Referendums and the Constitution

By Lucy Atkinson and Andrew Blick

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Summary and recommendations

On 23 June 2016 a referendum was held in the United Kingdom (UK) to determine whether it should remain within or leave the European Union. On a turnout of 72.2 per cent, 51.9 per cent chose the latter option. Ongoing political and constitutional turmoil has followed. Given its apparent potential to trigger such dramatic outcomes, the salience of the referendum as a subject of study has increased. However, the significance of this device extends beyond this particular episode. Referendums have been a prominent part of political life in the UK for more than forty years. In this paper we consider the nature of these votes from a constitutional perspective, taking into account their whole course of development. We assess their strengths and the potential problems associated with them, before making recommendations. (For details of UK referendums to date, see the appendix to this paper).

Our starting principle is that referendums can play a valuable democratic role, especially in ensuring that substantial constitutional change is a consensual process. Some success has been achieved in this regard through the cumulative votes held in relation to devolution in Wales and Scotland (in 1979, 1997 and 2011), and the Northern Ireland peace process (in 1998). But we note that referendums can have defects and create difficulties. They are susceptible to manipulation by the UK executive. As a consequence they can be subordinated to party political ends (in 1975); and present voters with restricted options (eg: 2011). The change on offer may not be clearly defined, and may be to a

significant extent unknowable (eg: 2014). Referendums can have the effect of affording discretion to the UK executive as much as empowering voters (2016). Yet the executive is not all-powerful and referendums are in some senses a demonstration of its weaknesses, and can in the process add to those weaknesses. Referendums may be inimical to cohesive government (eg: 1975, 2011 and 2016). This latter tendency is a problem from the point of view of government effectiveness, and also because divisions in government can make accountability more difficult to achieve. Referendums can generate resentment (eg: Scotland in 1979); and highlight or even exacerbate social and political divisions (eg: 2014 and 2016). Most seriously referendums potentially pose a challenge to our system of representative democracy,[1] and principles associated with it such as the rule of law.

Referendums became part of the UK constitution without this change being overt or subject to a full and inclusive discussion, and without a comprehensive attempt to reconcile their use with other features of the political system. Observers and critics have long raised many of the fundamental constitutional questions we address in this paper. Yet those responsible for initiating referendums, in particular UK governments, have generally not meaningfully engaged with these considerations, or attempted to discern and incorporate a clear set of first principles. Below we sketch out the possible constitutional framework for referendums in the UK that has not yet been established. Some of it might be implemented through an Act of Parliament, aspects of it might be found in a written constitution, if the UK had such a text, and other portions of it would be most likely to rest in convention,

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1   N. le Roux, 'Is there a tension between Parliamentary Democracy and referendums?', McDougall Trust workshop, 9 Nov., 2016 [accessed via: http://consoc.org.uk/publications/tension-parliamentary-democracy-referendums/ (12/01/17)].

perhaps described in documents such as the *Cabinet Manual* or *Ministerial Code*. There may well be strong political objections to some of what is proposed. Consensus would be needed and may be difficult to attain. But the problems posed by the ill-conceived use of referendums, when it occurs, are potentially serious. Consequently, though there may be barriers to it, action is required.

Key Principles and Good Practice for Referendums in the United Kingdom

1. In the UK, the use of referendums has had both positive and negative democratic manifestations. In the context of UK democracy, they should be deployed sparingly. They should be used as a means of ensuring major changes take place on a basis of broader than usual consent; they should not be deployed purely for partisan purposes, or in a way that undermines democratic principles.

2. It is useful to distinguish between three categories when considering whether a referendum should be held on a particular subject. First, there are courses of action that should be embarked upon only after receiving approval in a referendum. Second, it is useful to consider whether there are matters over which a referendum should *never* be held. The third category covers all those matters that do not fit in the first two, over which referendums might be held, but do not need to be.

3. It is undesirable for a referendum to create a circumstance in which a UK government feels obliged to implement a major public policy with serious implications for its overall programme to which it and the UK Parliament (especially the House of Commons) were opposed.

4. Exceptions to the general rule set out in 3 above include referendums on secession by parts of the UK, where the UK government is likely to be a supporter of the status quo. Another

exception may be a change that does not directly impact upon the ongoing policy of the government of the day, for instance an alteration in the parliamentary electoral system.

5. 'Change' options should be as clearly defined as possible, as a minimum in a white paper and preferably in pre-referendum legislation. If there are difficulties in clarifying what a change will mean, then serious consideration should be given to the possibility of a further referendum, when the details become firmer, if practicable.

6. Referendums should not be used as a means of resolving internal party or intra-governmental tensions. In circumstances where there is an official government recommendation, an allowance for dissent from it by ministers is not desirable.

7. In some circumstances, it may be appropriate to offer multi-option referendums, in order that the members of the public are presented with a more open opportunity to express their judgement.

8. Whether a result is to be treated as only advisory or binding should be made clear from the outset of the intention to hold the referendum being announced. The execution of a policy that has been rejected in a referendum should be avoided.

9. The opportunities for the UK government to manipulate referendum details should be minimised.

10. The greater the gravity of a particular choice, the more consideration should be given to the possibility of using thresholds or supermajorities.

11. Referendums should never be regarded as producing mandates that override regular principles of representative democracy and the rule of law.

Introduction

On 23 June 2016 a referendum was held in the United Kingdom (UK) to decide whether it should remain within or leave the European Union (EU). On a turnout of 72.2 per cent, 51.9 per cent chose the latter option.[2] In doing so they rejected the recommendation of the then-Prime Minister, David Cameron, and his government.[3] Even before the vote took place, the EU referendum had become the focus for a complex combination of developments of profound importance. The result of the referendum served to intensify the tendencies it had already generated. While the ultimate outcomes are difficult to predict and will take years to unfold, it is possible to identify a number of key areas of impact. The regional and global role of the UK is likely to change significantly. Furthermore, an exit from the EU will have important economic and financial consequences for the UK, including for business interests.[4] The immediate political consequences have been dramatic. There was a changeover at the

2   For a detailed account of the result and preceding campaign, see Electoral Commission, *The 2016 EU Referendum: Report on the 23 June 2016 referendum on the UK's membership of the European Union*, London: Electoral Commission, 2016.

3   There were authorised dissenters within the government, provided for by a temporary suspension of collective Cabinet responsibility over this issue. See T. May, 'Personal Minute from the Prime Minister to all ministers', 11 Jan., 2016.

4   For the ongoing work of the House of Lords European Union Committee in this area, see http://www.parliament.uk/hleu. For the House of Commons Exiting the European Union Committee, see http://www.parliament.uk/business/committees/committees-a-z/commons-select/exiting-the-european-union-committee/

head of the Conservative government, with Cameron standing down as Prime Minister, to be succeeded by Theresa May. The accession of May saw a significant turnover of personnel in the Cabinet. The referendum also provided the moment for an attempt to depose the Labour leader, Jeremy Corbyn, deepening unprecedented divisions within the Labour Party. The Richmond Park parliamentary by-election of 1 December 2016 produced a victory for the Liberal Democrats, that many attribute to approval of the party's sustained pro-EU stance.[5] More fundamental shifts in the overall structure of the party system with connections to the EU upheaval may yet occur.

Finally, there is a constitutional dimension. The manner in which the government goes about responding to the referendum result, including the extent to which it involves Parliament within this process, has already been a matter of pronounced political controversy, and the subject of a high-profile legal case.[6] Another unresolved issue is the impact upon the future of the Union, and whether departure from the EU will jeopardise the place of Northern Ireland and Scotland – both of which voted to 'remain' – within the UK.[7] Future questions likely to require close attention include the functioning of the post-EU legal system and the process for making law at UK and devolved level.[8]

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5   F. Gillett, 'Richmond Park by-election result: Zac Goldsmith stunned as Lib Dem Sarah Olney wins seat', *Evening Standard*, 2 Dec., 2016, [accessed via: http://www.standard.co.uk/news/politics/richmond-park-byelection-results-sarah-olney-wins-in-extraordinary-liberal-democrat-victory-a3410356.html (12/01/17)].

6   A. Blick and R. Gordon, *Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union*, London: Constitution Society, 2016.

7   A. Blick, *The EU Referendum, Devolution and the Union*, London: Federal Trust, 2016.

8   R. Gordon and R. Moffatt, *Brexit: the immediate legal consequences*, London: Constitution Society, 2016.

A further constitutional aspect involves the nature of the EU referendum itself. It has generated multiple debates. One discussion has centred on the extent to which it took place out of a genuine desire to involve the public in an important decision, or whether it was driven by political contingencies from the 1990s onwards such as pressure from certain sections of the media, divisions within the Conservative Party, and the perceived threat posed to the Conservatives by the United Kingdom Independence Party (UKIP).[9] When David Cameron held negotiations at EU level to provide a package of reforms to offer the UK electorate, some argued that they had little substantial meaning and were an attempt to manipulate the outcome of the referendum.[10] There were also disputes about the timing of the vote; the precise question that should be included on the ballot paper; and the role of the UK government during the campaign.[11] A further feature of the referendum that generated substantial interest and discussion among commentators and political protagonists involved the suspension of collective Cabinet responsibility, allowing ministers who objected to the official government support for 'remain' publicly to adopt a dissenting position, without being required to resign, as would normally be the case. A connected issue involved the proper role of civil servants in these circumstances.

Since the 'leave' vote of 23 June, even more discussions and points of contention have gained in prominence. One involves whether

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9   For a discussion of constitutional issues around the EU referendum, see
     A. Blick, *Taking Back Control? The EU referendum, Parliament and the 'May
     Doctrine'*, London: Federal Trust, 2016.

10   T. Ross, 'Cameron's new EU deal criticised as a "sham" by top Tories'
     The Telegraph, 23 Apr., 2016 [accessed via: http://www.telegraph.co.uk/
     news/2016/04/23/camerons-new-eu-deal-criticised-as-a-sham-by-top-tories/
     (12/10/17)].

11   Electoral Commission, *The 2016 EU Referendum*, pp.24–27.

the result of a referendum is binding upon government and Parliament, or merely advisory. Some hold that the final decision should rest with representatives in Westminster, or perhaps even that the devolved institutions should have a role. Another question that has arisen has been whether a simple majority of those taking part should be a large enough level of support to justify an action as important as departure from the EU, or some form of super-majority requirement should have been applied. The 'remain' votes in Scotland and Northern Ireland (as well as Greater London) are regarded as particularly problematic in this regard. Furthermore, might a second referendum at some point be appropriate – or perhaps even a requirement – to authorise (or by implication reject) this course of action?[12] (However, the debate about a second referendum is connected to a further dispute over whether the UK can unilaterally revoke its decision to initiate departure from the EU under Article 50 of the Treaty on European Union).

Attempts to deny that the 23 June vote has created an irresistible force to implement exit from the EU often rest at least partly on the idea that it was not a satisfactory decision-making process. Those of this disposition argue, for instance, that false claims were so prominent during the campaign that they prevented voters from making a properly informed choice. Another criticism is that some participants simply treated a vote for 'leave' as a means of registering general discontent with the political system, rather than representing considered support for an exit. A further argument is that the precise meaning of 'leave' was not knowable in advance. A variety of different possible models

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12 For the work of the House of Commons Public Administration and Constitutional Affairs Committee in these areas, see http://www.parliament. uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/news-parliament-2015/ lessons-learned-eu-referendum-launch-16–17/

exist for a post-EU UK. The outcome will derive from complex negotiations involving multiple parties. To progress to the final destination exclusively on a basis of a referendum held at the very beginning of the process, some might hold, is not democratically satisfactory.[13] Other issues, such as the proper part for impartial civil servants to play in executing departure from the EU, have also become salient.

That a popular vote should lie at the centre of turmoil on the scale currently being experienced in relation to the status of the UK within the EU, and that this public engagement mechanism itself is subject to such scrutiny, establishes the importance of referendums in the UK as a subject of study.[14] The existence of such doubt about the proper role of these devices is further cause for a close assessment of their nature. It could be held, however, that the focus on referendums in contemporary debate has been brought about by those who did not like the particular result, and are blaming the process. While there may well be some truth to such an observation, it could be made of virtually any constitutional debate. Moreover, it might equally be suggested that those who now defend the validity of referendums do so in pursuit of their own ulterior agenda, namely a desire to ensure that departure from the EU is executed. (Indeed, as we will see, advocacy of the use of referendums, and their actual implementation, has often been driven by a desire to attain or avoid particular outcomes, rather than a more abstract desire to engage the public). Constitutional discourse will always be connected to material political forces and tensions. Indeed, it

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13   For an account of these views, see Blick, *Taking Back Control?*.

14   For an earlier investigation of the subject, see V. Bogdanor, *The People and the Party System: The referendum in British politics*, Cambridge: Cambridge University Press, 1981. See also: M. Qvortrup, 'Democracy by delegation: the decision to hold referendums in the United Kingdom', *Representation* 42.1 (2006): 59–72.

becomes most relevant when this association is at its strongest. However, we should not allow this undeniable linkage to prevent us from attempting to discuss matters of constitutional principle, both accepting the interests that are involved and at the same time seeking, as far as is possible, to distinguish between them and fundamental values.

Furthermore, the significance of referendums extends far beyond the specific instance of the vote of June 2016. Since the 1970s, referendums have become a firmly established part of the UK's political and constitutional landscape. They have been central to decisions not only about European integration, but also devolution, the status of Northern Ireland and Scotland within the UK, and the voting system used for elections to the Westminster Parliament.[15] Referendums have even influenced events when they have *not* ultimately been held. The prospect of such votes taking place, and commitments to or demands for referendums, have formed an important part of public discourse and political calculation over a number of decades. If referendums retain their prominence, the need better to understand them is manifest.

The experience of 2016 may prove for some to be a strong deterrent from holding such votes in future. However, we will be living with the consequences of the EU vote for many years. Circumstances may require close consideration of the nature and force of such mandate as it has created, adding to the value of the study of devices of this kind. The idea of a second EU referendum to finalise or reject exit might gain in force; and the 'leave' result may trigger another such vote on Scottish independence. Moreover, the underlying pressures for holding referendums might well continue to exert themselves. Furthermore, as we

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15   For an acknowledgement of this historic perspective, through a list starting in 1975, not 1973, see: Electoral Commission, *The 2016 EU Referendum*, p.131.

argue in this paper, referendums can play a valuable part in processes of constitutional change. Their future use should not entirely be precluded simply because particular uses of them are judged problematic. Rather, we should identify both better and worse practice, to ensure they are deployed well in future, rather than abandoned. Even if referendums become less frequent, or cease to take place at all, they have already made a difference. Their absence would do so too. Referendums demand attention.

More specifically, the rise to prominence of referendums in the UK engages the core purpose of the Constitution Society. Before the Northern Ireland sovereignty poll of 1973, though they had been discussed as a possibility since the nineteenth century, referendums were not employed in the UK for purposes of substantial significance. (They had occurred at local level, but we do not deal directly with such votes in this paper). Indeed, many in UK political circles regarded them as a device that was alien to the domestic constitutional tradition.[16] Referendums would, their opponents felt, be an unwelcome and inapt import from foreign systems that differed fundamentally from our own. As devices, this school presented referendums as characterised by a sinister, populist tinge. For some, such doubts remain.

The establishment of the referendum as part of the UK governmental repertoire therefore represents an important constitutional change in the UK; one that has itself been deployed in processes leading to further alterations to the UK system. Yet, as is often the case in the UK, there was no precise point at which this transformation occurred. Possibly the most important event came in 1975, with the first UK-wide referendum, on continued membership of the European Economic Community (EEC). As is

16   For a classic version of this view, see M. Thatcher, 'House of Commons Speech – EEC Membership (Referendum)', 11 Mar., 1975 [accessed via: http://www.margaretthatcher.org/document/102649 (17/09/16)].

discussed below, some attempted to raise the prospect that a major constitutional shift was underway. But the government sought to present the referendum as dealing with unique circumstances, therefore restricting the potential for a discussion that addressed the fundamental principles. Harold Wilson, the Labour Prime Minister who called the 1975 vote, was insistent that there would be no further referendums. Less than a week after it took place, when pressed in the House as to whether he intended to maintain his commitment 'not to repeat the constitutional experiment of the Referendum', he responded in the affirmative.[17]

Retrospectively, the 1975 referendum was a turning point for the UK constitution, helping to facilitate subsequent referendums that in turn further reinforced this change of direction. As we will show, subsequent inquiries into referendums, that led on to legislative change, made reference to this vote as an important precedent.[18] The Electoral Commission in its referendum oversight work also takes an historical perspective.[19] But at the time this crucial initiative took place, its chief instigator sought to avoid the impression that it possessed greater constitutional significance. While arguments were made pertaining to the underlying constitutional implications, they were deliberately excluded from the policy-making process.

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17   Independent Commission on the Conduct of Referendums, *Report of the Commission on the Conduct of Referendums*, London: University College London, 1996, p.22.

18   Committee on Standards of Public Living, 'Fifth Report of the Committee on Standards in Public Life', pp.171–172 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf (12/01/17)].

19   Electoral Commission, *Referendum on the voting system for UK parliamentary elections: Report on the May 2011 referendum*, London: Electoral Commission, 2011, pp.18–19.

Given the assertion that no lasting change was underway, it is unsurprising that 1975 saw no attempt to create a lasting legal framework that could apply to the EEC referendum and subsequent votes alike. Until the passing of the *Political Parties, Elections and Referendums Act 2000* (PPERA) each referendum was provided for by specific legislation. Even since PPERA, important aspects of every referendum are contained in individual statutes that interact with the provisions of the 2000 Act. Nonetheless, in PPERA, there is an Act of Parliament with a fixed role in defining the basis on which referendums take place. Moreover, PPERA creates a body, the Electoral Commission, with a role, among its other duties, in overseeing the conduct of these votes.

Both PPERA and the Commission are largely concerned with matters that are significant, but not of primary constitutional importance. Issues on which they are focused include the timing of the referendum in the political calendar, the regulation of the campaign, transparency of funding for participating groups, registration of voters and the practicalities of voting. Beyond the statutory framework, documents such as the *Cabinet Manual* offer little help regarding the constitutional position of referendums. Moreover, as we will see, inquiries that have been conducted into referendums in the UK have acknowledged that there are more fundamental matters at stake, but have generally avoided coming to direct conclusions about them. Instead of seriously interrogating their desirability or underlying purpose, the tendency has been to take them broadly as a given that must be made to function as satisfactorily as possible.

The consequence of these patterns is an ironic one, since referendums are generally justified as providing clear, democratic legitimisation for change. The incorporation of referendums into the UK constitution was not subject to a specific decision-making

process, with a careful consideration of their nature and possible implications. It is difficult even to discern what this change means for our constitution. The Constitution Society holds that casual and amorphous alterations of this type – regardless of their substantive merits – are problematic.

With this unsatisfactory lack of deliberation in mind this pamphlet sets out to promote a more fundamental consideration of the constitutional role of referendums in the UK. We pose and seek to answer a series of questions that engage the core values involved. We ask:

♦ How, why and when did referendums become an established feature of the UK constitution? Has their character changed over time?

♦ Is it possible to discern general underlying constitutional principles applying to the use of referendums in the UK?

♦ In what circumstances are referendums likely to be held?

♦ How far do referendums genuinely empower voters in a way they are not by other democratic processes?

♦ How far do referendums present a clear choice to voters? What consequences might follow to the extent that they do not?

♦ What is the relationship between referendums and key pre-existing features of the UK democratic system?

♦ What material difference has the use of referendums in the UK made?

We have deliberately avoided close assessment of more practical issues such as campaign rules. Though they are important, they have received – and will probably continue to receive – more attention in the form of various inquiries and legislation than the basic subjects raised above.

Our approach to these questions involves studying developments over time, that is the history of referendums in the UK. Referendums have taken place in three major bursts – 1973–1979; 1997–2004 and 2011 to the present; and have figured in major political developments for more than forty years. There is a substantial volume of evidence, therefore, to consider. A different means of understanding UK referendums would be by placing them in international perspective, assessing how they operate across multiple countries. This exercise would certainly have merits of its own. But such comparisons must be handled carefully. They must be conditioned by a close consideration of the particular circumstances of each state under examination. Contexts differ, and crude, direct analogies are to be avoided. For instance, the UK constitutional tradition is peculiar for the emphasis it places on parliamentary sovereignty and collective Cabinet responsibility. The use of referendums may have important consequences for both of these principles. Because of the importance of constitutional specificity, a prior task is essential. It is a valuable project in its own right, and a prerequisite to the successful conduct of any comparative project. We must appreciate what referendums mean to the UK.

In seeking to elucidate the part played by referendums, we have no UK written constitution to consult. Such a text might – if it existed – have provided some guidance as to their role within the UK constitution, though we should be cautious about exaggerating the extent to which it might clarify matters. Furthermore, as we have noted, such legislation as exists does not help with our chief subjects of interest; and inquiries have tended to avoid seeking to resolve them. The first place we must look, then, is the actual incidence of referendums and the events and discussions associated with them. While there has been significant academic interest in referendums in the UK, most

of the work considers individual votes, rather than taking an overview. Moreover, since referendums have become relatively frequent events since the late 1990s, there is a need to update the studies that do exist. This pamphlet is intended as an initial effort in this direction.

We begin with a general outline of the rise of the referendum in the UK, tracing the sequence of events leading to the present. We consider the idea of using these devices as it developed from the late nineteenth century, its ultimate implementation from the 1970s onwards, and the implications of this outcome. There follows a series of case studies of particular referendums, intended to give a span of close analysis and providing controlled analogies. The votes selected are the EEC referendum of 1975; the referendum on Scottish devolution of 1979; the poll on the Belfast or 'Good Friday' Agreement of 1998; and the Alternative Vote referendum of 2011. We draw on secondary sources and some primary material such as media coverage. Issues we consider include the political background to the referendums, the substantive decision they addressed, the constitutional and legal framework, the nature of the campaign, and the result and its consequences. The conclusion synthesises the overall historical evidence and case studies in relation to the search questions we have applied. It advances views on the nature and consequences of referendums in the UK, and makes recommendations regarding the possibility of a more satisfactory approach to referendums in the future.

The rise of the referendum

The pre-history of the referendum

Referendums have a prominent place on the constitutional landscape of the contemporary UK. Although they have origins as far back as the medieval era in mainland Europe, before 1973, they had never been used in relation to major decisions above local level in the UK. Nonetheless, the *idea* of using referendums in the UK had advocates at least as long ago as the nineteenth century. The possibility of their use was at times before 1973 given serious consideration, though it had opponents as well as supporters.

