UK public law and explores instead the broader normative issue of the compatibility of referendums in general, and this one in

particular, with the very notion of a political constitution. I shall argue that referendums can play a valid political constitutional role as part of a system of checks and balances on executive authority so long as they are appropriately embedded within a system of representative democracy. On this account, referendums do not displace parliamentary sovereignty with popular sovereignty. As a result, they can encourage popular participation without producing populism.

The argument proceeds as follows. First, I briefly outline both the constitutional qualities political constitutionalists associate with a parliamentary representative democracy and some of the limitations that critics attribute to it. Second, I explore how far referendums can be said to be compatible with the former while potentially addressing the latter. I shall argue this can be possible to the extent referendums can be nested within, and made a component of, the standard picture of the political constitution so as to form part of a system of political checks and balances with constitutional qualities. Third, I turn to the Brexit referendum and consider whether, while far from perfect, it was so nested and can be regarded as democratically and constitutionally legitimate in terms of the political constitution, performing an important supplementary function appropriate to such constitutive issues.

Political Constitutionalism

Political constitutionalism proceeds from the argument that the laws determining the terms of social and political co-existence, including the basis and interpretation of fundamental rights, are matters of reasonable disagreement among those who are subject to them (Bellamy 2007: 4-5; Waldron 1999: 107-18). Political constitutionalists claim that the most appropriate way of recognising the contested nature of these terms and rights is to subject them to a collective decision-process as to their content and implementation that treats all concerned impartially and promotes reciprocity among them, so all are regarded

with equal respect and concern (Bellamy 2007: ch. 4; Waldron 1999: ch. 11). Representative democracy linked to parliamentarism is held to satisfy these desiderata in a manner that deploys certain qualities standardly associated with constitutionalism (Griffith 1979; Tomkins 2005: 1-10; Bellamy 2007: 12, 259, 260; Gordon 2019: 131-3).

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These constitutional qualities are achieved not through legal mechanisms that hold politicians and the administration to the norms of a codified and entrenched constitution that acts as a higher law, but through the operation of a political system that renders them subject to authorisation by and accountable to citizens (Bellamy 2007: ch. 6). However, these political mechanisms incorporate two key constitutional devices – those of checks and balances (Bellamy 2007: ch. 5), reflecting respectively negative and positive aspects of constitutionalism (Barber 2018: 2-9). On the one hand, governments are checked through requiring authorisation by, and being held regularly accountable to, citizens through the electoral process. These mechanisms provide checks on arbitrary rule and the protection of individual rights. They can also be supplemented by weak form judicial review, that highlights the adverse impact of general legislation on the rights of particular individuals (Waldron 2016: ch. 9; Bellamy 2011). On the other hand, governments, and indirectly those citizens supporting them, are balanced by having to compete against opposition parties – both in elections and in the legislature, and hence must 'hear the other side'. These balances promote the participation in decision-making by citizens so as to support the need for politicians to appeal to their commonly avowable reasoning and interests and enhance identification with the public good. Bicameralism, federalism and a proportional electoral system can all, where appropriate, provide further sources of balance that foster deliberation and the need to address all sections of the community (Waldron 2016: chs 3-5).

All these mechanisms can be seen as sharing a lineage with the ancient notion of the mixed constitution, which aimed at achieving a degree of mutual

checks and balances between the different classes of a society (Bellamy 1996). Although in their modern incarnation they involve democracy, their virtues lie not as means for collective self-rule or popular will formation, as in certain theories of deliberative and direct democracy. Rather, as per the neo-Roman republican tradition, their core concern is with the promotion of freedom as non-domination and relatedly of equality (Tomkins 2005: ch. 2; Bellamy 2007: ch. 4). From this perspective, what matters is that public authorities cannot act arbitrarily: that is, simply as they will, without consulting the views and interests of those subject to their rule.

The capacity for arbitrary rule arises when there is an inequality of power and a relationship of dependence of the ruled on the rulers (Lovett 2001). Political constitutionalists regard a democratic system as a way of overcoming this possibility by placing rulers under the equal influence and control of the ruled, and rendering all equal before the laws (Bellamy 2007: ch. 6). Indeed, given citizens are both rulers and ruled in turn, with politicians elected by appealing to a majority among them, citizens too can be considered as mutually influencing and controlling each other. In such a situation, no politician or citizen can reliably will what the collective rules should be without consulting others and appealing to their commonly avowable judgments, while personal dependence on a particular master or patron is replaced by the mutual dependence of equals for their considered and voluntary support.

