I'm not a lawyer but, I've a reasonable knowledge of history, and a layman's interest in legal and constitutional matters. I'm writing this in the hope that I can shed some light on the constitutional problem we now seem to have following the Brexit vote. I say *seem to have*, because the legal position is clear, although politically unpalatable for many.

Ever since Sir Edward Coke (1532-1634) became Chief Justice of Common pleas in 1606, Judges have held the executive to account. Lord Atkin's* dissenting judgement in Liversidge v Anderson (1941), which was confirmed as correct by the Rossminster case (1979), stipulates that Ministers have to abide by the letter of the law, and not a subjective interpretation of what they would like it to mean.

Regarding Brexit, the legal position is simple: referenda have no place in the British constitution. Legislation can only be framed and agreed by Parliament. The AV referendum in 2011 was "binding" in the sense that one-off legislation had already been passed, which would automatically be implemented in the event of a 'yes' vote. *But* there was no legal or constitutional bar to that legislation being repealed by Parliament *alone* at some later date.

The European referendum was specifically designated as "advisory" when Parliament passed it. Therefore the result did not change the UK constitution, or law, in any respect. Given that membership of the EU is defined by the European Communities Act of 1972, as amended by various treaties, also ratified by Parliament, leaving the EU was never going to be a simple matter - assuming that Parliament agreed to respect the referendum result.

Supposing that Mrs May had invoked article 50 without repealing the various laws pertaining to the EU. She would then be in breach of UK law, meaning that the government and possibly individual ministers could be sued by any parties adversely affected, and some transfers of monies from Britain to the EU would still be mandatory. ***The government cannot act as if Parliament has changed the law, when it hasn't!*** The only way to leave in an orderly fashion would be for *Parliament* to pass an Act providing for the European Communities Act to be repealed, at some future date, when the notice to leave triggered by article 50 came into effect, after the two year notice period, or earlier in the event of agreement with our former EU partners. But repealing the Act, and replacing the legislation on VAT and many other matters, is a matter for Parliament and not the Prime Minister.

None of this has any bearing over what trade and customs relationships we would have with the EU once Brexit was formally implemented. Given that, even among the Brexit camp, there was no unanimity about what a post Brexit deal (if any) should look be, and no guarantee of good (if any) terms from the EU, one can understand the reluctance of the Government to trigger Article 50 before terms had been agreed. However, it is also in the interests of the EU to play hard-ball with the UK over this, leaving the government in a situation which is somewhere between difficult and impossible. The referendum did not express a preference over a post-

Brexit deal, which again means that Parliament should decide what the priorities are. Therefore we are in chaos because the referendum was advisory, and on a point of principle with no pre-agreed way of translating that principle into the law of the land. Why was the referendum advisory? A binding referendum would have had to implement legislation already passed by Parliament, but whose implementation was contingent on the referendum result. Such legislation would have been complex, contentious, and used far more Parliamentary time than was available in the Government's desired timetable after the 2016 election. And it may well not have been approved by Parliament, given the personal preferences of MPs and Peers. But Mr Cameron had promised a referendum before the election, so there had to be one: **to speak it profanely, he cocked everything up by losing the gamble on his own authority and popularity: then he f***ed off, leaving others to attempt to clear up his mess.**

Personally I would be quite happy, subject to safeguards, to see referenda become part of the British constitution. The most important safeguards would be thresholds of minimum turnout and support for questions put, and also that some equivalent to the Representation Of The People Act should apply to referenda. This would invalidate the result if blatant and objectively provable lies, like the £350 million per week, were used by the winning side. This is analogous to laws for Parliamentary elections. For example, in 2010, Phil Woolas had his election as an MP overturned, and was disqualified from standing again, because he had effectively made false statements against his closest opponent. If something akin to the Representation of the People Act had applied to the Euro-Referendum, the result would have been declared invalid by the courts because of the major factual untruths used by the Brexit side. It is also likely that several politicians and newspaper editors would have received fines and gaol sentences – OR they might have allowed their campaigns to be restrained by the law of the land.

If referenda *are* to be a meaningful expression of the sovereignty of the people, in my view they must enact legislation. But will it be good legislation? Parliament does not just "pass" a law. All proposals must pass each House three times, where the wording is discussed and provisions amended. So perhaps three referenda should be held for any legislation: the first for a decision in principle, the second to decide the details, and the third for final approval. There would need to be agreement about the procedure to frame amendments. This would not eliminate all problems. Many legal issues arise when different laws clash with each other, and the courts must decide which law takes priority. For example, Habeas Corpus, which goes back to Magna Carta, and effectively prohibits imprisonment without trial, is generally regarded to trump other laws unless it is specifically suspended.

In conclusion, it is inevitable that both Parliament and the courts will be involved in implementing Brexit, *if it happens*, because many rights and obligations of citizens are affected, and these cannot be fairly adjudicated either by the whim of the Prime-Minister, or by a simple Yes-No vote in a non-binding referendum.

* Excerpt from Lord Atkin's judgement in Liversidge v Anderson:

Dissent [edit]

In a dissenting speech Lord Atkin stated his view the majority had abdicated their responsibility to investigate and control the executive, and were being "more executive-minded than the executive". Atkin protested that theirs was "a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister," and went on to say:

> In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.
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> [...]
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> I know of only one authority which might justify the suggested method of construction. "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be the master, that's all." After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has". I have an opinion that they cannot and the case should be decided accordingly.

Lord Atkin's view was that the phrase "reasonable cause" in the statute at hand indicated that the actions of the Secretary of State were meant to be evaluated by an objective standard. As a result, it would be within the court's purview to determine the reasonableness of those actions.[6]

The potential power of this dissenting judgment was clearly recognised even before it was published. The Lord Chancellor, Viscount Simon, wrote to Lord Atkin asking him to amend the proposed terms of the speech. He did not.[7]