

Why the UK needs a written constitution!

It is a generally accepted legal principle that ignorance of the law is no excuse. One of the founding fathers of the USA and one of its first presidents, Thomas Jefferson, expressed it in these terms:

“XX has probably engaged in this business, not knowing the law: but ignorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can be always pretended.” (Letter to André Limozin, 22.12.1787)

It assumes a responsibility and duty on the individual to keep him/herself informed and educated about the law, and it assumes a right of the individual to expect the authorities to make all the relevant acts of parliament etc. available for reference by the individual. In most other countries you can go into a bookshop or a library and ask for a copy of the constitution. In some cases, pocket versions are given to school children. However, in this area of law the authorities of the UK are conspicuously faltering.

Yes, there is a UK constitution, but it is unwritten, uncodified, which means that unless you have expert, inside knowledge there is no point of reference, nowhere for the ordinary citizen to check whether this or that measure is ‘unconstitutional’.

Much of the confusion that has permeated British political life since June 2016 could have been avoided if the UK had had a written constitution with clear guidelines for example for the duties and responsibilities of an MP or the conduct of referendums nationally.

Instead we have a situation where one part of the parliament (the so-called ‘Brexiters’) appears to hold the view that MPs are subservient to the electors and are obliged to carry out their instructions. Another part (the so-called ‘Remainers’) appears to view it as an MP’s duty to weigh up all the information he/she receives including the views of the electors and make up his/her own mind in the best interest of the constituency and the country.

We are therefore now witnessing the strange paradox that the Brexiters have a fundamental interest in assuring the continuation of parliamentary sovereignty, but are tempted to bypass a divided House of Commons to achieve this end*). Remainers – on the other hand - are keen to assert parliamentary sovereignty, but for the only purpose of giving it away, in effect advocating the transfer of sovereignty from our national legislature.

In respect of referendums there are some general rules set out in the 2000 Act (Political Parties, Elections and Referendums Act 2000) with regard to expenditure and other matters, but nothing about who can call referendums, in what situations, on what subject, whether they should be advisory or binding on the government and parliament etc. As a result it is not clear whether the outcome of the referendum in 2016 legally should have been binding or advisory.

*) Or, as we witness at the time of writing this 22nd of October 2019, in setting impossible tight deadlines for conducting the business of Parliament.

A briefing note leading up to the second reading of the 'European Union Referendum Bill 2015-16' states:

"[This Bill] does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions." Uberoi, Elise, Briefing Paper Number 07212, House of Commons Library, 3 June 2015.

However, in a later pamphlet to the general electorate the government state categorically:

"This is your decision. The government will implement what you decide." HM Government pamphlet: 'Why the Government believes that voting to remain in the EU is the best decision for the UK.'

The main argument for an unwritten constitution is that it is more flexible than a written constitution. As the world and political imperatives change so the constitution will change accordingly as part of the ongoing law making process without necessarily using special measures such as referendums used in countries with a written constitution.

A less charitable view is that the political establishment wish to keep the constitution unwritten, subject to the whims of the government and to a large extent inaccessible for lay people. The establishment can then choose to alter it or interpret in ways that suits itself without the danger of a challenge to its decisions in a court or otherwise.

By contrast with a written constitution it is the government which is the subject. Written with clarity and with definitive rules and regulations the constitution becomes an important safeguard against abuses by the powers of a government and its supporters.

In an official pamphlet (House of Commons Information Office, 'You and Your MP', undated) the role of MPs is described in these terms:

"MPs have responsibilities to three main groups: their constituents, Parliament and their political party."

It is noticeable that the pamphlet has not included the most important area, the responsibility to the country, the nation as a whole. It seems that the characteristics of an ideal MP have long since been lost.