By advocating an institutional framework for a non-dominating system of democratic government, political constitutionalism seeks to achieve a form of rule that treats all with equal respect and concern (Bellamy 2007: ch. 4). The securing of equal respect can be regarded as an intrinsic feature of political constitutionalism. Elections based on one person, one vote and majority rule treat all citizens as possessing equal status, and provide a mechanism that gives equal weight to their views and interests and that is neutral and impartial with regard to their worth for any collective decision (Christiano 2008). This proves

instrumental to securing equal concern and the negative and positive constitutional purposes of protecting rights and fostering participation and the public interest respectively (McGann 2004: 56, 71). The balancing features of the political constitution encourage reciprocity among citizens and a willingness to compromise to create viable party programmes with broad popular appeal. For example, competition between different parties incentivises politicians to fish for votes and construct programmes that build coalitions between different groups of citizens that appeal to the median voter – usually that set of preferences that represent the Condorcet winner across the electorate (Ordeshook 1986: 245-57). As R A Dahl famously observed, within pluralist societies majority rule tends to be the rule of an alliance of various minorities (Dahl 1989: 218). Given many minorities could swap allegiance this motivates both a regard for minority rights and the need to frame policies in terms of their benefit to the public interest rather than particular sectional interests.

Meanwhile, the prospect of future elections constrains arbitrariness by governments, which will be held accountable for their failings when they next seek authorisation to rule. That parties may alternate in power also creates a reason to wish the rules of the game to remain fair and for the judiciary to be independent and ensure all are equal under the law. As noted above, bicameralism – especially where the second chamber is selected by different electoral rules to the first – may likewise provide a spur to inclusive deliberation and a regard for the public interest. The precise nature of these institutional arrangements will tend to reflect the social characteristics of the polity concerned (Dahl 1989: 251 ff).

Of course, there are numerous imperfections and flaws in any extant political constitution. Many of these problems are those associated with representative democracy more generally (Dunn 2005: 19). Critics focus on the elite character of representative systems, the lack of responsiveness of parties and the ways collusion between them can keep key issues off the electoral

agenda, and the resulting disempowered nature of citizen participation, limited as it is to a periodic vote on the, often overlapping, programmes offered by politicians (Tierney 2012: 3-4; Tierney 2013: 2187-8). These failings are held to largely depoliticise democracy and limit both its checking and balancing capacity, thereby weakening its negative and positive constitutional qualities. If parties fail to adequately contest each other and offer clear alternatives, then it becomes harder to check governments and hold them to account. Likewise, if the main parties ignore the preferences of certain groups of citizens and take them off the electoral agenda, then these preferences will carry no weight in the balance of political priorities within any of the party programmes (Mair 2013). The danger in such cases is less that of the tyranny of the majority as of a tyranny of a minority – a feature exacerbated in plurality electoral systems such as that of the UK, which reduce the number of viable parties in play, and result in parliamentary majorities that rarely represent a majority of voters. This possibility has seemed especially perilous in the case of constitutional rules – especially those relating to the political process, where a government or politicians as a class can have an interest in enacting policies that entrench their own position and weaken competition, as with gerrymandering (Ginsburg and Aziz 2018). Indeed, a number of authors sympathetic to the political constitutionalist position on matters of substance, such as abortion rights, have advocated judicial review on matters of democratic process on these grounds (Dahl 1989: 188-192).

Given that the normative case for political constitutionalism has been linked, as we saw, with republican notions of citizenship and the avoidance of the domination resulting from arbitrary rule, the participatory deficits of representative democracy have appeared to many critics as in conflict with the aspiration of its advocates to offer an alternative to liberal accounts of democracy (Tierney 2013: 2187). After all, a key criticism of legal constitutionalism by political constitutionalists relates to its alleged elitist and

anti-democratic character. Against this criticism, some legal constitutionalist critics have countered that contestation through legal challenges, such as class actions, offer an avenue for more citizen participation, and an important supplementary legal source of constitutional checks and balances (Lafont 2019: ch. 8). I leave these arguments to one side. However, other, more radical republican and democratic, critics argue that referendums – especially on constitutional and constitutive issues, but also with regard to certain policies – provide a way of both giving such legal constitutionalism a political endorsement of a democratic kind (Ackerman 1991), and providing a more directly democratic form of political constitutionalism (Tierney 2012, 2013). As they typically note, referendums would seem, at least prima facie, to provide a stronger realisation of the intrinsic quality of democracy than voting in elections, in that it gives each citizen a direct say on a salient issue – one that may even have been occluded by parties (Tierney 2012: 19, quoting approvingly Bogdanor 1981: 93). However, even if this obtains, worries persist that referendums may lack many of the instrumental constitutional qualities associated with a representative democratic system (Lord 2021). Nevertheless, as was suggested above, suitably designed, they could possibly provide a potential check and balance to the legislature on matters where incentives are lacking for politicians not to put their own interests in holding on to power above those of the public at large. It is to these issues that I now turn.