The constitutional authority Albert Venn Dicey is credited as placing the idea of using referendums for major decisions on the agenda in the UK, beginning with an article he published in 1890.[20] The irony that Dicey, who remains the most famous exponent of the doctrine of parliamentary sovereignty, should also be renowned as the pioneering advocate of a mechanism that some believe undermines the authority of Parliament, is frequently remarked upon. (In the theory Dicey developed, however, the people – voting in referendums on whether to accept bills – would be incorporated into Parliament, not challenging it from outside.)

At this time, key motive for the advocacy of referendums was that it was the most appropriate means of resolving the question

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20   A. V. Dicey, 'Ought the referendum to be introduced in England?', *Contemporary Review*, 57, 1890.

of whether Home Rule – a forerunner to devolution – should be introduced to Ireland. This issue was a central political controversy of the late nineteenth and early twentieth centuries. For some, Home Rule threatened the Union; for others it was the means of preserving it. Significantly, in the period since referendums have been in active use in the UK, the issues to which they have been applied more than any other have been devolution and the Union. In this sense, referendums might be seen as a response to territorial fault-lines in the UK polity that it is difficult for the system to resolve by other means. Precise approaches have changed, however. The early advocates of a referendum on Home Rule envisaged that the whole UK would take part in the vote. However, referendums on devolution and the Union since the 1970s have taken place only in the areas directly involved.[21]

Home Rule was an important constitutional issue; as were many of the other matters over which the holding of referendums were urged. Indeed, during the cross-party talks of 1910 that arose from the clash between the House of Commons and House of Lords, it was proposed that provision should be introduced whereby referendums could be used to determine whether change could take place in a set of areas defined as constitutional. Such a mechanism, had it been introduced, might have been in practice a step towards a written constitution, within which a referendum might form part of an amendment procedure. Although no such text has yet been established, referendums have become an established part of the UK system. They are used for decisions that might be regarded as constitutional, accepting that such definitions are informal in the UK, in as far as a written constitution is lacking. Indeed, a century after the crisis of 1909–11, the House of Lords Select Committee on the

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21 Bryce to Dicey, 'Bryce Papers', MS 3, 83, 23 Mar., 1911 in Bogdanor, *The People and the Party System*, p.12.

Constitution stipulated that the most appropriate use for referendums was over proposed changes to core aspects of the UK constitution.

As the 1910 episode demonstrates, calls for referendums have arisen from circumstances of pronounced controversy. They have included the issue of female suffrage shortly before the First World War.[22] One especially contentious issue that divided a party and governments was tariff reform. There were calls for a referendum on this matter in the first decade of the twentieth century (notably from Joseph Chamberlain),[23] and again in the 1930s (from Stanley Baldwin).[24] The disputes surrounding tariff reform and their sustained nature bear comparison to a later controversy, over the role of the UK within European integration. This divisive issue has been an important motive for the use of referendums in the UK from the 1970s onwards. At various points it split both the main parties – Labour and the Conservatives – each of which held referendums on the subject, in 1975 and 2016 respectively.

In the case of tariff reform (and European integration), a referendum was seen potentially as a means of handling an issue that the party system had difficulties in resolving. For Dicey, the referendum was in part a means of offsetting the growing dominance of party that he observed. He felt that if the deliberations of the House of Commons were determined increasingly by party considerations, then the people were not necessarily well represented.[25] From this perspective referendums were a means of ensuring popular participation in political

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22   Curzon MSS, Eur. F 112/39, in Bogdanor, *The People and the Party System*, p. 34.

23   C. W. Boyd (ed.), *Mr Chamberlain's Speeches*, vol. 2, London: Constable, 1914, p.303.

24   K. Middlemas and J. Barnes, *Baldwin*, London: Weidenfeld and Nicolson, 1969, p.571.

25   Dicey, 'Ought the referendum to be introduced in England?', p.504.

decisions. Perhaps there is some significance to the fact that the introduction of referendums in the 1970s coincided with a trend towards partisan de-alignment; and the practical entrenchment of this device took place during a period in which traditional forms of participation, including party membership, were generally in decline. The referendum may have offered a different form of participation to those previously on offer. Rather than being a response to a dominant party system, referendums were ultimately connected to its relative decline.

Aside from issues of principle, advocates of referendums also saw them in more instrumental terms. Dicey and others saw referendums as a means of blocking Home Rule; and more generally as a conservative device, whereby the people would generally tend to vote to preserve existing arrangements, rather than bring about change. Others – in particular advocates of tariff reform – saw a referendum as a means of forcing through radical transformation. In the era of the use of referendums in the UK, both these tendencies have remained at work – sometimes in a contradictory sense. Referendums have been seen as a means of preventing or limiting participation in European integration; or perhaps of keeping the UK within the EU. In this sense, they were perceived as conservative devices. Yet they have also been advocated as means of endorsing change – either through legitimising the decision to join after the fact, or of making departure from the EU possible. In relation to devolution, referendums have, again, been seen as a means both of prevention and facilitation. Similarly, in relation to the Union, referendums have been seen as a means of preventing the loss of territories from the Union, and of authorising their departure. In each instance, referendums are pursued as means to an end, more than genuine forms of democratic engagement.

Historic phases of the referendum

It is possible to identify three distinct historic phases in the use of referendums: 1973–9; 1997–2004; and 2011 onwards. Equally, we can discern a broader overall pattern of development whereby this device has become a familiar and important part of the democratic system of the UK, but about which there remain problematic areas of constitutional uncertainty.

1973–9: 'That constitutional monster'[26]

During this period, a combination of fundamental and longstanding issues of contention, party political concerns, and short term contingencies saw the referendum return to political discourse and – unlike in earlier eras – be put into use. The first use of a referendum in relation to a major policy issue, the Northern Ireland sovereignty poll of 1973, was a response to the resurgence of conflict in Northern Ireland known as 'The Troubles'. In this sense, the referendum addressed a manifestation of the same difficulty that had first led to its use being considered in the nineteenth century. Though they were not directly concerned with Ireland, two further referendums – over Welsh and Scottish devolution in 1979 – were also a continuation of this tradition, in that they were held over devolution, an updated version of the Home Rule concept. As noted above, the EEC controversy had some similarities to the debate over tariff reform from the first half of the twentieth century, since it concerned the external orientation of the UK and its trade relations, and was implicitly linked to domestic policy.

A principled position of support for the referendums held in this phase is possible. They engaged matters that were not only

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26   M. Thatcher, 'Speech to Helensburgh Conservative rally', 18 Apr., 1975 [accessed via: http://www.margaretthatcher.org/document/102678 (17/09/16)].

of immense importance, but were arguably qualitatively different from other types of decision, therefore requiring the application of a special mechanism. It might be held, with Northern Ireland, the EEC and devolution, sovereignty was in some sense at stake, and thus it was proper to consult the people directly, with whom sovereignty could be regarded as residing. As one advocate of the 1975 referendum put it at the time, the 'issue of entry into Europe [was] different in kind from the wide range of issues normally considered by Parliament;' and was an 'issue of sovereignty.'[27] (How, and whether, this thesis can be reconciled with the doctrine of parliamentary sovereignty is a matter to which we will return.) It was also the case that more traditional mechanisms of representative democracy had not managed to settle arguments about both devolution and the EEC, thereby opening the way for a different approach – though whether referendums were successful in resolving the problems they addressed is another issue.

Alongside questions of principle other concerns drove the use of referendums. The 1975 and 1979 votes were in part responses to party-political concerns within Labour. The devolution project itself moved to the centre of the Labour agenda because of the perceived threat posed to its position in key areas of electoral support in Scotland and Wales. In the cases of both devolution and the EEC, the referendum was a perceived means of defusing serious divisions in the party by passing responsibility to the wider electorate. In this sense, the desire to protect the cohesion of Labour, as a party of opposition before February 1974 and as a government thereafter, was perhaps more important than an urge directly to engage the public in an important decision. Furthermore, parliamentary arithmetic was influential on the complex development of devolution policy by the 1974–9

27   R. MacFarquhar, 'HC I [EEC Membership Referendum]', 11 Mar., 1975 [accessed via: http://www.margaretthatcher.org/document/102650 (17/09/16)].

Labour governments, including the use of referendums (and the application of a threshold).

Retrospectively, a major constitutional change began during the 1973–9 phase. The repeated use of referendums helped establish them as a feature of the UK system. They came onto the agenda as a consequence of difficult-to-resolve political issues, combined with particular party political circumstances involving the Labour Party. The early rise of the referendum can be seen in the context of a period of wider political uncertainty, involving economic and social turmoil and declining support for the two main political parties. Some of these trends were in turn connected to proposals for constitutional change. They included EEC membership and devolution, both of which led to the use of referendums, which in turn prompted further systemic modifications, most notably the suspension of Cabinet collective responsibility of 1975.

While a significant constitutional transition occurred between 1973 and 1979, it was not fully avowed at the time. The breakthrough for the referendum was an accumulation of discrete decisions rather than a single deliberate act. Some noted the importance of what was taking place. In particular, sceptics over the EEC referendum drew attention to its novelty and argued that it would have a lasting constitutional impact extending beyond the particular usage.[28] But there was never a fully-fledged debate about the merits of referendums in general, considering the constitutional and democratic aspects. Instead, discussions tended to focus on the material policy issue involved and whether the referendum should be applied to it. Nor were the questions raised about when the use of referendums was appropriate and how they fitted within the UK constitution clearly answered. Even a single legal framework governing campaigns was

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28   Thatcher, 'House of Commons Speech – EEC Membership (Referendum)'.

eschewed. However, by 1979, despite the absence of a conscious, open and considered moment of inauguration, not only had the referendum been deployed, but it had taken place on multiple occasions for more than one purpose. Precedent is important to UK constitutional discourse; and 1973–9 had firmly provided it.

1997–2004: New Labour

When the Scottish referendum of 1979 failed to meet the threshold of 'yes' support deemed appropriate for the implementation of devolution, Scottish Nationalist MPs voted for a motion of no-confidence in the Labour government. The General Election that followed saw the Conservative Party come to power, remaining in office until 1997. During this period, the referendum went into abeyance. It is notable that in 1983, the Labour Party, despite having held a referendum on continued membership in 1975, felt able to commit in its election manifesto to leaving the EEC without such a popular vote. Nor did the *European Communities (Amendment) Act 1987*, giving effect to the Single European Market, give rise to campaigns for a referendum. By the later 1980s the Labour Party was more reconciled to European integration. However, during the 1990s, with Euroscepticism a rising force in the Conservative Party and beyond, this divisive issue once again helped force the referendum back to the centre of UK politics. Controversy over the Maastricht Agreement of 1992 led some to call for a popular vote to be held on the subject. By the time of the 1997 General Election, both Labour and the Conservatives had pledged that they would not join the European Single Currency unless agreement to such an objective was attained through a referendum. No such vote was held (since the trigger of a government seeking to join the Euro never occurred), but this non-referendum is an example of how the prospect of a popular vote, even if it does not take place, can make an impact.

For the Blair governments, the likely difficulty of winning such a referendum influenced the decision not to attempt to participate in the Euro. Blair, under Eurosceptic pressure, also committed in 2004 to holding a referendum on the draft European Constitution. Ultimately, 'no' votes in France and The Netherlands in the EU killed off this particular agreement before a referendum needed to be held in the UK. During this period, the idea of a further referendum on leaving or remaining within the EU began to gain momentum. In 1997, the Referendum Party contested the General Election on this issue. Another referendum that did not take place, but which Labour was in this instance supposedly committed to holding, was on the voting system used for the House of Commons.

Familiar issues, once known as the 'Irish Question' and 'Home Rule', continued to be important motivators. The major referendums of the Blair period, which occurred during 1997–1998, took place to secure popular approval for devolution in Wales and Scotland (in 1997) and to endorse the Belfast or 'Good Friday' Agreement (in 1998). Referendums were also applied to the governance of England. In 1998 voters in Greater London endorsed the reintroduction of directly elected government for the connurbation. There were plans to introduce new tiers of regional devolved governance across the whole of England, subject to approval by referendums. However, the first such vote, held in 2004, in the North East, produced a decisive 'no' and prompted the government to drop its plans.

At this point the second historic phase of referendums came to an end. Another aspect to the referendum agenda of the Blair governments, however, continued. Under the *Local Government Act 2000* it was possible to introduce directly elected mayors to local authorities, subject to approval through referendums. This particular use of referendums falls without the immediate

scope of the present paper, which is not directly concerned with local-level votes. However, the 2000 Act was significant in that it contained provision for referendums to take place following petitions – that is to be triggered by members of the public.

As the twentieth century closed, referendums – never used above local level prior to 1973 – were an important part of the working constitution. But clear principles applying to their use were difficult to discern. When, for instance, was it appropriate to hold a referendum, and when was it not? The Blair governments implemented a wide range of substantial constitutional change. Indeed the revival of the referendum is part of its legacy of constitutional development. However, a clear rationale for when a popular vote was required is difficult to discern from this period. Referendums were judged necessary for devolution, the Northern Ireland peace process, changes in the structural arrangements of local authorities, joining the European single currency, a change in the electoral system of the House of Commons, and the ratification of the draft European constitution. But no public vote was perceived as required for a catalogue of other important constitutional changes, such as the incorporation into UK law of the European Convention on Human Rights through the *Human Rights Act 1998*; the radical alteration in the composition of the House of Lords of 1999, and the *Freedom of Information Act 2000*.

It is difficult to avoid the conclusion that the overriding concern was not a constitutional principle but a political necessity. Demands for referendums, commitments to holding them, and their actual occurrence, were the consequence of a desire to achieve lasting change, to prevent it from taking place, or to minimise political controversy or divisions within a party. These kinds of factors could make a referendum appear an attractive or necessary exercise. In their absence, there was no decisive pressure for a referendum. The arbitrary quality of referendums was augmented because

these pressures exerted themselves through the party system and the government of the day. Ultimately, a referendum took place if (and only if) whoever held office at UK level decided to do so. This position should not be confused with unfettered control, since a government might feel obliged reluctantly to concede a referendum, as with Blair over the European Constitution, though he was able to avoid holding the vote.

During the 1997–2004 phase, consideration of referendums tended to accept them as a given and focus on matters that were significant but, from a constitutional perspective, of second-order importance. Shortly before the commencement of this period, the Constitution Unit and the Electoral Reform Society established an Independent Commission on the Conduct of Referendums, in April 1996. Its report, published in November of the same year, was prescient in that it anticipated a resurgence in the use of referendums. However, it stated that it was 'strictly netural on whether referendums are desirable, on whether they should be held on any particular issue… As a Commission we are neither for nor against referendums… This report is not intended to provide material for advocates or for opponents of referendums of referendums, but to provide guidelines for regulating their conduct.'[29] While the Commission report acknowledged many of the constitutional issues addressed in the present paper, it deliberately avoided attempting to resolve them. It took the formally correct position that referendums need not contradict the doctrine of parliamentary sovereignty. A key recommendation was for a set of guidelines that would apply consistently to all referendums, perhaps regulated by an independent body.

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29   Independent Commission on the Conduct of Referendums, *Report of the Commission on the Conduct of Referendums*, pp.15–16.

This focus on practicalities was maintained when the Committee on Standards in Public Life (CSPL) considered the subject of referendums. Indeed, it was more constrained still in its outlook. In October 1998, CSPL published its Fifth Report, on 'The Funding of Political Parties in the United Kingdom'. It included recommendations for the regulation of elections and referendums.[30] CSPL chose to examine the existing framework for referendums in the UK, in response to a number of witnesses concerned that the system was 'chaotic and unfair, especially when the government is itself a participant.'[31] In its resulting report, the Committee acknowledged that although referendums had 'come to play an increasingly significant role in our political system [...] The United Kingdom's experience of them has, however, been limited, and there are no agreed rules or even common understandings governing the administration and conduct of referendums and referendum campaigns.' Having identified a need for more consistency and transparency, it concluded that a proposed Election Commission should 'keep under review the law and practice relating to referendums, and should be empowered to issue reports and to make recommendations concerning referendums to Parliament and the Government.'[32] CPSL expressed concern that both sides of any referendum campaign should have the chance to make their case. If public finance were made available, it should provide an equal amount that would make it possible for the competing groups to publicise their respective platforms. It would fall to the proposed Election Commission to determine the groups that would receive such support if it were on offer, and to receive their subsequent

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30 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf

31 Riddell cited in 'Fifth Report of the Committee on Standards in Public Life', p.115.

32 'Fifth Report of the Committee on Standards in Public Life', pp.171–172.

accounts. The CPSL argued that the finance made available in 1975, adjusted for inflation, should be the baseline for that provided in future referendums. Alongside various other recommendations with respect to funding, CPSL was firm that governments should maintain a position of neutrality during referendums.

The 1998 CSPL recommendations formed the basis for the *Political Parties, Elections and Referendums Act 2000* (PPERA). This Act set out a legal framework for the management of referendums held either in the UK, in one or more of the UK's constituent nations, or in any region in England, where that referendum is held in pursuance of an Act of Parliament. It did so by providing for the establishment of the Electoral Commission, with responsibility for the future management of referendums in the United Kingdom. PPERA prescribes the following: the means by which referendum question(s) are determined; requirements on individuals and groups who campaign in referendums – known as permitted participants – including controls on the amount that they spend and on the donations that they are permitted to accept; and the means by which lead campaign groups – known as designated organisations – are determined, and the assistance which they are entitled to receive.[33]

The 2000 Act represented a statutory acknowledgement of referendums as a fixture of the political landscape of the UK, rather than just a series of one-off events. The body it created, the Electoral Commission, had the management of referendums as part of its task. Certain important principles did underpin this new framework. They included the idea of each side having certain opportunities provided to it to present its case; and

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33   House of Lords Select Committee on the Constitution, '12th report –
      Referendums in the United Kingdom, Chapter 5: The referendum campaign:
      practical issues, 2011 [accessed via: http://www.publications.parliament.uk/pa/
      ld200910/ldselect/ldconst/99/9907.htm (17/09/16)].

that the government, even if it had a position in a referendum, would remain neutral during the campaign. However, even as the 2000 Act further established the constitutional status of the referendum, it left considerable ambiguities. During the third historic phase of the referendum they would manifest themselves once more.

Referendums since 2011: the coalition and beyond

No major referendum was held in the UK between 2004 and 2011. However, throughout this second period of abeyance, though unused, referendums remained a presence. There were calls for a vote on the Treaty of Lisbon of 2007 (a successor to the abandoned European Constitution), and on continued EU membership, as well as for the introduction of a 'referendum lock' on further integration. The *Government of Wales Act 2006* both extended the scope of the National Assembly for Wales, and provided for a further expansion of its powers, subject to approval in a referendum. Moreover, all three of the then-main parties at Westminster – Labour, the Conservatives and the Liberal Democrats – made, as the 2010 General Election approached, pledges to hold further referendums on a variety of matters. This salience encouraged the House of Lords Select Committee on the Constitution to conduct an inquiry into referendums in the UK, publishing its report in 2010.[34]

The Committee carried out the closest equivalent there has been to a full, official assessment of referendums from a constitutional perspective. However, it took place more than thirty-five years after the use of referendums on substantial decisions

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34 House of Lords Select Committee on the Constitution, '12th Report of Session 2009–2010' [accessed via: https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf (16/09/16)]. For the summary of conclusions and recommendations, see: pp.49–51.

began. The overall tone of the report was one of pronounced scepticism regarding the desirability of referendums, but resignation to the fact that they had come into use and were likely to continue to be employed. Consequently, the focus of the firmer recommendations was on practicalities: how to manage referendums when they almost inevitably occurred on some subject or other. A particular point of concern for the Committee was the *ad hoc* basis on which they were held by UK governments to suit their tactical purposes. It hoped that agreement between the parties might be attained regarding when it was proper to employ such votes. While stressing the problems associated with referendums, the Committee noted that if they were to be held, it was best to do so in connection to 'fundamental constitutional issues'. Partly because of the lack of a written constitution in the UK, a precise means of discerning whether a matter fitted this definition was not possible. However, the Committee produced a list of actions that it regarded as falling within such a category. They were: abolition of the monarchy; exit from the EU; secession from the Union by one of the 'four nations'; abolition of either the House of Commons or the House of Lords; changing the electoral system employed for the Commons; the introduction of a written constitution; and altering the UK currency.

The Committee made further recommendations about the timing and management of referendums. It opposed the use of supermajorities or thresholds, and argued that, given parliamentary sovereignty, a binding referendum was not possible. Though the Committee was clearly apprehensive regarding the constitutional implications of referendums, its report in a sense embedded them – through recognising their importance – and may through the list of possible uses, though not intending to do so, have encouraged an application of referendums far wider than had previously been the case.

The Committee was correct to anticipate more referendums, though its members might have been surprised by the precise circumstances in which they occurred. One driver of the referendum in its third historic phase was the advent of a coalition government. Following the inconclusive General Election of May 2010, negotiations between the Conservatives and Liberal Democrats produced an agreement to hold a referendum on the introduction of the Alternative Vote (AV) for parliamentary elections. Once again, party political necessity was a key motive for this use of a referendum, which took place in 2011. It was important not only because it helped revive the devices once again, but also because it extended referendums into an area in which they had not previously been employed: the voting system. It also meant that both the Liberal Democrats and Conservatives had now initiated a UK-wide referendum. Up to this point, Labour was more clearly linked to the actual holding of referendums. The only major referendum not taking place under a Labour government was the first, in Northern Ireland in 1973. During the third phase, then, referendums decisively became a device deployed by multiple parties.

The second motivator for referendums was more familiar: the twin subjects of devolution and the union. In accordance with the terms of the *Government of Wales Act 2006*, Welsh voters in 2011 confirmed their support for an extension of the legislative powers of the National Assembly for Wales. Here was another example of arbitrariness driven by party political considerations. On the surface it is not entirely clear why this change required a referendum. Expansions in Scottish devolution, for instance, did not; nor does the Wales Bill passing through the UK Parliament at the time of writing. The answer again seems to lie in party political concerns, on this occasion controversy within the Welsh Labour Party at the time the measures eventually included in the 2006 Act were being devised.

A vote that attracted more attention was the Scottish Independence Referendum of 2014. The trigger for this event was the Scottish National Party winning, in 2011, a majority in elections to the Scottish Parliament. In this sense it did not involve the internal politics of the governing party or parties at UK level, but forces clearly external to them, that it was judged necessary to respond to with a referendum. Unlike the Northern Ireland sovereignty poll of 1973, the outcome was seriously contested, and for a time it seemed possible to some that Scotland could choose independence. Though it lost the vote, the Scottish independence movement seemed to gain some impetus from the campaign. The possibility of a further referendum remained on the agenda, especially following the EU referendum of 2016. A source of pressure for the continuation of referendums, then, is referendums themselves; a self-sustaining device.

