Views from Abroad

Referendums, Constitutional Reform and the Perils of Popular Sovereignty

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I. Introduction

At the time of writing, the constitutional systems of Italy and the United Kingdom (UK) are still reverberating from the shockwaves caused by the respective referendums held in 2016. Although the constitutional context and the subject matter of the referendums were quite different certain illuminating points of comparison can be identified both in respect to the regulation of holding of referendums, and the difficulty of reforming core pivotal constitutional institutions. The first part of this essay interrogates the use of referendums as a device for testing popular sovereignty against established constitutional practice in the United Kingdom. The resort to the Brexit referendum by a Prime Minister in order to resolve the conflict within his own party on the issue of UK European Union (EU) membership highlights the absence of constitutional rules limiting their use. In the case of the Italian referendum, the Prime Minister (PM) regarded constitutional reform as a vehicle for consolidating his political leadership. PM Matteo Renzi deliberately turned a technical question of constitutional reform requiring formal approval, into a plebiscite for himself, and his Government, by promising to resign if he failed to achieve the desired outcome. A common denominator then between the referendums conducted in the UK and Italy in 2016 was that in each case the Prime Minister was seeking voter endorsement to consolidate his own political standing. The next section looks at recent UK constitutional practice in order to consider whether any clear rules can be established to prevent the manipulation of the procedure for political advantage, and, at the same time, determine when national referendums might be conducted as a legitimate form of consultation. The final section proceeds to evaluate the substantive issue of second chamber reform. The evolving constitutional role of the House of Lords as a second chamber is considered before the discussion turns to the reform of the Italian system. This analysis is framed around the concept of 'elective dictatorship'

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which has also been applied to the UK system to describe the trend towards executive dominance in respect to the functioning of Parliament.

II. Referendums, Deliberative Democracy and the British Constitution

The use of a national referendum to determine questions of major political and economic complexity in the United Kingdom is out of step with previous constitutional practice. It is instructive to glance back to the constitutional crisis of 1909 which arose when the House of Lords used its veto powers to prevent the approval of a budget in defiance of a strong convention recognizing the predominance of the Commons over money bills. The crisis was resolved after elections were held to provide confirmation of a majority in the House of Commons in support of fundamental reform of the House of Lords. Once victory for the Liberal/Irish Government had been demonstrated at the election in 1910, if necessary, King George V was prepared to appoint sufficient peers to overcome the Conservative majority in the House of Lords. The popular will was expressed through the holding of a general election and not by holding a referendum.

Indeed, the importance of representative democracy over direct democracy might be regarded as an integral part of the constitutional orthodoxy recognized by Albert Venn Dicey but also elaborated by other writers, including Edmund Burke a century earlier.[1] Of course, the classic counter argument to resorting to referendums in a democracy is founded on the basis that elected politicians are better placed to make decisions on behalf of the people. They are elected to parliaments, assemblies, or local councils with procedures for debate, and possess the expertise and experience to make decisions on behalf of the electorate. At the same time, they are equipped to take into account the complexity and interrelatedness of controversial public policy questions. These influential nineteenth century writers concerned with the dangers of the 'tyranny of the majority' advocated 'representative government' based on what was then a limited franchise.[2] On the other hand, it was argued that ordinary voters may be prone to make ill-informed choices without adequate deliberation. For example, there is considerable evidence that many voters in the Brexit referendum delivered their preference because of other concerns, ranging from the perceived inadequacies of immigration control to the funding of the National Health Service.[3] In other words, the resort to referendums on a

[1] A. Dicey, *An Introduction to the Study of the Law of the Constitution* (Basingstoke: Macmillan, 10th ed, 1959), 82.

[2] R. Crossman, 'Introduction' to W. Bagehot, *The English Constitution* (London: Fontana, 1963), 6.