The Constitutional Qualities of Referendums

Referendums typically fall into three rough issue categories and take two broad forms, with two distinctive modalities. With regard to issues they can be categorised as related to constitutive, constitutional or policy matters (Tierney 2012: 11-15). The first involves decisions that redefine either the polity, as in referendums on secession - such as the recent Scottish referendum on independence, or the fundamental form of its regime, as in referendums on an

entirely new constitution. The second relates to more limited amendments to an already existing written constitution or constitutional statute, which operate within the prevailing constitutional structures with regard to both the polity and the regime, such as the recent Irish referendum on abortion or the British referendum on changing the electoral system. Finally, the third concerns policies ranging from changes in local planning regulations, as is common in Swiss communal and some English Parish referendums, to major policy decisions, such as the California Proposition 218 that - while technically a constitutional amendment - was designed to give voters a direct say over levels of local government taxes. As this last example indicates, there can be some overlap between the issue types– a policy issue can have constitutional implications, as in this case, while most constitutive referendums will raise both constitutional and policy issues, as was the case with Brexit. It will also be a matter of degree as to how far a constitutional amendment can be regarded as altering the nature of the regime or polity, as might have been the case with electoral reform, or in referendums on establishing elected Mayors.

As to forms, referendums can be regarded as either top down, where the government calls and frames the referendum, or bottom up, where a process exists for citizens to request a referendum – for example, by gathering a prescribed number of signatures. Here too there are forms that combine elements of both, such as the Irish use of citizen juries to identify issues on which referendums might be called.

Finally, concerning modalities referendums may be negative, called to abrogate an existing law or arrangement; or positive, aimed at approving a proposal for a new measure or arrangement. Once again, this distinction may not be clear cut. In some cases, a successful negative referendum may entail the need for new positive measures or arrangements, though the precise nature of these may not be clearly specified. Likewise, if a positive proposal has failed to get approval it has by implication been abrogated.

The degree to which referendums can be regarded as either possessing themselves constitutional qualities or complementing those of representative and parliamentary forms of democracy will depend on the particular ways the issue, forms and modalities interact with each other and, where relevant, with the system of representative democracy (Lord 2021). Broadly speaking, the intrinsic securing of equal respect appears strongest in referendums that are bottom up and allow citizens to propose new policies, and weakest in those that are top down and merely seek approval of a government measure (Cheneval and el-Wakil 2018). Referendums of the former type, that belong to the policy issue category, take a bottom up form and involve a positive modality, approximate most closely to exercises of direct democracy that can be characterised as embodying popular sovereignty. As such, prima facie at least, they appear best placed to counter the criticism of representative democracy for its lack of participation and elitism. However, these types of referendum are also those where critics have most doubted their instrumental constitutional qualities. These worries involve the limitations of referendums with regard to collective policy making; citizen competence and elite manipulation; majority tyranny; and the lack of accountability or undermining of the role of representatives (Tierney 2012: 22-24, and Lord 2021: 35). I shall consider each in turn, although as we shall see they relate in various ways to each other.

The key problem for referendums with regard to collective policy making relates to the weighting of citizens' preferences across the whole domain of policy options (Bellamy 2018: 314-16). A referendum necessarily focuses on a single issue, whereas elections focus on party programmes that bundle together a range of policies and seek to weigh them against each other, including giving consideration for the knock-on effects of decisions in one policy area for decisions in others (Tierney 2012: 37). A decision on a policy taken in isolation from others risks producing policy incoherence – as when voters vote for tax cuts that would undermine the government's ability to fund public services and

infrastructure that they wish to see expanded (Haskell 2001: 16). True, the Ostrogorski paradox suggests the possibility that bundling may involve putting together a number of policies, many of which taken on their own are not supported by a majority (Setälä 2006, Lord 2021: 34). In this scenario, a bottom-up, positive, policy referendum might be justified to challenge parties having taken off the agenda or ignored a majority view in a given area. However, that would depend on the policy being discrete, which in most cases is unlikely.

The policy implications of a popular vote may also be imprecise. This is especially true of negative, abrogative, referendums, where what is to be put in place of the rescinded measure – if anything – may be unclear. Yet, positive referendums may also be imprecise unless the policy proposal is clearly specified. A related issue stems from the binary nature of many referendums, whereby the two options on offer may be arbitrary and suppress alternatives that would have been the most preferred (ie the Condorcet winner), particularly if voters could rank their preferences among multiple possibilities (Weale 2018: 62-66; Bellamy 2018: 317-8). Of course, voters could be given multiple options to choose from and allowed to rank them, as occurs in some Swiss referendums (Lord 2021: 36). Yet, these are likely to still be options relating to a single policy.