2011 was an important year for referendums. The AV referendum took place – the second UK-level vote to be held – and there was a referendum on Welsh devolution. Furthermore, the *European Union Act 2011*, though it has not led to a referendum being held, and might well never do so, created a standing requirement for referendums to be held on the further pooling of responsibilities at EU level. Political necessity was at work. In 2009, David Cameron committed to what would become the 2011 Act, following his abandonment of his pledge to hold a referendum on the Lisbon Treaty, should he take office. Some contemporaries were critical of this approach, describing it as a 'fig lea[f] designed to hide Cameron's blushes after he and [William] Hague dropped the "cast-iron guarantee" to hold a referendum on the Lisbon treaty.'[35]

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35   R. Oulds, 'The Government's EU Bill being presented to Parliament on Thursday is 'a fig leaf designed to hide Cameron and Hague's blushes': Response to the Government's EU Bill', 2010 [accessed via: http://www.brugesgroup.com/ the-conservative-party/57-issues/the-conservative-party/253-the-government- s-eu-bill-being-presented-to-parliament-on-thursday-is-a-fig-leaf-designed-to- hide-cameron-and-hague-s-blushes (16/09/16)].

The Act makes ratification of a range of possible expansions in the remit of the EU subject to a binding referendum. It was known as the 'referendum lock'. The Act is an example of referendums – or the possibility of referendums – being conceived of as a means of preventing change, as Dicey envisaged them. Other referendums in this period were driven more by those who saw them as a means of achieving rather than blocking transformation, such as the Scottish Independence Referendum. So too was the EU referendum of 2016. Like the European Union Act, it demonstrated the continued capacity of the issue of continental integration to create pressure for the holding of referendums. Whether it marked the end of a particular phase in the history of these votes, or another stage within it, remains to be seen.

Case studies

1975 EEC REFERENDUM

Overview

On 5 June 1975, the people of the UK were invited to answer the question 'Do you think that the United Kingdom should stay in the European Community (the Common Market)?'. It was the first such UK-wide vote. On a turnout of 64.5 per cent of the electorate, 67.2 per cent voted 'Yes,' with less than a third (32.8 per cent) voting 'No'. The people had voted in favour of EEC membership with a convincing majority of 8,908,508 votes; the UK was to remain a member of the EEC.

After months of heated public and parliamentary debates, the decision to hold a referendum on the issue had resulted in an endorsement of the EEC. The people had contributed to a decision about what many contemporaries perceived to be 'the most important constitutional issue of the century.'[36] The referendum politically entrenched the decision to join the EEC, following accession on 1 January 1973, with all its repercussions for the transfer of law-making power away from Westminster. It had implications for the political circumstances of the Labour Party, which had been seriously divided over the issue. The significance of the referendum extended further still. It was the occasion

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36   Bogdanor, *The People and the Party System*, p.38.

for only the second formal suspension of Cabinet collective responsibility. It also caused contemporaries to question the concepts of representative government and parliamentary sovereignty which lay at the heart of British democracy. Most signficantly, despite attempts to present it as a one-off, the 1975 referendum had set a precedent for the use of such a device that has since proved to be difficult to ignore.

Political background

The use of a referendum on EEC membership

The issue of EEC membership involved the highest possible stakes for the UK. It pertained to its external orientation as a former global power and its economic future, as well as the UK constitution, including the impact of participation in the EEC on the doctrine of parliamentary sovereignty. European integration has always been such a contentious matter in the UK and controversy over the substance of the EEC spilled over into associated arguments about the way in which decisions about membership should be made. Out of this foment arose the first UK-wide referendum.

The 1975 vote had diverse origins. It followed a build-up in support for the idea from across the political spectrum, with advocates who were both more and less supportive of participation in the EEC. The Liberals were the first to suggest the device at their Assembly in 1969, on the basis that the issue had created noticeable divisions within British society that could not be overcome without some form of democratic device that would engage the public, and resolve the dispute.[37] In August 1970, the Labour politician Douglas Jay added to the momentum. He was quoted in the press stating that 'where the constitution and the

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37   Bogdanor, *The People and the Party System*, p.39.

powers of Parliament itself were being altered, there was unique justification for a referendum *or* election.' A year later, a book written by the Conservative backbench MP Philip Goodhart was published reiterating calls for a referendum. Despite his own personal commitment to the EEC, Goodhart argued that the voice of the people of Britain had to be heard on such a constitutionally significant issue.[38]

There was also an international dimension. On 16 March 1972, President Pompidou of France announced that a referendum was to be held in France, seeking popular views on whether Britain (alongside Denmark, Ireland, and Norway) should be admitted into the European Community. Significantly, the UK was the only one of these four candidate states not to have committed to holding a referendum on the issue. Pressure to provide some means of popular validation consequently increased, prompting the Labour Party to adopt the policy that led to a 1975 referendum.

Labour's attitude towards European integration had always been ambivalent (though at the 1966 and 1970 general elections, Labour had advocated EEC membership). The Labour government had left its failed bid for membership of 1967 on the table. But by the early 1970s, now in opposition, many within the Party were turning against the EEC, and saw the attempt by the Conservative Prime Minister Edward Heath to achieve entry as a source of vulnerability that Labour could exploit. During 1970 and 1971, Wilson resisted pressure to adopt an overtly anti-EEC policy.[39] He eventually arrived at a compromise position intended to avert a more serious split in his party. Labour would oppose the terms of membership Heath had obtained in Parliament. But it would then pledge, if returned to power, to renegotiate those terms,

38   Ibid.

39   Bogdanor, *The People and the Party System*, p.40.

and subject EEC membership to popular approval. If the Labour government felt it had been successful in its renegotiation, it would advocate a vote to remain within the EEC. Otherwise it would recommend that voters support leaving.

Although the Labour government rationalised this approach on the basis that Heath had 'taken Britain into the Community without securing the 'full-hearted consent of the British people,'[40] it was widely construed at the time that this account was more a justification than an explanation. In one parliamentary debate, Margaret Thatcher maintained that the referendum had been proposed as 'a tactical device to get over a split in their [Labour's] own party,' before going on to suggest that 'any constitutional consequences are, therefore, of only secondary importance in the Government's eyes.'[41] According to a considerable body of contemporary thought, then, the introduction of the referendum into UK-level politics owed more to internal Labour difficulties confronting Wilson during the early 1970s than any more principled stance.

Arguments for the use of a referendum

The proposal to hold the vote precipitated a flurry of arguments involving a wide cross-section of politicians, the media, and members of the public. It is interesting to compare this episode with cases of referendums held more recently. In 1998 in Northern Ireland, for example, there was a noticeable lack of opposition to the use of a referendum for the validation of the Belfast/Good Friday Agreement.

Several arguments were offered in favour of the referendum as a suitable tool for democratic decision-taking. The most obvious

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40 C. Seymour-Ure, 'Press and Referenda: The Case of the British Referendum of 1975', *Canadian Journal of Political Science*, 1978, 11, 3, p.602.

41 Thatcher, 'House of Commons Speech – EEC Membership (Referendum)'.

reason cited by advocates was the need for some sort of public validation of significant changes to the constitutional make-up of the UK. Those in support of a referendum on EEC membership emphasised the unusual nature of the issue. Articles published in political journals at the time highlighted the possibility of a 'sacrifice of sovereignty' and loss of territorial and constitutional independence, should Britain find herself 'submerged in a larger political entity'.[42] There were growing concerns at the time that remaining in the Common Market might lead to British membership in a fully-blown European Parliament. In such scenarios people of the UK could find that their Parliament was no longer the supreme body. Speaking in the House of Commons in early March 1975, Roderick MacFarquhar asked fellow Members to imagine a future in which 'Parliament is to be put into a position where it will no longer be able to unmake laws, where it will no longer be the supreme body controlling the destinies of the people of this nation […]'[43] For Mr. MacFarquhar and other supporters of the device, the referendum was the only vehicle through which an expression of direct and explicit public consent could be made, and continued UK membership in the EEC could legitimately be sanctioned.

Arguments against the use of a referendum

Aside from the use of a border poll in Northern Ireland in 1973, minor applications at local level, and examples of referendums held on mainland Europe, the referendum was an unknown entity to the people and governments of the UK. The fact that this would be the first countrywide referendum to be put to the British people

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42   J. Mackintosh, 'The Case Against the Referendum', *Political Quarterly*, Jan.–Mar., 1975, p.74.

43   MacFarquhar, 'House of Commons Intervention – EEC Membership (Referendum)', 11 Mar., 1975 [accessed via: http://www.margaretthatcher.org/document/102650 (30/08/16)].

formed the basis of the arguments made by opponents of the device. Writing in *Parliamentary Affairs*, political commentators R.J. Williams and J. Greenaway spoke of how 'many regard the referendum as some kind of cataclysmic event which will alter, transform or even destroy representative democracy in Britain.'[44] They viewed the referendum as 'a thin end of an alien wedge, destined to break apart the basic principles of our political system and our constitutional practice.'[45] Opponents argued that the referendum was a direct challenge to parliamentary sovereignty, and reflected a lack of confidence in the ability of Parliament to 'consider and discuss all the points in detail,' on behalf of those who 'have not time to look into every detail of this or that Bill.'[46] To opponents of the device, a political instrument which provided an additional means of ratifying contentious policy decisions 'assert[ed] that a majority in the House of Commons is not a sufficient indication of the acceptability of a measure.' Put in this context, the referendum was the 'most serious attack that could be made on a system of representative government.'[47] The stance Labour took on the status of the referendum courted confusion in this area. In its manifesto for the February 1974 General Election, the party had stated that a referendum would be consultative; but when it reiterated the general policy in its programme for the October 1974 General Election, Labour described the proposed referendum as binding. Subsequently, in March 1975, the Labour Leader of the House of Commons, Edward Short, clarified that a referendum would be binding on the government but not on Parliament.[48]

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44 R. J. Williams and J. Greenaway, 'The Referendum in British Politics – a Dissenting View', *Parliamentary Affairs*, 1975, p.250.

45 Williams and Greenaway, 'The Referendum in British Politics – a Dissenting View', p.250.

46 Thatcher, 'House of Commons Speech – EEC Membership (Referendum)'.

47 Mackintosh, 'The Case Against the Referendum', p.73.

48 House of Commons Library, Briefing Paper No. 7253, *The 1974–75 UK Renegotiation of EEC Membership and Referendum*, London: House of Commons Library, 2015, p.7.

Opponents were also concerned about future calls for more referendums. Once established as a legitimate means of attaining public validation on areas of constitutional uncertainty, some thought that the use of the device may become cemented as an irreversible constitutional convention. As one Labour politician and commentator speculated early in 1975, 'once it is accepted that key issues cannot be determined by Parliament and that the 'full-hearted consent of the British people' must be demonstrated by other methods, then there may well be a growing view that unless controversial laws have been validated by this process, they are lacking full authority and need not be obeyed.'[49] This point of contention was echoed across the political spectrum. In an article for *The Times*, Roy Jenkins, who resigned from the Shadow Cabinet when Labour adopted its referendum policy in 1972, warned that 'Once the principle of the referendum has been introduced into British politics, it will not rest with any one party to put a convenient limit to its use.'[50]

Management of the referendum

The suspension of collective responsibility

Following completion of the renegotiation of EEC terms of membership, Wilson wanted to recommend a vote to remain to the country. However, the Labour movement remained divided over the issue, up to the level of the Labour Cabinet. A further constitutional innovation was required to avoid a damaging split. For the first time since 1932, and the second time in UK history, an agreement was reached that the Cabinet could reach a conclusion (in favour of a 'yes' vote) from which ministers who disagreed with it could publicly dissent. By this means,

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49   Mackintosh, 'The Case Against the Referendum', p.75.

50   R. Jenkins, *The Times*, 11 April 1972.

the Wilson government could back EEC membership without damaging resignations. On 7 April 1975, two months ahead of the referendum, Wilson announced that 'those Ministers who do not agree with the Government's recommendation in favour of continued membership of the European Community are, in the unique circumstances of the referendum, now free to advocate a different view during the referendum campaign in the country.'[51] Attempts were made to minimise the impact of the 'agreement to differ' commitment during the campaign. Wilson called on Ministers to 'avoid personalising or trivialising the argument' and forbade Ministers from appearing 'in direct confrontation with another Minister'. But the suspension had important consequences,[52] allowing as it did for members of the government, even up to Cabinet level, publicly to disagree with one-another.

Tony Benn in particular became infamous for his opposition to the government's proposals from inside the government, as Secretary of State for Industry. Benn's well-documented displays of political opposition presented a potential threat to public confidence in the Labour government. Indeed, his grievances were by no means limited to the matter of the Common Market. In one instance, in response to an announcement on the April Budget, Mr Benn was said to have circulated a paper to every member of the Labour Party's Industrial Sub-Committee directly opposing the Chancellor of the Exchequer's policy of reflation, in a bid to overturn the Budget proposals.[53] The temporary suspension of collective responsibility may have deepened existing divisions within the Labour government,

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51   H. Wilson, 'Speech to the House – Collective Responsibility', 7 Apr., 1975.

52   Wilson, 'Speech to the House – Collective Responsibility'.

53   A. Silkin, 'The 'Agreement to Differ' of 1975', in A. Marshall (ed.), *Ministerial Responsibility*, Oxford: Oxford University Press, 1989, p.62.

providing Ministers with the confidence to undermine a range of government policies to which they objected. These instances attracted media interest, further enhancing the potential for them to cause damage.[54] Yet from Wilson's perspective, the possible alternative if he had not allowed for the suspension of collective responsibility – resignations from and perhaps the collapse of his government – was worse.

Wilson's decision to suspend collective ministerial responsibility was seen by opponents as an act of defeat. In her speech to the Commons on the referendum, Margaret Thatcher charged that the Labour government was clearly failing to perform its most basic task: 'No Government can be properly accountable to Parliament unless they acknowledge a collective responsibility with regard to main matters of policy […] The whole relationship of government with Parliament [and, in turn, the people] depends on that principle.'[55] The suspension of collective responsibility was presented by some as a an admission by the Government that it was incapable of making a decision on a critical piece of foreign and economic policy; and that the public could no longer rely on it to perform on of its core functions. Opponents regarded the decision to suspend ministerial responsibility as a further detrimental consequence of the referendum. It was portrayed as yet another example of how the use of the device threatened to undermine constitutional conventions and governmental coherence.

Practical implementation of the referendum

The absence of a set of previously established constitutional or legal guidelines presented a number of procedural difficulties.

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54   N. Beloff, 'Labour votes 2–1 to quit the Market', *The Observer*, 27 April 1975, p. 1.

55   Thatcher, 'House of Commons Speech – EEC Membership (Referendum)'.

In an effort to compensate for the lack of historical precedence a Referendum Unit was set up in the Cabinet Office on 27 January 1975. It took a lead on producing the *Referendum Act 1975* (gaining Royal Assent on 8 May 1975), which provided the legislative framework for the vote (the referendum was implemented through the *Referendum Order 1975* of 14 May 1975). Members of this Unit highlighted five specific areas which they thought might prove most problematic: the counting of the votes; the management of the media campaign; campaign expenditure; framing of the question; and dissemination of official information.

The framing of the question proved problematic. Government officials struggled to decide on whether the ballot paper should include a 'preamble' explaining the possible ramifications of the proposal, but it was the exact wording of the question itself which proved most contentious. Aiming to safeguard against framing the issue in a way that might be biased towards one side, whilst also ensuring that the issue was presented in a clear and concise way that members of the electorate would easily understand, the government resorted to trying out a number of different phrases in an opinion poll conducted at the beginning of February 1975. In the end, the final question presented to the people on 5 June 1975 was almost identical to the question proposed in the original white paper.

Some in Parliament challenged the plan to count votes centrally in London rather than at local points of origin.[56] This proposal was ultimately dropped. Another concern which gained currency was whether the franchise should differ from that used for

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56   Short, 'House of Commons Debate – EEC Membership (Referendum)', 888, cc291–408, 11 Mar., 1975, [accessed via: http://hansard.millbanksystems.com/commons/1975/mar/11/eec-membership-referendum#S5CV0888P0_19750311_HOC_319 (01/09/16)].

parliamentary elections (other than the enfranchisement of peers which was always intended). The Government faced growing calls for special arrangements to be made to enable servicemen and their families, Britons living abroad, and holiday-makers to participate in the referendum.[57] There were heated parliamentary debates, including an intervention by Enoch Powell, who argued that 'the privilege of voting in the referendum must be the same as that […] embodied in our electoral law.'[58] It was eventually agreed that no overseas civilian would be able to vote.

The lack of precedence for the management of referendums led to uncertainty over how the results should be interpreted. The possibility of a condition for a minimum turnout or supermajority was called for by some as a means of giving the referendum an extra degree of legitimacy, but the idea was not accepted.[59] Just four years later, though, the issue was raised and this time acted upon with the introduction of the '40 per cent rule' clause adopted for the referendums on devolution in 1979.

There were serious concerns surrounding the appropriate course of action in the case of a 'No' majority. John Mackintosh drew attention to this possibility in his article, 'The Case Against the Referendum,' written in March 1975. He asked readers to consider the implications of a 'No' majority on the whole system of government. Mackintosh argued that the official government commitment to a 'yes' vote made it 'look as if on one side the Prime Minister and two-thirds of his Cabinet, all Conservative and Liberal leaders plus British industry, the quality press and the bulk of Whitehall will all be wanting a 'Yes' answer.

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57   D. Butler and U. Kitzinger, *The 1975 Referendum*, Basingstoke: Macmillan Publishing, Second Edition, 1996, p.56.

58   E. Powell, *Hansard*, col., 22 Apr., 1975.

59   Butler and Kitzinger, *The 1975 Referendum*, p.56.

If this combination is defeated, it will be the rejection of the entire British establishment.'[60] Mackintosh's critique reveals an important uncertainty regarding the use of referendums. The government had no previous experience in handling an unanticipated and unwanted outcome. Mackintosh and other opponents had doubts over whether the government had the relevant contingency plans in place in the event of a 'No' victory; and whether they had fully appreciated the ramifications of the use of a referendum in the first place. Significantly – in the context of the differentiated outcome of the 2016 EU referendum – Mackintosh also speculated on a possible scenario in which 'Britain had a 'Yes' majority but Scotland and Wales had majority against, so that they were carried into the EEC "by the votes of the English."'[61] The plan for a central count (subsequently dropped) was intended in part to mask possible territorial discrepancies of this sort.

Campaign

In the absence of any past examples of nationwide referendums held in the UK, those responsible for the management of the referendum, seeking legitimacy, looked towards the handling of past elections for guidance. It was readily agreed that the broadcasting and funding for the campaign would be modelled on the existing procedural arrangements already in place for election campaigns.

However, unlike in election campaigns, both the 'Yes' and 'No' campaigns cut across party lines. The Liberals were the most united and consistent of the three main political parties, with only a few members against remaining in the EEC. The Conservative

60   Mackintosh, 'The Case Against the Referendum', p.80.

61   Mackintosh, 'The Case Against the Referendum', p.81.

Party was also largely in favour of EEC membership; although there was significant resistance from some backbenchers and Conservative supporters. In stark contrast, the Labour Party was 'split wide open on the question,'[62] as one political analyst put it in 1978. There was resistance within the Cabinet itself (resulting in the controversial suspension of collective responsibility), and though the Cabinet was predominately pro-Market, a majority of the Parliamentary Labour Party and of a special party conference were against EEC membership.

Lack of party consensus led to the development of two 'umbrella organisations,' both of which were officially recognised by the government and received public funding. Those active in the 'Yes' campaign, known as 'Britain in Europe', sought to put party political concerns to one side, united by their views on the EEC issue. Similarly, the 'No' campaign, which went by the title 'National Referendum Campaign', saw members of all three main parties campaigning together; Conservatives working alongside trade unionists as well as the Left wing of the Labour Party.[63] An arguable advantage for the 'Yes' side was that it appeared to bring together a more convincing collection of mainstream political figures, while the 'No' campaign appeared more of a fringe enterprise.

Media

Aside from the distribution of a 'popular version of the White Paper on the renegotiated terms and on the Government's recommendation to every household,' the Government relied on the media to carry the referendum campaign and 'provide

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62   Seymour-Ure, 'Press and Referenda', p.602.

63   Seymour-Ure, 'Press and Referenda', p.602.

plenty of general information.'[64] As D. Butler and U. Kitzinger summated, 'In the absence of a single, permanent, organised leadership and official orthodoxy on each side, the press could decide for itself what the issues were. No one else could claim to be a more legitimate arbiter.'[65] The press played a central part in defining and presenting the issues in dispute.

With little involvement from political parties, it was the media that facilitated the involvement of politicians. Prominent voices from both sides took advantage of this interest to advance their own political agendas. Benn, for example, contributed to four Dailies and two Sundays and developed a particular relationship with the *Daily Mail* on the issue of the EEC and unemployment. Roy Jenkins and Edward Heath both wrote for three Dailies.[66] Involvement also extended to television appearances, most notably in a quasi-parliamentary debate between six of the leading campaigners staged by ITV three days before the referendum was held. The media thus provided key individuals with a forum from which to influence popular opinions and sway the outcome.

However, not all contemporaries were enthusiastic about the active part played by the media in the referendum campaign, and concerns were raised regarding the legitimacy of their role in the dissemination of information. The participation of leading political figures in the media coloured popular understandings of UK membership of the EEC, leading to a personalisation of the issue. Members of the public began to associate certain arguments with the individuals themselves, which certain critics felt gave one side of the campaign an unfair advantage. Indeed,

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64   Short, 'House of Commons Debate – EEC Membership (Referendum)', pp.291–408.

65   Butler and Kitzinger, *The 1975 Referendum*, p.245.

66   Seymour-Ure, 'Press and Referenda', p.605.

acute difficulties with the legitimacy of the campaign lay in the implementation of a 'balanced' and 'fair' coverage. In his analysis of the 1975 referendum campaign published three years after the referendum was held, Seymour-Ure noted that the notions of 'balance' and 'fairness' were subject to interpretation. 'Balance' was taken to mean different things to different newspapers, depending on the publisher's underlying objectives. According to Seymour-Ure, anti-marketeers took the idea of 'balance as 50–50 coverage'. Pro-marketeers, however, favoured definitions of 'balance as coverage proportionate to the strength of the rival sides,' and 'coverage proportionate to the 'output' of each side.'[67]

There was also an underlying mistrust of the media, and numerous commentators fuelled rumours that the media was 'brainwashing the public.'[68] On one occasion, Raphael Tuck MP asked how Wilson could ever expect the referendum 'to be fair, when […] the whole of the mass media is attempting to brainwash the public by insidious propaganda in favour of staying in the Common Market?'[69] On another, speaking on behalf of the House of Lords European Communities Committee, Earl Cowley challenged the effectiveness of the dissemination of information, referring to a 'considerable lack of public understanding of the EEC.'[70]

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67   Seymour-Ure, 'Press and Referenda', p.613.