In a speech in 1774 to his electors in Bristol the MP Edmund Burke said:

"... it ought to be the happiness and glory of a representative to live in the strictest union, ... with his constituents. Their wishes ought to have great weight; their opinion, high respect; their business, unremitting attention. It is his duty to sacrifice his repose, pleasures and satisfactions, to theirs; above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, mature judgment, and enlightened conscience, he ought not to sacrifice, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the

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

"... parliament is a ... assembly of one nation, with one interest, that of the whole; where no local purposes or prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member; but when you have chosen him, he is not member of Bristol, but he is a member of parliament. If the local constituent should have an interest, or an opinion, opposite to the real good of the rest of the community, the member ought to be as far, as any other, from any endeavour to give it effect." (Burke, Edmund, *Speech to the Electors at Bristol at the Conclusion of the Poll*", 1774, abbreviated download from Wikipedia.)

It would seem that the general consensus in the country and among MPs is that by the 2016 referendum they were issued an instruction, the instruction being to get the country out of the EU. Any exercise on the part of individual MPs of "unbiased opinion, mature judgment, and enlightened conscience" in the interest of the general good appear to have been deemed irrelevant. The so-called 'will of the people' has been used to empower the executive and side line parliament.

To consult the general electorate by way of a referendum is a relatively new feature of the governance of the UK, the first one being the referendum held in Northern Ireland in 1973 to determine whether Northern Ireland should remain part of the United Kingdom or join the Republic of Ireland. The first national referendum was held in 1975 to determine whether the UK should stay in the European Community. Prior to that the use of referendums had been considered, but rejected by both labour and conservative politicians.

Churchill wanted permission from the electorate to continue the wartime coalition government beyond the defeat of Nazi-Germany until Japan had also been defeated, but it was rejected by Clement Attlee:

"I could not consent to the introduction into our national life of a device so alien to all our traditions as the referendum which has only too often been the instrument of Nazism and Fascism."

In March 1975 Margaret Thatcher described referendums as "a device of dictators and demagogues". Thatcher was quoting Clement Attlee who noticed that Hitler, Mussolini and Napoleon III used referendum to legitimise decisions they had made. If we just look at referendum before World War II we can see how Mussolini and Hitler used them to their advantage.

Looking at the European political scene in recent years and countries such as Poland, Hungary and Turkey perhaps this judgment - or fear, if that is what it is – is still well founded.

However, rightly or wrongly, we have to accept that referendums have now become established as part of the British political decision making process, but with the chaos following the 2016 referendum in mind it is clear that each one require very careful thought, planning and preparation. The question put to the electorate in particular needs very careful consideration.

The outcome must not lend itself to the possibility of a multitude of different interpretations. It must be clear and unambiguous about what action is required by the government or other body following the referendum. It should be clear whether the referendum is advisory or binding, but if the outcome is considered 'the will of the people' and therefore beyond reproach in a democracy, advisory referendums should probably be avoided. It would appear that much of the chaos following the 2016 referendum has been caused by the outcome not meeting these criteria.

A briefing paper on the Referendum Bill (Uberoi, Elise, *European Referendum Bill 2015-2016*, briefing paper no 07212, House of Commons Library, 3 June 2015) stated:

"(The Bill) does not contain any requirement for the UK Government to implement the results of the referendum, Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions."

Nevertheless when the government released its referendum information (HM Government, *Why the Government believes that voting to remain in the European Union is the best decision for the UK*) a year later, they declared:

"This is your decision. The Government will implement what you decide."

If a new written constitution with the primary aim to avoid the chaos, confusion and uncertainty of the last three years is borne out of Brexit, it will at least have served some good.

The preparations must give opportunities for the entire population to be involved and must give everybody a chance to air their views. It must be truly unambiguous, neutral and objective and in the end be able to be supported by a substantial majority of the electorate.

Having been devised in the first quarter of the 21st century it will be an opportunity to include new rights and responsibilities such as abandonment of discrimination in any form and criminalising destruction of or cause damage to the natural environment. It could include regulation for the creation and use of Citizens' Assemblies and it could include electoral reform.

In this way the UK could once again be seen to be in the forefront of political thought instead of relying on an 800 year old anachronism.

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