[3] See M. Goodwin and O. Heath, 'Brexit vote explained: poverty, low skills and lack of

routine or unprincipled basis will tend to marginalize the elected institutions and thereby undermine fundamental assumptions about the role of representative democracy.[4]

In the UK there is an absence of constitutional law or clear conventions governing the holding of referendums as opposed to general elections. The constitutional position changed in 1975 when PM Harold Wilson decided to call a *post facto* national referendum on the continuation of European Economic Community (EEC) membership. He did this to manage the divisions mainly within his own party. Apart from the Brexit vote in 2016, the unsuccessful referendum in 2011 on a proposal to change the electoral system from first past the post to alternative vote (discussed below), is the only other national referendum. In addition, referendums have also been used in relation to the introduction of devolved government and to approve the introduction of directly elected mayors at local government level.

III. When Should Constitutional Referendums Be Held?

The Italian Constitution provides that national referendums must be held as part of the constitutional amendment procedure[5] and in relation to a limited range of other issues.[6] In the absence of a codified constitution or a specific law concerning the prerequisites for referendums the lack of constitutional and legal regulation arises as a serious problem in the United Kingdom.[7] Once referendums become accepted as a constitutional device the obvious difficulty is determining in what circumstances a referendum should be held and whether the result should have binding effect. Some commentators argue that an adequate system of regulation can prevent, or at least minimise, the elite control and manipulation of referendums.[8] Against a backdrop of emergent populism in the UK with UK Independence Party (UKIP), and in Italy with Five Star Movement and the Northern League, a fundamental problem is to avoid the arbitrary manipulation of a popular vote for political advantage. The task of deciding whether, in principle, a referendum should be held to test opinion on an issue of constitutional importance is extremely problematic.[9]

opportunities' available at https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities?gclid=CMbC4eOHitECFa0W0wodsLkEEw (last visited 20 March 2017).

[4] P. Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution', in Id, R. Rawlings and A. Young eds, *Sovereignty and the Law* (Oxford: Oxford University Press, 2013), 147.

[5] Art 138 of the Italian Constitution.

[6] See eg Arts 75, 123 and 132.

[7] P. Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution' n 4 above.

[8] S. Tierney, 'Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum' 4 *Public Law*, 633-651 (2015).

[9] S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*

For instance, it would be convenient to argue that the 2014 referendum in Scotland was a legitimate exercise because, first, it concerned the issue of secession which, as a matter of principle, was relatively clear cut and needed to be determined by consulting the Scottish electorate. Second, that the vote itself was preceded by mature debate over a two year period which allowed genuine reflection on the political and economic arguments. The high turnout of eighty-five per cent demonstrated the degree of public engagement. Although in the end the vote was not in favour of independence, the Government responded to the popular mood emerging from the campaigns and expressed by the closeness of the result by greatly strengthening the system of devolution in place in Scotland.[10]

The independence referendum in the short term defused a contentious issue and provided the basis for a new phase of devolution commanding popular support. By way of contrast, although the Brexit referendum concerned the apparently simple question of UK EU membership, in practice, apart from being extremely divisive, this was a deceptively opaque issue because voters exposed to the routine criticism of the EU by a hostile press were largely unaware of the role of the EU, and therefore of the wider implications of Brexit. For this reason it has been suggested that the highly technical economic and political debate should have been conducted by parliamentarians in Parliament. The parliamentary process, notwithstanding its shortcomings, is geared up to consider such questions as part of the legislative process. Ministers, Members of Parliament (MPs) and Peers sit on specialist committees and they are informed by specialist advisers. In my view this line of argument is difficult, if not impossible to sustain. It is hard to envisage any rules concerning the holding of referendums which would not allow for the calling of a Brexit referendum in order to consult the electorate. This is because UK EU membership is fundamentally about a core constitutional issue, namely, the prospect of a change to the sovereign status of the United Kingdom. Not only is this a central constitutional question, but also, the 1975 referendum mentioned earlier provides a precedent for the holding of a referendum on this very question. In comparing these two examples the Scottish Referendum and the Brexit Referendum, the credibility of the process might only be contested on the quality of the ground rules regulating the way each of the respective referendum campaigns were conducted.[11]

The only other national referendum in the UK, the Alternative Vote referendum in 2011, was conducted to honour the commitment in the coalition agreement drawn up between Conservatives and Liberal Democrats

(Oxford: Oxford University Press, 2012), chapters 4 and 5.