Worries about citizen competence enter here. Some advocates of policy referendums claim they benefit from the 'wisdom of crowds' (e.g. Landemore 2013). However, that depends on citizens possessing sufficient knowledge about the relevant policy area to be able to make a reasonable guess as to which of the available options might be best. Meanwhile, the aforementioned problems regarding policy connectedness and the representativeness of the options on offer still apply. Even referendums that emerge from a popular initiative can be subject to elite manipulation (Honohan 2002: 220-30), as they will generally arise as a result of a campaign led by a small group of activists, who will then

seek to shape the referendum question so as to favour their preferred result. In the absence of personal expertise, most voters will also follow elite cues from media and other campaigns (Honohan 2002: 218). In these respects, referendums may at best allow for a similar degree of misrepresentation and manipulation as elections, and at worst an even greater degree given party ideology tends to act as a relatively stable indicator of the overall direction of the policies advocated taken as a whole, whereas such guides may be lacking when it comes to a single issue. Of course, as advocates of these initiatives note, the issue concerned may be one that divides parties, with support and opposition cutting across standard party lines (Glencross 2021: 57-8). A referendum in such circumstances may help overcome such divisions. Yet, it could also be seen as an abnegation of responsibility by politicians to take a difficult decision. After all, free votes in legislatures can often be among the most deliberative precisely because politicians do not simply follow the party lead. By the same token, though, the fact that politicians have no clear mandate for how they would vote could be seen as legitimising a popular debate and decision.

Nevertheless, so far as policy issues are concerned, the disadvantages of referendums may outweigh the advantages. As was noted in the last section, the need to fish for votes from a diverse electorate and build a coalition for a party programme helps support minority interests. But when it comes to a vote on a single issue the need for coalition building is likely to be less. That increases the danger of majority tyranny, since the need for compromise and accommodation is greatly reduced, as is the capacity, within the procedure, to develop a compromise (Bellamy 2018; Haider-Markel, Querze, Lindaman 2007). Meanwhile, policies that are so decided tend to become entrenched - politicians will be wary of reversing a measure possessing a popular mandate, even if they regard the policy as deleterious. Moreover, they will bear no personal responsibility for it and so cannot be held to account for its failings. Once again, the worry is that referendums may not only lack adequate instrumental

constitutional qualities themselves but also undermine those associated with representative democracy.

These concerns arise when referendums are seen as exercises of direct democracy, involving the exercise of popular sovereignty. Some theorists have argued that while referendums with this quality may be inappropriate on policy issues, they are suitable for constitutive and constitutional issues (Tierney 2012, 2013). As I noted above, referendums on these two issues concern respectively the definition of the polity and its demos; and the character of the regime – particularly the rules of the democratic game. Both these issues have been regarded as being suitably conceived as expressions of 'we the people' (Ackerman 1991). In the first case, a referendum could be seen as providing a way for those concerned to contract to form a people who then subject themselves to a common authority under their mutual control. In the second case, a referendum allows the secondary rules that define the legal and political system to be authorised directly by the people to whom they will apply, encouraging them to identify with these rules as theirs.

Two additional claims are often made in regard to both issues (Tierney 2012: 12-15; Tierney 2013): first, that these are matters of collective and common interest, that transcend the particular interests individuals may have with regard to specific policies; and second, that referendums spark a more participatory and deliberative debate of a kind that promotes public reasoning on a topic that defines both the public or demos and their public interactions. On this account, constitutive and constitutional referendums form part of a dual democracy (Ackerman 1991): they provide a democratic mechanism for bringing into being a democratic system that can address policy issues. Yet, it is disputable whether they can escape the problems identified above with regard to policy referendums. To do so, it must be assumed that the referendum does indeed take the form of a contract whereby all citizens agree on fair terms of cooperation and consent to them, with constitutional and constitutive politics

differing in deliberative and epistemological quality to normal politics, such that citizens are moved by the better argument and avoid the conflicts of interest and ontological disagreements typical of policy debates (Habermas 1996: 278-79). However, there is no compelling reason to believe this will be the case (Bellamy and Schönlau 2004).

If, as political constitutionalists argue, rights and procedural rules can be matters of reasonable disagreement, then no consensus is likely to be reached on them through a public wide discussion and referendum any more than in a legislative debate. Nor are such discussions necessarily any more bottom up and lacking elite manipulation, given that as with policy proposals they are likely to be prompted by political entrepreneurs and the debate heavily influenced by the media. Meanwhile, such a discussion may lack the incentives of checks and balances that lead to legislators 'hearing the other side'. Indeed, as the 2008 Swiss referendum on minarets, recurrent Swiss referendums on immigration and residence of foreign criminals, and California Proposition 8 illustrate (Moeckli 2011; Hainmueller and Hangartner 2019; Frey and Goette1998), such exercises of popular democracy may allow minority rights to be abrogated by tyrannous majorities. Some such checks might be incorporated into the referendum process – for example, it might be necessary to have a threshold for the turnout of over 50% and/or to achieve a super majority if the measure is to carry. However, while these requirements may prevent certain unjust proposals carrying they can also inhibit reforms that remove injustices from the prevailing status quo (Schwartzberg 2013). They can only be justified if it is reasonable to assume that most changes would be likely to be worse than the prevailing system – hardly an endorsement of popular sovereignty. Arguably, a comprehensive constitutional reform might allow for more compromise to arise of a balancing kind between the representatives of different groups, and – as with the Icelandic constitutive assembly – there could be a direct crowd sourcing of ideas by the public, with the whole package then put to a

referendum. However, this proposal seems to suggest that constitutive and constitutional referendums become more acceptable the more they develop the characteristics of representative, competitive party politics.

