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Referenda: Plebiscites or Opinion Polls
An Analysis of the Use, Constitutionality and
Appropriateness of Direct Democracy in
the British Constitution

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2. INTRODUCTION

This paper is an investigation into the changing nature of the referendum in light of contemporary British constitutional reform. Clement Atlee once said that “referendums...are just not British”¹, but they are now indisputably an important part of the British decision-making process. The growth in the use and popularity of referenda in the intervening years will be examined. It will be shown that whilst the growing use of a previously alien device is to be commended this has regrettably occurred as a result of political expediency rather than the political and constitutional recognition of popular sovereignty.

A solution to the long-standing debate about the constitutionality – or lack thereof – of referendums will be proffered. Bagehot wrote that “the unresolved role of the people in the constitution lies at the heart of arguments about...referendums.”² If popular sovereignty is accepted, it follows that referendums have binding force; if the old principle of parliamentary sovereignty is retained, then referendums will remain mere ‘opinion polls’. Bagehot’s conundrum would quickly evaporate if the law recognised that in practice sovereignty rests with the people.

A case for a continuing use of referenda in the United Kingdom will be made. It will be shown that all arguments against referenda can be dismissed with relative ease, without going so far as arguing that opponents of referendums are indeed opponents of democracy.

Whilst more than 98% of states have used referendums³, it is unwise to assume that they are always appropriate. The feasibility of the referendum will be considered and it will be shown that despite its shortcomings the referendum – used wisely – is an appropriate, valuable and progressive tool particularly in light information technology advances and e-democracy.

Voting at general and local elections aside, the referendum is the only contact point between the people, the legislature and the executive. The constitution currently precludes the citizens’ initiative and it has yet to find favour with politicians. Whether the initiative should be legitimised in Britain will be investigated. Of particular interest here is the government’s motivation for its U-turn with respect to a referendum on the European constitutional treaty.

A thin line divides constitutional law and political science. This paper will, out of necessity, straddle the two and offer debate focussing on the referendum grounded in constitutional principles.

¹ Clement Atlee when responding to whether a referendum be held to extend Britain’s wartime coalition until Japan’s surrender. As per Ollie Stone-Lee, *The UK and referendums* (BBC Online)

² Walter Bagehot, *The English Constitution*, (Fontana, London, 1963) in Rivka Weil, *We the British People* [2004] PL 380

³ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002)

2.1. DEFINITIONS

It is important to define important terms before proceeding. ‘Referendums’ should be taken to mean “a mechanism which allows voters to make a choice between the alternative courses of action on a particular issue.”⁴ Whilst ‘plebiscite’ means an ordinance of self-determination with binding authority.⁵ A Citizens’ Initiative is a process whereby a significant body of popular opinion can automatically trigger a referendum or debate in Parliament.

⁴ Iaian McLean (eds), *The Concise Dictionary of Politics* (OUP, Oxford, 1996).

⁵ Plebiscite = Latin for ‘ordinance of the people’, resurrected by Voltaire to describe the referendum in Switzerland. In the 19th century, plebiscite was used in English as a derogatory term to describe referendums called by Napoleon I and Napoleon III to boost their personal authority, but the term is no longer regarded as derogatory. As per Iaian McLean (eds), *The Concise Dictionary of Politics* (OUP, Oxford, 1996).

3. THE USE OF DIRECT DEMOCRACY IN BRITAIN SO FAR

3.1. FROM DESPISED TO BELOVED: THE HEYDAY OF AN UNPOPULAR DEVICE

There is no tradition of referendums in the United Kingdom⁶, nor is there a longstanding expectation amongst the people of consultation regarding major constitutional innovations⁷. The Liberal Party first suggested that a referendum be employed in 1969 to solve the deep divisions across the country with regard to membership of the EEC. But, neither of the main parties took referendum proposals seriously⁸ and subsequently opposed a referendum on the issue in the 1970 General Election.⁹ Prime Minister Harold Wilson quickly rejected a referendum on entry into the EEC: “The constitutional position is that whatever this House decides in this matter, or any other matter, is the right decision”¹⁰. Yet despite this deep distrust and wide unpopularity, the referendum has enjoyed thirty golden years.

Until the 1970s referendums were widely considered to be prima-facie antagonistic to the central principle of the British Constitution – parliamentary sovereignty¹¹ - and therefore unconstitutional¹². Even the 1975 referendum on the EC was seen by the then Labour government as a unique event. Four days after the referendum in 1975 Sir John Eden, a conservative backbencher, asked Prime Minister Harold Wilson, “Will he keep to his determination not to repeat the constitutional experiment of the Referendum?” To which he replied “I certainly give the right Honourable Member...the assurance he seeks.”¹³ However backbench pressure subsequently forced the government to concede referendums on devolution to both Scotland and Wales.¹⁴ Nevertheless until the election of ‘New Labour’ in 1997 only four referendums had been held.¹⁵

⁶ Interestingly Whilst Winston Churchill argued for the issue of female suffrage to be decided by referendum in 1910.

⁷ Rodney Brazier, *Constitutional Reform* (2nd ed., Oxford 1998)

⁸ Birch in Vernon Bogdanor *Our New Constitution* [2004] LQR 120

⁹ Constitution Unit, *Delivering Constitutional Reform* (Constitution Unit, Faculty of Laws, University College London) p66

¹⁰ Prime Minister Harold Wilson quoted by Mads Qvortrup in *Vote 2004, Blair's referendums* www.vote-2004.com

¹¹ Vernon Bogdanor, *Power and the People, A Guide of Constitutional Reform* (Victor Gollancz, 1997)

¹² David Butler and Austin Ranney (eds) *Referendums Around the World – The Growing Use of Direct Democracy* (Macmillan, London, 1994) p33. See also Vernon Bogdanor *Our New Constitution* [2004] LQR 120, 242

¹³ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p22

¹⁴ Vernon Bogdanor, *Power and the People, A Guide of Constitutional Reform* (Victor Gollancz, 1997) p25

¹⁵ See Appendix A: List of referendums in the United Kingdom

However, an unprecedented number of referendums have been held in the last seven years.¹⁶ There have been a further four major pre- and post-legislative referendums¹⁷ and no less than thirty local referendums on directly-appointed mayors.¹⁸ Three further referendums have been promised: a referendum on the voting system for the House of Commons,¹⁹ a referendum on the adoption of the Euro and a referendum on the European Constitutional Treaty. It is particularly interesting that the decisions to hold these referendums were uncontroversial – the referendum device was not criticised by opposition parties or from within the government²⁰. This is of huge importance; less than 30 years ago the referendum was considered constitutionally impossible. In May 2002 John Prescott issued advice to local authorities on how to use the referendum to consult voters on council tax. And Nick Raynsford threatened to use local referendums as a means to cap council taxes across the country in September 2003. Nigel Smith²¹ notes that this “betrays another characteristic of referendums initiated by governments: they sometimes use them as instruments to further policy and not as a key to genuine choice and decision by the voters.”²²

Undoubtedly the referenda held so far have set a precedent. The argument that referenda are unconstitutional is now unsustainable.²³ Furthermore, the introduction of the Political Parties, Elections and Referendums Act 2000 (PPERA) is evidential of an intention to hold further referendums. It must be remembered, however, that whilst the referendum enjoys unprecedented popularity with the current government,²⁴ it is still a discretionary device. A simple change in government could result in the referendum falling from political grace.

¹⁶ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* 12.2

¹⁷ Scotland devolution (1997), Wales devolution (1997), Northern Ireland re the Good Friday Agreement (1998) and the Greater London Mayoral Referendum (1998)

¹⁸ Anon, http://www.thebestlinks.com/Referendums_in_the_United_Kingdom.html

¹⁹ This referendum is now unlikely to take place. The 1997 Labour Manifesto claimed “we are committed to a referendum on the voting system for the House of Commons” (<http://www.labour-party.org.uk/manifests/1997/1997-labour-manifesto.shtml>). There was no such promise in the 2001 manifesto.

²⁰ Mads Qvortrup in Introduction to Vote 2004, *Blair’s referendums* www.vote-2004.com

²¹ Nigel Smith was the chair of the all-party yes campaign in the Scottish referendum of 1997

²² Nigel Smith in Vote 2004, *Blair’s referendums* www.vote-2004.com

²³ Constitution Unit, Delivering Constitutional Reform (Constitution Unit, Faculty of Laws, University College London) para 234

²⁴ Mads Qvortrup in Introduction to Vote 2004, *Blair’s referendums* www.vote-2004.com

3.2. ANALYSES : NOT YET A CONSTITUTIONAL SAFEGUARD

Every referendum held to date has concerned a constitutional issue: the transfer of legislative power²⁵. Whilst the referenda are indicative of the recognition of the constitutionality of the transfer of legislative power, did this constitutional status trigger the referendum or were the decisions to hold referendums motivated by other factors? It is submitted that referendums were and still are held on an ad-hoc basis. The referendum is an expedient device, appointed when a particular situation calls for a popular verdict²⁶ and is not yet a true constitutional safeguard.

This is demonstrated by the reasons behind each referendum. The twin devolution referendums of 1979 were forced upon Callaghan's government by an alliance of the opposition parties and Labour rebels²⁷ which was "defensive from the start."²⁸ Referenda are allegedly employed by the current Labour government as a 'problem solving' mechanism – once a question has been put few can argue with the result. It is interesting to note the government's U-turn regarding a referendum for the EC constitution.²⁹ If one assumes - as one might - that the decision was a political one, motivated by fears of a backlash from the voters, MPs and party members who were clamouring for a referendum, then what we see is the power of the People in effecting a referendum. This is a remarkable step forward. Worldwide "the tradition is spreading, as more and more countries with no legal need to have referendums feel impelled to hold them at crucial junctures."³⁰

²⁵ For example the referendums on devolution in Scotland, Wales and the regions and the referendum on the EC. E C S Wade submits that the sovereignty of parliament is unlimited by the transfer of legislative authority to the EC. If, for example, the sovereign in the United Kingdom should wish to leave the European Union, then – in terms of national constitutional law – that could be effected by an ordinary piece of legislation. Whether there are any international sanctions on so doing does not effect the position in British constitutional law. E C S Wade in Dicey *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

²⁶ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p18

²⁷ Nigel Smith in Vote 2004, *Blair's referendums* www.vote-2004.com

²⁸ Constitution Unit, Delivering Constitutional Reform (Constitution Unit, Faculty of Laws, University College London) para 231

²⁹ On 17th October 2003 Tony Blair said: "there will not be a referendum." In an interview for The Times, he said it would "not be a wise thing" to have the Government "convulsed" for months preparing for a referendum on the issue (BBC News, *Tracking Blair's EU comments*, BBC Online http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/3638491.stm) by December of that year his opinion was "let's wait and see" (from the Daily Mail: http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=199505&in_page_id=1770) Yet, soon after announcing that his "policy has not changed" in April 2004 he conceded a referendum on the very same subject (BBC News, *Tracking Blair's EU comments*, BBC Online http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/3638491.stm)

³⁰ Nigel Smith in Vote 2004, *Blair's referendums* www.vote-2004.com

But there remains no formula for initiating referendums, they do not arise as a necessary mechanism of constitutional change³¹ but are ‘granted’ at the whim of the government. The only constitutional principle involved is that parliamentary sovereignty remains intact.³² Indeed it is surprising that given the large majority commanded by the Prime Minister in the House of Commons, he is willing to risk his policies at referendum when there is nothing in law compelling him to do so³³. Remarkably, most of those who advocate the use of referendums in the UK do so because they believe that they can defeat an innovation that would otherwise go through parliament unopposed³⁴.