[10] See Scotland Act 2016.

[11] S. Tierney, 'Was the Brexit Referendum Democratic?' (25 July 2016), available at https//ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/ (last visited 20 March 2017).

following the 2010 general election. The Liberal Democrats were committed to allowing the electorate to make a choice on reforming the electoral system. This is because the first-past-the post system put the party at a severe disadvantage. The Alternative Vote method was the agreed choice to replace the current system which was put to the electorate in the referendum. It is also worth mentioning that this referendum was clearly intended to be legally binding.[12] The statute specified that if the vote was in favour of change the Minister must issue an order to bring into force the alternative vote provisions.[13]

In the *Miller* case there had been an attempt to argue that by inference the referendum result was intended to be binding on the Government but because of the way the 2015 statute was drafted, this argument was not repeated on final appeal.[14] The majority judgment in the *Miller* case in the Supreme Court held that legislation would be required to trigger Brexit under Art 50. As mentioned below the decision was crucial as it also confirms that popular sovereignty as expressed in the result of a consultative referendum had not replaced the legal sovereignty of Parliament.[15]

Even where the constitutional implications are far reaching in their effect, the holding of a referendum is not necessarily the appropriate method for determining the matter in question. The introduction of English Votes for English Laws (EVEL) might be regarded as one such issue. The introduction of devolution in Scotland, Wales and Northern Ireland in 1999 was a radical re-allocation of power which set up democratically elected law-making bodies in Edinburgh, Cardiff and Belfast. The constitution of the UK is uncodified which meant that all these changes were all achieved by ordinary legislation followed by referendums in the home nations.[16] While not satisfying nationalist parties, devolution was a genuine response to the centralising tendencies of the Westminster Government, and it has provided considerable scope for policy divergence to suit local needs. Furthermore, devolution has been extended to meet the evolving political situation in the devolved parts of the United Kingdom. In terms of institutional reform, devolution might be regarded as a positive response to a pressing problem of over centralisation which also redefines the constitution.

At the same time, devolution was a piece meal reform package which has impacted on the functioning of many other aspects of the constitution. In

[12] By way of contrast the Referendum Act 2015 merely makes provision for the holding of a referendum on whether the United Kingdom should remain a member of the European Union. No specific requirements were set out as part of the 2015 Act in the event of a vote for Brexit.

[13] Parliamentary Voting System and Constituencies Act 2011 sections 9 and 10; Schedules 10 and 12.

[14] R (Miller) v SS for Exiting the European Union [2017] UKSC 5, para 31.

[15] S. Tierney, *Constitutional Referendums* n 9 above, 299.

[16] These referendums were a requirement of the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998.

particular, England was not offered an equivalent intermediate level of government. The block grant funding arrangements for Scotland, Wales and Northern Ireland (NI) remained the same under the Barnett formula, but perhaps most conspicuously, the legislative role of the Westminster Parliament was left unchanged. Indeed, the so-called West Lothian question meant MPs at Westminster elected in Scotland, Wales and NI could continue to vote on bills concerning England but MPs elected in England no longer had any direct input in relation to legislation falling under the devolved Scottish Parliament and the assemblies in Wales and NI.