68   K. Clarke, 'House of Commons Debate – Referendum Bill', 890, cc1613–61, 23 April 1975, [accessed via: http://hansard.millbanksystems.com/ commons/1975/apr/23/referendum-bill-1#S5CV0890P0_19750423_HOC_561 (01/09/16)].

69   R. Tuck, 'House of Lords Debate – EEC (Prime Minister's Speech)', 884, cc182–7, 14 Jan., 1975 [accessed via: http://hansard.millbanksystems.com/ commons/1975/jan/14/eec-prime-ministers-speech#S5CV0884P0_19750114_ HOC_138 (01/09/16)].

70   Earl Cowley, 'House of Lords Debate – European Communities Committee: Second Special Report', 363, cc274–313, 22 July 1975, [accessed via: http://hansard.millbanksystems.com/lords/1975/jul/22/european- communities-committee-second#S5LV0363P0_19750722_HOL_587 (01/009/16)].

Results and implications

On 5 June 1975, 25,903,194 people voted on whether the United Kingdom should remain in the EEC. On a respectable turnout of 64.5 per cent (of the 40.456.877 total electorate), 67.2 per cent of those participating voted 'Yes'.

	Number of votes	Percentage of those voting	Percentage of the electorate
Yes	17,378,581	67.2	42.96
No	8,470,073	32.8	20.94
Spoilt Papers	54,540	/	/

The victory of the 'Yes' campaign was reinforced by its geographical distribution. Although the people of Northern Ireland were less convinced, with only 52 per cent of voters backing EEC membership, across Great Britain the 'Yes' majority was no lower than 55 per cent in any region, and as high as 76 per cent. Overall, majority support for EEC membership was spread across the United Kingdom, with only the Western Isles and Shetland in Scotland producing 'No' majorities.[71] The question of what would happen had there been more substantial divergence remained unanswered.

The decisive result had an immediate effect on position of the Labour Party and the stability of the government. The Conservative Party and the Liberals were largely unaffected by the outcome. The 'Yes' majority, initially at least, abated the heated contention between Labour politicians.[72] Tensions within the party and government itself were reduced, enabling the Labour government to focus its efforts on the UK's economic difficulties.

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71 Bogdanor, *The People and the Party System*, p.42.

72 Ibid.

As stated in the *Daily Telegraph*, Mr. Wilson's '[…] gamble ha[d] paid off handsomely, perhaps even better than he had ever dared hope […]'[73] Even the analysis published in the *Birmingham Post* which was rather more lugubrious in tone accepted that after 'three weeks [of] Britain being effectively (or, more properly, ineffectively) ungoverned […] The one merit of the referendum is that it leaves the Government better placed and with better authority to cope with the economic mess.'[74]

In the longer term, however, it has since been argued that the 'result was not the ringing endorsement of the EEC that it appeared to be at the time.'[75] The referendum did not put a stop to questions surrounding the EEC. Within a few years, debates had arisen over the issues of direct elections to the European Assembly and the UK financial contribution to the European Community.[76] Moreover, controversy within the Labour Party returned. On this evidence the referendum did not offer a proficient means of resolving cases of contention in UK politics. While the use of the referendum in 1975 might not have immediately precipitated a major constitutional change to the extent that opponents had anticipated, it did contribute to a lasting development. Despite Harold Wilson's hastened assurances that the EEC example was a 'one-off', a crucial precedent for the use of future referendums had been set. Calls for a referendum to be held on Scottish devolution were already being made by 1976. Moreover, the *ad hoc* way in which the 1975 referendum was carried out left many questions about the role of referendums in the UK constitution unanswered.

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73   *Daily Telegraph*, 7 Jun., 1975.

74   C. Warden, *The Birmingham Post*, 9 Jun., 1975.

75   Bogdanor, *The People and the Party System*, p.47.

76   Ibid.

'The Pontius Pilate of British politics':[77] the 1979 referendum on devolution in Scotland

On 1 March, 1979, Scottish voters participated in a referendum that asked the question: 'Do you want the provisions of the Scotland Act 1978 to be put into effect?' This Act provided for the establishment of a devolved Scottish Assembly with limited legislative powers. The question put forward to the Scottish electorate in March 1979 thus had the potential to lead to significant constitutional change. The Scotland Act 1978 provided for this referendum to be held; and also included a stipulation that the government would introduce an order to Parliament repealing the Act if less than 40 per cent of the electorate voted 'yes'.

The result failed to clear this hurdle. Although 51.6 per cent voted 'Yes' (1,230,939 votes) compared to the 48.4 per cent who voted 'No' (1,153,502 votes), the insertion of the 40 per cent rule while the bill was passing through Parliament prevented this slight majority from being enough to ensure the Scotland Act went 1978 into effect. With a turnout of 62.9 per cent, only 32.85 per cent of the electorate had voted in favour of devolution.

Background

The referendum was the culmination of more than a decade of policy proposals, parliamentary bills, and public debate. Indeed, the idea of devolution for Scotland went back further still, to the 'Home Rule' movement beginning in the nineteenth century. The serious revival of proposals for Scottish devolution came out of the electoral success of the Scottish National Party (SNP)

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77   Finer as quoted in S. E. Finer (ed.), *Adversary Politics and Electoral Reform*, London: Anthony Wigan, 1975, p.18.

in parliamentary by-elections and local elections between 1966 and 1968, and – by extension – a growing belief that there was clear demand amongst the Scottish people for some form of democratic devolution. This reform was also seen by supporters of the Union as a means of removing a perceived need for Scottish independence.

In response to this pressure, the Labour government appointed a Royal Commission on the Constitution – more commonly known as the Kilbrandon Commission (after Lord Kilbrandon, who became its chair in 1972) – in 1969. Tasked with examining the existing governance of the regions of the United Kingdom and assessing need for change, the Commission's final report of 1973 supported claims that the electorate of Scotland wanted a greater degree of autonomy. After protracted political and parliamentary debate and manoeuvring, and an initial abortive legislative effort in 1976–7, the Labour government eventually introduced the Scotland Bill in November 1977, which included provisions for the establishment of a Scottish Assembly. It was introduced alongside a Wales Bill proposing a form of devolution for Wales. The Bills were passed by Parliament, receiving Royal Assent in July 1978.

Political framework

A range of factors led to the use of the referendum in 1979. The overt justification offered by its advocates was the existence of a need to test the premise that there was substantial demand for devolution among the Scottish people. During the passage of the Government's original single Scotland and Wales Bill – taken to Second Reading in November 1976 – it conceded that a popular

vote would take place.[78] When the bills for Scotland and for Wales were first introduced in 1977, they referred to a referendum, though there was no 40 per cent threshold at that point.

The impetus for a referendum did not originate inside the Labour government; instead, the pressure came primarily from anti-devolutionists, opponents of the official party line. A central part of the government's decision to hold a referendum was the developing schism within Labour over the issue. Much like the case of the EEC referendum, the devolution vote was accepted as a means of minimising an intra-party spilt – though a fundamental difference lay in the fact that the EEC referendum began as an official part of an overall government policy, rather than something introduced under outside pressure. It provided a solution to the Labour government, enabling dissident backbenchers to vote for both the Scotland and Wales Bills, but also allowing them to campaign against the resulting legislation.

There were considerable complexities in the motivations for the use of a referendum over Scottish devolution. Whilst ostensibly a means of consulting the public, and thereby legitimising greater autonomy for Scotland, devolution was also conceived partly as a means of resisting a more radical outcome: Scottish independence. In this sense, the referendum was intended as a means of preventing a change it did not directly address, as much as authorising the reform to which it referred. Provision for the referendum itself, moreover, was, from the point of view of the government, a means of enabling those among its own supporters who opposed devolution to support the Bill in Parliament. They could do so in the interests of avoiding further undermining of the Labour government; whilst leaving open the option of

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78 Independent Commission on the Conduct of Referendums, *Report of the Commission on the Conduct of Referendums*, p.38.

campaigning for a 'no' vote in the referendum that followed. Finally, from the point of view of those who sought to prevent devolution, the referendum was not a means of securing support for change, but of blocking it. Yet their ultimate goal was shared with supporters of devolution. They too wished to preserve the Union, but disagreed over tactics, fearing that devolution would lead to break-up, rather than avert it.

The decision to hold a referendum on the question of Scottish devolution therefore arose more from disarray in the Labour Party, than a genuine desire to offer the people of Scotland a chance to have their say on the future of their nation. The Labour government reluctantly chose to hold a referendum out of expediency. The 1979 referendum reveals a distinction between the official justifications and the underlying political motivations for the government in office to make provisions for a referendum.

The use of a referendum to determine whether the United Kingdom would remain part of the EEC in 1975 undoubtedly provided a vital precedent for the subsequent decision to hold a referendum on the question of devolution in Scotland. Politicians had come to view the referendum as a means of addressing controversial political issues. Those in favour of a vote were quick to utilise the arguments made by politicians in the lead up to the EEC referendum. Just as the 1975 case had been justified on the grounds that the public had a right to be consulted on an issue that carried significant constitutional implications, it was possible to extend this existing argument in the case of devolution. Certainly, in both instances, there was a case to be made for the use of a referendum as a constitutional 'safeguard'; a means of gauging public opinion on a political question that could have lasting constitutional repercussions. However, such claims – though they had some truth to them – did not encompass all the motivations for the holding of referendums, which were driven to a significant extent by party political contingency.

Campaign

In the absence of constitutional guidelines on the use of the referendum, the 1975 example was continually cited in discussions leading to the 1979 vote. This was openly acknowledged by advocates at the time; Bruce Millan, Secretary of State for Scotland, piloted the Scotland Act 1978 Referendum Order through the Commons on the basis that 'It follows substantially the precedent of the order made for conducting the EEC referendum held on 5 June 1975.'[79]

However, as observed by academics in the early 1980s, 'the 1979 practice followed the 1975 referendum only in some respects, but diverged markedly in others.'[80] One obvious difference was the 40 per cent threshold provision. Another was the fact that the EEC referendum followed the implementation of a major change: EEC membership; while the Scottish devolution referendum, though post-legislative, took place in advance of the proposed reform being implemented – or as it transpired, not being implemented. Marked differences between the two referendums emphasise the 'pick and mix' approach and ad hoc procedural and constitutional development in the use of referendums in the UK.

Media

In comparison with the EEC Referendum – which had largely been fought by two competing sides – the variety of campaigning groups involved in the lead up to the 1979 Scottish referendum presented the media with a difficult task. Michael Brown's analysis of the referendum coverage in the media during 1978 and 1979 suggests that as a result of this, the 1979 referendum

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79   Hansard, 958, col. 1270.

80   Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p. 5.

'rarely received prominent treatment in its own right.'[81] Instead, media portrayals centred on the individuals, organisations, and specific areas of contention that dominated. In particular, the decision to include the 40 per cent rule became a focal point, and the press capitalised on opponents' claims that the amendment was undemocratic. In the wake of the Cunningham Amendment, *The Scotsman* described the whole process as a 'rigged election.'[82]

Campaign groups

Multiple bodies were involved in the campaigns for and against the implementation of the Scotland Act. In contrast to 1975, public funding was not made available to campaigns. Also unlike the EEC referendum, with neither side able to agree on the core principles of their campaign, the 1979 referendum was fought without any all-party umbrella organisations, and in this sense the public was left with less of a clear-cut choice.

The fragmentation of groups in favour of the Scotland Act undermined the effectiveness of the 'Yes' campaign in particular. The 'Yes' side was primarily fought by the Labour Movement Yes Campaign, the Scottish National Party, the Yes for Scotland group, the Alliance for an Assembly, the Liberals, and the Communists, alongside a small number of student organisations in the later stages of the campaign.

The Labour Movement (made up of the Labour Party, Co-operative Party and Scottish Trades Union Congress) campaigned for the 'Yes' vote on the grounds that the establishment of a Scottish Assembly would helpfully offer limited devolutionary powers, whilst simultaneously suppressing calls for Scottish independence.

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81 M. Brown, 'The Scottish Morning Press', in Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p.111.

82 Brown, 'The Scottish Morning Press', p.111.

In this sense they were campaigning for a particular outcome in the referendum, but with an additional underlying agenda. In contrast, many nationalists saw the Scottish Assembly as a step towards independence, and to some extent fought for the 'Yes' vote with this ultimate objective in view. This fundamental divergence in opinion prevented the two most influential and popular 'Yes' groups (the Labour Party and the Scottish National Party) from taking part in any form of joint campaign. Mrs Helen Liddell, secretary of the Scottish Council of the Labour Party, had made this explicitly clear to the public in 1977, announcing that 'We will not soil their hands.'[83] The resulting public arguments between the competing sections of the 'Yes' campaign, the duplication of local campaigning efforts, and the myriad of different ways in which the referendum was framed, coupled with the deep schism within the Labour movement itself, diminished public confidence in the 'Yes' campaign.

The ways in which referendum campaigns are run and organised affects the way issues are presented to the electorate, thus influencing the quality of the decision taken. It is reasonable to suggest that the lack of clarity in the lead up to the March 1979 vote undermined the coherence of the campaign. Faced with multiple bodies pressing them to vote either 'Yes' or 'No', the public were met with a sea of different party political ideas and voices. This complexity in turn raises questions over the legitimacy of the use of the referendum as a democratic tool. The extent to which a campaign supports independent decision making by the public can be undermined by strategies that are themselves determined by party political considerations.

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83   R. Perman, 'The Devolution Referendum Campaign of 1979', *The Financial Times*, in H. M. Drucker and N. L. Drucker (ed.), *The Scottish Government Yearbook 1980*, Edinburgh: Paul Harris Publishing, 1980, pp.55–56.

40 per cent rule

Perhaps the most crucial difference in the conduct of the 1975 and 1979 referendums is the use of the 40 per cent rule. During the 1975 referendum campaign, Harold Wilson was adamant that the government was committed to the promise made in the original White Paper that 'a one-vote margin would be enough […] a simple majority – without qualifications or conditions of any kind.'[84] In the Scottish case, however, a simple majority in favour of the proposition would not be sufficient. It remains the only referendum held since 1975 in which a 'Yes' vote did not result in the implementation of the proposal put forward to the people.

Despite referring to a post-legislative referendum, when the Scotland Bill was first introduced in 1977 there was no 40 per cent threshold. This provision was included in the Scotland Act (and applied to Wales) as a consequence of an amendment tabled by the Labour back-bencher George Cunningham MP. Advocates of the 40 per cent rule argued that in the face of a possible turning point in the constitutional make-up of the United Kingdom, the amendment was needed to ensure that Scottish devolution had support from a sufficient proportion of the Scottish electorate. Speaking in Parliament at the time, Mr Willie Hamilton, Labour MP for Fife Central, alluded to the constitutional implications of the devolution question. He and others felt that 'Parliament being sovereign could overturn it [a 'Yes' vote]. But it is a bit like falling off a cliff. One cannot change one's mind and go back.'[85]

For those in favour of Scottish devolution, however, the 40 per cent rule was seen as a 'gerrymandering device,' an anti-democratic measure devised to ensure that the Scotland Act was

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84   Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p. 6.

85   House of Commons Debates, vol. 942, col. 1477.

not implemented. Certainly, the amendment was the product of pressure from both Labour rebels and others who were opposed to devolution. The Cunningham Amendment was significant both in its impact on the conduct of the campaign and subsequent result of the referendum. It also had potential implications for the use of the referendum as a decision-taking tool. In terms of its immediate effect, the 40 per cent rule prevented the introduction of devolution in Scotland. Without the 40 per cent rule, the (albeit slight) 'Yes' vote would have been enough for the establishment of a new legislative body, the Scottish Assembly, to take place. It thus played the crucial role in the securing the repeal of the Scotland Act.

The implications of the amendment for the authority of Parliament have been the subject of academic interest and controversy. In a firm legal sense, Parliament retained its 'sovereignty' irrespective both of the referendum and of the 40 per cent amendment. It could repeal and pass any Act it chose to. More specifically in the context of the Scotland Act, it could refuse to pass an order introduced by a minister to repeal the Act following the referendum.[86]

While the reliance on referendums, even if subject to parliamentary sovereignty, suggests a reduced role for Parliament in the making of major decisions, it can be held that the use of the 40 per cent rule in particular did provide Parliament with an additional source of authority. By this means it inserted an extra stipulation of its own regarding the conditions under which implementation of the Act could occur. In essence, then, 'the 40 per cent rule was a Parliamentary declaration of intent.'[87] As George Cunningham himself admitted at the time, the rule

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86   Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p. 8.

87   Ibid.

did not 'decide whether devolution takes places or not, but only whether the matter goes back before Parliament in the event of an inconclusive referendum result.'[88] By giving Parliament the discretion to decide whether a vote that did not meet the 40 per cent requirement would be enough to implement the Scotland Act 1978, the rule carried with it the potential to restrict the role of the people in deciding the fate of Scottish devolution, ensuring that the ultimate authority remained in the hands of Parliament.

Underlying the Cunningham Amendment was the implication that matters of constitutional change should be treated differently, requiring more than a bare majority of support. The amendment was a constitutional innovation; the first occasion in Britain when 'the *status quo* [had] been successfully entrenched by requiring a qualified majority to overturn it,'[89] as Vernon Bogdanor put it in an article published in 1980.

More generally, if one considers the amendment within the wider discourse of referendums, it serves to illustrate their flexibility and malleability in the UK. It was possible for Parliament to sculpt and mould each proposed referendum in accordance with the motivations, intentions, and pressures facing it at that specific time. Although the Labour government had conceded that it would hold a referendum on devolution, Parliament was within its rights to alter the procedural arrangements of that referendum as it saw fit. The decision to include the 40 per cent rule demonstrated this procedural freedom. This realisation has significant implications for the legitimacy of the past, current, and future application of referendums. One might wish to question how appropriate is the capacity to pick and choose the constitutional framework of referendums held in the UK.

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88   Bogdanor, *Devolution in the United Kingdom*, p.188.

89   Bogdanor, 'The 40 per cent rule', p.249.

Electoral register

The inclusion of the 40 per cent rule had direct repercussions for the way in which the referendum was held. Most significantly, the amendment fuelled debates about *who* was eligible to vote in the referendum. Within the flexible framework of the UK, with each referendum that is proposed, decisions have to made about who can vote, and how this choice might influence the outcome. This was particularly acute in the case of the 1979 referendum, since the introduction of the 40 per cent rule demanded a majority of at least 40 per cent *of the electorate*.

The 40 per cent rule, together with the electoral register used, provided 'No' campaigners with a sizeable advantage. Although the referendum was held on a new register, the electorate still included the following 'unavoidable non-voters': voters who would reach 18 years old after 1st March; voters dead since registration in October 1978; students who were double-registered; prisoners; errors in registration; hospital patients; seriously disabled people; 'ill at home'; those effected by moving house.[90] Difficulties in determining who was eligible to vote resulted in an official deduction taking into account 'deaths, those under age on polling day, and convicted prisoners.'[91]

Crucially, although the referendum was based on an 'adjusted electorate', the deducted figure did not include any estimate for those who may have been double-registered, for the recent 'ill at home', and any other inaccuracies. Whilst estimates of 'unavoidable non-voting' have differed slightly amongst

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90   The Scottish Political Archive, 'The 40% Rule at the 1979 Devolution
       Referendum', p.3.

91   Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p. 8.

academics,[92] it is clear that, in the context of the 40 per cent rule, the nature of the electoral register meant that the 'Yes' side needed to gain substantially more votes than it otherwise would have done, in order to be successful. Writing in an article for the *Alloa Advertiser* in 1979, Yes campaigner George Reid MP for Clackmannan and East Stirlingshire provided an example of this pattern: 'my wife Dee and I have just been given four votes in the coming referendum on March 1. Two for our front door and two for out back gate. Two Yes and Two No. In effect therefore we are disenfranchised. Naturally we will be voting yes, but our two additional votes, which we cannot legally use, cancel this out. They count automatically as a No. If we have been anti-Assembly of course all votes would count as a No.' Mr Reid went on to explain: 'In all referenda the largest share of the votes cast has been the only criteria for determining the winner. Not so this time […] For the Yes campaign to be successful 40 per cent of the total electorate must vote that way.'[93] Both the 40 per cent rule and the electoral register thus transformed the way in which the referendum functioned and undoubtedly had an influence upon the result.

Outcome

On 1 March 1979, 62.9 per cent of the electorate cast their votes on the question of Scottish devolution, with the following results:[94]

Vote cast	Number of votes	Percentage of those voting	Percentage of the electorate
Yes	1,253,502	51.6	32.85
No	1,230,937	48.5	30.78

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92   For more, see The Scottish Political Archive, 'The 40% Rule at the 1979 Devolution Referendum', p.3.

93   G. Reid, *Alloa Advertiser*, 12th Jan., 1979, p.6.

94   Bogdanor, *Devolution in the United Kingdom*, p.190.

Although a bare majority of the votes cast favoured the Act it proved insufficient to bring about the envisaged constitutional change. Falling well short of the 40 per cent threshold set by Parliament, the Labour government was forced to halt provisions for the implementation of the Scotland Act 1978.

In the short-term, then, the slim majority for devolution meant that despite initial claims of popular demand, with less than a third of the electorate voting for the implementation of the Scotland Act 1978, the referendum result 'destroyed the credibility of devolution.'[95] The 1979 referendum had further political repercussions. After the referendum the Labour government concluded that it could not proceed with the implementation of devolution, thereby losing the parliamentary support of the SNP. On 28 March 1979 the government was defeated on a confidence vote, leading to a General Election.[96] Noting this chain of events, Bogdanor has remarked: 'It was thus devolution and not the industrial and economic troubles of the 'Winter of Discontent' of 1978–9 that was the immediate cause of the collapse of the government, and which was to inaugurate eighteen years of Conservative rule.'[97]

Reflections

The 1979 Scottish referendum established that the EEC vote of 1975 set a precedent for the future use of this instrument in the United Kingdom. As with the 1975 case, the 1979 example demonstrates the use of the referendum as a tactical political tool, utilised to overcome party divisions. However, the substantial differences in the ways in which the referendum was carried out in 1979 also highlight the degree of flexibility and manoeuvrability in this area.