Before the call for “a new regulatory framework for referendums”³⁵ by the Committee on Standards in Public Life in 1996 and the resulting PPERA 2000 the referendum process was unregulated. “No coherent, consistent principles were applied in their operation.”³⁶ The PPERA gave the responsibility for administering a referendum to the Electoral Commission, providing for referendums generally for the first time. If the increasing use of the referendum has fostered an environment where referendums are expected as a matter of course, then the PPERA has propped open the floodgates.

In most states referendums are held as and when they are required by the constitution rather than for any ulterior or political purpose.³⁷ This is how it should be³⁸. They operate for the reasons originally advocated by Dicey: to provide a ‘check and balance’ on the power of the government.

³¹ This is in marked contrast to many other states, where constitutional changes must be authorised by the people – e.g. Australia.

³² The Institute of Welsh Affairs, *The Road to the Referendum Requirements for a Fair Debate* (Institute of Welsh Affairs, 1996) in the Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom 12.4*

³³ David Butler and Austin Ranney (eds) *Referendums Around the World – The Growing Use of Direct Democracy* (Macmillan, London, 1994) p33

³⁴ Vernon Bogdanor, *Power and the People, A Guide of Constitutional Reform* (Victor Gollancz, 1997)

³⁵ The 5th report of the Committee on Standards in Public Life, *The Funding of Political Parties* (Cm. 4057 (1998)) Ch 12: Referendums. Such a regulatory scheme is also advocated by the Constitution Unit, in *its Report of the Commission on Referendums* (Constitution Unit, Faculty of Laws, University College London, 1996)

³⁶ The Institute of Welsh Affairs, *The Road to the Referendum Requirements for a Fair Debate* (Institute of Welsh Affairs, 1996) in the Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom 12.4*

³⁷ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p22

³⁸ See Below for the most appropriate type of referendum in Chapter 5(d)I

3.3. THE BINDING NATURE OF THE REFERENDUM

When questions of the binding nature of referenda arise, the mindset of key individuals is crucial. In law referendums are nothing more than advisory.³⁹ This should not come as a surprise.⁴⁰ At the time of the EC referendum, Edward Short, the leader of the House of Commons remarked, “the Government will be bound by it, but Parliament of course, cannot be bound by it...although one would not expect the honourable members to go against the wishes of the people, they remain free to do so.”

Nevertheless it can be concluded that whilst in law the referendum will be advisory, in practice the result will be binding - but only because the politicians consider it to be so⁴¹. The binding nature of the referendum can be further demonstrated by asking whether legislation approved by referendum could be repealed without legislative approval. For example could the Welsh Parliament be abolished without first consulting the Welsh People? – surely not. Despite the obviously binding nature of the referendum, some constitutional commentators insist on claiming that to date no binding referendums have been held, and that to do so would seriously undermine principles of governmental responsibility.⁴²

³⁹ Chris Ashton notes that neither of the referendums were specifically stated to be binding [either by their enabling acts or governmental officials] *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

⁴⁰ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

⁴¹ See chapter 4(c) below re a new constitutional convention.

⁴² See for example Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003) p155

4. IS DIRECT DEMOCRACY CONSTITUTIONAL?

When Dicey first advocated the referendum in England,⁴³ his friend James Bryce asked him two questions that remain pertinent to the constitutionality of direct democracy in Great Britain today:

1. “What is to be the authority to decide when a bill should be referred [to the people]”
2. “How can ‘constitutional changes’ be defined in a country which has no rigid constitution”⁴⁴

Mads Qvortrup suggests that the popularity of the referendum clouds the question of constitutionality.⁴⁵ It is submitted, however, that the reverse is true. As referendums become increasingly popular, the importance of their constitutionality rises proportionately. Until the constitutionality of direct democracy is thoroughly examined, the status of referendums and initiatives lies in the balance.

4.1. DEFINING THE CONSTITUTION

It is difficult to theoretically analyse that which we cannot even identify.⁴⁶ And it is prima-facie impossible to decide – with any reasonable level of accuracy – whether or not direct democracy is constitutional when only one thing about the constitution is certain: that it’s borders are elusive.⁴⁷

Britain is almost unique insofar as it lacks a written constitution.⁴⁸ The Constitution Committee has adopted, as its working definition of the constitution “the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationships between the different institutions and the relationship between the different institutions and

⁴³ A V Dicey, *Ought the Referendum to be Introduced into England* (Contemporary Review, 1890)

⁴⁴ Bryce to Dicey, 6th April 1915: Bryce Papers, Bodleian Library, MS 4 to 84, in Vernon Bogdanor at Ch 3 p33, David Butler and Ausin Ranney(eds), *Referendums Around the World, The Growing use of Direct Democracy* (Macmillan, 1994)

⁴⁵ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p1

⁴⁶ E C S Wade in Dicey *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

⁴⁷ ‘there is no marked or clear distinction between laws which are not fundamental and constitutional and laws which are fundamental and constitutional’ as per A. V. Dicey, *Introduction to the Study of the Constitution* (online text at http://constitution.org/cmt/avd/law_conn.htm)

⁴⁸ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p22

between those institutions and individuals.”⁴⁹ Blackstone saw “that the king can do no wrong” as the central pillar of the constitution.⁵⁰ As the cabinet and parliament replaced the King and his court, Dicey noted that “there is no law which Parliament cannot change. There is no fundamental or so-called constitutional law”⁵¹ and that there is not body of persons “which can pronounce invalid any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution.”⁵² Under any of these analyses the constitution can be whatever the Queen in Parliament enacts. It is submitted that whilst we are moving closer to an answer, the second of Bryce’s questions remains unanswered. If the constitution is indeed ‘whatever the Queen in Parliament enacts’ then referential precedent and the PPERA confirm the referendum’s constitutionality.

4.2. DIRECT DEMOCRACY AND PARLIAMENTARY SOVEREIGNTY⁵³

4.2.1. THE TRADITIONAL APPROACH

Parliamentary sovereignty and direct democracy are traditionally antagonistic. Historically the House of Commons would refuse ‘supply’ until grievances had been redressed: it represented the people. In passing the 1911 Parliament Act, Parliament declared its own sovereignty⁵⁴ such that in law it will always be for parliament to decide the law of the land⁵⁵. The House of Lords’ ‘referential theory’⁵⁶ redefined the roles of both Houses and the electors.⁵⁷ Unfortunately the role of British subject is limited to periodically approving preselected Members of Parliament who propose policies and lead public affairs.⁵⁸ In *Ellen Street Estates Ltd v. Minister of Health*⁵⁹ Maugham LJ said,

⁴⁹ Constitution Committee, *First Report, Reviewing the Constitution* (2001 – 02 HL 11) Chapter 2

⁵⁰ Sir William Blackstone, *Commentaries III 17* in Kaplan, Justin (ed) & Bartlett, John *Bartlett’s Familiar Quotations* (17th ed, Boston, Little, Brown and Company)

⁵¹ A V Dicey, source unknown in Vernon Bogdanor *Our New Constitution* [2004] LQR 120

⁵² A V Dicey, source unknown in Vernon Bogdanor *Our New Constitution* [2004] LQR 120

⁵³ “Sovereignty is often conceived of as the only kind and absolute authority in a community, and, as such, unlimited, one and indivisible, omnipotent, and even infallible” Markku Suksi, *Bringing in the People, A comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff publishers, 1993) p15

⁵⁴ Rivka Weil, *We the British People* [2004] PL 380

⁵⁵ E C S Wade in Dicey *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

⁵⁶ Referential Theory = That the House of Lords was a check on the power of the House of Commons on behalf of the people

⁵⁷ Rivka Weil, *We the British People* [2004] PL 380

⁵⁸ Joseph F Zimmerman: *Participatory Democracy – Populism Revived* (Praeger Publishers, 1986)

“the legislature cannot according to our constitution bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature.”⁶⁰ It follows that Parliament cannot bind itself to follow the result of a subsequent referendum. It would however be political suicide for the government of the day to contradict a referendum result.

Charter 88 claims that “in major constitutional matters, the people ought to be consulted. It is not incompatible with Parliamentary sovereignty that there should also be popular sovereignty, where people have a direct say.”⁶¹ It is submitted that they are mistaken; there is no room for true direct democracy in a constitution based on parliamentary sovereignty. As long as parliamentary sovereignty is the central pillar of the constitution, a referendum decision will be, in the eyes of the constitution, no more than an expression of the popular opinion. At the heart of Direct Democracy is the opinion that sovereignty in the United Kingdom rests with the people, that the people should be able to express their wish and that wish be enacted into law. If a referendum result was to conflict with parliamentary opinion, the honourable members should be legally obliged to accept the decision of their electors. They are currently free to ignore popular opinion at the risk of provoking outrage and sacrificing their tenures.