In view of the difficulty in gaining support for a federal or regional solution, the Conservative Party going into the 2010 and 2015 elections favoured a reform based on the idea of restricting the voting rights of Westminster MPs representing Scottish, Welsh and NI constituencies. The reform was known as English Votes for English Laws (EVEL).[17] The EVEL proposal was included in the 2015 Conservative Party election manifesto, and after the Conservatives were elected to Government with an overall majority in the House of Commons, the reform was adopted by way of a procedural amendment to standing orders (which regulate legislative procedure within Parliament) for a trial period. The Government had a mandate despite considerable opposition in Parliament. This change to the voting rights of MPs raised many technical issues relating to the drafting and scrutinising of legislation, but it was also highly controversial. Just at the moment when the Scottish Nationalists had achieved virtually a clean sweep of seats in Scotland the role of Westminster as a Parliament for the entire United Kingdom was called into question. Certain categories of MPs (those from Scotland, Wales and NI) were deprived of some of their voting rights under the new procedure. Moreover, the change suited the Conservatives as they nearly always have a large majority in England. As a result, Conservative Governments will have the capacity to legislate for England without effective opposition in the House of Commons. Even if Labour form a future Government on the basis of winning a majority of seats in Scotland and Wales under these rules they will no longer have a majority to pass English legislation. This reform is significant at a constitutional level. It affects how the sovereign will of Parliament is expressed, and so, from a technical standpoint might satisfy a constitutional or legal requirement for the holding of a referendum prior to adoption. But it will also be apparent that EVEL is a highly technical procedural change. As such, the matter is unsuited for resolution in a national referendum. Rather, given the controversial nature the change, it should have been introduced by legislation.

Some commentators have suggested that the apparently increasing resort to referendums has opened up the possibility for the expression of 'people

[17] See generally 'English Votes for English Laws' House of Lords, Select Committee on the Constitution, 6th Report of Session 2016-17, 2 November 2016, HL Paper 61.

power' and that, as a result, parliamentary sovereignty in the UK has been replaced by popular sovereignty as the central principle of the British Constitution.[18] In fact, quite the reverse is the case. The *Miller* decision by the UK Supreme Court has confirmed that, notwithstanding the referendum result, it must be primary legislation approved by Parliament which triggers the formal Brexit withdrawal process. For the present at least, any such claim concerning the predominance of popular sovereignty must be viewed as both tendentious and inaccurate. To date, we have seen there have only been three national referendums. The determination of UK membership of the EU was and still is a wholly exceptional issue which has twice in the last fifty years been put before the electorate in referendums.

IV. Constitutional Reform: Rebalancing the Constitution

Certainly as far as the general public were concerned, the new EVEL procedure almost slipped under the radar as a technical reform, but it potentially opened the way for the introduction of a new form of executive dominance. It is perhaps ironic that such an eventuality raises the sort of nightmare scenario envisaged by the academic opponents of the Senate reforms in Italy. Before turning to briefly consider the situation in Italy, it is useful to assess the constitutional importance of the House of Lords in light of very recent developments (1999-2017). In fact it is extraordinary that almost by accident the House of Lords has emerged at the beginning of the twenty first century as a genuine counter balance to the House of Commons. After the constitutional crisis of 1909-1911 (referred to above) the Parliament Acts of 1911 and 1949 restricted the House of Lords to a one year delaying power over legislation. The reform was left incomplete as there was no consensus on the precise form of an elected upper house. The Lords was therefore left composed exclusively of hereditary peers, most of whom were supporters of the Conservative Party. The new category of Life Peers, established in 1958, provided scope to widen the composition of the House and to appoint a substantial number of women as life peers. However, the overwhelming support in the Lords for the Conservative Party was ended with the House of Lords Act 1999. All but ninety-two of the hereditary peers lost their right to sit in the Lords. Since then the numbers have increased and the political allegiances have been distributed more evenly. Currently, the main political groups among the eight hundred and four members are Conservatives (two hundred and fifty-two), Labour (two hundred and two), Liberal Democrats

[18] V. Bogdanor, 'After the Referendum the People, not Parliament, are Sovereign' *Financial Times*, 10 December 2016; 'Brexit and the Transformation of British Politics' Monitor 64: October 2016, The Constitution Unit, available at https://constitution-unit.com/2016/10/24/monitor-64-brexit-and-the-transformation-of-british-politics/ (last visited 20 March 2017).

(one hundred and two) and Cross Benchers having no declared allegiance (one hundred and seventy-seven). In consequence, this situation means that no single party has anything approaching overall control. Moreover, the whips are in a much weaker position in the House of Lords since peers are in place for their lifetime, or until retirement, and are not looking over their shoulders at the electoral implications when they vote on a contentious issue.