Although there is some evidence that Dicey may have come to regard referendums in this light (Weill 2003), the development of his argument seems to have been driven by the desire to stop Irish Home Rule at any price (Cosgrove 1980: 105-10, 247). However, that need not mean that referendums could not be incorporated into a Diceyan version of political constitutionalism where political sovereignty lies with the people but legal sovereignty rests with parliament, which retains both constitutional and legislative authority (Weill 2003 474-5). Dicey's point – at least until 1911 – seems to have been that an executive required a significant level of popular political authorisation for major constitutional change. However, as with the Great Reform Act of 1832, he considered – at least initially – an election victory in which the change figured prominently in the campaign as sufficient (Weill 2003: 478-9). He only turned to advocating a referendum as Home Rule appeared unlikely to be opposed. The logic of his argument was not to consider the people as possessing legislative sovereignty, though, as some have argued. Rather, he saw referendums as a means for exercising a popular political constraint on the legislature in the case of significant constitutive or constitutional laws that paralleled - and could even be exercised by - the withdrawal of their authorisation of a government at an election (Weill 2003: 480-88).

In a similar manner, Eoin Daly (2015) has argued, referendums may be considered as forming a part of the mixed constitution, adding another political channel for checks and balances in areas that legislatures may be ill-suited to provide for themselves (Daly 2015: 32). Rather than being bottom up and positive exercises of popular legislative sovereignty, and as such as rivals to parliamentary sovereignty, he contends that referendums are better seen as negative and top down, serving a contestatory function aimed at guarding

against arbitrary rule and promoting public justification (Daly 2015: 37). As such, they can contribute to the negative and positive instrumental constitutional functions identified above, usefully supplementing representative democracy in the process.

Daly considers referendums of this kind as particularly relevant for constitutive and constitutional issues. Both these issues could be regarded as relating to areas where politicians might have an interest at variance with those they represent. For example, a government might wish to introduce electoral reforms or constitutional amendments that make it more likely they remain in power or the policies they favour are entrenched. He contends that forcing governments to put proposals on these two sorts of issues to a referendum can promote a wider public discussion and promote civic participation. As he notes, in Europe Ireland, Switzerland and Denmark all have mandatory constitutional amendment referendums for issues of this kind (Daly 2015: 38), as does Australia (Daly 2015: 41). Even in Germany, which had been thought averse to referendums given their use by the Nazis, the Basic Law has been amended to allow for a referendum on changes to the Basic Law itself (A146) (Lord 2021: 31). Their aim is to reinforce the likelihood such measures treat all with equal respect and concern by giving all citizens an equal vote on them while having the proposal itself and its implementation the product of coalition building and compromise by parties in the legislature, whose actions remain electorally authorised and accountable. He distinguishes referendums that still retain parliamentary legislative sovereignty from those, such as De Gaulle's 1962 referendum amending the rules on Presidential elections, that involve a direct populist appeal by a political leader to the 'people's will' in order to by-pass parliamentary amendment procedures (Daly 2015: 36-37). Daly likens referendums of the former type to the role of a second chamber that adopts a different form of representation to the first and primary legislative chamber. As a form of multicameralism (Daly 2015: 43), referendums both support the

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representation of all relevant interests on such important questions, and promotes their balancing through enhancing the scrutiny to which they are subjected.

Daly's argument presents an account of referendums that can be reconciled with political constitutionalism in so far as it distinguishes political and legal sovereignty, leaving the latter with Parliament. So conceived, referendums introduce a check and balance that possess the intrinsic and instrumental constitutional qualities of democracy that political constitutionalists seek to deploy, at least when they are embedded within a system of representative democracy and act as a supplement to it. However, his account gives referendums a largely negative, contestatory, role. They operate not to propose change so much as to approve or reject changes proposed by the legislature. As such, they only partly address the alleged failings of representative democracy. They operate against elites when they are acting against the public interest, but not when they are failing to act in the public interest. Yet though any given individual act of omission may pose less of a danger than any single act of commission, taken cumulatively over time they may do as much, if not more, to undermine popular support for democracy.