Bagehot wrote that ultimate authority in the United Kingdom rests with the House of Commons – suggesting that once appointed parliamentarians are free to decide as they like, with no reference to their electors. He described the power of the head of the executive to “overcome the resistance of the second chamber by choosing new members of that chamber”⁶² as “the safety valve of the truest kind. It enables the popular will – the will of which the executive is the exponent, the will of which it is the appointee – to carry out within the constitution desires and conceptions which one branch of the constitution dislikes and resists.” This so-called safety valve allowed the Houses of Commons to ensure that its legislation was not unduly withheld, but did not protect against a tyrannical house or a house under the control of a tyrannical executive. Interestingly this ‘trump card’ was played to force the introduction of the Parliament Act. However it is submitted that Bagehot placed too much trust in the House of Commons.⁶³ Furthermore, the safety valve which he talks of no longer exists and the danger – as it then was – of the House of Lords blocking legislation proposed by the elected house is

⁵⁹ [1934] 1 KB 590

⁶⁰ *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590

⁶¹ Charter 88, *Reinventing Voting – holding a referendum of elections to the commons*, (Charter 88, London, 1996)

⁶² W Bagehot and H R S Crossman (eds), *The English Constitution* (C A Watts & CO Ltd, 1964)

⁶³ Indeed on p 248 he writes “The English constitution in its palpable form is this – the mass of the people yield obedience to a select few; and when you see this select few, you perceive that though not of the lowest class, nor of an unrespectable class, they are yet of a heavily sensible class – the last people in the world to whom, if they were drawn up in a row... would ever give an exclusive preference.” W Bagehot and H R S Crossman (eds), *The English Constitution* (C A Watts & CO Ltd, 1964)

no more. The danger now, is of the executive enacting legislation that is not supported by the people – and there is no valve net to prevent such an atrocity.

Interestingly, the American constitution does not place sovereignty anywhere – its writers feared that to do so would fuel tyranny.⁶⁴ Is such a position desirable? If so the status quo should be maintained. But Wade warns us that “the body which exercises sovereignty may well be more dangerous to stability than in the days when parliament commanded universal respect. It must not be forgotten that the inevitable consequence of the Supremacy of Parliament in the legislative field is that there can be no check upon the unscrupulous use of power by a Government which finds itself in command of a majority in the House of Commons.”⁶⁵

4.2.2. SOVEREIGNTY REDEFINED

Traditionally the House of Commons drew its ‘parliamentary’ sovereignty from the Royal Prerogative – this is an outdated and fundamentally unjust model. The crown, as a matter of convention, has no control over the House of Commons or the course of legislation in the UK. There must be a supreme authority, “a conclusive power, in every point somewhere.”⁶⁶ The time has come to recognise the essence of Dicey’s theory in law: that the constitution is in practice based on popular sovereignty⁶⁷. “Dicey identified parliamentary sovereignty as the fundamental norm of the British Constitution. But, he distinguished between Parliament as the legal sovereign and the People⁶⁸ as the political sovereign.”⁶⁹ In advocating the referendum Dicey promoted the legal recognition of the political position.

The cabinet system relies on parliamentary sovereignty and “is saved from being an autocratic instrument by the knowledge that at intervals the electorate may alter the composition of the Commons and so place the supremacy of Parliament in other hands but it is the political supremacy rather than the legal doctrine which saves the democratic

⁶⁴ Bagehot and H R S Crossman (eds) , *The English Constitution* (C A Watts & CO Ltd, 1964) p218

⁶⁵ E C S Wade in Dicey *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

⁶⁶ Bagehot and H R S Crossman (eds) , *The English Constitution* (C A Watts & CO Ltd, 1964) p214

⁶⁷ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 474)

⁶⁸ The capitalisation of ‘People’ “describes the instances in which the people mobilise, deliberate and pronounce their deliberate and sustained opinion on constitutional change. This happens at times when the people engage in public life with the seriousness they usually accord the most important decisions of their private lives. In all other times we refer to ‘the people’ without a capital. This follows the work of Professor Bruce Ackerman of Yale Law School. See Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass. 1998) Vol II” in Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

⁶⁹ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 474)

principle.”⁷⁰ That a political doctrine is necessary demonstrates that the constitution is lacking. This is further evidence that the ‘legal’ seat of sovereignty is misplaced.

4.2.3. A RECONCILIATION PROPOSED

Aristotle wrote that “the majority ought to be sovereign, rather than the best, where the best are few...[a] feast to which all contribute is better than one given at one man’s expense.”⁷¹ If one accepts that policy in the UK is largely driven by the majority, and also accepts Dicey’s ‘obvious conclusion’⁷² that policy is driven by the sovereign’s opinion”⁷³ then the sovereign and the people are indistinguishable. The electorate trusts its representatives to apply their minds to legislate, but they are not given the authority to delegate their power. Bogdanor suggests that such a power “can only be obtained through a specific mandate” – a referendum.⁷⁴ Even though Dicey was of the opinion that there is no law in the state which parliament can not change,⁷⁵ he took his argument one step further when arguing that in practice the people must consent to all constitutional change in Britain⁷⁶.

John Austin saw MPs as trustees for their electors in so far as they are able to impose their will on parliament in the long term. But there is no check on their power between elections. Dicey maintained that there was a “dualist system” in the United Kingdom: that in reality the consent of the people for constitutional change was sought whilst in law, such an idea was abhorrent.⁷⁷ He claimed that the existing British constitution already recognised the people as the political sovereign.⁷⁸ Bogdanor believes that, as Dicey foresaw, the referendum has in practice become “an instrument of entrenchment” since it “prevents the powers of Parliament from being transferred without the approval of the people”⁷⁹ He is implying a shift in sovereignty. Whilst this may have occurred in ‘real’ or ‘practical’ terms, in law the position has remained the same. Dicey wrote that the referendum was “the one available check on the recklessness of party leaders [and it would yield] formal acknowledgement of the doctrine which lies at the basis of English democracy – that a law depends at bottom for its enactment on the consent of the nation

⁷⁰ E C S Wade in Dicey *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

⁷¹ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996) p130

⁷² A V Dicey, *Lectures on the Relation Between Law & Public Opinion in England during the nineteenth century* (2nd ed, Macmillan, London, 1930) p10

⁷³ A V Dicey, *Lectures on the Relation Between Law & Public Opinion in England during the nineteenth century* (Macmillan, London, 1930) p11

⁷⁴ Bogdanor in Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p46

⁷⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

⁷⁶ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 474) at 475

⁷⁷ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

⁷⁸ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

⁷⁹ Vernon Bogdanor *Our New Constitution* [2004] LQR 120

as represented by the electors.”⁸⁰ The next logical step is the legal acceptance of this doctrine.

4.3. A NEW CONSTITUTIONAL CONVENTION?

Constitutional conventions are “rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.”⁸¹ Vernon Bogdanor reminds us that “of the recent constitutional reforms, most of them have been validated by referendum”⁸² and in particular suggests that a convention may have been established that “the powers of parliament should not be transferred without popular consent.”⁸³ Whether such a convention exists will be examined below.

By accepting the existence of such a convention we could circumvent all controversial questions of parliamentary sovereignty yet snugly incorporate referenda into the constitution. For this to be acceptable a supplementary convention would have to be accepted: that the decision is binding on the commons. There is evidence to support the existence of such a convention. At the time of the 1975 referendum on whether or not Britain should remain in the EC, Edward Short, the leader of the House of Commons declared that “the government will be bound by it, but Parliament, of course, cannot be bound by it.”⁸⁴ It is unlikely that politicians will not accept the result of a referendum. Tony Benn, who had come under criticism from the Prime Minister during the 1975 campaign, said: “when the British people speak, everyone, including members of Parliament, should tremble before their decisions and that’s certainly the spirit with which I accept the result of the referendum”⁸⁵. As so long as the politicians consider referendums binding upon them, a convention will exist. It is suggested that – the introduction of a written constitution and a recognition in law of the sovereignty of the people aside - the development of conventions for referendums is the only way to prevent political expediency from being the dominant factor in British referendums.⁸⁶

An argument against the existence of a convention is that all but one of the referendums held to date (Northern Ireland in 1973) have been held by Labour governments – thus the referendal mechanism of constitutional change has not yet been practiced by all parties. However the Liberal Democrats (and the Liberals before them) favour the use of referendums for any constitutional change, and the Conservatives have advocate

⁸⁰ Vernon Bogdanor in Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p35

⁸¹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959) p423

⁸² Vernon Bogdanor, *Our New Constitution* [2004] LQR 120, 242

⁸³ Vernon Bogdanor, *Our New Constitution* [2004] LQR 120, 242

⁸⁴ Vernon Bogdanor *Our New Constitution* [2004] LQR 120, 242

⁸⁵ BBC, *On this day: 6 June 1975* (BBC online)

⁸⁶ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p24

referendums in certain situations⁸⁷. It is submitted that any future government would find it difficult to enact major constitutional change without referendal approval.

4.4. THE CONSTITUTIONALITY OF DIRECT DEMOCRACY

The closest the UK gets to entrenched direct democracy is a general commitment in the Northern Ireland Constitution Act⁸⁸ “that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll.”⁸⁹ However any such poll still requires parliamentary ratification.⁹⁰ Some maintain, “there is no legal or constitutional basis for holding a referendum in the UK other than that granted by an Act of Parliament. The doctrine of supremacy of Parliament gives all power to parliament (and in effect to the Commons) to decide whether or not to seek the advice of the electorate.”⁹¹ They argue that the principle of parliamentary sovereignty is so central to the British constitution, that to move away from it slightly – let alone abolish it altogether – would be unconstitutional. Such analyses conclude that the referendum can never be incorporated into the British constitution, let alone be seen as a fundamental machine of the constitutional reform process. Another quick argument against the constitutionality of direct democracy is that “the UK doesn’t have any citizens – only subjects (of the crown). Until we move beyond the present ‘constitutional monarchy’ – which isn’t constitutional at all and would probably be better called conventional monarchy (i.e. everything is based on convention rather than law) – you couldn’t even contemplate the type of citizen based system which exists in ‘purer’ democracies.”⁹²

These arguments are fallacious. Direct democracy is constitutional on two different grounds. Firstly, if the real base of sovereignty is accepted then claims that direct democracy is constitutional are irrefutable. Secondly, there is a strong case for concluding that two constitutional conventions exist, one that a referendum must be held before any significant change is made to the constitution and two that the decision of that referendum be binding on the legislature.

⁸⁷ Conservative Party website, *Public must decide future of the Welsh Assembly* (30/11/2004)

http://www.conservatives.com/tile.do?def=news.story.page&obj_id=117763

⁸⁸ Kevin Bampton, *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

⁸⁹ Northern Ireland Act 1998 s.1(1), re-enacting s.1 Northern Ireland (Constitution) Act 1973

⁹⁰ Northern Ireland Act 1998 s.2: (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.

