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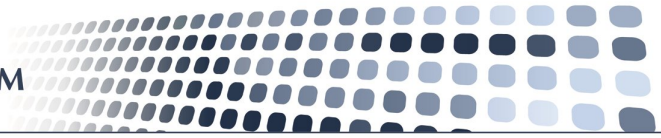
# Redefining Parliamentary Sovereignty: the example of the devolution referenda

by

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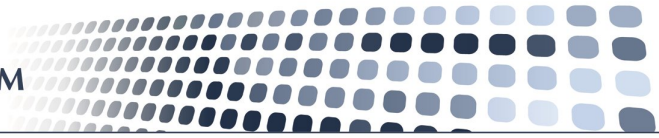


## Abstract

The goal of this paper is to draw attention to a critical issue regarding the decline in the traditional doctrine of Parliamentary sovereignty in the United Kingdom. Devolution has proven to be a serious threat to Westminster's supremacy in view of the fact that until now it has evolved with a degree of complexity that the original proponents had scarcely imagined. One of the most peculiar examples of this evolution is the extent to which the referendum has been used to put forward major constitutional changes in this new order. In that regard, this paper, which is divided into two parts, retraces the crucial points of Dicey's reasoning and then attempts to verify what the devolution process has entailed for the referendum within the United Kingdom's constitutional framework, up to the latest developments.

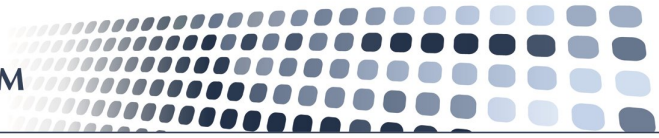
## Key-words

Parliamentary sovereignty, United Kingdom, Devolution, Referenda, Dicey



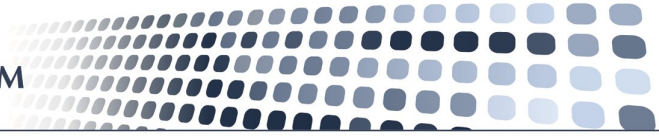
## 1.1 The Diceyan Theory of Parliamentary Sovereignty

Dicey defines Parliamentary sovereignty as the legal right of the British Parliament, under the Constitution, to make or unmake any law and do so without the possibility of its decisions being overridden or set aside by another body or person<sup>I</sup>. In order to explain the workings of the Constitution from this particular point of view, the author cites the 1716 Septennial Act<sup>II</sup> as a perfect example, both in theory and practice, since by enacting this particular law Parliament did something which was perceived, even at the time, as a deviation from the most basic principles of the British Constitution. The incumbent legislature authoritatively prolonged its own term far beyond the time for which it had been elected by declaring the Septennial Act applicable to itself, thus extending the duration of the legislature by four years. However, as some of his contemporaries pointed out<sup>III</sup>, the problem was that Parliament had essentially bypassed the need for a general election and hence forsaken the cardinal principle, by virtue of which the members of the House of Commons had to be appointed exclusively by popular vote. Perhaps it is not at all surprising that Dicey's view on this issue is in favour of those who enacted the Bill. Even though the author does not question the People's constitutional right to choose their representatives, he argues that no use of parliamentary power, even if unprecedented, may be labelled "illegal" because it violates the electoral mandate, since, once a general election has been held, the transfer of powers from the electorate to the legislature is complete and, therefore, in theory, the latter is not accountable to the former for the laws it enacts, nor can it be constrained by principles that are generally designated "constitutional" because it is up to the Parliament to establish what is constitutional and what is not. Therefore, electors have the sole legal right to elect members of Parliament. To further substantiate his theory, Dicey reflects on Parliament's interference in the private sphere. His assumption is that, if Parliament can meddle with private rights, held sacred in most civilised states, then it can by no means be prevented from changing the basic elements of the constitution<sup>IV</sup>. He draws upon the example of the Acts of Indemnity, statutes which render certain transactions<sup>V</sup> that were by law illegal at the time they took place legal or exclude



liability for the individuals to whom the statute applies. According to Dicey, such enactments<sup>VI</sup> represent the maximum exertion of supreme power and, for this reason, whether or not the Parliament may authoritatively change the very foundations of the British constitutional system should not be questioned since its supremacy pervades not only the public aspects of legality but also, most importantly, its private aspects, which encompass the most inviolable rights of the individual as construed by the advocates of natural law.