Even in pluralist systems such as the UK, though, electoral competition may work against parties successfully colluding to take certain constitutional issues completely off the agenda. For example, although the two main parties have generally opposed any move towards proportional representation for national elections, the hung parliament of 2010 gave the Liberal Democrat's the opportunity to push for electoral reform. Given the type of issue and the fact that no parliamentary majority probably existed for this measure, putting a proposal to a referendum could be regarded as a legitimate alternative to canvas the support of the broader public for such a fundamental reform. Likewise, the referendums on Northern Ireland remaining part of the UK (1973) and the Good Friday Agreement (1998) and the Scottish (1979, 1997) and Welsh (1979. 1997,

2011) referendums on devolution, and in the case of Scotland independence (2014), all deal with constitutional issues where it is conceivable no majority would exist at Westminster for the change, and those voters with a strong interest in the issue lacked sufficient representation. Even though not all of these detailed the precise form the proposal would take, they can be seen as a means for checking against potential inaction by politicians on a core constitutive or constitutional issue through canvassing the wider and more diverse chamber of the relevant public as a whole. It would be misleading to regard them as operating as expressions of popular sovereignty or consent. It remains to be seen whether the Brexit referendum can be understood in similar terms.

The Brexit Referendum and Political Constitutionalism

The Brexit referendum has been subjected to a high degree of criticism, especially, but not solely, by those favouring remaining in the EU. These criticisms have ranged from concerns about the misleading character of the Leave campaign, including financial irregularities, misinformation and the use of algorithms for media advertising that derived from dubiously obtained personal information (Hansson and Kröger 2021), to dissatisfaction with the franchise, especially for its failure to include resident EU nationals or to reduce the voting age to 16 (Grayling 2017: 189-97). The evaluation developed here focuses on the second set of criticisms relating to the referendum's institutional design and constitutional credentials rather than the first set relating to its conduct. However, neither the referendum's conduct nor design need to be perfect for it to be legitimate. Though both were flawed in various ways, it was arguably no worse in these respects than current general elections in the UK or most other advanced democracies, such as the United States. These too rightly attract criticism for their many shortcomings. For example, similar campaign techniques to those of the Brexit referendum feature in normal elections in these

countries, while a case exists in both the UK and USA for allowing permanent residents to vote, lowering the age of the franchise, and changing the electoral system to some form of PR. Yet, though undoubtedly improvable, both systems are regarded as possessing sufficient democratic qualities to be legitimate processes. The Brexit referendum arguably met a similar threshold of legitimacy, despite its manifold faults (Electoral Commission 2016; Bellamy 2019a). Granting this to be the case, my concern is whether it could be regarded as compatible with political constitutionalism along the lines given in the last section.

Note, if it can, that would offer a different ground for the referendum's legitimacy than was given by not only many Leave supporters but also others, such as the former Prime Minister Theresa May, who supported Remain but felt obliged to honour the referendum's result: namely, that it was an expression of the people's will, with popular sovereignty trumping parliamentary sovereignty (Weale 2018: ix-x). It also provides a response to those who considered the referendum as unconstitutional – either in principle, or due to the absence of its procedures forming part of a legal constitution (Grayling 2017: 189-97). Instead, it could be seen not as a form of direct democracy requiring constitutional regulation but rather as a constitutional form of democratic politics as part of a mixed political constitutional system.

To fit this role, a referendum needs to be both embedded within and regulated via the system of representative democracy, and as such subject to the legal authority of parliamentary sovereignty, while offering a justified check and balance upon it issuing from the political authority of the people taken as a whole. The argument of the previous section suggested this is most likely to be the case in referendums on constitutive and constitutional issues, which are top down and related to affirming or contesting a proposal from the executive, and that can only take place when legislated for by a duly elected legislature, which

retains the responsibility for acting on the result as its members think fit. How far was this true of the Brexit referendum?

The decision to call the referendum resulted from a manifesto pledge of the Conservative Party in the 2015 election. That origin has been viewed as somehow tainted - a hypocritical move to blunt the electoral threat posed by the UK Independence Party (UKIP) to the Conservatives. Yet, it could equally be seen as a mechanism for giving voice to an issue that the major parties had largely kept off the electoral agenda. True, the Conservatives had tried to make the EU an electoral issue in the 2001 and 2005 elections without success, a point to which I return below. However, to the extent that EU membership forms a constitutive issue as to the very nature of the polity, then it can be regarded as rightly a matter on which the people as a whole should be consulted. Indeed, across the EU that has steadily become the norm, including in Germany where the Constitutional Court (2009: paras 179 & 263) has recently argued that the development of a 'federal state' at the European level could reach a point that would require 'a decision of the German people beyond the present application of the Basic Law'. If a referendum is increasingly seen as necessary for not only joining the EU but also for any significant deepening of European integration, then the same should hold for a decision to leave the EU altogether. Making that possibility a manifesto pledge within an election can be regarded as providing a democratic test of its significance for the electorate. Meanwhile, doing so to fend off a challenge from a small party with significant but diffuse support (UKIP has only won one parliamentary seat in an election, which was held by a popular MP who had defected from the Conservative Party), can be regarded as providing a form of balance within a plurality system for views that might otherwise go unheard.