⁹¹ Chris Ashton, *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

⁹² Colin Talbot, *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

The argument that direct democracy is inconsistent with parliamentary sovereignty has lost its validity.⁹³ The Commission on the Conduct of referendums claims that since “parliament has sovereign power, it must have the power to call a referendum”. But this is an oversimplification – it is submitted that the people are sovereign and parliament is under a moral obligation to call a referendum. Under Blackstone’s interpretation of the common law, the referendum is permissible. Furthermore, referenda are consistent with the social contract doctrine developed by Locke, Kant and Rousseau⁹⁴. Interestingly under the American Constitution a referendum cannot be characterised as a delegation of power. The American constitution assumes that “all power derives from the people”⁹⁵

Furthermore there is no reason why an ordinary Act of Parliament could not state a referendum to be binding or to be required before constitutional change. Exactly such a provision appears in the Australian Constitution Act (Queensland) 1867⁹⁶. However, whilst Parliament cannot ‘ignore’ its own legislation it could impliedly repeal it in the ordinary manner regardless of the first act. What is important here is that the MPs will likely consider the provisions as effectively binding. Bogdanor claims that “in general, a referendum will bind both Government and Parliament”⁹⁷ and as long as it does so, it will have an effect on the constitution. Under any analysis of what is ‘constitutional’ a mechanism for its change is inherently included within it.

⁹³ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996)

⁹⁴ A M Green, *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

⁹⁵ in Joseph F. Zimmerman, *Participatory Democracy – Populism Revived* (Praeger Publishers, 1986)

⁹⁶ Nicholas Aroney writes that “s.53(1) of the Constitution Act 1867 (Queensland) provides: “A Bill that expressly or impliedly provides for the abolition of or alteration in the office of the Governor or that expressly or impliedly in any way affects any of the following sections of this Act...shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance with this section...” *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

⁹⁷ Vernon Bogdanor, *Our New Constitution* [2004] LQR 120

Under these analysis, both referendums and citizens' initiatives should be considered constitutional. However there are no precedents for citizens initiatives in the UK and expression of popular opinion have been ignored more often than not.

5. HOW APPROPRIATE IS DIRECT DEMOCRACY FOR THE UK?

5.1. DESIRABILITY

It is simply asked whether embracing direct democracy is more desirable than the current model of indirect democracy?

Rousseau argued that indirect democracy is not democracy properly so called. He claimed, "the people of England think they are free. They are gravely mistaken. They are free only during the election of Members of Parliament."⁹⁸ However, the Athenian model⁹⁹ would be expensive and impractical. Magleby concluded that "people who believe in undiluted representative democracy place the higher value on the virtues of stability, compromise, moderation, and access for all segments of the community, regardless of how small and seek institutional arrangements that insulate fundamental principles from short-term fluctuations in public opinion. People who believe in coming as close as possible to direct democracy place the highest value of the virtues of charge, participation, competition, conflict, and majority rule and seek institutional arrangements that maximise rapid and full responses to what particular majorities want."¹⁰⁰

It is submitted that the most appropriate solution is a system of compromise entrenched in law that incorporates both direct and indirect democracy, allowing a certain degree of flexibility yet entrenching minority rights. With the problem of popular and parliamentary sovereignty solved, such a middle ground can be found. Wallace-Macpherson finds that "the assumption that 'direct' and 'representative' forms of democracy are bound to be in conflict is (a) likely to be self-fulfilling prophecy and (b) not entirely correct either historically or prospectively."¹⁰¹ A case will be made for a move towards such a system and the arguments against referendums will be dismissed.

5.1.1. THE CASE FOR

⁹⁸ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

⁹⁹ Athenian democracy was direct, all citizens were expected to participate and the sovereign body would consist of up to 6,000 members. When decision-making took place in smaller groups, the participants were drawn from lots rather than elected by their peers Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996) p131

¹⁰⁰ Magleby, Direct Legislation, *Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p180-181

¹⁰¹ <http://www.iniref.org/direct.or.indirect.html>

Rodney Brazier states that “questions relating to the fundamental structures of the constitution are of a higher order of importance than those in other areas of national policy, and that in itself is a reason for resorting to unusual methods to resolve them.”¹⁰² Why this is the case is examined below.

Democracy, of necessity, dispenses “a sort of equality to equals and unequals alike.”¹⁰³ Yet Bagehot noticed that Britain’s political arrangements reflected not a participatory but a deferential political culture.¹⁰⁴ Richard Lung explains partisan Europe’s mistake: “it thinks its elections are representative, when they are mainly referential. Even where party lists are ‘open’...the voters are left with a corporate veto for a party that is really only a manifesto referendum vote.”¹⁰⁵ Our MPs have become representatives of and responsible to their parties rather than their electors. As the executive dominates the legislature, the principles of a free constitution are disappearing.¹⁰⁶ Furthermore Ministers’ extensive use of the wide range of prerogative powers weakens ministerial accountability to parliament.¹⁰⁷ This results in a tenuous link between the people from whom authority is derived and the people who exercise it. Direct democracy will address such problems.

When studying the sovereignty of Parliament, Dicey showed that the certain alleged limitations on the power of Parliament did not exist. “He shows how the resolutions of one parliament cannot alter the law; that sovereignty as a matter of law does not lie in the electorate, whose right is restricted to choosing members of Parliament; nor yet in the law courts, where even if a decision is equivalent to judicial legislation it remains subject to repeal by Parliament.”¹⁰⁸ The greater problem is not the lack of a constitutional check on the power of parliament, but of check on the power of the Prime Minister and the small number of ministers who comprise the cabinet and who use party whips to ensure compliance from the House. Nevertheless, the power of the House of Commons is not to be underestimated and comfort can be placed in the minds of the members. It was suggested at the time of the 1911 Parliament Act that the referendum could be employed to resolve conflicts between the two houses of parliament rather than a removal of the

¹⁰² Rodney Brazier, *Constitutional Reform* (2nd ed., Oxford 1998) p36

¹⁰³ Plato, *Republic VIII 558-C* in Kaplan, Justin (ed) & Bartlett, John *Bartlett’s Familiar Quotations* (17th ed, Boston, Little, Brown and Company)

¹⁰⁴ Vernon Bogdanor, *Power and the People, A Guide of Constitutional Reform* (Victor Gollancz, 1997) p144. In the early 1960s, Gabriel Almond and Sidney Verba in their classic work, *The Civic Culture* saw Britain as a paradigm example of a deferential political culture

¹⁰⁵ Richard Lung, *When knowledge fails belief: referendums* (www.voting.ukscientist.com/referend.htm)

¹⁰⁶ Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* in Kaplan, Justin (ed) & Bartlett, John *Bartlett’s Familiar Quotations* (17th ed, Boston, Little, Brown and Company): “The principles of a free constitution are irrevocably lost, when the legislative power is dominated by the executive.”

¹⁰⁷ Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (2003-04 HC 422)

¹⁰⁸ A V Dicey, *Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

Lords' power of veto¹⁰⁹. It was further suggested that the referendum was a necessity only when the absolute veto of the Lords was dying, but not before.¹¹⁰ That time has come – the House of Lords' veto is dead and buried.

Indeed, the only remaining constitutional safeguards are the three committees of the House of Commons which scrutinise bills for their adherence to constitutional and legal values,¹¹¹ but they have no power to block legislation¹¹². Any real constitutional safeguards have been weathered away.¹¹³

There is a demonstrable need for a check on the power of the government. Dicey's suspicion that constitutional changes would be enacted without the people's consent¹¹⁴ is more relevant as the constitution's constraints on the legislature weaken. He wrote that checks were necessary "in order to guard the rights of the nation against the usurpation of national authority by any party which happens to have a parliamentary majority."¹¹⁵

A democracy is "government of all the people, by all the people, for all the people."¹¹⁶ Referendums strengthen representative democracy by allowing popular participation without necessarily undermining the system of representative government.¹¹⁷ A stronger democracy is surely preferable. The referendum should also help the fight against the current rising tide of voter apathy and ensure that politicians do not 'lose touch'¹¹⁸ with the preferences of the electorate.¹¹⁹

¹⁰⁹ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p19

¹¹⁰ Vernon Bogdanor, *The People and the Party System. The Referendum and Elected reform in British Politics* (CUP, Cambridge, 1981)

¹¹¹ Robert Hazel describes these as 'three new pillars of the constitution.' They are the *Delegated Power and Regulatory Reform Committee* (which guards against 'enabling' or 'skeleton' bills which would simply enable the government to legislate by secondary legislation), the Joint Committee on Human Rights (which reports on bills which risk Human Rights Violations) and the Select Committee on the Constitution (the terms of reference of which are "to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution) Robert Hazel, *Who is the Guardian of Legal values in the Legislative Process: Parliament or the Executive?* [2004] PL 495

¹¹² The Crown, of course may refuse to give Royal Assent to a Bill but such an act may in itself be unconstitutional.

¹¹³ See previously, regarding the passing of the Parliament Act.

¹¹⁴ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

¹¹⁵ Cosgrove, quoting Dicey to Salisbury, 11 November 1892, Salisbury Papers

¹¹⁶ Theodore Parker, *The American Idea, speech at the New England Anti Slavery Convention, Boston [May 29, 1850* in Kaplan, Justin (ed) & Bartlett, John *Bartlett's Familiar Quotations* (17th ed, Boston, Little, Brown and Company)

¹¹⁷ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p7

¹¹⁸ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002)

¹¹⁹ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

There is huge popular support for referendums. A 1968 poll found that 69% of respondents believed that Britain should adopt a referendum system and the 1995 MORI/Joseph Rowntree Reform Trust Survey showed that this belief has strengthened with 77% of respondents coming out in favour of the greater use of referendums.”¹²⁰ Referendums isolate questions and focus minds.¹²¹ From 50,000 people recently surveyed regarding the European Constitutional Treaty, 70% were in favour of a referendum before ratification.¹²²

Theoretically the referendum device provides a mechanism of entrenchment like no other.¹²³ Currently this entrenchment is political only – it has no legal qualities whatsoever. This is insufficient.

5.1.2. DISMISSAL OF THE CASE AGAINST

All previous serious calls for referenda have allegedly “foundered on the difficulty (and, in the view of some, the undesirability) of distinguishing constitutional from ordinary legislation without a written constitution.”¹²⁴ Nevertheless many referendums have taken place despite this difficulty – this is no longer a valid objection to the referendum, it is a problem to be overcome and a solution is proffered below. Referendums are, however, victims to other difficulties. But all these difficulties can be minimised such that they no longer challenge the referendum as a constitutional device and, more importantly, a constitutional safeguard.