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95 Ibid.

96 Perman, 'The Devolution Referendum Campaign of 1979', p.53.

97 Bogdanor, *Devolution in the United Kingdom*, p.191.

The most significant difference between the two referendums is, of course, the inclusion of the 40 per cent rule. The 40 per cent rule transformed the nature of the referendum, and was arguably solely responsible for preventing the establishment of a Scottish Assembly. Claims made by advocates of the amendment that certain policy issues require more than just a bare majority to be legitimate raised questions surrounding the overall nature of the referendum itself. They encouraged further questions regarding its handling. Contemporaries considered: What are the fundamental characteristics of a policy issue deemed worthy of a referendum? What makes some policy areas more constitutionally significant and contentious, requiring an extra layer of consent, whilst others only require a bare majority vote?

On a positive note, the 1979 referendum was successful to some extent in initiating public engagement on the subject of Scottish devolution, encouraging the electorate to participate in the debates and meetings which took place at central and localised levels across Scotland. It enabled the Scottish electorate to have their say in determining the future of their nation, and in this sense, the 1979 example demonstrates the potential role of the referendum as an effective vehicle for active democracy and public consultation. Although the 1979 referendum was proposed as a 'party life raft,'[98] and the inclusion of the 40 per cent rule ensured that power remained firmly in the hands of Parliament, the 1979 referendum nevertheless demonstrates the potential of such devices to be used as an effective form of public consultation on issues of constitutional and political contention.

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98   Bochel, Denver, and Macartney, *The Referendum Experience: Scotland 1979*, p. 170.

The 1998 Belfast/Good Friday Agreement Referendum

Overview

On 22 May 1998 voters in the Republic of Ireland and Northern Ireland were invited to register approval or otherwise of the Belfast (or 'Good Friday) Agreement (in the case of the Republic, the question on the ballot paper pertained to a constitutional amendment arising from the Agreement).[99] The provisions in the Agreement were wide-ranging, and covered a plethora of different constitutional safeguards and mechanisms. They were designed to establish a new form of governance in Northern Ireland and secure consensus over how its constitutional future might be shaped. The principles of the Agreement necessitated amendments to the existing Irish Constitution, thus requiring a referendum to be held within the Republic of Ireland. And so, on the same day, at the same time, the Agreement was put forward to two different electorates in two adjoining but separated territories.

After peace talks stretching over a number of years, the results of the referendum facilitated the implementation of the Belfast Agreement. On a turnout of 81.1 per cent, 71.1 per cent of participants in Northern Ireland voted in favour. In the Republic of Ireland, while a lower turnout of 56 per cent of the electorate cast their vote, 94 per cent chose to support the amendment to the Constitution. Irrespective of the longer-term repercussions – which are still in dispute amongst academics – the outcome of the referendums represented 'a hugely significant political breakthrough in the context of centuries of political mistrust and decades of violent conflict.'[100]

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99   UK Government, *The Agreement: Agreement Reached in the Multi-Party* Negotiations, 10 Apr., 1998 [accessed via: http://cain.ulst.ac.uk/events/peace/docs/agreement.pdf (19/08/2016)].

100 E. Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History*, Portland: Hart Publishing, 2006, p.176.

Background

Despite long-term groundwork helping prepare the way, including the Anglo-Irish Agreement of 1985 and the Downing Street Declaration of 1993, academics have pointed to a 'fortunate constellation'[101] of conditions which provided the impetus for the eventual peace accord of 1998. It represented a combination of factors that built upon these previous shifts in political mindset, and equipped advocates with the confidence to suggest the use of the referendum device in the relatively late stages of the peace process. In Northern Ireland, changes in the activity and rhetoric of political parties and associated groups enabled better cooperation between opposing sides. One important transformation was the adoption by the Provisional Irish Republic Army (IRA) of an increasingly cooperative approach, and the eventual willingness of its political wing, Sinn Fein, to participate in negotiations. Changes in the leadership of both nationalists and Unionists also proved particularly significant. John Hume became leader of the Social Democratic and Labour Party (SDLP), and David Trimble introduced a more 'moderate, comparatively enlightened'[102] approach to Unionism. Other individual politicians were also instrumental in the run up to 22 May, encouraging members of both electorates to exercise their democratic rights and pave the way for a more peaceful future. The UK Prime Minister, Tony Blair, who took office in May 1997, engaged in an effective media campaign (albeit in the later stages) campaigning strongly for a 'yes' vote on the grounds that the Agreement would offer greater devolved powers to Northern Ireland, whilst attempting to pacify opposition by assuring that prisoners would 'not be released unless violence was given up for good.'[103]

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101   J. Lloyd, 'Ireland's Uncertain Peace', *Foreign Affairs*, Sept.– Oct., 1998, 77, 5, p.121.

102   A. Reynolds, 'A Constitutional Pied Piper: The Northern Irish Good Friday Agreement', *Political Science Quarterly*, 1999–2000, 114, 4, p.624.

103   M. von Tangen Page, *A Negative Peace: Northern Ireland and the Good Friday Agreement*, London: Centre for Defence Studies, King's College London, 2000, p.37.

Academics have also highlighted the role of state parties in the conditioning of the Belfast/Good Friday Agreement referendums. Support from the United States and the UK played a considerable part in the referendum campaign, and arguably swayed the votes of individual members of the electorate. With just one week to go, the British government announced a £315 million programme for the economic development of Northern Ireland. Promises were also made with regards to the export trade of red meat, with £2 million made available to support Northern Ireland's overseas marketing campaign.[104] Despite assurances that these economic measures were not conditional on a 'yes' vote in the upcoming referendums,[105] promises of considerable financial investment impacted upon the campaign.

Issue

The Agreement put to voters in 1998 was a complex 'hybrid of domestic and international law.'[106] The first clause offered a means through which the people of Northern Ireland were theoretically given the power to determine the future of their country.[107] This provision was an 'innovative approach to an issue of territorial sovereignty and self-determination,' arguably unique in international law.[108] It also serves as an expression of the model of political cooperation known as consociationalism; R. MacGinty has described the Belfast Agreement as a 'comprehensive,

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104 B. McSweeney, 'Identity, Interest and the Good Friday Agreement, *Irish Studies in International Affairs*, 1998, 9, p.99.

105 T. Blair, Speech delivered to the Royal Ulster Agricultural Society, Balmoral showgrounds, Belfast, 14 May 1998.

106 C. Campbell, F. Ni Aolain, and C. Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland', *The Modern Law Review*, 2003, 66, 3, p.317.

107 UK Government, *The Agreement*, p.2.

108 Wicks, *The Evolution of a Constitution*, p.183.

sophisticated, consociational package [...] specifically designed to circumvent majoritarian politics.'[109]

In the UK, the 1998 referendums are often viewed through the prism of the introduction (or reintroduction) of devolution into the UK constitution in the late twentieth century. However, although devolution was undoubtedly a prominent feature of the Agreement and significant to the referendum, the devolution provisions were only part of a wider set of peace proposals on which the publics of Northern Ireland and the Republic were voting. The referendums should not be categorised solely as part of New Labour's domestic reform programme – not least because negotiations which culminated in the Belfast Agreement pre-dated the election of the New Labour government.[110] Some components of the Agreement did not relate directly to the UK at all. It provided for amendments to be made to Articles 2 and 3 of the Irish Constitution, thereby entailing the Republic's relinquishing its territorial claims over the North.[111]

Alongside those parts of the Agreement specific to either the Republic or the UK, other aspects had a cross-border dimension. The Agreement provided for a threefold network of institutional changes, with the establishment of a North-South Ministerial Council, a British-Irish Council, and a British-Irish Intergovernmental Conference. It was hoped that these institutions would facilitate better co-operation on governmental matters and improved relations more generally.[112] In addition, in an attempt to address areas of particular contention, special

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109   R. MacGinty, 'Constitutional Referendums and Ethnonational Conflict: The Case of Northern Ireland', *Nationalism and Ethnic Politics*, 2003, 9, 2, p.7.

110   Wicks, *The Evolution of a Constitution*, p.182.

111   McSweeney, 'Identity, Interest and the Good Friday Agreement', p.96.

112   Wicks, *The Evolution of a Constitution*, p.182.

commissions comprising representatives of various significant parties were promised to examine policing, the release of prisoners, disarmament, and economic discrimination.[113]

The provisions for devolution were crucial to the Agreement, allowing for the restoration, on different terms, of self-government for Northern Ireland, which had been suspended in 1972. The Northern Ireland Assembly envisaged in the Agreement was to be elected by the Single Transferable Vote (STV) form of proportional representation, with powers to legislate on all matters other than 'excepted' and 'reserved' matters (the latter of which included policing and criminal justice and could be devolved subject to the consent of the Secretary of State for Northern Ireland).[114] The idea of establishing an Assembly made up of all the leading political parties proved to be important to the campaign. David Trimble, leader of the Ulster Unionist Party, encouraged his supporters to vote 'Yes', claiming that proportional representation would 'allow participation at all levels from all sections of the Community.'[115] Yet for some unionists, the prospective entry of the two leading figures in Sinn Fein, Gerry Adams and Martin McGuinness – alongside provisions to release prisoners – undermined the appeal of the Agreement.[116]

More generally, the Agreement was a product of multi-faceted, multi-national efforts to initiate more effective communication and understanding between the Republic of Ireland and Northern Ireland that had been developing progressively during the preceding two decades. Building on established principles,

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113 Reynolds, 'A Constitutional Pied Piper', p.620.

114 Wicks, *The Evolution of a Constitution*, p.177.

115 Speech by D. Trimble MP, leader of the Ulster Unionist Party to the Annual General Meeting of the Ulster Unionist Council, 21 Mar., 1998.

116 Lloyd, 'Ireland's Uncertain Peace', p.109.

it contained a clever compromise guaranteeing to the people of Northern Ireland the right to determine their constitutional future. It provided that if the people of Northern Ireland voted in a referendum to leave the UK, then the UK government would introduce into Parliament a bill giving effect to this wish. This stipulation preserved in form the sovereignty of the UK Parliament, since it bound the UK government rather than the UK Parliament. Moreover, it meant that the nationalists could in theory one day achieve their objective, but the Unionists were protected by the need for majority consent to such an outcome. In the words of Tony Blair, 'the principle of consent remained at the heart' of negotiations,' serving as the 'foundation stone of the […] Good Friday Agreement.'[117] It also represented a turning point in a conflict that had plagued the North and South for decades, providing a new opportunity for cooperation.

The use of the referendum

In *Frameworks for the Future* – the product of international talks in 1995 which set out a procedural and conceptual basis for the ensuing peace dialogue – the then-UK Prime Minister John Major declared that 'Any outcome of these negotiations will be put to the people of Northern Ireland for their approval in a referendum.'[118] In contrast to the heated discussions about the idea of a referendum on EEC membership, there was a notable dearth of opposition to the use of a referendum to ratify the Belfast/Good Friday Agreement. Gerry Adams did question the use of referendums in a speech to his supporters on 10 May 1998, arguing that 'referendums do not constitute the exercise

117   T. Blair, 'Speech delivered to the Royal Ulster Agricultural Society, Balmoral showgrounds, Belfast, 14 May 1998.

118   'Foreword by the Prime Minister, the Right Hon. John Major MP', *Framework for the Future*, Belfast: HMSO, 1995, p.111.

of national self-determination.'[119] However, any concerns he may have had did not prevent him from supporting the use of a referendum on behalf of Sinn Fein.

There are several factors which might be used to explain the relative lack of opposition to the use of the referendum. First, there was cross-party consensus on the need to hold a referendum and the principles that were being put forward for the public to vote on. Second, in the Republic, a referendum was legally required for the proposed amendments to Articles 2 and 3 of the Constitution. In fact, since independence in 1922, there have been numerous such referendums in the Republic. In the Irish Constitution, Articles 47, 48, and 50 have provided that 'every constitutional change, no matter how minor or contentious, needs a referendum.'[120] This historical precedence and constitutional framework ensured that an Agreement outlining constitutional changes would result in a referendum, and presumably influenced politicians' decision to hold a referendum in Northern Ireland as well. It also demonstrates how a written constitution in some circumstances diminishes political contention and disputes about the use of particular devices and how best to engage the public in matters of constitutional change. Third, MacGinty and several other academics have identified a 'consent principle' that was embedded in the Belfast/Good Friday Agreement as part of a longstanding acceptance of consensual politics in Northern Ireland, tracing the consent principle to its foundation in the 1920s.[121] The use of a referendum fitted with this model.

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119 G. Adams, 'Speech to the reconvened Sinn Fein', 10 May 1998.

120 M. Gallagher, 'Ireland: the referendum as a constitutional device', in M. Gallagher and P.Uleri, *The Referendum Experience in Europe*, Basingstoke: Macmillan Press Ltd, 1996, p.101.

121 R. MacGinty, R. Wilford, L. Dowds, and G. Robinson, 'Consenting Adults: Northern Ireland's Constitutional Future', *Government and Opposition*, 2001, 36, 4, pp.472–92.

Campaign: 'It was a rollercoaster – it was extraordinary.'[122]
Quintin Oliver, non-party 'Yes' campaigner

The two Good Friday/Belfast Agreement referendums were indeed 'extraordinary', most notably in the decision to hold the same referendum in two areas with two distinctive electorates. There had been international instances of Agreements that have contained a similar referendum 'component'; however, the Belfast/Good Friday Agreement was the only example of a referendum agreement that has stipulated a 'two state territorial contingency.'[123] In the context of the wider referendums discourse, there are legitimacy issues with presenting two different electorates with aspects of the same Agreement. Some living in Northern Ireland must have viewed it from a different perspective to those in the Republic of Ireland. The ramifications of the Belfast/Good Friday Agreement – if implemented – were to be substantively different for both populations. The divergence of political, socio-economic, environmental, and constitutional conditions and circumstances facing the two electorates doubtless meant that the circumstances in which the electorate were voting also varied.

Campaign role of the Northern Ireland Office

On 26 March 1998, a document written by the Director of Communications, Tom Kelly, to be circulated amongst employees of the Northern Ireland Office (NIO) was leaked to the Democratic Unionist Party. This text provides insight into the

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122 Interview with Q. Oliver, ''Quintin Oliver: 'People thought I was mad to work towards Good Friday Agreement'', *Belfast Telegraph*, 6th Oct., 2014 [accessed via: http://www.belfasttelegraph.co.uk/opinion/columnists/ quintin-oliver-people-thought-i-was-mad-to-work-towards-good-friday-agreement-30639679.html (24/08/16)].

123 Campbell, Ni Aolain, and Harvey, 'The Frontiers of Legal Analysis, p.330.

role of the UK government in developing the Northern Ireland referendum campaign in the media. Addressing members of the NIO, Kelly described the ways in which the NIO was engaged in the 'yes' campaign.[124] The document indicates that extensive use was made of the media, with ministerial and departmental speeches, interviews, meetings, and weekly information bulletins utilised by the NIO in their efforts to secure a 'yes' vote. The government also put into place an effective monitoring system, commissioning several surveys of the media coverage of the referendum, conducting focus groups chosen to reflect 'a section of the wider community,'[125] and creating a dedicated website. The text reveals that its authors attached substantial importance to the media in the months preceding a referendum, and recognised the part the government could play in persuading the people of Northern Ireland to ratify the Belfast Agreement. The NIO clearly recognised the need to 'exert some influence on the content and quality of media coverage'[126] – the media offered 'considerable scope' for the Government to present their ideas and surreptitiously cultivate favourable representations of the Agreement.

Significantly, the phrasing used in the NIO document reveals a discrepancy between the expected position of governing bodies in the handling of a referendum and the reality of the role played by these bodies, when faced with the possibility of a 'no' vote to their proposed Agreement. The actions taken by the NIO

124 T. Kelly, "Northern Ireland Office document on the proposed Referendum', 4 March 1998' – Text of the Northern Ireland Office document on the proposed Referendum which was leaked to the Democratic Unionist Party on 26 May 1998 [accessed via: http://cain.ulst.ac.uk/events/peace/docs/nio26398. htm (22/08/16)].

125 T. Kelly, "Northern Ireland Office document on the proposed Referendum', 4 March 1998'.

126 Ibid.

to 'convince the Northern Ireland public […] 'that not only is agreement possible, but [that] they have a vital role to play in endorsing it,' were not intended to be publicised.[127] A degree of secrecy was employed. Kelly referred to this, disclosing that the Office had 'commissioned McCann Erikson [a global advertising agency network] to have both quantitative and qualitative research carried out, without it being seen to be Government inspired.'[128] Similarly, Kelly also divulged that the Office was relying on inside 'intelligence gleaned from informal contacts with key media people.'[129]

The Kelly text illustrates the potential for referendums to be manipulated by the UK executive, raising legitimacy questions about the role of the government in their management, and the extent to which official involvement undermines the use of the device as an exercise in democratic deliberation. For the UK government, as for other parties to the Agreement, the cost of failure was exceptionally high. From their point of view, the purpose of the referendum was not to consult the public on whether or not they wished to proceed with the peace process, but to secure their consent to it. Consequently, methods both open and covert were deployed to secure the outcome they deemed essential.

Republic of Ireland

There were many differences between the referendum held in Northern Ireland and the referendum in the Republic. Whereas the people of Northern Ireland were only asked to vote on the Belfast Agreement, in the Republic of Ireland, the constitutional

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127 Ibid.

128 Ibid.

129 Ibid.

amendment proposition was put to the electorate of the Irish Republic alongside another referendum on the Amsterdam Treaty.[130] The decision to hold the two referendums on the same day led to concerns about 'recklessness and insensitivity.'[131] Quoted in the *Irish Times* in the week preceding the referendum, Mr Trevor Sargent, the Green Dublin North TD,[132] stated that 'The enthusiasm for the Belfast Agreement is being hijacked to give the impression of interest in the Amsterdam Treaty.'[133]

Perhaps the most notable difference was in the establishment of the Referendum Commission in the Republic of Ireland. Following a case taken to the Supreme Court in 1995 – in which Patricia McKenna criticised the Republic of Ireland government for financially supporting one side of a referendum campaign – the Referendum Act 1998 made provisions for a commission that would supervise the arguments put forward to the public during all future referendum campaigns. It was tasked with explaining 'the subject matter of referendum proposals', promoting 'public awareness of a referendum,' and encouraging 'the electorate to vote.'[134]

The Commission undoubtedly had an impact on several aspects of the handling of the referendum, including funding, the use of the media, the ways in which the public were informed, and the presentation of both sides of the issues of contention.

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130 The Irish Constitution (*bunreacht na hEireann*) allows for two kinds of referendum: one to amend the constitution, and another, 'a rejective referendum', used in cases of 'ordinary legislation in the event of a clash between the Dail and the Seanad,' in M. Gallagher and P.Vincenzo (eds.), *The Referendum Experience in Europe*, London: Macmillan, 1996, p.88.

131 T. Sargent, 'No vote will not leave 'Ireland in limbo', *Irish Times*, 18 May 1998.

132 Teachta Dala (TD) is a member of Dail Eireann, the lower house of the Oireachtas (the Irish Parliament).

133 Sargent, 'No vote will not leave 'Ireland in limbo'.

134 Referendum Commission, 'About Us' [accessed via: http://www.refcom.ie/en/About-Us/ (21/08/16)].

Under the chairmanship of Thomas Finlay, the Referendum Commission was allocated £5.5 million to oversee the running of both referendums and 'to inform voters of the arguments for and against the referendum in a manner fair to everybody.'[135] This stipulation was significant to the ways in which the referendum on the Agreement was portrayed to the public, and several contemporaries at the time criticised this requirement. Des O'Malley TD argued that in attempting to provide both arguments for and against the ratification of the Agreement, the Commission was forced to 'contrive negative arguments' and 'adopt unreal fears and develop them as if they were genuine'[136] – thus, providing a misleading portrayal of the issue and misinforming the public. Others were concerned that the forced neutrality of the Commission's information campaign undermined the part traditionally played by political parties.[137]

In contrast to the discreet influence of the NIO in Northern Ireland, in the Republic the Commission had an overt publicity role. Drury Communications Limited – a media consultancy firm – was hired specifically to assist in the dissemination of information to the public, utilising a combination of leaflets, radio, television, and newspaper advertisements to maximise awareness.[138] Polls conducted in the immediate wake of the referendums indicated that over half of those who had voted in the Republic of Ireland had found the information bulletins provided by the Referendum Commission 'helpful' in their

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135 'Democracy is being demeaned by referendums', *Irish Times*, 9 May 1999.

136 M. Muire Tynan, 'O'Malley criticises referendum restrictions', *Irish Times*, 15 May 1998.

137 P.Cox, 'Brussels fails to close gap with the citizen', *Irish Times*, 1 June 1998; 'New approach needed on referendum', *Irish Times*, 17 June 1998.

138 L. Mansergh, 'Two Referendums and the Referendum Commission: The 1998 Experience', *Irish Political Studies*, 1999, 14, 1, p.128.

decision-making.[139] In contrast, similar surveys conducted amongst voters in Northern Ireland revealed that the population had been left to their own devices; the majority of the electorate seemed to have made up their minds well in advance of 22 May 1998, without much consideration of the implications of the Agreement. For example, 40 per cent of those surveyed in the North mistakenly believed that even with 'no' majority vote, Articles 2 and 3 would still be amended.[140]

The use of a designated Commission in one but not both territories undoubtedly resulted in differences and discrepancies in the management of the two referendums. Legitimacy questions arise from this different treatment of the two groups of voters. Both electorates of the Republic of Ireland and Northern Ireland were being asked to consider the same Agreement on the same day (though from slightly different perspectives with a different question). Yet the management of the referendum campaigns that followed – and the ways in which the Belfast Agreement was presented to the peoples of the North and the Republic – was notably different.

Political parties

In contrast to the other referendums discussed in this paper, there was a notable lack of campaigning or momentum in the months and weeks leading up to the Belfast/Good Friday Agreement votes. This was partly due to the consensus reached amongst the different political parties. There was, of course, some underlying opposition to the Agreement, and it contained several compromises and areas of continuing contention. In the lead up

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139 Referendum Commission, 1998, p.47, cited in Mansergh, 'Two Referendums and the Referendum Commission', p.128.