However, we must not forget that Dicey has a clear inclination towards the practical and more worldly aspects of law and, for this reason, his deliberations on the nature of Parliamentary sovereignty fully reflect the mood of the early Twentieth century, the time in which he lived. Even though he stresses the importance of the fact that electors have no legal means of initiating, sanctioning or repealing legislation, Dicey plainly admits that the notion of “restricted omnipotence”, i.e. the idea of the utmost authority ascribable to any human institution, does not apply to the British Parliament, since its asserted supremacy is, in fact, legal fiction. Bringing into play Austin’s theory of sovereignty<sup>VII</sup>, the author observes that the concept of sovereignty is closely related to the long-standing familiarity of English jurists with the historical existence of a supreme legislature whose law-making power cannot be restricted by any legal limit. However, if the strictly legal significance of the notion of sovereignty is put aside to allow for the theorisation of a political notion of sovereignty, the balance of power shifts dramatically in favour of the electors, who always manage to enforce their will in the long run since Parliament’s supremacy is ultimately measured by the degree of obedience that British citizens convey upon the laws passed by the former. Legal sovereignty from the People’s point of view implies, firstly, that judges may question the validity of a statute by taking into account the electorate’s opposition to its enactment or continued application and, secondly, that a legal mechanism of delegation and representation exists in order to ensure that the House of Commons acts as a trustee for the electors<sup>VIII</sup>. However, Dicey points out that British courts have never affirmed or even alluded to the idea of a “bond of trust” between members of Parliament and their electors, and the unchallenged validity citizens are endowed with is factual<sup>IX</sup> and coexists with a historical element that also limits the actual exercise of legal authority. In this regard, Dicey refers to “external” and “internal”

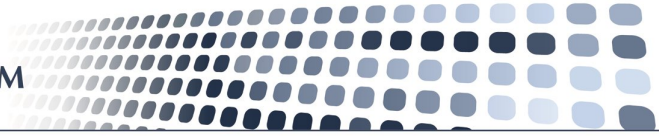


limitations: the former are meant to ascertain the degree of certainty that a sovereign power has with respect to the possibility of some laws being disobeyed or resisted by the governed<sup>x</sup>, or, from a different perspective, to establish the degree of certainty that Parliament can expect from the electors' readiness to comply with its directives; the latter constitute an evaluation criterion of a more sociological nature, as they seek to discover the peculiar social and historical features that result in the legislature's exercise of authority in accordance with that distinct framework.

In Dicey's concluding opinion, the mark of a truly representative Parliament is a more or less precise convergence, which in the long run is a correspondence, between external and internal limitations, which means that Parliament cannot survive very long without passing laws that meet the People's desires<sup>x<sup>i</sup></sup>. A similar conclusion may be drawn when considering the original end for which the House of Commons was created<sup>x<sup>ii</sup></sup>, i.e., not to become a part of the government, but rather to monitor its conduct from the outside as an intermediate body between those who govern and those who are governed, elected directly from amongst the People, in the hope that their needs and concerns would find a more attentive listener, as opposed to the more permanent and remote branches of government.