The case for referendums is considerably stronger than the case against. That “the mass of the English people are politically contented as well as politically deferential”¹²⁵ is no reason to reject direct democracy, indeed it is a reason to advocate it. Solon was asked whether he had given the Athenians the best system of laws. He replied, “No, only the best they were capable of receiving”¹²⁶ – we are now capable of receiving more than referential party politics.

Bogdanor notes that whilst referendums can articulate a submerged consensus, they cannot create it.¹²⁷ But whilst the object of democracy¹²⁸ is the debate¹²⁹, at some point

¹²⁰ Constitution Unit, *Delivering Constitutional Reform* (Constitution Unit, Faculty of Laws, University College London) para 237

¹²¹ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

¹²² Michael Macpherson (by email)

¹²³ This is as a result of precedent and convention. Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996)

¹²⁴ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p22

¹²⁵ W Bagehot and H R S Crossman (eds), *The English Constitution* (C A Watts & CO Ltd, 1964) p250

¹²⁶ Richard Lung, *When knowledge fails belief: referendums* (www.voting.ukscientist.com/referend.htm)

¹²⁷ in Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003) p155

crucial controversial and difficult decisions will have to be taken, and it is these situations in which the referendum shines. He notes that “acceptance of the referendum is but the logical consequence of accepting the democratic form of government”¹³⁰ Some commentators go further: The Economist claims that “most objections to direct democracy are, when you look closely, objections to democracy.”¹³¹

We must remember, however, that the referendum is not perfect. Nothing is. The use of referendums as mechanisms of entrenchment is problematic insofar as the cost of protection from unwarranted innovation is a loss of flexibility. The benefits here far outweigh the costs.

Bogdanor writes, “where it is known that an unpopular government is committed to a particular outcome, voters may well wish to punish the government even at the cost of defeating a policy which they support.”¹³² The reverse is also true. Referendum results may reflect the popularity of the current government rather than the nation’s opinion on the question put to them.¹³³ But referendums are preferable – general elections should not be decided simply on one issue, but on a whole range of criteria.

Some argue that direct democracy allows the majority to trample the rights of the minority: Citizens’ Initiatives have targeted minority groups, for example, quarantining AIDS victims¹³⁴ and repealing rights granted to homosexuals in several American states.¹³⁵ Joseph Schumpeter gives examples of (near)-democracies which have persecuted Jews and burnt witches.¹³⁶ Representatives are seemingly more likely to

¹²⁸ Whilst this is not an investigation into the demerits of democracy, it is relevant to note that “Plato and Aristotle both deplored democracy, Plato on the grounds that it handed control of the government from experts in governing to populist demagogues and Aristotle on the grounds that government by the people was in practice government by the poor, who could be expected to expropriate the rich.” Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

¹²⁹ For further information see Hla Koch, elaborating thomas Masaryk’s theory in Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p7: “The essence of democracy...is not the vote but the discussion. The vote is assuredly an integral part of democratic decision-making. When the matter has been discussed, then a vote must be taken. For it is the vote which shows if the discussion has been fruitful. What is undemocratic is the fruitless debate where neither side listens with an open mind”

¹³⁰ Vernon Bogdanor, *The People and the Party System. The Referendum and Elected reform in British Politics* (CUP, Cambridge, 1981) p93

¹³¹ As per The Economist in December 1996 in Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002)

¹³² Vernon Bogdanor, *Power and the People, A Guide of Constitutional Reform* (Victor Gollancz, 1997) p132

¹³³ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p24

¹³⁴ David Magelby, *Taking the initiative: Direct Legislation and Direct Democracy in the 1980s* Political Science and Politics, 21 3 Summer [1988] 608

¹³⁵ Derrick Bell, *The Referendum* p19

¹³⁶ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

protect minorities.¹³⁷ Referendums have also been criticised because they have been used by authoritarian rulers to justify and legitimise their policies.¹³⁸ Qvortrup writes “a balanced conclusion seems to be this: the referendum is neither better nor worse than representative democracy [at protecting minorities’ rights].”¹³⁹ Both direct and representative institutions of democracy can be used to enact legislation that discriminates against minorities.¹⁴⁰ The Referendum cannot be criticised on this ground – it is the place of constitutional courts and Bills of Rights to protect vulnerable minorities who will always require special protection. To accept this criticism would be to accept that the people, as the sovereign, require protection from themselves.

It has been suggested that ‘by providing a politically acceptable way in which elected representatives can evade difficult decisions by passing the buck to voters, referendums make it easy for representatives to shirk their responsibilities and evade the consequences of doing their jobs’¹⁴¹. Tristan (now Lord) Garel-Jones dubbed it “an abdication of responsibility.”¹⁴² Referendums do weaken the essential fabric of representative government¹⁴³ by reducing its prestige and honour¹⁴⁴ and “enabling a government to blame the voters if a policy that was submitted to a referendum turns out to be mistaken or unpopular.”¹⁴⁵ But given the benefits outlined above, this is small price to pay. Furthermore referendums legitimate controversial policy decisions¹⁴⁶ and rarely upset party systems.¹⁴⁷ Indeed “the very concept of ‘representative democracy’ has been losing ground because the parties favour voting methods that reduce voters to party supporters. Rather than people, who might aspire to have wishes of their own to be represented.”¹⁴⁸

Butler and Ranney note that ordinary citizens have neither the analytical skills nor the information to make wise decisions, whilst elected officials can weigh the intensity of

¹³⁷ Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984)

¹³⁸ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p24

¹³⁹ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p14

¹⁴⁰ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p14

¹⁴¹ David Butler & Austin Ranney (eds), *Referendums Around the World, The Growing use of Direct Democracy* (Macmillan, 1994) p18 p20

¹⁴² Mads Qvortrup in an Introduction to Vote 2004, *Blair’s referendums* www.vote-2004.com

¹⁴³ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989) p183

¹⁴⁴ Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984)

¹⁴⁵ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

¹⁴⁶ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

¹⁴⁷ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p18. the only evidence of an upset party system is in Norway.

¹⁴⁸ Richard Lung, *When knowledge fails belief: referendums* (www.voting.ukscientist.com/referend.htm)

opinions and reach compromises.¹⁴⁹ Ian Budge claims that “Referendums sometimes stimulate a temporary influx of ill-informed and normally apathetic electors whose participation adds further unpredictability to the result and introduces greater inconsistency and incoherence to the process of decision making.”¹⁵⁰ This analysis is pessimistic, voters are considerably better educated and reasoned at referendum polls than one might at first imagine; indeed it is environments with limited political participation that breed popular ignorance and political complacency.

Referendums do not prima-facie “allow for prudent compromise”¹⁵¹: it is the bill, the whole bill, and nothing but the bill. David Magelby asserts that “direct legislation serves to intensify conflict and lead to a politics of confrontation. In contrast, indirect democracy is generally structured to facilitate compromise, moderation and a degree of access of all segments of the community.”¹⁵² But the nation would not necessarily be divided and polarised if a referendum question was particularly complex or controversial.¹⁵³ Evidence shows that the 1975 referendum gave rise to meaningful intellectual discussion in the media and amongst the people that transcended party lines.¹⁵⁴ Moreover, a referendum device offering the opportunity to measure the intensity of opinion is available.¹⁵⁵ In short, the empirical evidence disproves claims that direct democracy is inimical to a system of government which facilitates compromises,¹⁵⁶ and clearly shows that the elite theorists’ denunciations of referendums have been greatly premature.

5.2. THE FEASIBILITY OF REFERENDUMS

Referendums are constitutional and desirable but will be inappropriate, unfeasible and illegitimate unless ‘fair play’ can be ensured.¹⁵⁷ The losing side must feel that the fight

¹⁴⁹ Indeed it has been suggested that the essence of democracy is not the decision but the discussion that led to it.

¹⁵⁰ Ian Budge, *The New Challenge of Direct Democracy* (Blackwell, 1996) p89

¹⁵¹ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989) p183

¹⁵² David B Magelby, *Direct Legislation. Voting on Ballot propositions in the United States* (Baltimore: John Hopkins University Press, 1984) in Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002)

¹⁵³ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989) p183

¹⁵⁴ See Vernon Bogdanor, *the people and the party system* p84

¹⁵⁵ See later re ‘The Question’

¹⁵⁶ Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) 11

¹⁵⁷ The Liberal Democrats’ main concern before the 1975 referendum was that it should be decided on a ‘level playing field’ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* para 12.24

was fairly conducted.¹⁵⁸ All democratic institutions should meet three criteria: equal participation, enlightened participation and minority protection. Until the referendum can meet this test, its authority will be questionable.

Most of the problems examined below are practical, and unlike the metaphysical constitutional problems above, these can be solved by applying a little common sense.

5.2.1. SOVEREIGN SUBJECTS

Voters will almost undoubtedly take other matters into account.¹⁵⁹ But the human mind is not infallible and MPs must suffer the same frailties. There is evidence that voters view referendums as a general election on one issue¹⁶⁰ and may use the opportunity to punish the government “even at the cost of defeating a policy which they supported.”¹⁶¹ However according to Butler and Ranney, “referendum voters...seem nevertheless to be better informed and more sophisticated than voters in candidate elections.”¹⁶² Recent evidence points to voters being more conscientious than Dicey gave them credit for.¹⁶³ Voters’ minds focus on the proposed change at General Elections,¹⁶⁴ where everyone realises the importance of the decision to be made. It is patronising to assume – after having accepted popular sovereignty – that the People are not capable of making important decisions for themselves.

In short, the arguments against entrusting important decisions to the voters are fallacious: the voters are sovereign – the decisions are theirs to take. Whilst decision-making may – and in many cases should – be delegated to a parliamentary body, that body must always remember the source of its authority and its responsibility to it.