140 Referendum Commission, 1998, p.47, cited in Mansergh, 'Two Referendums and the Referendum Commission'.

to 22 May, 'no' supporters were vocal in their campaign against the Belfast Agreement. One notable instance of opposition is found in the case put forward to the High Court of the Republic of Ireland a mere two days before the referendum was to be held. Mr Denis Riordan, a lecturer at the Limerick Institute of Technology, claimed that the amendments set out for Articles 2 and 3 did not conform with Article 46 of the Irish Constitution.'[141]

In the main, though, the public was not supplied with any united or sustained 'no' campaign. There were splits between the different unionist 'no' groups, the efforts of which were disjointed. The mainstream party consensus (however complex) around the Agreement probably undermined the credibility of the 'no' campaign in the eyes of voters. Though ultimately victorious, the 'yes' campaign was similarly lacklustre in the build-up to the referendum and it was only in the last few weeks, days even, that it gained momentum. Quintin Oliver – a leading 'yes' campaigner–[142] described the 'Yes' campaign' as '*non*-party' rather than *cross*-party.'[143] Despite concerted efforts to formulate an Agreement that could be accepted by all major political parties, politicians were conscious that if implemented, the Agreement would soon lead to another election which would see them pitted against each other. The 'Yes' campaign was therefore run in 'parallel to the political parties, in liaison, but neither guiding, or being guided by them'.[144]

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141 'Mr Denis Riordan is claiming:', *Irish Times*, 20 May 1998 [accessed via: http://www.irishtimes.com/news/mr-denis-riordan-is-claiming-1.154548 (21/08/16)].

142 Interview with Q. Oliver, 'Quintin Oliver: 'People thought I was mad to work towards Good Friday Agreement''.

143 Q. Oliver, 'Making It Work', *Fortnight*, Jun., 1998, 371, p.7.

144 Oliver, 'Making It Work', p.7.

Writing in the *Fortnight* journal a month after the referendum, Oliver noted how both sides of the referendum campaign lacked political legitimacy. Until the very late stages of campaigning, neither side benefited from any substantial involvement from the key political leaders of the time. Without any forthright assurances from party leadership – barring the Agreement itself – the people of both Northern Ireland and the Republic were preparing to vote without any guidance from their political leaders. It was only in the last week that the momentum of the campaigns picked up. Initially, 13,600 first-time voters received a video produced by Mark Chichester-Clark outlining the principles of the accord. With days to go, Tony Blair accepted an invitation to breakfast with David Trimble and John Hume on the Wednesday ahead of the election, making a televised appearance on the Dunadry lawn. The involvement of the leading politicians culminated in the televised appearances of David Trimble and John Hume at a concert featuring the Irish rock group U2 (the lead singer of which was Bono). One sceptic reflecting on the referendum campaign in the immediate aftermath begrudgingly acknowledged the 'heady symbolism of Hume/Ash/Bono/Trimble handclasp at the Waterfront Hall which galvanised the last three days of the referendum campaign'.[145] The 'David and John' referendum show provided the faltering 'yes' campaign with a coveted boost. As another journalist noted, 'Everyone, and in particular the media, project[ed] the "image" of the middle ground settlement, the two great forces of Northern Ireland politics caught in a historic clinch […] compered by Bono!'[146]

The sudden shift in campaigning efforts and public awareness highlights the influential role played by political parties in the development of a referendum. At every stage of the process – the

145   J. O'Farrell, 'Welcome the New Order', *Fortnight*, Jul.–Aug., 1998, 372, p.10.

146   B. McCabe, 'Not Just Two Parties', *Fortnight*, Mar., 1999, 377, p.13.

decision taken to use the device, the negotiations and handling of the referendum campaign, and the subsequent results, party politics remains at the heart of the management of this democratic device, even if, as in this instance, it is carried out on a basis of cross-party agreement rather than competition.

How the referendum was sold

The multi-faceted nature of the Agreement provided a broad spectrum of ways in which advocates of the Agreement were able to encourage members of the electorates to vote. Both unionist and nationalist leaders sold the referendum to their supporters on the principle of *peace* and *consent*. They emphasised the need to establish some sort of middle-ground to end the decades of violence and hostility. The principle of consent in particular was a sophisticated tool.[147] For nationalists, the consent principle embedded in the Agreement provided a means of uniting the island of Ireland in the future, whereas for unionists, the Agreement held a guarantee that departure from the Union would take place only subject to majority agreement. In terms of longer-term ramifications, however, while this ambiguity was the cornerstone of the compromise finally accepted by the different groups, some have suggested that it entailed the preservation of underlying tension and the failure of the 1998 Agreement fully to resolve pre-existing disputes.[148]

The devolutionary agenda outlined in the Agreement also served as a 'hook' for prospective 'yes' votes, for unionists in particular. Efforts were made to sell the Agreement as part of a wider devolutionary package within a unitary state, with comparisons

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147   McSweeney, 'Identity, Interest and the Good Friday Agreement', p.96.

148   MacGinty, 'Constitutional Referendums and Ethnonational Conflict: The Case of Northern Ireland', p.6.

made between Northern Ireland, Scotland and Wales at the time.[149] However, to see the Northern Ireland referendum through a 'devolution lens' presents the referendum in a way that overlooks the constitutional and international implications of the Agreement the electorates across the island of Ireland voted for.[150] Campbell, Aolain, and Harvey have queried the extent to which 'the political parties that negotiated the Agreement, and the people who voted for it, really believe[d] they were signing up to devolution in a unitary state.'[151]

In his address to the Royal Ulster Agricultural Society a week before the referendums took place, Tony Blair noted how 'the focus of discussion during the campaign has not, interestingly, been so much the constitutional and institutional structures, which have caused so much difficulty in the past.'[152] Instead, he went on to say, members of both electorates were far more concerned by the prospective changes to the Royal Ulster Constabulary (RUC). Interest centred on the treatment of policemen in the context of the sacrifices they had made during the past period of violence and paramilitary activity, and provisions for the release of political prisoners. So much so, in fact, that Reynolds has since described the early release of prisoners as 'an emotional incendiary device which burst into flames and was fanned relentlessly by the 'yes' side.'[153] In the absence of a single clear-cut policy issue at stake, the Agreement was sold on a number of different bases. The plethora of different principles outlined in the Agreement therefore resulted in an array of motivations and driving-forces that may have influenced voters in their decisions.

149   Wicks, *The Evolution of a Constitution*, p.182.

150   Campbell, Ni Aolain, and Harvey, 'The Frontiers of Legal Analysis', pp. 317–345.

151   Campbell, Ni Aolain, and Harvey, 'The Frontiers of Legal Analysis', p.317.

152   T. Blair, 'Speech delivered to the Royal Ulster Agricultural Society'.

153   A. Augley, 'A Pragmatic Triumph', *Fortnight*, Jun., 1998, 371, p.11.

Outcome

On 22 May 1998, the Belfast/Good Friday Agreement was
supported by an overwhelming majority 'yes' vote. Of a high
turnout of 81.1 per cent, 71.1 per cent in Northern Ireland voted
in favour. In the Republic, despite a noticeably lower turnout of
just 56 per cent, a prodigious 94 per cent of those who turned up
to vote chose to endorse the constitutional change arising from
the Agreement.

	Northern Ireland	Republic of Ireland
Percentage of those voting in favour	71.1	94
Percentage of those voting against	29.9	6
Turnout	81.1	56

These results were taken by the majority of contemporaries as
an 'emphatic endorsement of the Agreement from all sections
of the community – unionists and nationalists, loyalists
and republicans.'[154] Certainly, if compared to the devolution
referendums held in Scotland and Wales at a similar time, both
the turnout and the percentage voting 'yes' to the Agreement in
Northern Ireland were higher. The turnout in the Republic was
lower, but the 'yes' percentage even more emphatic. The isolated
attempts to undermine the legitimacy of the Agreement in the
lead up to the referendums had thus done little to persuade
electors to vote against the proposals.

In the short-term the referendums entailed validation of the Belfast/
Good Friday Agreement and the commencement of its implemen-
tation. Most notably, a devolved Assembly and Executive were

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154 M. Mowlam, 'Statement to the House of Commons on the Northern Ireland
     Referendum', 1 Jun., 1998.

established in Northern Ireland; and provisions put in place for future changes to the constitutional status of Norhern Ireland (all under the *Northern Ireland Act 1998* passed by the UK Parliament); and the Republic constitution was amended as envisaged.

However, several academics have argued that the subsequent decision to suspend the devolved institutions in Northern Ireland (the first instance of which took place in 2000) was 'a huge departure from the terms of the [original] Agreement'[155] which 'violated the will of the people of Ireland, North and South […]'[156] With specific reference to the 1998 Irish referendums, MacGinty has questioned the utility of the referendum device as a means of managing long-standing ethnonational conflicts, concluding that 'despite the "once in a generation" nature of the 1998 peace accord, significant constitutional uncertainty persisted.'[157]

The referendum device was chosen in 1998 as the best democratic means available to validate an Agreement aimed at addressing more areas of constitutional contention in the future. Yet the referendums were based on a peace accord that stipulated that a further settlement, if it took place, would require another referendum, on the possible departure of Northern Ireland from the UK. While the previous referendums that had been held in the UK were proposed on the grounds of cementing some sort of constitutional change, the 1998 Good Friday referendums demonstrate how the referendum device can also serve to augment pre-existing constitutional ambivalence. For some contemporaries, the use of the referendum in 1998 provided an opportunity for further constitutional fluidity.

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155 Wicks, *The Evolution of a Constitution*, p.183.

156 B. O'Leary, 'The Character of the 1998 Agreement: Results and Prospects', in R. Wilford (ed.), *Aspects of the Belfast Agreement*, Oxford: Oxford University Press, 2001, p.66.

157 MacGinty, 'Constitutional Referendum and Ethnonational Conflict', p.9.

Unique features

On the surface, the Belfast/Good Friday Agreement referendums appear relatively straightforward; textbook examples of how a referendum can be used to ascertain an overwhelming consensus for the ratification of a proposed constitutional measure. As this brief examination of the handling of the referendums has demonstrated, however, the referendums on the Agreement were far from typical, in as far as referendums can be typical. There are several unique ways in which the referendums were proposed and subsequently managed that sets them apart from any other referendums held in the United Kingdom.

The most obvious difference is in the decision made to hold two referendums on the ratification of the same accord, in two different territories. Further to this, while the electorate of Northern Ireland was only asked to consider the Agreement, in the Republic of Ireland, voters also had to give their verdict on the Amsterdam Treaty on the same day. The accord put to the people on 22 May 1998 was the product of protracted talks and negotiations that arose from prolonged political tension and violent conflict. Yet it also covered a wide range of different constitutional areas. The referendums were thus multi-faceted, and held implications for a number of constitutional, international, and more policy-specific matters that affected members of the electorates in a variety of ways. In part a product of the multiplicity of the issues incorporated into the accord, the repercussions of the Agreement referendums are still being disputed today.[158]

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158   Wicks, *The Evolution of a Constitution*, p.182.

2011 – THE ALTERNATIVE VOTE REFERENDUM

Overview

On Thursday 5 May 2011, voters in the UK were asked whether they wished to adopt the Alternative Vote (AV) system for elections to the UK Parliament, replacing the existing First-Past-the-Post system. The answer was 'no', by 67.9 per cent to 32.1 per cent, on a turnout of 42.4 per cent. The AV referendum was a subject of discussion and even controversy from a number of perspectives. One topic of interest was the nature of the choice being offered to the electorate; and whether a system other than or in addition to AV should have been on offer. Another involved the circumstances in which the referendum came to be held, arising as it did from a coalition negotiation between the Conservative and Liberal Democrat parties. Further debate centred on the manner in which the referendum campaign was fought, the claims made, and the repercussions for the coalition government itself. Finally, commentators have considered the long-term implications of the AV referendum for the electoral system of the UK, and the likelihood that the method used for determining the composition of the House of Commons will change at some point in the future.

Political background

In May 2010 the First-Past-the-Post (FPTP) electoral system failed to produce a single-party majority in the House of Commons, the regular delivery of which is held to be one of its strengths. This result led on to circumstances in which a decision was made to hold a referendum on shifting to a different electoral system, the Alternative Vote (AV). The appropriateness of FPTP, including its disproportionate nature, had long been questioned

and different possible electoral models floated. The Single Transferable Vote (STV) model, for instance, had advocates in the UK as long ago as the nineteenth century, who argued that it was a better model because it rewarded parties with seats in the legislature commensurate with total votes cast for them at the election.[159] But the issue of electoral reform was inevitably closely linked to partisan considerations. Those who are responsible for governing will always perceive such matters partly in terms of the implications for the political contest. While principled positions are possible, and do influence politicians, party political calculations are never far away. Consequently, debates and processes involving the electoral system, including the AV referendum, can become contaminated by controversy.

For many decades prior to 2011, a barrier to change in the electoral system was the fact that the parties that held power were beneficiaries of the existing system. Labour and the Conservatives have helped preserve the existence of FPTP. Since 1918, the Liberal Party (which became in 1988 the Liberal Democrats, following a merger with the Social Democratic Party) has suffered under FPTP, being denied representation in the Commons in line with the popular vote the party received. The party, unsurprisingly, became supportive of electoral reform. But since FPTP had the effect of substantially reducing the chances of the Liberals/Liberal Democrats playing a part in government, the opportunity for the party to attain this outcome was circumscribed.

At the 2010 General Election, the Conservative Party – in line with its longstanding position – did not favour reforming the system used for elections to the House of Commons. The Liberal Democrats, also in line with their established stance, advocated

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159   For the long-term background, see L. Baston and K. Ritchie, *Don't Take No For Answer: The 2011 referendum and the future of electoral reform*, London: Biteback, 2011, pp.1–20.

the introduction of STV. Labour, however, had adopted a new policy. It pledged to hold a referendum on the introduction of AV.[160] Labour returned to opposition in 2010; yet the government formed by the other two parties ended up taking on the policy it had advocated, in preference to their own. In this sense the existence of a direct electoral mandate for the holding of the AV referendum was questionable.

The commitment to hold the AV referendum was a central part of the coalition agreement struck between the Liberal Democrats and Conservatives following the inconclusive General Election of May 2010. In the words of Vernon Bogdanor, 'The proposal for a referendum on the alternative vote system was the product of a deal between the Conservatives and the Liberal Democrats, a deal without which the coalition would almost certainly not have been possible'.[161] Electoral reform was as important to the Liberal Democrats as it was objectionable to many Conservatives. The favoured Liberal Democrat option, STV, was too great a break with the existing model, and would have represented a substantial threat to the electoral advantage obtained by the two largest parties under FPTP, of which the Conservatives, alongside Labour, were one. But eventually the Conservative leadership proved willing to countenance AV, subject to a referendum, as a means of facilitating the formation of a coalition government and returning to power after 13 years of opposition. From the Liberal Democrat perspective, while AV was not proportional, there was some speculation that it might benefit the party as a recipient of second preferences, and some who disliked FPTP argued that AV would be at least a marginal improvement.

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160   V. Bogdanor, *The Coalition and the Constitution*, Oxford: Hart, 2011, pp. 89–91.

161   Bogdanor, *The Coalition and the Constitution*, p.91.

There was subsequently some controversy over how this part of the coalition agreement had been reached, and whether it had been accepted by the Conservatives on the basis of exaggerated claims from the Liberal Democrats about what Labour, with which the Liberal Democrats were holding parallel post-election negotiations, was willing to offer in terms of electoral reform.[162] This suspicion was another example of how the legitimacy of the referendum could be challenged on a basis of its emergence from a coalition negotiation. As we have seen, the absence of an electoral mandate for it was another possible line of criticism. More generally, those who simply disliked the idea of the coalition could denigrate the referendum as a crucial component of the deal that facilitated it. It is certainly the case that the decision both to hold a referendum on electoral reform and to make AV available as the alternative system was the product of political bartering. The Conservative Party did not want it, and the Liberal Democrats had specifically opposed the idea of an AV referendum. In advance of the 2010 General Election, Clegg had described Labour's proposed AV referendum as 'a miserable little compromise',[163] though conceding it would represent minor progress. But the imperatives of the coalition negotiations had thrown it up as a means of helping to clinch a deal.

Issue

AV did not offer potential change of the type that many advocates of electoral reform, including the Liberal Democrats, had long proposed. Crucially, it was not a proportional system and in this

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162 P.Wintour, 'Nick Clegg "bluffed" David Cameron over alternative vote referendum', *Guardian*, 29 Jul., 2010 [accessed via: https://www.theguardian.com/politics/2010/jul/29/clegg-bluff-cameron-alternative-voting (12/01/17)].

163 A. Grice, 'I want to push this all the way, declares Clegg', *Independent*, 21 Apr., 2010 [accessed via: http://www.independent.co.uk/news/uk/politics/i-want-to-push-this-all-the-way-declares-clegg-1950668.html (12/01/17)].

sense did not offer a qualitative change from FPTP. It might be held that the referendum did not, therefore, provide the electorate with as meaningful choice as it might otherwise have done. Various other more proportional systems were by this time in use in different elections in the UK. STV was deployed, for instance, in local, devolved and European elections in Northern Ireland and at local authority level in Scotland. Forms of the Alternative Member System were used for the Scottish Parliament, Welsh Assembly and London Assembly. A preferential system distinct from AV was used for the London Mayor. D'hondt was employed for European elections in Great Britain.[164] At the same time that the coalition held the AV referendum, it was developing plans – again in accordance with the coalition agreement – for electing the House of Lords using STV.

However, even if a proportional system had been chosen, the particular model selected would have been criticised by those who favoured another. A more radical approach might have been a multiple choice process such as that which was held in New Zealand in 1992. Voters were asked if they wanted a different electoral system (which was agreed to); and if they did, what system of four they would like to move to. At a subsequent referendum in 1993 they were then offered a straight choice between the existing system and the most popular of those offered as the potential alternative. By this means, New Zealand shifted from FPTP to the Mixed Member Proportional (MMP) system, similar to AMS. In 2011 a further referendum, similar to that held in 1992, took place, at which voters chose to retain the existing MMP system.[165]

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164   Ministry of Justice, Cm 7304, *Review of Voting Systems: the experience of new voting systems in the United Kingdom since 1997*, London: Stationery Office, 2008.

165   See http://www.elections.org.nz/voting-system/referenda.

Another question which might be raised regarding the AV referendum was whether the decision it engaged necessarily required approval through a vote of this type at all. In the UK there is little clarity over when such votes are and are not needed. From 1996 through to the early 2000s, Labour policy was (notionally) that parliamentary electoral reform could take place, but subject to a referendum. In 2010 the House of Lords Select Committee on the Constitution had included changes in the voting system for parliamentary elections in its indicative list of actions that might legitimately involve a referendum. As discussed above, in its 2010 manifesto the Labour Party had proposed a referendum on AV, perhaps implying that the introduction of this system ought to be dependent on this form of approval. When assessing the legislation providing for the AV vote, the House of Commons Political and Constitutional Reform Committee found that a referendum was an appropriate means of deciding this issue. However, the committee also noted that the same coalition government holding the AV referendum was engaged in a variety of other constitutional changes that it did not deem to require authorisation through popular vote. The Committee drew attention to the lack of clarity in this area, and noted that a future government might seek even to alter the voting system without holding a referendum.[166]

Managing the referendum

The AV referendum was in fact driven to a significant extent by the needs of coalition. This point is underpinned by the nature of the legislation introduced to authorise the referendum. Provision for the referendum was included in the *Parliamentary Voting System and Constituencies Act 2011*. This Act provided

166 House of Commons Political and Constitutional Reform Committee, '3rd Report of Session 2010–11, HC 437, 'Parliamentary Voting System and Constituencies Bill', London: Stationary Office, 2010, p.8.

simultaneously for a part of the coalition deal that the Liberal Democrats had secured – the AV referendum – and a portion of it that the Conservatives had insisted upon: namely changes in the number of Westminster constituencies and an equalisation in the number of registered voters in each.

Another interesting feature of the Act was that it provided for the automatic implementation of AV in the event of a 'yes' vote. The two other UK-wide referendums to date – the 1975 and subsequent 2016 European referendums – were in legal terms only advisory, though the political reality may have been different. The 2011 Act made the AV referendum legally binding (notwithstanding the fact that Parliament could in theory have amended or repealed the Act, even to reverse a referendum result). The need for this provision was another product of the dynamics of coalition: it provided confidence for the Liberal Democrats that a 'yes' vote, if secured, would be put into effect. The passing of full legislation in advance of a referendum had the merit of providing voters with a clear idea of the choice that lay before them. However, the political priority attached to the legislation meant that it was driven through Parliament so swiftly as to give rise to complaints about proper scrutiny being compromised.[167]

The Act did not completely escape parliamentary investigation. Unlike in earlier eras, there was now a committee in the House of Lords charged specifically with reviewing legislation for its constitutional content, the Select Committee on the Constitution. It produced a report on the *Parliamentary Voting System and Constituencies Bill* in 2010.[168] The Committee found,

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167 House of Commons Political and Constitutional Reform Committee, 'Parliamentary Voting System and Constituencies Bill'.

168 House of Lords Select Committee on the Constitution, '7th Report of Session 2010–11, HL 58, Parliamentary Voting System and Constituencies Bill', London: Stationery Office, 2010.

in accordance with its previously expressed views, that a change in the voting system was a matter of fundamental constitutional significance and that the holding of a referendum on the decision might be judged suitable. The Committee noted, with approval, that – in accordance with its function as set out in the *Political Parties, Elections and Referendums Act 2000* – the Electoral Commission had recommended a different form of words for the referendum question, mainly to make it more simple, and that this proposal had been accepted. The original wording had been:

> *Do you want the United Kingdom to adopt the "alternative vote" system instead of the current "first past the post" system for electing Members of Parliament to the House of Commons?*

It changed, following the Electoral Commission recommendation, to:

> *At present, the UK uses the 'first past the post' system to elect MPs to the House of Commons. Should the 'alternative vote' system be used instead?*

The Committee reiterated its previous recommendation that the Electoral Commission should devise the wording for referendum questions, to present to Parliament for its agreement.

Another issue raised by the Committee revealed that previous constitutional changes underpinned by referendums made complications for the holding of the popular vote on AV. The 2011 referendum was scheduled to take place on the same day as devolved elections in Wales, Scotland and Northern Ireland, leading to complaints from the Welsh and Scottish executives about the clash. The House of Lords Committee expressed regret that proper discussion had not been held with the devolved institutions before the decision was made.