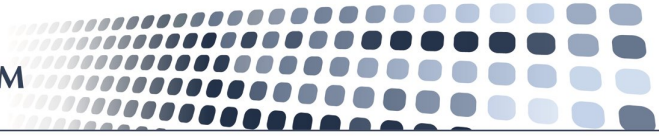
## 1. 2 Dicey's View on the Referendum

Dicey's theorisation of the referendum has fascinated and bewildered scholars because of its apparent peculiarity when compared with the author's general outlook on the British Constitution. The only way to retrace the steps of Dicey's theory, which underwent a long and constant evolution, is to start with the notion of political sovereignty within the historical context of the Home Rule Bills<sup>x<sup>iii</sup></sup>. It is a fact that between 1832 and 1911 the passage of long-disputed measures, which nowadays would surely be ascribed to the constitutional sphere, was made to depend upon the People's consent. The first notable example of this practice was the 1832 Great Reform Act, which changed the composition of the Commons by allowing members elected from amongst the middle class to sit on its benches. In 1910<sup>x<sup>iv</sup></sup>, Dicey wrote that the 1831 elections had been fought by Earl Grey's Whigs on the basis of the aforementioned Bill and, therefore, electors were asked not so



much to choose representatives, but rather to decide whether or not they wanted the Bill to pass into law. In his view, it was an informal referendum in the guise of a formal election in order to overcome a political crisis. However, despite the landslide majority obtained by the Whigs, the Upper House vetoed the Bill, causing the popular riots which became known as the nine “Days of May”. King William IV then declared that he would create new peers, should the Lords’ obstructive conduct linger any further, and the latter finally resolved that the People had sanctioned the Act and, on account of that fact alone, they would accept its passage<sup>xv</sup>. According to Dicey, the second example worthy of mention is the 1869 Irish Church Act, which amended the previous Act of Union by disestablishing the Church of Ireland, formally protected by that Act, and instituting religious freedom in Ireland. In this case, the measure was approved by the Lower House before the dissolution of Parliament but, nevertheless, the 1868 election focused on its preservation and resulted in an unquestionable victory for Gladstone’s Liberals, who had proposed the Bill while in opposition. Dicey interpreted this victory as the People’s ratification of the Bill, otherwise their aversion would have resulted in an electoral defeat for the advocating party. Even the Upper House, originally against the Bill on account of its merits, chose to pass it on the grounds of popular approval, as demonstrated by the unambiguous outcome of the election<sup>xvi</sup>.

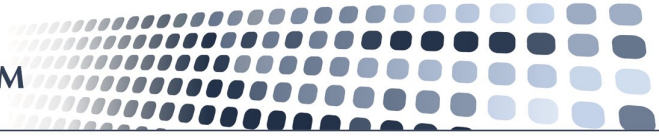
We have now come to the Home Rule Bills. Dicey’s views on the referendum are best remembered, criticised and debated on the basis of his extensive writings, more than three decades worth, on the recurring issue of Home Rule. His writings have sparked an ongoing debate amongst scholars regarding the true meaning Dicey attributes to the People’s sovereignty, and thus also to the constitutional role of the referendum as the main instrument of direct democracy. In order to fully understand the evolution of Dicey’s theory over the years it is perhaps better to begin by stating that the omniscient legislative supremacy which - according to the author - Parliament is entrusted with cannot endure the allocation of law-making powers to other bodies, something which would diminish its own power. Thus, any kind of federal arrangement, like the one resulting from the passage of the Home Rule Bills, is out of the question. Dicey believes that a written constitution is necessary for federalism to work. Therefore, it weakens any national government not only because of the power-sharing mechanism, which inevitably tends to produce conservatism, but also due to the fact that federalism implies the existence of a



judiciary body, whose will is meant to prevail in the event of a political crisis. Dicey's firm opposition to a written constitution for the United Kingdom is of great importance, since the very notion of a Referendum Act stems from the conviction that the effectiveness of the British Constitution depends upon its flexibility, a peculiarity which allows the political sovereign, i.e. the People, to assert their will more rapidly than in other countries. It is perhaps for this same reason that he rejects the idea of proportional representation, or any kind of broader representation for that matter, arguing that the People do not need it to manifest their will effectively, and that government cannot be reduced to a mere "debating society".