5.2.2. VOTING SYSTEMS AND MAJORITIES

Democracy is Greek for ‘rule of the People’.¹⁶⁵ Yet since the People are rarely unanimous a better translation would be rule by the majority.¹⁶⁶ The voting system and

¹⁵⁸ Vernon Bogdanor in See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* 12.4

¹⁵⁹ Rodney Brazier, *Constitutional Reform* (2nd ed., Oxford 1998) p35

¹⁶⁰ Such as Ireland on the Nice Treaty and Sweden’s vote on the Single European Currency

¹⁶¹ Vernon Bogdanor, *Power and the People, a Guide to Constitutional Reform* (Victor Gollancz, 1997) p132

¹⁶² David Butler & Austin Ranney (eds), *Referendums Around the World, The Growing use of Direct Democracy* (Macmillan, 1994) p18

¹⁶³ Dicey claimed that ‘In England the introduction of the referendum means...the transfer of political power from knowledge to ignorance’, he went on to say that if referendums had been employed, the vaccination programme would have been stopped and steam engines might have been banned. A. V. Dicey, *Introduction to the Study of the Constitution* (http://www.constitution.org/cmt/avd/law_con.htm)

¹⁶⁴ Rivka Weil, *Dicey was not Diceyan* (CLJ [2003] 575)

¹⁶⁵ Athens called itself a democracy because all ‘citizens’ could take part in political decisions, but neither woman nor slaves were citizens – the quorum of this Athenian

the majority used are of paramount importance if a referendum's binding force is to be universally accepted. Currently "a simple majority of those who cast their votes carries a natural majority."¹⁶⁷ The Labour government insists this is sufficient for devolution.¹⁶⁸ And whilst Scottish advocates of devolution complained that they were cheated by the 40% rule in 1979, the result was accepted with little resentment.¹⁶⁹

Brazier asks, what would happen if the MPs show a clear majority in one direction and the electorate show a clear majority in the other direction¹⁷⁰ – one must overrule the other but which is it to be? In this case, the decision of the People must carry more constitutional weight than the decision of their elected representatives, provided that the voting system demonstrates equal participation, enlightened participation and minority protection.

A qualified or double majority¹⁷¹ would protect minority rights¹⁷² and entrench legislation, but would be inflexible; whilst a simple majority would facilitate flexibility at the cost of not entrenching rights and rendering the constitution vulnerable to a passing majority. Despite this fact no country seems to have used a double threshold.¹⁷³ Vernon Bogdanor's and the Commission on the Conduct of Referendums' suggestion is to be preferred: "if a threshold is used, it should be a set percentage of the votes cast and not a percentage of the eligible electorate"¹⁷⁴ "because of possible disputes in calculating the total electorate after making deductions for transient voters and those unable to vote at any given moment."¹⁷⁵

The voting system itself is also important, internationally majorities have taken various different forms. In Weimar Germany a yes vote from 50% of the population was essential for the referendum to pass – if someone abstained, they were counted as a 'no'.¹⁷⁶ "There is no reason to suppose the single transferable vote isn't equally

democracy was less than half. Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

¹⁶⁶ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

¹⁶⁷ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996)

¹⁶⁸ Vernon Bogdanor, *Power and the People, a Guide to Constitutional Reform* (Victor Gollancz, 1997) p135

¹⁶⁹ Vernon Bogdanor, *Power and the People, a Guide to Constitutional Reform* (Victor Gollancz, 1997) p131

¹⁷⁰ Rodney Brazier, *Constitutional Reform* (2nd ed., Oxford 1998)

¹⁷¹ A double majority combines a specific quorum and a specific majority – both have to be obtained before the result is valid.

¹⁷² Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002) p15

¹⁷³ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p42

¹⁷⁴ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p43

¹⁷⁵ Vernon Bogdanor qualifies his suggestion with reference to evidence from Northern Ireland in Vernon Bogdanor, *Our New Constitution* [2004] LQR 120, 242

¹⁷⁶ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) p42

applicable to referendums, as to representations...STV gives ordinary voters the power of the initiative simply by entering a polling booth, without all the extra constitutional machinery and collective action required for formal initiatives.”¹⁷⁷ Whilst the setting of the majority and threshold is a political decision, STV allows the most comprehensive survey of public opinion.¹⁷⁸

5.2.3. THE TIMING OF THE VOTE

When should the referendum be held? And who should decide? Referendums will not become well-respected constitutional safeguards while parliament still decides when and how they are held, as the device remains vulnerable to exploitation from the government.¹⁷⁹ A date should be set by consensus between political parties or, preferably, by an independent body. It is submitted, however, that where possible referendums are held at the same time as general elections,¹⁸⁰ this should allay fears of voter fatigue, prevent electors voting down a referendum proposal to punish the government and increase the turnout at the General Elections themselves.¹⁸¹

Where certainty or an extra degree of entrenchment is desirable, a two-stage process should be applied: the measure should be voted for in two referendums at different times.¹⁸² This system is particularly suited to situations where the voters have to indicate a preference at the first ballot. On the second paper the voters could be asked whether they would like to preserve the status quo or whether they support the option put forward in the first referendum.

Furthermore, a referendum should not be rushed. Sufficient time should be allowed for the voters to educate themselves about the question at hand.

5.2.4. THE QUESTION TO BE PUT

Where, as in Northern Ireland, the protagonists disagree about the definition of the issue, let alone the question, an attempt to hold a referendum may well prove futile.

Cronin notes that “the greatest deficiency of the referendum is its tendency to force voters to choose between only two alternatives, they must either approve or reject the

¹⁷⁷ Richard Lung, *When knowledge fails belief: referendums* (www.voting.ukscientist.com/referend.htm)

¹⁷⁸ See below on ‘multi-choice’ referendums in ‘the question to be put’ and Fn 185

¹⁷⁹ Lijphart asserts that governments only hold referendums when they are certain that they will win Arend Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984) p 203

¹⁸⁰ NB> The Electoral Commission has publicly disapproved of such a plan.

¹⁸¹ in Joseph F. Zimmerman, *Participatory Democracy – Populism Revived* (Praeger Publishers, 1986)

¹⁸² New Zealand appointed this system in its referendums on the reform of the electoral system. Commission on the Conduct of Referendums, Report of the Commission on Referendums, (Constitution Unit & Electoral Reform Society, 1996) p48

measure referred.”¹⁸³ Questions should allow citizens the opportunity to express the strength of their opinions.¹⁸⁴ The Commission on the Conduct of referendums recommended that this should “depend on the nature of the issue (or issues) to be put to the electorate.”¹⁸⁵ The problem with multi-choice referendums¹⁸⁶ is that they often produce no clear ‘winner’ and evidence from Sweden shows that multi-choice referendums sometimes prolong the issue for much longer than a simple yes-no vote.¹⁸⁷ A system of preference voting would produce clear results and allow supporters of reform to indicate whether they would be prepared to accept their second, or even third, choice reform options over the status quo¹⁸⁸ and allow for prudent compromises.¹⁸⁹

Dawn Oliver asks who should be responsible for writing the question?¹⁹⁰ Currently the Electoral Commission gives opinions on the intelligibility of questions¹⁹¹ but does not write them. Magleby criticises some American states for placing detailed legislation in front of its voters and advocates questions worded in a general, simple and clear manner.¹⁹² In any event, questions “should be short and simple and should not be open to either legal or political challenge after the result is known.”¹⁹³ Questions should in fact be written by the commission to prevent bias and safeguards against tendentious questions should be implemented.¹⁹⁴ In terms of Britain voting to enter the euro, a simple ‘in’ or ‘out’ would serve the same purpose. Nonetheless, whilst the 1975 referendum shows how delicate the issue of wording can be, it also shows “how little difference it can make in the long run.”¹⁹⁵

¹⁸³ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989) p161

¹⁸⁴ For example, citizens may be required to answer ‘strongly agree’, ‘agree’, ‘indifferent’, ‘disagree’ and ‘strongly disagree’ with respect to a statement.

¹⁸⁵ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) Guidance 10

¹⁸⁶ A Multi-choice referendum is a referendum where voters are asked to pick their preferred option from a selection but are not asked to rank the options in order of preference.

¹⁸⁷ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p51

¹⁸⁸ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) p49

¹⁸⁹ NB> Compromise and Discussion are widely considered to be some of the most important building-blocks of democracy.

¹⁹⁰ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

¹⁹¹ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

¹⁹² Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p 98

¹⁹³ Commission on the Conduct of Referendums, Report of the Commission on Referendums (Constitution Unit & Electoral Reform Society, 1996) guidance 9

¹⁹⁴ Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003)

¹⁹⁵ Canadian Parliamentary Research Branch, *Referendums: the Canadian Experience in an International Context* (Law and Government Division, 1992) section C provides a detailed analysis of the effect of the actual question on referendum results.

5.2.5. MONEY MATTERS

Cronin suggests that “money is, other things being equal, the single most important factor determining direct legislation outcomes”¹⁹⁶ yet the government remains concerned that in limiting the spending on referendal campaigns, it is inhibiting freedom of speech. But, in a society where money – quite literally – speaks, should those who can afford the biggest media campaigns be allowed to influence voting? Analysis of past referendums is not comforting. The committee on standards in public life was ‘disturbed, in particular, by the evidence ... that the referendum campaign in Wales in 1997 was very one-sided, with the last-minute ‘No’ organisation seriously under-funded and having to rely on financial support essentially on a single wealthy donor.’¹⁹⁷ Thankfully the PPERA¹⁹⁸ imposed restrictions on campaign funding, with the government issuing ‘core funding’ to the main participants and limiting overall spending. That relief is short-lived. The legislation is flawed.

In the Preface to the White Paper ‘Referendum on United Kingdom Membership of the European Community’¹⁹⁹ the then government was “convinced that any attempt to limit total expenditure by the two sides was impracticable, not least because it could apply only after legislation had received the Royal Assent, and that it would limit traditional freedom of speech”²⁰⁰ The Committee on Standards in Public Life believed that “it would be futile and possibly also wrong to impose such [spending] limits in connection with referendums. Ordinary election campaigns bear resemblance to sporting contests, in the sense that they are fought by competing ‘teams’ in the form of political parties...By contrast, a referendum campaign is more like a free-for-all. Anyone can participate. Many do.”²⁰¹ Under these circumstances they claimed that it would be impracticable to try to control campaign spending. The government did believe that it was in the public interest for information about money spent by major individuals and organisations (and the source of this money) to be disclosed after the event.²⁰² Why this is so is unclear, once the vote has been counted and the decision taken of what effect is this information if could not be used to prevent a rerun of the same situation in the event of another referendum on the same issue? {Ed.: sentence should be clarified.}

Sam Younger, the chairman of the Electoral Commission warned in an interview with the times that “legislation governing campaign spending was ‘flawed’ and

¹⁹⁶ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989)

¹⁹⁷ Commission on the Conduct of Referendums, *Report of the Commission on Referendums* (Constitution Unit & Electoral Reform Society, 1996) para 12.32

¹⁹⁸ s.110 in particular which concerns assistance to protagonists in referendum campaigns

¹⁹⁹ Referendum on United Kingdom Membership of the European Community, 26 February 1975, Cmnd 5925

²⁰⁰ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* 12.9

²⁰¹ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom*

²⁰² See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* 12.10

‘unworkable.’²⁰³ He claims that “wealthy organisations on both sides could exploit legal loopholes and hijack the campaign.”²⁰⁴ One of the major problems being that the amount spent can only be analysed after the event, once the result has already been declared. Neil O’Brien²⁰⁵ plans to challenge the government in the courts regarding the funding rules. He claims that the PPERA gives the government “an unfair advantage”²⁰⁶ since “the spending of the ‘yes’ and ‘no’ campaigns is limited by the PPERA for up to six months before a referendum, but the government’s own spending is not limited until the last 28 days of a referendum campaign.”²⁰⁷ Furthermore one individual could create several different groups, each able to spend £500,000 and thus distort the whole campaign.