The amendment of the Brexit Bill in March 2017 supports one of the main conclusions of the recent study by Professor Meg Russell indicating that the House of Lords is now increasingly influential on policy matters and in determining the final form of legislation. She explains that:

> '(…) the key reason is the chamber's "no overall control" character, where neither government nor opposition has a majority, and policy must be carefully negotiated with non-government peers. This change has brought a significant degree of consensus politics to the heart of Westminster (…)'.[19]

Notwithstanding the shortcomings relating to its unelected composition and consequent limited legitimacy, this evidence confirms that the House of Lords makes an active contribution to the parliamentary process. But under the so called Salisbury Convention the House of Lords does not normally block the manifesto commitments of an elected Government. The heightened profile of the House of Lords illustrates some of the benefits of having a two chamber Parliament. A lack of consensus has undermined repeated attempts at completing the reform by introducing an elected second chamber, such as an elected Senate for the Regions as proposed by the Labour Party in its 2015 election manifesto.

V. Elective Dictatorship UK and Italy Compared?

The Italian referendum in 2017 was held as the final stage of the procedure for amending the constitution. In contrast to the United Kingdom, Italy has a rigid constitution which is relatively difficult to amend. This is because there is a special procedure which involves legislation having to go through both Houses of Parliament twice, and if it fails to receive a two thirds majority on the second occasion a referendum is required to approve the change. Achieving a majority for the Senate reform would almost certainly have been challenging, given that it amounted to a radical transformation of one of the prime elements of the original constitution. Constitutional rigidity serves an important purpose by entrenching fundamental characteristics of

[19] M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013), 7.

the constitution, and the Italian Constitution was designed to minimise the possibility of executive dominance.

Quite apart from its political impact, the referendum held in Italy on 4 December 2016 was an event of special interest for academics and commentators because an affirmative vote would have given the green light to a constitutional reform which would have transformed the functioning of Parliament at the heart of the political game.[20] In terms of the fashioning of its parliamentary system, the Italian Constitution of 1948 is unusual in that it created a two chamber Parliament where both houses were remarkably similar (sometimes termed perfect bicameralism), not just because they are popularly elected bodies, but also in their respective powers and functions, particularly in regard to their law-making capacity. As David Hine pointed out:

> 'The Italian Parliament, with its fragmented party system and its independently-minded members, appears to be a far more formidable obstacle to the concerted will of the political executive than in any other Western European democracy'.[21]

The proportional voting system seldom, if ever, gave a single party a majority in both houses. There have been attempts at reforming the electoral system by partly reducing the proportional element in favour of first past the post.[22] Such changes adjusted the balance somewhat by encouraging parties to fuse together but, nonetheless, the two chamber Parliament presented a formidable obstacle to any Government.

Now turning to the UK, what Lord Hailsham famously termed 'Elective Dictatorship' has been regarded by many commentators as one of the problematic characteristics of the UK parliamentary system.[23] The UK retains a system of first past the post elections which has frequently resulted in an overall majority in the House of Commons for either the Conservatives or for Labour. This outcome can be achieved with well under forty per cent of the popular vote.[24] Once elected the Government is able to force through its legislative programme by using the party whips in the House of Commons to maintain its parliamentary majority. Of course, failing to get a bill passed followed by losing a vote of confidence could precipitate an early general election. The upshot is that Governments rarely lose a second or third reading

[20] See G. Delledonne and G. Martinico, 'Yes or No?' Mapping the Italian Academic Debate on the Constitutional Reform' in this issue.

[21] D. Hine, *Governing Italy: The Politics of Bargained Pluralism* (Oxford: Oxford University Press, 1993), 166.

[22] See J. Luther, 'Learning Democracy from the History of Constitutional Reforms' in this issue.

[23] A. King, *The British Constitution* (Oxford: Oxford University Press, 2007), 83.