I also noted how referendums are likely to most fit with political constitutionalism to the extent they are regulated by parliamentary legislation. Here too that was the case. Legislation governing referendums in general had

been passed under the Political Parties, Elections and Referendums Act 2000, and this was specifically applied to the Brexit Referendum in the European Referendum Act 2015. This Act was passed with an overwhelming majority in the Commons of 544 to 53 in favour, with only the Scottish National Party voting against.

As I remarked above, the main complaints with this legislation related to the franchise, the lack of supermajority rules, the length and rules for the conduct of the campaign and the alleged vagueness of the question posed. The relevant question to ask here is whether the proposed changes could be justified as necessary for the referendum to perform its checking and balancing role. My claim will be that at best they were unnecessary for the constitutional legitimacy of the referendum and at worst they would have been illegitimate.

With regard to the franchise, the referendum adopted that used for national elections under the provisions of the Representation of the People Act 1983 and 2000. Although those provisions are contestable, they are largely consistent with those found in other established democracies. A related but distinct issue is whether a reasonable case can be made for keeping to those provisions, or whether not to depart from them in this case involved an unequivocal injustice. Here it is useful to distinguish 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 (Bauböck 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 – something that was relatively easy for long term resident EU citizens to do. This view also seems the most consistent with political constitutionalism, which concerns the ability for citizens to decide the rules governing their social co-existence on an equitable basis. It would be inapposite to include in such a process those who are not committed to living under those rules over time. 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 justifiably insisted.

What about the argument that the franchise ought to have included 16-year olds? Critics of this decision argue that it excluded those most directly affected by the proposal. They note that while those aged over 65 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 et al. 2017, p. 155). Again, these are important objections. Cohort injustices are possible, and some have even suggested disenfranchising the elderly from voting on certain issues (Van Parijs 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 any economic downturn as a result of Brexit would also have short term and direct effects on their pensions and access to health care.

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. Neither did the Brexit referendum, where the majority of 51.89% on a

participation rate of 72.21% represented just 37.4% of the electorate —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 realise, 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. This is an important consideration. However, 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). Instead, the issue was addressed in part by the referendum being advisory to Parliament, which subsequently had to debate and implement relevant legislation. In that sense, there was an opportunity for Parliament to deliberate the implications of the decision, and for it to be reconsidered by the electorate – a point I return to below.

A slightly different version of the supermajority argument is whether the vote should have obtained a majority among – or even in all – of the different 'nations' of the UK. The devolved regions argued that the UK included at least four demoi: those of Scotland, Wales and Northern Ireland, as well as England. Indeed, 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. This requirement could be conceived as an additional political check and balance necessary in multinational political systems. However, it is not at present one that exists within the UK for non-devolved matters. Rather, power is devolved downwards from Westminster to these authorities for the purpose of managing domestic issues. The UK at present is not formally a federation and even if it has federal like features, federative powers with regard to the sovereignty of the British state, such as the ability to contract obligations under international law, remain at Westminster, for which purpose the UK operates as a single nation – much as the EU represents all the member states in those areas where competences have been conferred upon it, notably the negotiation of trade issues within the WTO. Nor is this an unusual arrangement – it is true of federations such as the USA and Germany, for example. It reflects the fact that the federal parts ultimately form a unitary state, which in the area of external affairs has to be able to act as a single unit, for example on issues such as defence . The two parts of the UK most likely to leave - Scotland and Northern Ireland – had had respectively referendums on independence (2014) and joining the Republic of Ireland (1973), with the referendum on the Good Friday agreement (1998) also, in part, a referendum on the conditions under which Northern Ireland might leave the UK and join the Republic – and although Brexit may prompt them to be repeated sooner rather than later, at the time of the EU referendum a reasonable case existed for saying that for these purposes the UK formed a single demos.

With regard to the question posed, unlike the referendum on electoral reform of 2011 the electorate were not asked to accept or reject a specific constitutional proposal, which would then automatically become legislation. Formally speaking, as with the other UK referendums hitherto, it was a consultative referendum and the EU Referendum Act did not include any requirement that the government implement the decision. As such, it was consistent with parliamentary legislative sovereignty. Instead, the question was

'Should the United Kingdom remain a member of the European Union or leave the European Union?' However, this could be seen as a referendum on whether to accept or reject David Cameron's, the then Prime Minister's, renegotiation of the terms of Britain's EU membership. In other words, it offered a check on the prevailing view of the government and in the legislature more generally – and, indeed, was the first - and so far the only time - that view has been rejected in a referendum. The issue then turned to what terms of leaving the EU should follow from that decision, and should the electorate have been consulted via a second referendum on them?