It appears to be the case is that any legislation, however altruistic its aims, which attempts to limit the spending of referendum campaign groups will be rendered ineffective because such spending will be impossible to police. Comfort can however be taken from that fact that of the 189 state referendums in the USA between 1976 and 1984 for which spending data is available,²⁰⁸ “campaign spending can be judged the decisive factor in only 23 – one eighth of the total.”²⁰⁹

5.2.6. THE INFLUENCE OF MASS MEDIA

At election time broadcasters are obliged to be unbiased and neutral in their reporting and grant all parties the opportunity to air their views. It is submitted that political expedience reduces the amount voters are influenced by the media and the likelihood that (late deciding) participants will vote contrary to their ideological predispositions.²¹⁰ Political awareness also has a moderating effect; “it decreases the likelihood that partisans will be pulled by a campaign towards decisions deviating from their predispositions and not in like with the campaigns of ‘their’ elite. It also reduces the

²⁰³ Tom Baldwin and Rosemary Bennett, *Referendum law unworkable, says watchdog* (Times online April 24, 2004) www.timesonline.co.uk/printFriendly/0,,1-2-1085888-2,00.html

²⁰⁴ Tom Baldwin and Rosemary Bennett, *Referendum law unworkable, says watchdog* (Times online April 24, 2004) www.timesonline.co.uk/printFriendly/0,,1-2-1085888-2,00.html

²⁰⁵ Neil O’Brien is the Campaign Director for the ‘Vote No’ campaign for the referendum on the European Constitution

²⁰⁶ BBC News, *Euro Referendum gets Green Light*, BBC Online, http://news.bbc.co.uk/go/pr/fr/-/hi/uk_politics/4034715.stm

²⁰⁷ BBC News, *Euro Referendum gets Green Light*, BBC Online, http://news.bbc.co.uk/go/pr/fr/-/hi/uk_politics/4034715.stm

²⁰⁸ This data is available for approximately $\frac{3}{4}$ of the campaigns in this period.

²⁰⁹ Schmidt, *Citizen Lawmakers* (Temple University Press, Philadelphia, 1989) p 35

²¹⁰ David M. Farrell & Rudiger Schnitt-Beck (eds), *Do Political Campaigns Matter? Campaign Effects in elections and referendums* (Routledge / ECPR Studies in European Political Sciences, 2002) p191

likelihood that (late deciding) partisans will vote contrary to their ideological predispositions.”²¹¹

Birch also cites numerous studies in the United States to conclude the mass media plays an insignificant part in changing opinions during campaigns, “people exposed themselves mainly to communications with which they were predisposed to agree and... they tended to remember the content only of those items with which they had agreed.”²¹² It is when the issues are new that “predispositions may give voters little guidance, thus enabling campaigns to influence different types of voters more evenly.”²¹³ In all situations, however a ‘better safe than sorry’ attitude is deemed preferable and such a position is reflected in the PPERA²¹⁴. In any event, the influence of mass media is not to be exaggerated, studies suggest that while mass media may reinforce some people’s opinions, it rarely changes them.²¹⁵

5.2.7. POLITICAL INFLUENCE

Before General Elections politicians are expected to campaign along party lines. But what is expected of them before a referendum when the major parties may not be competing against each other, and may not even stand united?²¹⁶ If governments decide to hold referendums on questions on which they are themselves divided and formally suspend collective responsibility²¹⁷, these divisions will manifest themselves in public speeches and campaigns.²¹⁸ The Committee on Standards in Public Life’s recommendation is to be preferred: “the government of the day in future referendums should, as a government, remain neutral and should not distribute at public expense literature, even purportedly ‘factual’ literature, setting out or otherwise promoting its case.”²¹⁹

²¹¹ David M Farrell and Rudiger Schmitt-Beck (eds) *Do Political Campaigns Matter? – campaign effects in elections and referendums* (Routledge, ECPR studies in European Political Sciences, 2002) p191

²¹² A. H. Birch, *Representative and Responsible Government* (George Allen and Unwin Ltd, 1964)

²¹³ David M. Farrell & Rudiger Schmitt-Beck (eds), *Do Political Campaigns Matter? Campaign Effects in elections and referendums* (Routledge / ECPR Studies in European Political Sciences, 2002) p191

²¹⁴ ss. 126-127 in particular.

²¹⁵ A H Birch *Representative and responsible Government* (George Allen and Unwin Ltd, 1964)

²¹⁶ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* 12.12(1)

²¹⁷ In 1975 Harold Wilson agreed to suspend the convention of collective responsibility for the duration of the referendum campaign. Vernon Bogdanor, *Power and the People, a Guide to Constitutional Reform* (Victor Gollancz, 1997) p25, it is unclear whether Mr Blair will allow his ministers the same freedom.

²¹⁸ Ian Budge, *The New Challenge of Direct Democracy* (Blackwell, 1996) p88

²¹⁹ See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life; the funding of Political Parties in the United Kingdom* recommendation 89

5.3. DOES DIRECT DEMOCRACY ALWAYS LEAD TO GOOD DECISION-MAKING?

Referendums do not provide final solutions.²²⁰ The referendums on the EC and devolution have not finally resolve the issues.²²¹ It has even been argued that referendums weaken representative government by discouraging energetic and innovative leaders from seeking election as legislators, and that the process of compromise and amendments to legislation that improves the quality of the law diminishes with the move towards popular sovereignty and direct democracy.

Referendums have not always led to good decision-making. The Swiss vetoed legislation on national health insurance against their own best interests allegedly under the influence of advertising paid for by the private insurance companies.²²² States such as Switzerland and California, which make extensive use of the referendum, do suffer difficulties. Their ability to pursue coherent policies is weakened as political parties have a less important role; voters can get fatigued or find themselves unequipped to decide complicated issues and instead rely on their favourite politician or media source to guide them and referendums may be seen as a general election on the government generally.²²³ Furthermore referendums can be used by political parties as publicity devices. Nevertheless, voters in these states value the referendum and are reluctant to discard it.²²⁴ Whilst Cronin claims that there is an abundance of evidence that electors are restrained and arrive at the polls well reasoned,²²⁵ Butler notes that referendums can “confirm the worst fears of critics and opponents of direct democracy. Decisions would often be inconsistent with each other and ill considered. One alternative would be carried on a great wave of emotion at one point, only to be partially abrogated or contradicted in another measure months later.”²²⁶

Despite the above criticisms, Zimmerman notes that “evidence is lacking that the mandatory referendum in general has resulted in poor-quality decisions or that the protest referendum has been abused by special interest groups”²²⁷. No system of government is perfect and all are open to abuse, a body of elected members in a representative government could very easily pass legislation to persecute minorities, and trample on fundamental human rights²²⁸. Direct democracy will provide a better system of government, it will not solve all the problems with democracy.

²²⁰ Indeed there are rumours that Tony Blair will continue to hold referendums on the Constitution for Europe until a ‘yes’ vote is secured.

²²¹ Vernon Bogdanor in Ch 3 p45, David Butler & Austin Ranney (eds), *Referendums Around the World, The Growing use of Direct Democracy* (Macmillan, 1994)

²²² A M Green *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

²²³ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

²²⁴ Iaian McLean, *The Concise Dictionary of Politics* (OUP, Oxford, 1996)

²²⁵ Cronin, *Direct Democracy, the Politics of Initiative, Referendum and Recall* (Harvard University Press, 1989) p231

²²⁶ Ian Budge, *The New Challenge of Direct Democracy* (Blackwell, 1996) p89

²²⁷ Joseph F. Zimmerman, *Participatory Democracy – Populism Revived* (Praeger Publishers, 1986)

²²⁸ See, for example, criticism of the terrorism acts.

5.4. DIRECT DEMOCRACY IN ITS MOST SUITABLE FORM

Direct democracy has been proved to be constitutional, desirable and feasible for use in the United Kingdom. What form it should take is detailed below.

“Across the world”, notes Ian Budge, “the nearest approach to direct democracy ... is where legislative votes are supplemented by referendums or popular initiatives on particular issues, supported by a right of recall of legislation or of elected officials.”²²⁹

Direct democracy should undoubtedly embrace the electronic age,²³⁰ but whilst the most extreme believers in direct democracy advocate using “new electronic mass forums to by-pass self-serving legislatures”²³¹ it is submitted that the referendum is employed to complement and occasionally correct representative government rather than to replace it.²³²

5.4.1. THE MOST APPROPRIATE FORM OF REFERENDUM

It is important to recognise the limits on direct democracy. “The referendum cannot”, as Bogdanor has noted, “do much to ‘unite a fundamentally divided society.’”²³³ The Referendum should not, for all its shortcomings, replace representative democracy.²³⁴ Referenda should not be used for all decision-making. Highly complex decisions (for example regarding economic policy) are out of reach for most electors. Others are so mundane that to refer them to the people would be futile. Indeed Rodney Brazier suggests that there is no case for referendums on any issue other than constitutional change. Other methods of consultation exist to ensure that interested parties can comment on legislation. This is consistent with Bruce Ackerman’s dualist constitutional system.²³⁵ Furthermore the referendum should not be over-used so as to become stale and disrespected. If used sparingly, it “can be a tremendous symbolic and significant political tool.”²³⁶

²²⁹ Ian Budge, *The New Challenge of Direct Democracy* (Blackwell, 1996) p4

²³⁰ See Institute of Public Policy Research, *Is the Online Community a Policy Tool?*

²³¹ Richard Lung, *When knowledge fails belief: Referendums* (www.voting.ukscientist.com/referend.htm)

²³² Markku Suski, *Bringing in the People, A Comparison of Constitutional Form and Practices of the Referendum* (Martinus Nijhoff Publishers, 1993)

²³³ Vernon Bogdanor, *Referendums and Separatism II* in Ausitn Ranney (ed) *The Referendum Device* (Washington DC: American Enterprise Institute, 1981) in Mads Qvortrup, *A Comparative Study of Referendums – Government by the People* (Manchester University Press, Manchester, 2002)

²³⁴ Markku Suski, *Bringing in the People, A comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff publishers, 1993)

²³⁵ Bruce Ackerman, *We the People: Foundations* (Belknap Press, Cambridge Mass. 1998)

²³⁶ Quintin Oliver in Vote 2004, *Blair’s referendums* www.vote-2004.com

Magelby's suggestion that "since Britain has an elastic constitution, so the use of the referendum must be elastic"²³⁷ is to be rejected. The 'elastic' use of a referendum does not ensure that the constitution is entrenched, nor is it consistent with popular sovereignty. Referendums should be triggered by citizens' initiatives or automatically when significant constitutional change is proposed.²³⁸ In all events the bar should be set sufficiently high so that the prestige of both parliament and the device itself stays intact. This could be achieved in a number of different ways.