[24] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Oxford: Hart Publishing, 2016), 110.

vote on a major bill in the House of Commons. The problem is that the executive is, in effect, in command of the legislature and the capacity for Parliament to critically scrutinise legislation is reduced because MPs, both at second reading stage and in committee will, rather than considering the merits of the issues before them, tend to defer to the government line dictated by the Whips.[25] While Parliament, and especially the House of Commons, has faced the accusation of being no more than a rubber stamp for government legislation, the flip side of this coin is that a Government with a majority can usually achieve its legislative objectives, and this allows any Government with a parliamentary majority to make decisive policy changes in line with its manifesto commitments. However, it should be noted that Lord Hailsham set out this view in the mid 1970s well before the House of Lords, relieved of nearly all its hereditary peers, emerged as a more consistently effective counter balance to the House of Commons.

Returning to the Italian reform, the constitutional question to assess was whether, the reformed and slimmed down indirectly elected, Italian Senate of around one hundred members, representing the Regions and local government, would have been adequate to take on its revised constitutional role. For example, this concerned questions of legitimacy, as it was going to be indirectly elected; and it concerned the extent to which the streamlining of the legislative process could be achieved while maintaining effective executive oversight. Viewed more widely, it appears that a perceived difficulty with these proposed changes to the Italian Senate was the fact that the reform was coterminous with a change to the electoral law for the Chamber of Deputies. The revised electoral system, known as *Italicum*, is a form of proportional voting, but it provides for top up majorities to assist in forming a Government in the Chamber of Deputies.

The point of engineering such a change was to overcome the previous tendency towards inertia in legislative productivity that characterised the system. Enhanced efficiency would have been achieved by facilitating the election of a majority government, but also by sacrificing some of the qualifying effects of the two chamber Parliament as originally conceived as part of the 1948 Constitution. A central part of the controversy was whether this change would have granted too much power to the Government and the executive while also supporting a tendency towards centralisation. In other words, it might have produced a kind of 'elective dictatorship' Italian style. To put the issue slightly differently, did the proposed reform adequately adjust the system of checks and balances to compensate for these far reaching changes? The answer to this kind of question is likely to be extremely complex and, of course, well beyond the scope of this article, as it would have to take account of first: the precise role of the reformed Senate as a counter balance of

[25] See Lord Hailsham, *The Dilemma of Democracy* (London: Fontana, 1978).

the Chamber of Deputies. The continuing importance of retaining a check on the first chamber is demonstrated well with the resuscitation of the House of Lords alluded to in the discussion above. Second, the application in practice of the technical rules and conventions governing the actual functioning of the reformed Senate. Third, the fact that constitutional changes of this magnitude will tend to have a knock on effect, in the sense that they will require further, often unforeseen, changes in procedure and in constitutional practice in other areas.

VI. Conclusion

Perhaps it is stating the obvious to point out that the drafting of constitutional laws is a highly controversial business. It is no co-incidence that the adoption of new constitutions, or the introduction of major constitutional reforms, tends to coincide with momentous historical events which force contesting parties to compromise and agree to a given constitutional formula. One only has to look back to the twentieth century to observe the flurry of constitution-making that followed the end of the second world war, the dismantling of empire, the end of Soviet influence in Europe and Asia, and the collapse of the apartheid regime in South Africa. These experiences teach us that it is crucial to seek as much consensus as possible before embarking on ground breaking constitutional reform. The testing of opinion in a referendum may assist in turning over a new leaf, as has been the case in Scotland after the independence referendum in 2014, or they may serve to amplify a potentially divisive issue, as with the UK Brexit referendum or the Italian constitutional reform referendum. Equally, the reform itself needs to be sensitive to the wider political context. The problem is that we are living through turbulent times for democratic constitutionalism with the many current challenges to the fundamentals of democracy presented by increasingly extreme oppositional parties. Perhaps the question is whether it is better to rely on tried and tested institutions or to embark on a metaphorical leap in the dark with innovatory strategies for reform. If nothing else, the discussion of 'elective dictatorship' and the recent contribution of the House of Lords set against proposals for the transformation of the Italian Senate, demonstrates that any reform package will be a trade off between often conflicting characteristics rather than a step on the path to a new sort of constitutional Nirvana.