In light of all this, we can now delve into Dicey's never-ending crusade against the passage of Home Rule Bills in order to understand the peculiarities of his referendum theory. The first Home Rule Bill had a very short existence, since it failed to pass in the House of Commons, where even ninety-three members of the same party as Gladstone – the proponent – voted against it. Parliament dissolved and the following 1886 election favoured the opposing party, something that Dicey interprets as the People's clear sanction of the Bill's lack of mandate (A.V. Dicey, 1890). The second Home Rule Bill is a much more interesting case for Dicey's theory on representative government, because it did not fail on account of political squabbles within the proposing party, but rather because it involved the House of Lords, which was exercising its constitutional prerogative. The facts were as follows: after Gladstone obtained a victory in the 1892 election, he decided to work towards the passage of a second Home Rule Bill, which was approved by the Lower House. However, the Lords vetoed the Bill by a landslide majority. The 1895 election was fought on the issue of Home Rule and resulted in a decisive victory for the opposing party, i.e. the Conservatives. Dicey writes that the Lords exercised their constitutional prerogative in the only way which was compatible with the democratic sentiment, i.e., by stepping in during a time of crisis, when the Commons failed to represent the will of the People, and putting a check on unwarranted fundamental constitutional change. The main detectable fault in the British system of representative government is that it allows a small majority in the Commons to bring about massive constitutional change. Moreover, according to Dicey, if that small majority does not represent the interests of the People, but rather those of a political party, the risk of subverting the constitution without a proportionate and actual

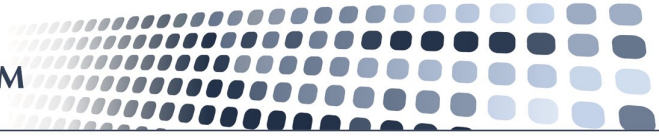




support to match such great power is all the more obvious. The Lords are thus entrusted with an indispensable constitutional safeguard, i.e., impelling a dissolution of Parliament so that the issue at hand may meet its fate once confronted with a direct appeal to the electors. However, Dicey is well aware of the fact that the House of Lords, as a non-elective body<sup>xvii</sup>, cannot appear to legitimately veto a Commons Bill without admitting it has done so because there is conclusive evidence to suggest that the House of Commons has misrepresented an existing national deliberation - in whatever form it may have come to be - with regard to a fundamental constitutional change. In other words, constitutional conventions which attribute discretionary prerogatives to non-elective bodies must only be exercised in times of crisis, when there is a noticeable gap between the interests of the electorate and those of their representatives, inasmuch as the People need another election to choose representatives who might actually embody their will regarding the fundamental issues at hand<sup>xviii</sup>.

We have now come to a truly crucial point in Dicey's reasoning: since the Lords are supposed to compel a dissolution of Parliament whenever a matter of fundamental constitutional importance is dealt with by a small majority without having been "tested" before the entire nation, it naturally follows that the People must be given the chance to confront that particular issue themselves. But how? After all, in a general election voters choose parties or, at the most, single representatives, but they are not asked to embrace any specific policy and, in fact, they often have to vote for a party that stands for a particular issue - amongst many others of course - which they do not approve of. Subsequently, compelling a dissolution is not enough, an addendum is needed in the form of a clause conditioning the passage of the Bill on the attainment of the formal assent of the nation. Dicey takes into account the possibility that an election following a dissolution might result in the pre-existing majority being re-appointed. Therefore, especially in his works opposing the second Home Rule Bill, he begins to distance himself from the notion that the People's consent on the passage of a specific Bill must necessarily be expressed through an election fought on the grounds of that very same Bill and called for after a dissolution caused by an unsolvable dispute concerning its passage. The main risk of asking the People to vote on a specific issue while, at the same time, making them choose their representatives is that what has been aptly defined as a "systematic mix up" may take place, because electors are