A list of 'constitutional statutes'²³⁹ could be maintained and the referential mechanism triggered if a Bill read in parliament impliedly or explicitly repealed any part of them. In such a case, the Bill's progress through the House would be paused until the people could ratify the change at a referendum. Whilst this would ensure the entrenchment of constitutional statutes, several problems are envisaged. Firstly a constitutional statute is notoriously hard to define.²⁴⁰ Any Act already referred to the people would no doubt qualify, but this would not include, for example, the Human Rights Act. A better option would be to entrust a commission to draw up a list of constitutional statutes to date to ensure the inclusion of all relevant statutes. But this would not solve the problem – there is simply no concrete definition of what is or is not constitutional. Secondly, to enact the 'enabling act' – that is the legislation to entrench the automatic process – would require parliament to bind itself as to the future. This is currently constitutionally impossible and would require the legal recognition of the people as the legal sovereign as advocated earlier.

An alternative would be to require the Constitutional Committee of the House of Lords or a new Constitutional Commission²⁴¹ to monitor acts in their passage through parliament and recommend a referendum as appropriate. Whilst this solves the problems of the earlier approach it does not provide an entrenched automatic referendum mechanism as the decision to hold one is still discretionary and parliament is not bound for the future.

It is submitted that a broadly drafted written constitution that recognises the people's sovereignty in law is the only watertight solution. As the one immutable, irrefutable and supreme source of law, a referendum would be required before any changes could be made to it. Either the reading in parliament of a Bill proposing a constitutional amendment or a citizens' initiative would trigger such a referendum. There are, however, no plans for a written constitution in the UK.

Furthermore any automatic trigger scheme seems unlikely. Nick Raynsford, the UK Local Government Minister suggested that a fixed formula by which to trigger referenda

²³⁷ Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984)

²³⁸ Such a power exists in France.

²³⁹ Or of course a list of sections of statutes which are constitutional would serve the same ends.

²⁴⁰ See above re : defining the constitution.

²⁴¹ As advocated by Rodney Brazier and Tony Wright MP

would be “unrealistic”²⁴². This is a disappointing statement and a setback for direct democracy campaigners in the UK.

5.4.2. THE MOST APPROPRIATE FORM OF CITIZENS’ INITIATIVE

Bogdanor importantly notes, “although commonly seen as an instrument of popular sovereignty, the constitutional referendum gives the people only the power of veto. The electorate is confined to giving a verdict on a change that has already been endorsed.”²⁴³ Thus, limited use of the initiative should also be employed, to allow the electorate to propose legislation or referendums directly.

The risk is that the citizens’ initiatives will be abused by well-funded groups to advance their cause²⁴⁴. Indeed in California an industry has sprung up which is dedicated to finding funding for initiative campaigns. And ever since the Supreme Court struck down state legislation imposing caps on referendum spending the possibility that the referenda may be ‘high jacked’ by rich individuals or corporations has increased.²⁴⁵ It is important that there is no such room for abuse in any British initiative process, and that the initiative is not used spuriously. It is submitted that the quorum required before the initiative be declared valid be set very high so as to discourage all but the most pressing issues.²⁴⁶

The Citizens’ Initiative and Referendum Campaign proposes a three-step procedure: (1) An initiative which can lead to the debate of the proposal by parliament. If the proposal is rejected by parliament, and a required number of endorsements are collected from citizens then: (2) People’s referendum demand. (3) A referendum must be held on the topic. The decision of the referendum is legally binding.²⁴⁷ They claim that this will create an “ideas greenhouse” where progressive policies will be cultivated by the people, yet the required number of endorsements should not be set so low as to render it

²⁴² As per William Lawton, *On-line discussion concerning the legal basis for national referendums in Britain* www.iniref.org/natref1.html

²⁴³ Bogdanor in Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p 30

²⁴⁴ See Neville Lindsay at <http://www.iniref.org/direct.or.indirect.html> : “The ballot initiative process in California was recently subverted to allow a tiny percentage of the population to dictate to the rest of us what meat we are allowed to eat, for heavens sake! With only a 28% turnout, an initiative to ban the sale of horse meat passed by 51%. That's less than 15% of the registered voters, or about 6% of the population, dictating to the rest of us what goes into our larders.”

²⁴⁵ Joseph F. Zimmerman, *Participatory Democracy – Populism Revived* (Praeger Publishers, 1986)

²⁴⁶ Unless this is done initiatives may be used for issues jovial issues. For example a recent petition in Hungary came very close to the required 100,000 signature needed to force the Parliament to debate the issue – a call for a ban on discrimination against blondes. Ananova News, *Blonde Jokes to be banned?*, http://www.ananova.com/news/story/sm_1186481.html?menu=

²⁴⁷ Citizens’ Initiative and Referendum, *Proposal for the Introduction of New Democratic procedures in Great Britain and Northern Ireland* <http://www.iniref.org/steps.html>

frivolous. Furthermore the proposed system “integrates parliamentary and citizens’ democracy. It brings citizens and MPs together to consider and debate issues of real concern to the electorate. Negotiation often occurs.”

6. CONCLUSIONS

The referendum is more popular in the UK than ever before. “Consciously or unconsciously, through the use of referendums Tony Blair has completely changed the constitutional landscape in this country.”²⁴⁸ It is compatible with parliamentary sovereignty insofar as parliament may refer questions to the people and there is a strong case to suggest that a referential convention has arisen. But this is insufficient.

At law the referendum lacks binding force, it remains an opinion poll. Furthermore, the People have no right to be consulted when constitutional amendments are made. There is no legal requirement for referendums to be held. It has been shown that if the people are accorded their proper position in law – that of the sovereign – then the referendum would become a key pillar of the constitution. Simply put, embracing the referendum will result in a better form of democracy.

Unfortunately the legal recognition of popular sovereignty would require the rejection of parliamentary sovereignty. This in itself is legally impossible as parliament is unable to bind itself to the future. In law the two are incompatible. A self-denying ordinance would only be valid insofar as it was not subjected to implied or explicit repeal. It would appear that there is no solution.

However Wade writes that “Dicey had no doubt that the abdication of sovereignty, whether total or partial, was consistent with his conception of parliamentary sovereignty. He argued that a sovereign power could divest itself of authority in two ways only, by outing an end to its own existence and leaving no means whereby a subsequent parliament could be legally summoned or by transferring sovereign power wholly or in part to a sovereign body.”²⁴⁹ A written constitution recognising popular sovereignty, approved by all electors at a referendum would have indisputable legal force. It need not

²⁴⁸ Nigel Smith in *Vote 2004, Blair’s referendums* www.vote-2004.com

²⁴⁹ E C S Wade in *Dicey Introduction to the Study of the Law of the Constitution* (12th ed. Macmillan & Co. Ltd, London, 1959)

even be a parliamentary self-denying ordinance, nor an ‘ordinary’ Bill requiring royal assent as Dicey implies. It should be considered a social contract between the people. This would entrench popular sovereignty in law, giving binding force to the referendum and maintain the House of Commons as the primary law-making body. “In the absence of a codified constitution, a referendum cannot ever be required as an instrument to ratify legislation.”²⁵⁰

A written constitution would also solve a greater problem, namely: what is the constitution? We currently let the tail wag the dog – a statute’s constitutional status is confirmed when it is submitted to the people at a referendum, it is not submitted because of its confirmed constitutional status.

Unfortunately there are no plans for a written constitution and a revolution is highly unlikely. Therefore one must, for the time being, advocate an intermediary solution and rely on the consciences of not only MPs, but their party leaders over whom we have diminishing control and in the fact that the House of Commons is subject to regular General Elections. A standing commission should be established and a list of constitutional statutes maintained as suggested above. Furthermore, provisions should be made to enable the citizens to propose legislation or referendums directly by means of a Citizens’ Initiative regardless of their strict legal status.

Whilst there are solutions to the practical problems with such mechanisms, safeguards must be put in place to ensure that the process is fair and leads to good decision-making. The PPERA 2000 clearly requires amendment.

²⁵⁰ Bogdanor in Magleby, *Direct Legislation, Voting on Ballot Propositions in the United States* (The John Hopkins University Press, 1984) p33

7. APPENDICES

7.1. TABLE OF MAJOR REFERENDUMS IN THE UK

NAME	DATE	QUESTION	RESULT
Northern Ireland Referendum	1973	On whether NI should remain part of the UK	Yes
United Kingdom Referendum	1975	On whether the UK should remain part of the European Community	YES
Scotland Referendum	1979	On whether there should be a Scottish Parliament	NO
Wales Referendum	1979	On whether there should be a Welsh assembly	NO
Scotland Referendum	1997	Two questions: 1) on whether there should be a Scottish Parliament 2) on whether a Scottish Parliament should have tax varying powers	YES YES
Wales Referendum	1997	On whether there should be a Welsh Assembly	YES
London Referendum	1998	On whether there should be a Mayor of London and Greater London Authority	YES
Northern Ireland Referendum	1998	On the Good Friday Agreement	YES
North East referendum	2004	On elected regional assembly	NO
North West referendum	[Tabled]	On elected regional assembly	
Yorkshire referendum	[Tabled]	On elected regional assembly	
UK Referendum on the EU constitution	Expected 2006	On the adoption/ratification of the EU constitution	
Euro Referendum		On the adoption of the Euro	
Referendum on voting system for		To choose a method of electing members of parliament	

the House of Commons			
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Source

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Anon,

http://www.thebestlinks.com/Referendums_in_the_United_Kingdom.html

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