In addition to the 2011 Act, non-legislative action was required to manage the referendum. While the coalition agreement committed the Conservatives to voting for the law providing for the AV referendum, it did not require them to support AV itself. This agreement entailed the unusual circumstance of ministers in the same government publicly opposing each other on a major issue. Before the formation of the coalition government of 2010–15, express relaxations of the convention of collective responsibility had taken place only on three occasions. The first occurred in 1932, during an earlier coalition, the National government, Liberal members of which were opposed to the decision it took to adopt tariff reform. The next suspension of collective responsibility occurred over the EEC referendum of 1975 (see case study a). On this occasion it applied to a single-party Labour government sharply divided over the EEC. The same government allowed dissent over direct elections to the European Parliament during 1977–1978. Another suspension of collective responsibility took place subsequently, in 2016, over the EU referendum.[169] It is notable that all three UK-wide referendums were accompanied by agreements to differ. This characteristic serves to underline that those referendums were held over issues that divided the government of the day – and might in this sense be seen as driven by the party political need to diffuse such dissent, rather than a principle of democratic consultation.

The 2011 position differed from the earlier instances in that, where previously Cabinet had taken a decision from which individual ministers were permitted publicly to disassociate themselves, with AV, there was no collective decision on whether a 'yes' or 'no' vote was desirable. Moreover, the exemption was part of a wider generalised provision for opt-outs written into

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169   M. Everett, Number 7755, 'Collective responsibility', London: House of Commons Library, 2016, pp.13–29.

various coalition documents, which stipulated that collective responsibility applied except in instances when it was specifically removed. During the course of the coalition government, the nature of these suspensions – what they entailed, what rules applied to them, even all the times at which they were in force – became blurred.[170] The AV referendum seems generally to have been regarded as an instance of a suspension, though there was no published guidance on how ministers should conduct themselves during the 2011 referendum campaign of the sort there had been in 1975 (and was again in 2016).

Campaign

The AV vote provided the first opportunity to test how the *Political Parties, Elections and Referendums Act 2000* (PPERA) legislative framework, and the Electoral Commission established under PPERA, would function in the context of a whole-UK referendum. The Electoral Commission, as it is required to do, produced a report on the referendum in October 2011.[171] It complained that the speed of the implementation of the referendum had given those who intended to campaign little time to prepare.[172] The Electoral Commission designated two lead campaign groups: 'Yes to Fairer Votes' and 'No to AV'. The Commission decided to allocate £380,000 to each of them. They each had an overall spending limit of £5,000,000. The Conservative and Liberal Democrat parties were also registered as campaigners, and were allowed respectively to spend up to £5,000,000 and £4,000,000.

170   House of Lords Select Committee on the Constitution, '5th Report of Session 2013–14, HL 130, Constitutional implications of coalition government', London: Stationery Office, 2014, pp.21–6.

171   Electoral Commission, *Referendum on the voting system for UK parliamentary elections*.

172   Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, pp.87–90.

Other registered campaigners were subject to a £500,000 limit; and non-registered groups could only spend £10,000.[173]

A further task of the Commission was to promote and monitor public awareness of the campaign. Its central task was the distribution of information pamphlets – 27 million in total, covering 96.1 per cent of UK households,[174] supported by connected media publicity. The Commission's opinion research suggested that 68 per cent of those asked were aware of one or more parts of its public information programme. 75 per cent of people asked replied that they had sufficient information to facilitate an informed decision; and 65 per cent replied that they had enough knowledge of the subject of the referendum.[175] In its analysis of media coverage, the Commission found that, in areas where elections were taking place at the same time, the elections received more attention than the referendum. For the UK as a whole, there were a total of 211 election stories in monitored outlets, as against 416 referendum items. However, referendum coverage tended not to be the lead item.[176]

The Electoral Commission could take steps to ensure that there was a resourced official campaign on each side; and could seek to promote understanding of the question being put and its implications. But guaranteeing an informed, balanced public discourse in which voters reached judgements on a rational assessment of the issues involved was beyond the scope of the

173 Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, pp.86–108.

174 Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, pp.4–5.

175 Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, pp.92–99.

176 Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, p.50.

Commission – and indeed would be outside the ability of any organisation. Problematic claims were made on both sides. Assertions by 'yes' campaigners that AV would somehow make MPs work harder were difficult to sustain; while advocates of 'no' promoted dubious scenarios about expensive counting machines.[177]

Moreover, though referendums for some are a means of escaping the importance of party politics, they undoubtedly played a part in the AV referendum campaign. A fundamental difference of outlook between the two coalition parties about the nature of the UK parliamentary electoral system was the essence of the 2011 referendum. The inclusion in the coalition agreement of a commitment to hold a vote on AV was a means of managing this discrepancy within the context of a partnership in government. But the referendum itself, and the release it provided from the need for unity between the government parties, became a focus for various tensions that the coalition had generated. The 'no' campaign deliberately channelled the perceived lack of public popularity at the time of the Liberal Democrats and their leader, the Deputy Prime Minister Nick Clegg.[178] This feeling spread across the political spectrum: Conservatives who, however irrationally, resented being dependent upon the Liberal Democrats to form a government; and Labour inclined voters who wished to punish the Liberal Democrats for supporting the Conservatives. Though the Labour leadership supported 'yes', the 'no' campaign had the benefit of many well known Labour grandees, such as the former deputy leader and Deputy Prime Minister John Prescott, on its side. Even though a major party, Labour, was divided over the issue, party political concerns and loyalties remained significant.

177 Baston and Ritchie, *Don't Take No For Answer*, p.31.

178 A. Seldon and P.Snowden, *Cameron at 10: The Inside Story, 2010–2015*, London: William Collins, 2015, p.119.

The strong party political dimension to the referendum campaign, and the importance of perceptions of the coalition, the Liberal Democrats, and Clegg may suggest that the actual policy issue involved was not necessarily a central concern for voters, and the value of the referendum as a decision-taking device was thereby compromised.

Clegg had left himself open to criticism through the pronouncement he had made before the General Election deriding the idea that AV should be offered as the alternative to FPTP, rather than a proportional system. Indeed, the selection of AV, determined by the political realities of the coalition negotiation – meant that even among the most natural constituency for the 'yes' vote, that is supporters of electoral reform – there was a degree of discomfort about the campaign. Some were concerned that if it succeeded, it would trap the UK into a different disproportional system; and it would be hard for them to make the case for a further change to a proportional model, that many of them favoured. There were reports of divisions among the groups that formed the official 'yes' campaign.[179] There were also subsequent accounts of poor organisation.[180] The adoption of a grassroots approach, emphasising activist work on the ground over the use of mass media and leading politicians, is judged by some to have been a mistake.

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179   Declaration of interest: one of the present authors was a member at the time of the governing council of Unlock Democracy, a participant organisation in the official campaign (and he continues to sit on the council today). Baston and Ritchie, *Don't Take No For Answer*, pp.25–29.

180   For various criticisms of the 'Yes' campaign, see https://www.opendemocracy.net/ourkingdom/anthony-barnett/ av-debacle-waste-of-nearly-%C2%A32m-and-rowntree-reform-trust.

Result and consequences

In advance of the campaign, some opinion research suggested a lead for 'yes', but ultimately it was not sustained.[181] By the day of the poll the 'no' result seemed a foregone conclusion. On this occasion, the theory that the status quo option enjoys an inbuilt advantage in referendums was supported. It may have been assisted by public confusion about the issues involved, perhaps promoting a predisposition, if voting at all, to oppose a move into unknown territory (not a decisive fear in 2016). An assessment for the Electoral Reform Society blog concluded that '[t]he criticisms of AV put forward by the "No" campaign were far more popular and proved more effective in shaping how people eventually voted on 5 May. The "Yes" campaign's key arguments were either lost or did not resonate with people in terms of why they should vote "yes".[182]

One significant characteristic of the vote was the turnout of 42.2 per cent. Of the three all-UK referendums that have been held to date, the AV saw the lowest level of participation by far. Research carried out after the referendum seeking to ascertain people's reasons for voting or not voting suggested that more than 50 per cent blamed 'circumstances' for their not doing so; among whom the most common reason was being 'too busy'. Those who did take part frequently referred to a 'duty' to vote (46 per cent); their 'wanting to have their say' (28 per cent); and that they always voted (18 per cent).[183]

Regardless of the low turnout, the referendum had important consequences. The overall experience – including its personalised nature, with attacks on Clegg in 'no' literature – contributed to a

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181 Seldon and Snowden, *Cameron at 10*, p.117; J. Curtice, 'The AV Referendum: What went wrong?' [accessed via: http://www.electoral-reform.org.uk/blog/the-av-referendum-what-went-wrong (12/01/17)].

182 Curtice, 'The AV Referendum: What went wrong?'.

183 Electoral Commission, *Referendum on the voting system for UK parliamentary elections*, p.64.

souring of relations within the coalition Cabinet, though the coalition ultimately lasted a full five-year term. It is possible to speculate further about the repercussions of the referendum and its outcome. The holding of the referendum on AV may have set a precedent that any change in the parliamentary electoral system should be dependent upon approval in this form. Equally, that there was a vote and the retention of FPTP was favoured by a substantial majority will be referred to by opponents of change seeking to claim the issue has permanently been settled. If they are successful, it could be concluded that the holding of a referendum on one particular system, AV, has damaged the overall cause of electoral reform, and closed off the possibility of adopting not only AV but other more proportionate systems such as STV and AMS. On the other hand, supporters of reform could hold that precisely because the vote was on AV, a proportionate solution has not been rejected. Moreover, they might be able to claim that the referendum was flawed in other ways – that it was driven by the needs of coalition, that the campaign was problematic – in their efforts to keep the issue open.

Finally, the AV referendum may have had consequences for the holding of votes of this type in future. For the Conservatives, the episode might have been seen as a political success. They had obtained the support they needed from the Liberal Democrats to return to government. They had minimised the cost of failure in the sense that the vote was on AV, not as problematic a system from the point of view of the Conservatives as a proportional one. The referendum had been won; FPTP was secure; and they had delivered their half of the bargain with the Liberal Democrats. At the time, it seemed that they had also secured the changes to parliamentary constituencies and boundaries that they thought would assist them electorally (though the Liberal Democrats subsequently blocked their implementation in retaliation for the failure of Lords reform). Perhaps David Cameron and other

leading figures in the Conservative Party at the time drew a positive conclusion regarding their ability to deploy referendums as political management tools. Two further major referendums followed under Cameron: on Scottish independence in 2014; and EU membership in 2016. Cameron may have held them regardless of his 2011 victory, but it may be that it encouraged him to seek referendums as a good way of dealing with difficulties.

Conclusions and recommendations

The following section sets out answers to each of our search questions, based on the historical analysis carried out. Building on these conclusions, it then makes proposals for the future operation of referendums, addressing fundamental constitutional principles.

Conclusions: key questions

♦   How, why and when did referendums become an established feature of the UK constitution? Has their character changed over time?

The possibility of holding referendums in the UK was advanced from the late nineteenth century, for use over issues such as Home Rule and tariff reform. But there was also resistance to the idea. Some saw such votes as alien to the UK constitutional system. These objections were overcome from 1973 onwards. Referendums were used to address issues similar to those for which they were envisaged in earlier times: the Union, devolution, and European integration. Nearly all major referendums in the UK – the exception being the AV vote of 2011 – have been held on these subjects. These policy areas have been the subject of pronounced controversy. Previously existing democratic mechanisms had struggled to resolve them. They involved questions about sovereignty and its transfer. For these reasons, interest rose in the idea of involving the public directly in

decisions over these matters. Added to these tendencies, specific political contingencies of the 1970s, especially divisions within the Labour Party, created a material incentive for the Labour government to hold referendums.

During the 1970s, the UK was arguably passing through a period of disorientation. Its role in the world had been changing and was continuing to do so; economic and social dislocation were underway. Support for the two main Westminster parties was declining, with groups such as Welsh and Scottish nationalists making gains. From the 1960s onwards, the UK constitution had become the subject of pronounced internal scrutiny. Referendums can be seen as one of a number of experiments that took place in this context; and also as being connected to other specific changes, attempted or actual, in particular devolution and participation in European integration.

The introduction of referendums, then, arose in connection to other issues – Northern Ireland, devolution and the EEC. It was not fully considered as a constitutional innovation in its own right. Crucially, in 1975, the Prime Minister, Harold Wilson, presented the EEC vote as a once-only event. It is difficult to pinpoint the moment at which the referendum became a part of the UK constitutional system. The votes of the 1970s were important. There then followed a period of 18 years in which referendums did not take place, although the idea of them was not forgotten. Again it was devolution that advanced the referendum, when Labour returned to power in 1997. By this point, the referendum was a firm part of the UK constitution. The *Political Parties, Elections and Referendums Act 2000* (PPERA) and the Electoral Commission it established provided a standing statutory regulatory framework for these votes (still supplemented by individual Acts). Yet it did not resolve a variety of fundamental issues. Referendums had become part of the UK

system, without an express decision to this effect, accompanied by a thorough and open debate of the core principles involved, taking place.

The referendum has become a more regular and accepted feature of the constitution, though there remain principled objections to its use. The introduction of PPERA and the Electoral Commission was one manifestation of this embedding of referendums; so too has been their extensive use in government by the Labour, Conservative and Liberal Democrat parties. The House of Lords Select Committee on the Constitution report of 2010, though recording reservations about referendums, represented further acknowledgement of their incorporation into the system. Moreover, the Committee suggested a range of possible uses for referendums extending far beyond the applications to which they had been put in practice.

In 2011 there seemed to be a significant shift towards referendum votes being legally binding. The idea that a referendum result might automatically come into force had in the past generated controversy, particularly from the perspective of the doctrine of parliamentary sovereignty. The House authorities had once ruled out amendments to bills that sought to make referendums binding, on the grounds that they were 'contrary to constitutional practice'. This position changed at the point when the government conceded referendums (over Welsh and Scottish devolution) in 1977 (though its plan at this point for a legally binding referendum was subsequently dropped).[184] The year 2011 also saw the passing of the *European Union Act 2011*, making a span of possible actions dependent upon binding popular votes. However, the results of neither the Scottish Independence Referendum of 2014

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184   Independent Commission on the Conduct of Referendums, *Report of the Commission on the Conduct of Referendums*, p.38.

nor the EU referendum of 2016 were given express legal force
in their own rights. Moreover, Parliament retains the theoretical
ability to reverse any previous decision it has made to make a
referendum binding.

♦   Is it possible to discern general underlying
    constitutional principles applying to the use of
    referendums in the UK?

Clear guidance in these areas is lacking; general principles can
be advanced only tentatively. Beginning with subject matter of
referendums, to date, they have all been held on subjects that
might be defined as constitutional, but this observation would be
difficult to use as a basis for future decisions about their application.
A decision might arise that is not clearly constitutional in nature,
but leads to a popular vote. Equally, not all constitutional
decisions could plausibly necessitate a referendum. Moreover,
defining what is meant by 'constitutional', especially under the
'unwritten' UK system, is difficult. One firm principle appears to
be that the secession of territory from the UK requires approval
through a referendum in the territory concerned, as the cases of
Northern Ireland and Scotland suggest. However, it is not clear
when such referendums should be triggered, or whether *any*
part of the UK could seek to exit the Union. It might be held
that the establishment – and subsequent abolition – of devolved
institutions requires referendums. However, the introduction
of devolution deals to England since 2014 has not been made
contingent on popular votes. Moreover, there has been a lack
of clarity about whether extensions in devolution require
authorisation by referendum. Devolution and secession could be
seen as issues of sovereignty, as was participation in European
integration, on which referendums took place in 1975 and 2016.
Another possible rule, not seemingly pertaining to sovereignty,

though it is subject to debate, is that there should be a popular vote prior to a change in the parliamentary electoral system. Further disagreement has surrounded whether a major reform of the House of Lords, presumably involving the introduction of elected members, should be subject to a referendum.

Is there general acceptance that there are limits on the use of referendums, and that there are types of decision for which they should not be used? A possible prohibition could be on matters of individual freedom, to prevent the use of majority rule for oppressive purposes. It is notable, in this context, that the introduction of the *Human Rights Act 1998*, incorporating the European Convention on Human Rights into UK law, did not involve a referendum. Moreover, those who propose the repeal or substantial amendment of this Act do not refer to the use of a popular vote. However the implementation of the EU referendum result of 2016 will entail the deprival of rights deriving from European citizenship.

Beyond the subject matter of referendums, a further principle might be that a decision taken on a basis of a referendum can only be reversed by the same process. The *Scotland Act 2016* places this rule, with respect to Scottish devolution, on a statutory basis. However, the Labour Party contested the 1983 General Election on a programme of withdrawal from the EEC, without making any reference to the holding of a referendum. More recently, directly elected mayors are being introduced in England whose jurisdictions overlap with areas which recently voted expressly to reject the creation of office-holders of this type.

Other questions arise that are difficult to answer. For instance, how much time must be allowed to elapse before another referendum can be held on the same subject? Another issue is whether simple majorities are accepted as adequate, or if thresholds and

supermajorities should be used. Generally the latter have been accepted, though the Welsh and Scottish referendums of 1979 provide a divergent precedent. A further principle that some would hold exists is that, regardless of legal status, referendum results should be abided by – that they are in practice binding, even if not in law. This idea is especially controversial in the post-EU referendum environment. Practice to date also suggests that a referendum held on devolution or secession can involve voters only in the territory directly concerned, despite there being possible constitutional consequences for the entire UK. Those who first proposed the use of a referendum on Home Rule for Ireland envisaged that the vote would take place across the whole UK. Finally, referendums have presented binary choices to the public (though there was an extra question over tax raising powers for the Scottish Parliament in 1997). Multiple options of the sort deployed elsewhere, including in New Zealand, have not been favoured, though sometimes discussed, for instance in relation to the Scottish Independence Referendum of 2014.

♦   In what circumstances are referendums likely
     to be held?

Referendums have often taken place in circumstances of sharp divisions over the issue involved impacting upon the government of the day. Labour was split over the EEC in 1975; the Conservatives were in a similar position over the EU in 2016. Unease among its own backbenchers regarding devolution encouraged the Labour government to commit to the referendums held in 1979 in Scotland and Wales. The 2011 AV referendum addressed a division of a different kind: between the two parties that made up the coalition, that had differing views on the merits of the electoral system. All three UK-wide referendums, then, have been to some extent exercises in the management of party political and

intra-government relations. The Belfast/Good Friday Agreement referendum, however, was not a product of division. Rather it was a means of providing popular endorsement of an agreement that was the product of a long period of negotiation and cooperation that crossed party and international boundaries.

Pressures external to governments and the parties of government have also been conducive to the holding of referendums. Persistent and complex political forces drove the introduction of devolution, that in turn engaged the holding of referendums. Similarly, the Northern Ireland 'Troubles' led to referendums in this territory in 1973 and 1998. The EU referendum of 2016 was to a large extent the product of divisions within the Conservative Party, but there were other influences at work. There had been a campaign in sections of the media stretching back for more than two decades; as well as the formation of UKIP and the Referendum Party. More broadly, developments in the EU, such as its expansion following the end of the Cold War, leading in turn to migration from accession states, helped create further pressure for a referendum on continued membership. What is difficult to discern, in this case as in others, is how far there was ever genuine public demand for a referendum on the given subject, as opposed to others on which referendums have not been held.

♦   How far do referendums genuinely empower voters in a way they are not by other democratic processes?

Referendums have allowed members of the public to participate in democratic processes in a way that would not otherwise be available to them. They make it possible expressly to record a preference on a specific issue rather than choosing between competing parties with programmes covering a range of different policies. In this

sense participants are no longer constrained by the usual confines of the party system. The extent to which people have taken up this opportunity to participate has varied substantially. High turnouts were recorded in the two most recent referendums, on the EU and on Scottish independence. However, there have also been less impressive turnouts, such as in the AV referendum in 2011.

Despite offering a different kind of democratic engagement, we should not imagine that referendums can ever fully be an expression of unmediated popular will, even if we wanted them to be. As already discussed, party political issues such as internal divisions and the need for coalition management have been an important driver of referendums. In this sense they remain closely associated with, rather than distinct from, the party system. Moreover, the particular subjects on which referendums are held, and the precise way in which they are framed, are determined at elite level, with important consequences for the genuine range of choice on offer. The 2011 referendum on the voting system, for instance, excluded the possibility of voting for a proportional system. In the case of the Belfast/Good Friday Agreement referendum of 1998, top-down management took another form. The vote was held not because of a breakdown of consensus at elite level, but because various senior figures from different groups had managed to reach a deal, for which they then sought popular approval, at the end of the process.

Referendums take place because a given UK government decides that they will, though it may do so to some extent because of external pressure. With these limitations, the UK executive can determine not only whether there will be a referendum on a particular issue, but when it takes place and the circumstances in which it does. For instance, both in 1975 and 2016, Harold Wilson and David Cameron respectively were able to hold European negotiations first and then present the package they secured for

the approval of the voters, an approach that was successful for Wilson but not Cameron. Government and Parliament are also able to impact upon the likely outcome in other ways. In 1979 in Scotland, for instance, the electoral register used combined with the 40 per cent threshold tilted the chances of success away from supporters of devolution. The prominence of party politics and the UK executive in the holding of referendums might be a source of concern that these votes are subject to abuse as a form of populist manipulation.

Despite the importance of elites to referendums, they can present the opportunity for members of the public, some of whom may often not be politically active, to express a view that runs counter to the policy of central government. In 2016 over the EU, a majority opposed the UK government; in 2014 in Scotland around 45 per cent did. In this sense, referendums have democratic potential. How far this form of participation is compatible with longer established methods of governance, however, is another question, discussed below. Moreover, though the executive is not omnipotent and acts subject to outside forces, the important part it plays in referendums means that they cannot be portrayed purely as a direct relationship between the people and the given decision made.

♦   How far do referendums present a clear choice to voters? What consequences might follow to the extent that they do not?

The clarity of the choice that faces voters at referendums has varied. A common criticism of the use of popular votes is that they over-simplify complex issues, reducing them to the level

of a binary decision.[185] A further, connected, point arising from our analysis involves not only complexity but also uncertainty. The full outcome of any political decision can never be predicted beforehand. But post-legislative referendums, such as those that took place in 1979 (over devolution) and 2011 (over Welsh devolution and AV), at least gave a structural idea of what could follow votes for change. In the case of the devolution referendums of 1997, white papers set out what was being proposed, though full legislation followed the votes. In 2014 over Scottish independence and 2016 over EU membership, the outcome of a rejection of the status quo was far less clear, partly because the UK government did not want it to happen and had therefore not developed proposals. The Scottish Government published in advance of the 2014 vote its blueprint for independence. However, what would have been obtainable was dependent partly on forces beyond its control, involving negotiations with the remaining UK. In 2016, there was no single, detailed depiction from the UK government (which backed 'remain') or 'leave' campaigners as to what the terms of departure from the EU would be. Even if there had been, it would have been subject to contingencies to an even greater extent than the Scottish Government proposal, depending as it would on complex diplomacy involving multiple parties and ongoing events. The Electoral Commission describes principles that should apply to referendums, including that 'Voters can easily understand the question (and its implications)' and that 'The result and its implications should be clear and understood'.[186] However, if the underlying proposition contained in the referendum is vague, there is little the Commission can do. While

185 House of Lords Select Committee on the Constitution, '12th Report of Session 2009–2010: Referendums in the United Kingdom', London, 2010, pp.18–19 [accessed via: https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf (16/09/16)].

