

Would a second Brexit
referendum be legitimate – and
if so, when?

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Two Types of Argument

- Note – concerned with normative rather than legal arguments – no body disputes that the first was lawful and a second could be lawful
- 1) Indirect – a second referendum required because the first was an illegitimate process/outcome
- 2) Direct – a second referendum legitimate even if the first was also legitimate

a) First Referendum Illegitimate

- i) Some arguments question the legitimacy of all referenda (but hence also of the legitimacy of/need for a second – elected legislature/government can reverse it).
- a) referenda seen as populist mechanisms invoking a mythical ‘will of the people’ (+ ignored peoples of UK)
- b) falsely isolate an issue from other issues
- c) divorce authority from accountability
- d) ‘un-British’ ‘advisory’
- e) yet valid to distinguish ‘normal’, constituted, politics from ‘constitutional’, constitutive politics?

Referendum 1 Illegitimate

- ii) top-down, not bottom-up; campaign too short and dominated by misleading information
- iii) referendum on constitutional questions require a super-majority (1975 ref 67.23% on 64.62% turnout; 2016 ref 51.89% on 72.21% turnout). Super-maj though violates a basic democratic norm of impartiality and fairness, and potentially entrenches injustices.
- iv) excluded non-UK resident EU citizens, 'all affected principle' vs. 'stakeholder principle'
- v) Involved elderly (60-40 pro leave) outvoting the young (73-27 pro remain)

b) Legitimacy of Second Referendum

- i) If we can revisit 1975 why not 2016? – democracy means 'being able to change your mind'. Jefferson's generational argument.
- ii) Ref 1 on Brexit, but not on a specific Brexit 'hard'/'soft' option.
- lii) Sterne's 'two beds of judgment'
- Iv) secession only justified when union involves an 'injustice' and it causes no 'injustice' – Brexit fails on both counts?

b) Legitimacy of 2nd Referendum

- v) Could a second referendum be legitimately organised? Just 14 months to go – Electoral Commission recommends legislation for a ref should be passed 6 months before campaign starts, and campaign should be 10 weeks. Will there be a deal to vote on in 6 months? Or the political will/opportunity – surely wd need rejection of withdrawal agreement by Parl, then general election and promise to hold 2nd ref?
- vi) What Question? ‘Do You Accept the Withdrawal Agreement?’ – is that no – go anyway, or no stay? (yes would be go). No, stay assumes simply revoke Art 50 unilaterally – but unclear EU would accept a de-Brexit without negotiation. So would need to be: do you prefer withdrawal agreement to the re-entry agreement?

Conclusion

- a) No knock-down argument for the illegitimacy of first referendum
- b) Likewise – no knock down argument for a second referendum ... and may be too late in any case
- c) But may be doesn't matter – political factor of extreme buyers remorse that would justify a second referendum would probably also allow reversal by a parliamentary vote – or, more realistically, simply the softest possible Brexit.