The argument against a repeat referendum tended to take the form that these should be a once in a generation exercise. Adapting a parallel argument to Thomas Jefferson's for a periodical ratification of the terms of the US Constitution to ensure they still reflected 'we the people' (Jefferson 1984), the argument goes that repeat referendums should only occur once the generation that decided the original referendum no longer form a majority. The reasoning is that 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. That criterion was met in 2016 with regard to the first EU referendum of 1975, but would require at least a decade for a repeat of the 2016 referendum to be legitimate. However, that objection does not really address two different arguments for a second referendum: one addressing the case for a super majority in a way more consistent with democratic norms, and that fits with the checks and balances rationale given for them here, the other raised by the need for a ratification of the terms of the withdrawal from the EU.

With regard to the first argument, the case for a second referendum might proceed 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 reflecting general considerations that derive from the reasoning underlying political constitutionalism rather than being ad hoc arguments that reflect one's view of the issue the referendum sought to decide. Unfortunately, the early triggering of Article 50 rendered it impossible to hold a second referendum before time ran out. However, arguably doing so for this reason would have been appropriate from a political constitutionalist perspective, and not to do so was a missed opportunity.

The second argument, that a vote should have been held on the specific terms of withdrawal, rather than the general issue of whether to withdraw at all, is more problematic. This moves the decision from a strictly constitutive and

constitutional issue to something more like a policy issue, where as we saw referendums prove more problematic. Parliament – arguably like the public as a whole – was divided between a) remaining in the EU, b) leaving and staying in the single market (roughly Norway/EEA) or customs union, c) leaving and not staying in the single market and customs union (a version of which would have been Theresa May's amended Chequers deal or the withdrawal agreement ultimately negotiated by Boris Johnson), and d) leaving without a deal (WTO rules). One solution, proposed by Justine Greening, would have been to offer voters these choices and accepted either the plurality winner or, using a Borda or Condorcet count, the most preferred of these options. However, that would still not have necessarily weighed the impact of these options against the full range of other policies of importance to voters. For this purpose, a general election in which voters have an opportunity to see how these options fit into a programme of government offers a better solution. As it happens voters were given such a choice, with elections in both 2017 and 2019. The latter election gave Boris Johnson's Conservative Party a landslide victory, with the party winning 43.6% of the vote – the highest percentage obtained by a party since 1979, and a parliamentary majority of 80 seats. Arguably, therefore, the second argument was met and there can be no doubting that 'getting Brexit done' was the settled preference of the British electorate.

Of course, criticisms continue about the conduct of both the election and referendum campaigns and especially the misinformation and failure to discuss certain key issues, notably Northern Ireland. Yet, these failings are arguably down as much to the failure of the opposition parties as the process itself. After all, the referendum and election were overseen by an independent regulator, the Electoral Commission, which in its report argued that no procedural failures were serious enough to invalidate the result. In other words, while flawed and improvable, the process cannot be regarded as so defective as to justify being annulled. Indeed, recent opinion polls suggest that even with the many problems

attendant on leaving the EU already having become apparent, a re-run of the referendum at the time of writing would be unlikely to produce a different result.

Conclusion

Disillusionment with the result of the Brexit referendum has led many critics to dispute the democratic or constitutional validity of referendums in general. They are seen as populist instances of popular sovereignty that are at odds with a properly constituted form of democracy (Weale 2018). Indeed, this was often assumed to be the position of political constitutionalists – and was in fact a view I personally held. However, despite regarding the decision to leave the EU as both economically and morally mistaken (Bellamy 2019b xiii-xv), I consider we should accept that decision and the legitimacy of the referendum for making it. Liberals consider that individuals have the right to make mistakes, hoping they - or at least the rest of us - may learn from their errors. The best one can seek to achieve is that a mistake is made in a considered way. Indeed, one must allow that maybe Brexit is not the mistake many of us consider it to be.

Political constitutionalism offers a system of checks and balances for resolving disagreements, such as those relating to membership of the EU, in a fair manner, which forces citizens and politicians to 'hear the other side'. This paper has argued that referendums can form a justifiable part of such a system, and that this was the case with the 2016 referendum. However, that does not mean that we should accept Brexit as reflecting the will of the British people. Rather, we should accept that the plurality of citizens who voted for this result made their case in a fair way that was suitably checked and balanced. The disagreement remains, making it justified to argue that those opposed to leaving the EU can continue to campaign for better terms with the EU (Weale 2017), and ultimately - ten years or more, as per the Jeffersonian principle discussed earlier - for a further referendum on rejoining.

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