186 Electoral Commission, *The 2016 EU Referendum*, p.20.

it can, and does, suggest changes to the wording of the question, such modifications do not deal with the deeper uncertainty.

There are further difficulties for the regulators in a referendum that presents voters with a choice between a difficult to comprehend change, or retention of the status quo. Attempts to ensure a fair campaign in which both sides have the chance to put their case across rest on a flawed premise. The nature of the task facing the two contesting groups is not the same. It is not a debate between equally defined propositions, that can be advanced, cross-examined, challenged and defended in the same way. While this imbalance may not favour one side or the other, it does have implications for the overall quality of the referendum process as a means of democratic deliberation. (However, even when there is a precise proposal on offer, as with AV in 2011, it does not guarantee a model public debate.)

When voters choose a particular option in a referendum, the extent to which such an act represents an exercise of power on their part could be seen as varying in proportion to the certainty that surrounds it. The more nebulous a proposal is, the more its implementation can be shaped by groups and forces other than the electorate that chose it, such as the executive that is responsible for implementing the decision, and those with which the executive interacts. The 2016 EU referendum is an extreme but valid illustration of this difficulty. Assuming the UK does leave the EU, a large array of possible post-EU arrangements for the UK is possible. The UK executive has sought to maximise its control over exit negotiations, and to keep public knowledge of them to a minimum.

While a lack of detail can be a problem, there may be a limit to how extensive a proposition the electorate can process. How far were those who voted for or against the Belfast/Good Friday Agreement

in 1998, for instance, aware of all its detailed contents? We should not assume that voters automatically want the highest possible clarity, or that they are necessarily interested in the specifics of the issue. They may vote on a basis of private disposition, prejudice or their attitude towards the government of the day or particular figures within it. Attacks on Nick Clegg were a key component of the anti-AV campaign in 2011. Those who made them must have believed they would make a difference and were perhaps correct. The public debate at the time of a referendum will inevitably be messy, with contested and contestable claims made on both sides. Subjective individual perceptions will be important; as will the various media in shaping the nature of discourse. Such is the nature of democracy, of which referendums are a manifestation.

♦   What is the relationship between referendums and key pre-existing features of the UK democratic system?

Referendums have presented a challenge to many traditional features of the UK political system. One such tension has involved the principle of collective Cabinet responsibility. It had to be suspended for the campaigns over Europe in both 1975 and 2016, with ministers allowed publicly to dissent from the official government recommendation in favour of continued participation in continental integration. In 2011 there was no single government line to dissent from. A connected issue involves the role of the Civil Service. If the government makes a particular recommendation as to which way to vote in a referendum, a tension arises with the perceived need for a fair contest. Rules must be imposed during campaign periods in which civil servants must not act in a way that promotes a particular side in the referendum, despite support for it being government policy. If ministers dissent from the official government policy,

the position becomes more complicated still, since officials are usually directly accountable to their secretary of state, who may be opposing the policy of the government that they serve.

Another feature of UK democracy with which referendums interact is the parliamentary electoral system, known as First-Past-the-Post (FPTP). Being in a position to authorise the holding of a referendum requires securing power under FPTP, a necessity that has consequences for the subjects on which referendums are likely to be held. FPTP rewards leading parties with representation in the House of Commons that outstrips the share of the total votes cast they received. Consequently, single parties are often able to form governments while securing substantially less than 50 per cent of the popular vote. In such circumstances, the internal politics of a given party can become imposed on the government. Divisions within parties are magnified in importance; and referendums can become to some extent a tool for managing them, as was the case for the two European votes of 1975 and 2016, when Labour and the Conservatives respectively could not reach agreement. In this sense, it could be held that FPTP makes referendums more vulnerable to abuse for party political purposes. (However, even when a coalition was formed in 2010 the referendum on AV held in 2011 was also partly an internal governmental management tool.)

Another feature of the UK polity that has significant connections to the use of referendums is its multinational quality, comprising Wales, Scotland, Northern Ireland and England. The idea of 'Home Rule' or devolution, and disputes in some territories about future participation in the UK, have been key motives for the advocacy and use of referendums. The national diversity of the UK has become important to referendums in another context. In 1975, a possible problem identified was one of majorities of voters in different nations within the UK voting in opposite directions, calling into question the legitimacy of the result. This difficulty did not materialise in 1975. But in 2016 it did. While majorities of those

participating in Scotland and Northern Ireland (as well as Greater London) supported 'remain', 'leave' won in England and Wales. This discrepancy has contributed to the political tensions that have arisen in the wake of the EU referendum. While for some this particular problem may have come as a surprise, the potential for it to occur was first identified more than four decades previously.

Another frequently identified tension connected to the use of referendums involves the doctrine of parliamentary sovereignty, traditionally regarded as the central tenet of the UK constitutional system. The idea of popular votes as a means of decision-taking presents a rival source of legitimacy to Parliament. Parliament may remain the ultimate source of legal authority; and even if it passes legislation making a referendum result binding, it can in theory subsequently repeal such provision. However, the advent of the referendum represents a practical limitation on the traditional role of Parliament as supreme arbiter within the UK polity. The belief by some in a principle that referendum results are always morally or politically binding, though still controversial, represents a further threat to the status of Parliament. In the wake of the 2016 EU referendum, some are asserting an accentuated version of this doctrine, claiming that to question or qualify the vote in any way amounts to an anti-democratic posture. The government sought to deploy the Royal Prerogative in a fashion that – though ultimately overruled by the Supreme Court on 24 January 2017 – has raised difficult questions about the nature of parliamentary sovereignty, an unexpected and dramatic outcome of the 23 June 2016 vote.

At an even more fundamental level, the relationship between referendums and representative democracy itself can be uneasy.[187] According to the principle of representative democracy, the public

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187   le Roux, 'Is there a tension between Parliamentary Democracy and referendums?'.

elects office holders who implement broad programmes and take decisions on behalf of those who have returned them to power. Referendums, however, involve engaging the public in specific decisions. There need not be a serious contradiction. If a referendum is firmly consultative rather than binding, then the ultimate power clearly remains with representatives, who can take into account the outcome, but make their own decisions. But if a referendum is treated – regardless of the legal position – as creating an obligation, it is still possible to avoid difficulties if the outcome accords with the clear wishes of the UK government and Parliament, as happened in 1998 over the Belfast/Good Friday Agreement. The representative institutions need not lose control. However, if during a referendum campaign the UK government is beset by open divisions – perhaps taking an official position but allowing open dissent by ministers, as in 1975 and 2016 – it can appear to have lost the ability to govern with respect to the given issue, and to have ceded control to a more popular mode of governance, even if the government wins the vote.

If a government seeking to implement a change – such as devolution in Scotland in 1979 – does not secure the referendum outcome deemed necessary, this circumstance is problematic, as it was for James Callaghan, the Labour Prime Minister, who soon lost office, and suggests a strong popular constraint on representative government. However, more difficult still is the outcome of a government holding a referendum potentially leading to a radical change, if it (and Parliament) would prefer to maintain the status quo, and the vote is for change. This scenario came about in 2016. As we have already seen, in a referendum where the UK government supports the 'status quo' selection (or its nearest equivalent), the chances that the 'change' option will be clearly defined are reduced, creating problems for the clarity of the process. When in 2016 that choice was nonetheless supported by a majority of voters over the EU, additional problems emerged.

In 2016, most ministers and majorities in both Houses of Parliament seem to have favoured the 'remain' option, but a majority of voters backed 'leave'. Ministers are now faced with implementing an outcome most of them did not want; a task that is difficult to reconcile with the idea that they govern as representatives. This tension is heightened because of the nature of the policy issue involved. In 1911, Arthur Balfour famously said that: 'The referendum, at all events, has this enormous advantage: that it does isolate one problem from the complex questions concerned with keeping a Government in office, and with other measures which it wants to carry out and with other questions of foreign and domestic policy. It asks the country not "do you say that this or that body of men should hold the reins of office?" but, "do you approve of this or that way of dealing with a great question in which you are interested?"[188] However, separating out a particular decision from the remainder of the business of representative government may not be a straightforward task. An issue such as EU membership spills into multiple areas. The implementation of a new voting system, if approved by referendum, might be handled as a discrete change that did not directly impinge upon large swathes of day-to-day government work. This claim cannot be made for the preparation and execution of departure from the EU. The central concern of the UK government, and of Parliament, arises from a decision with which it did not agree, imposed upon it through a popular vote. The strains placed upon the principle of representative democracy, arising from a referendum, are manifest.

If representative democracy is eroded by referendums, what values might come to usurp it? There are signs in the current, post-EU referendum political climate of the assertion of a doctrine of the popular mandate. According to this general

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188   Balfour, *Official Report*, 21 Feb., 1911.

school of thought, a simple majority of those who participate in a referendum supporting a particular course of action generates an overriding popular will. In this account it falls to the UK executive to implement the vaguely defined decision to 'leave' the EU. Even if statutory authority for such action is obtained, the real role of Parliament may be limited. Any attempt to question this theory is held to be anti-democratic and an attempt to overturn the verdict of the people. Even the idea of testing the legality of the intended approach of the executive was depicted as improper. The idea of an unconstrained mandate deriving from a referendum is doubly problematic. First, it can mean that one particular decision is exempted from the various mediating processes that seek to ensure that it is compatible with the overall conduct of programmatic, representative government. Second, though it deploys democratic concepts, this doctrine is potentially detrimental to values that are key to democracy. The rule of law, for instance, could be regarded as an inappropriate hindrance to the implementation of a mandate; and a referendum decision that would violate fundamental individual rights might be regarded as nonetheless legitimate because it rests in the popular will.

The EU referendum, then, presents us with a perverse scenario. Those voters who supported 'leave' have forced a policy upon the representative institutions that many within those institutions did not want. Yet in the process it is the UK executive that has become empowered. It wields significant discretion in the implementation of a decision that a number of ministers, including the Prime Minister, had opposed (though what will be the outcome of EU negotiations remains to be seen). In this circumstance neither representative nor direct democracy appears to be the beneficiary.

♦   What material difference has the use of
      referendums in the UK made?

The rise of the referendum represents a significant change in the
operation of the UK constitution. But the purpose of referendums is
to impact beyond the system. Indeed, if they did not, there would be
no point in their taking place. Referendums have in some instances
acted as a block on change, as with devolution in 1979 and electoral
reform in 2011. The prospect, rather than actual occurrence, of
referendums, was a deterrent to more enthusiastic participation
in European integration, in particular the single currency,
from the 1990s onwards. Referendums have also facilitated and
legitimised change, for instance devolution in the late 1990s. The
referendum of 1975 provided retrospective popular endorsement
for EEC membership. The Scottish Independence Referendum of
2014, though it rejected change, became a trigger for a variety of
substantial developments. They were not referred to on the ballot
paper, though some of them were promised shortly before the
referendum, in the 'Vow' issued by leaders of pro-Union parties.
In this sense, while voting against independence was formally an
expression of support for the status quo, in practice the choice on
offer to voters was between two different types of change. These
reforms impacted both on Scotland and on other territories in
which the referendum was not held. They included enhancements
to the powers of the devolved institutions in Scotland, Wales and
Northern Ireland; the introduction of devolution deals in England;
and adoption of an 'English Votes for English Laws' procedure in
the UK House of Commons. The 2016 vote could lead to the most
radical policy outcome of all, departure from a project in which the
UK has participated since 1973.

Referendums have prompted dramatic party political changes.
Victory in the 1975 vote enabled Harold Wilson to reshuffle

his Cabinet. The 1979 Scottish referendum outcome led to a no-confidence vote in the Commons and a Dissolution, followed by a General Election that inaugurated 18 years of Conservative government (though whether the early Dissolution made a material difference is debatable). The 2011 referendum seems to have brought about a souring of intra-coalition relations and a shift in the way that particular government operated. Finally, the result of 23 June 2016 led to the resignation of David Cameron as Prime Minister accompanied by departures and arrivals at Cabinet level. In other words, we cannot expect referendums to be confined to the specific issue they address. They are likely to impact upon the environment of representative party politics that produced them, with which they are intertwined, and to which they can present a challenge.

Do referendums help to resolve problems in a way that other democratic mechanisms might not? Certainly, it could be held that the Belfast/Good Friday Agreement vote helped solidify a peace deal that has achieved far greater success than previously attained in the region, though not perfect. In Wales and Scotland, referendums appear to have helped build a consensus around the desirability of devolution. But they have not solved disagreements about the position of Scotland within the Union. Indeed the 2014 vote may have aggravated such disagreement. Any success the vote of 1975 had in resolving the issue of EEC membership was limited, as recent events demonstrate. Furthermore, while the 2016 referendum may settle the issue of whether the UK should continue to participate in the EU, it has triggered one of the most divisive episodes in UK political history, drawing attention to and intensifying multiple pronounced social cleavages, involving geography, age and social profile.

But whether the impact of referendums is judged good or ill, it is immense, both on the workings of our constitutional system and

on substantive developments. Moreover, the evidence of 2014 and 2016 suggests that the stakes are rising higher. Consequently we make a set of proposals that treat this issue with the seriousness it merits, addressing first principles rather than secondary concerns. Our recommendations may seem ambitious. But the scale of the challenge merits this approach.

Recommendations: Key Principles and Good Practice

Our starting principle is that referendums can play a valuable democratic role, especially in ensuring that substantial constitutional change is a consensual process. Some success has been achieved in this regard through the cumulative votes held in relation to devolution in Wales and Scotland (in 1979, 1997 and 2011), and the Northern Ireland peace process (in 1998). But we note that referendums can have defects and create difficulties. They are susceptible to manipulation by the UK executive. As a consequence they can be subordinated to party political ends (for example, in 1975); and present voters with restricted options (eg: 2011). The change on offer may not be clearly defined, and may be to a significant extent unknowable (eg: 2014). Referendums can have the effect of affording discretion to the UK executive as much as empowering voters (2016). Yet the executive is not all-powerful and referendums are in some senses a demonstration of its weaknesses, and can in the process add to those weaknesses. Referendums may be inimical to cohesive government (eg: 1975, 2011 and 2016). This latter tendency is a problem from the point of view of government effectiveness, and also because divisions in government can make accountability more difficult to achieve. Referendums can generate resentment (eg: Scotland in 1979); and highlight or even exacerbate social and political divisions (eg: 2014 and 2016). Most seriously referendums potentially pose a challenge to our system of

representative democracy,[189] and principles associated with it such as the rule of law.

Referendums became part of the UK constitution without this change being overt or subject to a full and inclusive discussion, and without a comprehensive attempt to reconcile their use with other features of the political system. Observers and critics have long raised many of the fundamental constitutional questions we address in this paper. Yet those responsible for initiating referendums, in particular UK governments, have not meaningfully engaged with these considerations, or attempted to discern and incorporate a clear set of first principles. Below we sketch out the possible constitutional framework for referendums in the UK that has not yet been established. Some of it might be implemented through an Act of Parliament, aspects of it might be found in a written constitution, if the UK had such a text, and other portions of it would be most likely to rest in convention, perhaps described in documents such as the *Cabinet Manual* or *Ministerial Code*. There may well be strong political objections to some of what is proposed. Consensus would be needed and may be difficult to attain. But the problems posed by the ill-conceived use of referendums, when it occurs, are potentially serious. Consequently, though there may be barriers to it, action is required.

Key Principles and Good Practice for referendums in the United Kingdom

1.   Referendums can enhance democracy, but they can also be detrimental to it. In the UK, the use of referendums has had both positive and negative democratic manifestations.

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189   Le Roux, 'Is there a tension between Parliamentary Democracy and referendums?'.

In the context of UK democracy, they should be deployed sparingly. They should be used as a means of ensuring major changes take place on a basis of broader than usual consent; they should not be deployed purely for partisan purposes, or in a way that undermines democratic principles.

2. Referendums have generally been applied to decisions that can be regarded as constitutional in nature. But over what issues, precisely, should they be held? It is useful to distinguish between three categories when considering whether a referendum should be held on a particular subject. First, there are courses of action that should be embarked upon only after receiving approval in a referendum. They might be considered, in the UK context, entrenched. This category would include the abolition of the devolved institutions of Wales, Scotland or Northern Ireland; the creation of new devolved legislatures in England; and the secession of any part of the Union; all of which would necessarily be subject to approval in the territories concerned. Major transfers of sovereignty for the whole UK should be subject to popular votes across the entire country, though definitions of this kind of issue may be contested. Second, it is useful to consider whether there are matters over which a referendum should never be held. This group is most likely to involve personal freedom and the rule of law. To hold public votes on such subjects is to court the risk of populist violation of human rights. For instance, perhaps the status of the European Convention of Human Rights in UK law should not be the subject of a referendum; nor should the universal application of due process of law. The third category covers all those matters that do not fit in the first two. It is possible that a future government will encounter an issue – that may well be constitutional in nature, but not inevitably so – of

such controversy or importance that it feels it should consult the public on the proper response. If it does so, it should act taking into account the other principles proposed here.

3. It is undesirable for a referendum to create a circumstance in which a UK government feels obliged to implement a major public policy with serious implications for its overall programme to which it and the UK Parliament (especially the House of Commons) were opposed. For this reason, referendums on major initiatives of this kind should generally take place because a government wants to embark upon them, not because it is seeking permission to avoid them. In other words, the government should favour the option on the ballot paper that leads to change, not the status quo option. (It is possible for a referendum to take place in which a clear status quo option is difficult to discern, as in 1975 over the EEC. In 2014, voters in Scotland were in effect choosing between independence or a package of enhanced devolution that had been offered to them by pro-Union leaders with the 'Vow' shortly before the vote). In such circumstances, if it loses, the government may face serious political repercussions, but will not be under pressure to implement a policy in contradiction to the principles of representative democracy.

4. Exceptions to the general rule set out in 3 above include referendums on secession by parts of the UK, where the UK government is likely to be a supporter of the status quo. Ideally, the terms on which such independence referendums can be triggered and the process that would follow a 'yes' result should be clarified. Another exception may be a change that does not directly impact upon the ongoing policy of the government of the day, for instance an alteration in the parliamentary electoral system.

5.   'Change' options should be as clearly defined as possible, as a minimum in a white paper and preferably in pre-referendum legislation. If there are difficulties in clarifying what a change will mean, then serious consideration should be given to the possibility of a further referendum, when the details become firmer, if practicable. The means by which a change will be implemented should be made precisely clear. Any action to bring it about should have a definite statutory basis.

6.   Referendums should not be used as a means of resolving internal party or intra-governmental tensions. In circumstances where there is an official government recommendation, an allowance for dissent from it by ministers is not desirable.

7.   In some circumstances, it may be appropriate to offer multi-option referendums, in order that the members of the public are presented with a more open opportunity to exercise their judgement.

8.   Whether a result is to be treated as only advisory or binding should be made clear from the outset of the intention to hold the referendum being announced. If the result is to be binding, this fact should be made clear in an Act of Parliament passed in advance of the vote. Advisory referendums are attractive from the perspective of representative democracy. Yet failure to abide by the results of popular votes nonetheless risks undermining the credibility of such exercises. The execution of a policy that has been rejected in a referendum should be avoided. Adherence to 3 above will help a government to avoid needing to resist implementing a popular vote for change that it opposed.

9.   The opportunities for the UK government to manipulate referendum details should be minimised. There is a need

for more consistent, clear and impartial rules governing issues such as the timing of referendums, the franchise employed, official neutrality during the campaign (even if the government has a stated position), and the formulation of the question on the ballot paper.

10. The greater the gravity of a particular choice, the more consideration should be given to the possibility of using thresholds or supermajorities. If, for instance, a possible change for the whole UK would be of great importance and exceptionally difficult to reverse, then it might be desirable to require that three out of the four territories of Wales, Scotland, Northern Ireland and England should record majorities in support of it.

11. Referendums should never be regarded as producing mandates that override regular principles of representative democracy and the rule of law.

Appendix 1 – UK experience of national and regional referendums since 1973[190]

Event, Location and Date	Referendum Question	'Yes' vote (%)	'No' vote (%)	Turnout (%)	Result
Member of the European Community UK June 1975	Do you think that the United Kingdom should stay in the European Community (the Common Market)?	67.2	32.8	64.0	The UK remained in the European Community
Devolution Scotland March 1979	Do you want the provisions of the Scotland Act 1978 to be put into effect?	51.6	48.4	63.6	Devolution did not proceed as the threshold requirement that not less than 40 per cent of the total electorate had to vote 'yes' for devolution was not met – only 32.8 per cent voted 'yes'
Belfast Agreement Northern Ireland May 1998	Do you support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?	71.1	28.9	81.0	Community consent for continuation of the Northern Ireland peace process on the basis of the Belfast Agreement was given
Nineteenth Amendment of the Constitution of Ireland Republic of Ireland May 1998	Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?	94.39	5.61	55.6	Voters approved of the proposal to amend the Constitution of Ireland
AV voting system for electing MPs UK May 2011	At present, the UK uses the 'first past the post' system to elect MPs to the House of Commons. Should the 'alternative vote' system be used instead?	32.1	67.9	42.2	First past the post will continue to be used to elect MPs to the House of Commons
United Kingdom European Union Membership June, 2016	Should the United Kingdom remain a member of the European Union or leave the European Union?	48.11	51.89	72.21	The Conservative Government has committed to initiating Article 50, and putting plans in motion for the United Kingdom to exit the European Union

190   House of Lords Select Committee on the Constitution, '12th Report – Referendums in the United Kingdom', pp.9–10.

Referendums and the Constitution
By Lucy Atkinson and Andrew Blick

The June 2016 referendum on European Union membership lies at the centre of one of the most divisive controversies in the political history of the United Kingdom (UK). This event highlights the importance of the subject of referendums in the UK. Such popular votes have been a prominent part of political life in the UK for more than forty years. This research paper considers referendums from a constitutional perspective, taking into account their whole course of development. It includes selected case studies and an historical overview. The authors assess the strengths of referendums and the potential problems associated with them, before making recommendations. They find that referendums were incorporated into the UK constitutional system without satisfactory consideration being given to the desirability and implications of such a change. As a consequence, there remain difficulties in reconciling the use of referendums as deployed in the UK with the core features of representative democracy. The paper proposes some key principles and good practice intended to address this problem.

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