

The Brexit paradox: Direct democracy is a flawed route to reviving sovereignty

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By Democratic Audit UK

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*Rhetoric around parliamentary sovereignty and “taking back control” became a recurring theme in the Leave Campaign. But **Panagiotis Doudonis** argues that there is a contradiction in using a referendum – a coercive, direct democracy device – to reclaim parliamentary sovereignty, which has its foundations in representative democracy.*



For months, Vote Leave argued leaving the European Union would allow Britain to retain its “constitutional identity”, but the exact nature of identity was kept vague. Ahead of the referendum this came across as an effort of “totemism”, or a *mystification* of the constitution as an expression of the age-old tradition of the United Kingdom.

If we could single out the dominant feature of this identity, except for the obvious point of the lack of a codified constitutional text, it would be parliamentary sovereignty. This can be summed up, in its traditional form, with the very simple rule that there is no legal limit on the legislative power of the Parliament. As Dicey put it, the Parliament “has, under the English constitution, the right to make or unmake any law whatever”.

The accession of the United Kingdom to what was then the EEC posed the question of the relationship between the sovereignty and superiority of the British Parliament on the one hand and the superiority of the European law on the other. It became clear that the belief that there are no legal limits to the legislative power of the Parliament would hardly survive or coexist with the participation in the Union. Moreover, since parliamentary sovereignty, in its classic perception, is “continuing”, i.e. “no Parliament can bind its successors”, it becomes difficult to argue that the Parliament of 1972 with European Communities Act could bind -and will continue to bind until Brexit – the Parliaments that succeed it. Lord Bridge’s observations in *Factortame* may have settled the issue at a legal level, but have not achieved the same at the political level.

The EU’s power over Westminster is viewed by Eurosceptics as the cornerstone of the loss of national sovereignty. Closer inspection, though, reveals logical inconsistencies and contradictions. The British constitutional identity has demonstrated the ability to adapt to new challenges. Moreover, the participation of the UK in the Council of Europe and more recently the Human Rights Act 1998, in spite of its careful wording, poses other challenges to the traditional approach to the British constitutional law and consequently to the sovereignty of Parliament.

But what does this sovereignty amount to? Its explanatory basis is based on the interconnected notions of representation and national sovereignty. Parliament is the main “bearer” of internal sovereignty -which is the other face of external sovereignty, namely the sovereignty of the United Kingdom within the bounds of international law- due to the representativeness of its dominant part, the House of Commons.

If though parliamentary sovereignty is the cornerstone of the UK constitution, a referendum aiming at the “restoration of constitutional roots” as well as Leaving the EU seem quite oxymoronic. First, referendums belong to a completely different constitutional rationale, compared to that on which parliamentary sovereignty is founded. On the one hand, we have representative, parliamentary democracy; its central expression within the bounds of the UK constitution is the superiority of the main representative institution, the Parliament. On the other hand, the referendum, as a manifestation of direct democracy, is arguably incompatible with the traditional approach of British constitutional order. As Vernon Bogdanor, David Cameron’s tutor during his Oxford years has observed, the sovereignty of parliament is a principle “generally held to preclude the referendum”.

Therefore, on the 23 June, Leave campaigners asked the British people to restore the integrity of the Parliament’s sovereignty in its absolute form through a process that is based on the opposite rationale. The contradiction continues at another level, namely the implementation of the referendum. The extent to which the vote is binding has become a major topic of discussion since the referendum. Legally, it is consultative, and no constitutional convention binds the Parliament to always follow the view expressed in a referendum. Thus, the position that a Parliament with a vast majority of pro-EU MPs is bound to decide, if asked, in favor of leaving the EU because this is the result of a referendum, epitomises the denial of the parliamentary sovereignty.

In other words, if the Parliament considers itself bound by the referendum, then it actually moves to a quasi-negation of its sovereignty, aiming at the revival of this sovereignty in its absolute and continuing form through leaving the EU. If Parliament, on the other hand, realising the complete meaning of its sovereignty, chooses to ignore the result of the referendum and decides that the United Kingdom should remain in the EU, then it actually makes an absolute statement of its sovereignty while simultaneously deciding an *in perpetuo* limitation to it through continued participation in the EU.

This brief analysis does not aim to make the issue seem more complicated or to express sophistry. On the contrary, it purports to point out that the absolute sanctification and totemism of the tradition of British constitutionalism is not devoid of logical and inconsistencies. What is needed though now is a *new constitutionalism of truth*, a new constitutional ethos of both political actors and the people based on available knowledge, revealing the polycentricity of political decisions and not hiding behind ethnocentric legalism. Otherwise, logic will be defeated and paradoxes like the aforementioned would further obscure important issues.

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