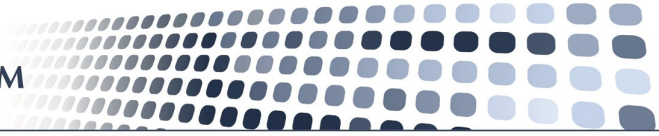




faced with the dilemma of prioritising a single policy over a party programme or personality, whose views they approve of<sup>XX</sup>. For this reason, the topic needs to be isolated and thus encompassed in a referendum independent of a concurrent election. In addition, the question must be posed in a way that underlines the constitutional nature of the issue<sup>XX</sup>, also because the turnout might increase in constituencies where there is a dominating party and hence a minority of voters who usually steer clear of elections in the certainty of defeat. According to Dicey, the isolation of the issue in a referendum produces other beneficial effects. Firstly, he believes that a Bill submitted to the People's assent is less susceptible to being changed in the final phases of its parliamentary debate and, therefore, political negotiations managed by parties are considerably limited. Secondly, group interests, or even class interests<sup>XXI</sup>, have no voice, since the whole of the nation is involved in the referendum and therefore the result is unbiased by party influences or otherwise.

Having resolved, albeit not definitely<sup>XXII</sup>, the question of "how" a referendum should be held, in his later works Dicey focuses almost exclusively on "why" it should be held, while bearing witness - and partly because of the fact that he bore witness - to historic developments in the fabric of the British constitution. He believes that, although the referendum itself is a breach of well-established parliamentary practice since it calls upon the assent of a fourth actor in addition to the Houses and the Monarch for a Bill to become an Act, it certainly derives from the democratic sentiment, i.e. the idea that the power to make laws is transferred from the People to their representatives, and the principles that embody it<sup>XXIII</sup>, which means that when there is an impasse, a return to the basic principles of the constitution is absolutely necessary to restore representative government to its former glory.

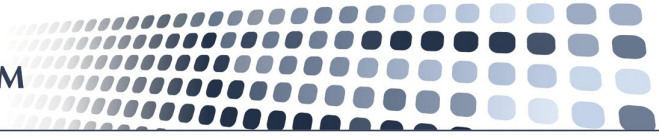
Regarding the second Home Rule Bill, Dicey argues that it is a measure implemented by a party - precisely, the Liberal party - arrogating to itself powers belonging to the State by disguising the constitutional revolution that would result from the passage of the Bill as a moderate reform, by refusing to openly debate it in Parliament and, ultimately, by exploiting its majority well beyond its actual political power in the constituencies to impose a radical transformation which, by evading any form of popular assent, should be considered profoundly undemocratic. The referendum's efficacy and



main purpose duly lies in establishing a check on party management of parliamentary government by thwarting the legislative omnipotence of the Commons majority, not to mention the fact that any Bill sanctioned by the People cannot be repealed as easily as an ordinary Act of Parliament, therefore limiting reactionary tendencies, while, at the same time, preventing hasty innovation.

By the time the third Home Rule Bill came around, Parliament had gone through several crucial transformations: class restraints no longer existed and, most importantly, the party system was fully functional. The independence of the members of Parliament lacked credibility and was further diminished by two new practice rules: the 1881 closure rule, which enabled the Commons to close the debate and move for a vote on the Bill under discussion<sup>xxiv</sup>, and the 1887 guillotine rules<sup>xxv</sup>, which allowed for a restriction of the time dedicated to the discussion of a particular Bill in the Commons by establishing dates and times at which specific provisions of the Bill had to be voted upon.

Up to this point, Dicey's belief in the effectiveness of the referendum is closely related to his faith in the validity of indirect democracy, since the former is a small price to pay to maintain political stability and efficiency. This is supported by the fact that law-making powers are in the hands of an intellectually educated minority rather than at the mercy of plebiscites, which would lead to spasmodic and irregular legislation<sup>xxvi</sup> and also to the strengthening of the bonds of accountability. Though a referendum could actually stand in the way of salutary reforms, it could also delay or prevent heavily opposed or far too hasty innovations and, for this reason, Dicey believes that the only place for direct democracy in the British Constitution is in referenda on controversial laws involving matters of fundamental constitutional importance that have already been passed by Parliament. The emphasis put on the nature of the laws susceptible to a referendum and on the level of completion the same law must have reached for a referendum to be proposed is a symptom of the fact that Dicey conceives the referendum as having a purely negative effect, thus making it a conservative instrument of liberal democracy<sup>xxvii</sup>. According to Dicey, the restriction of the use of referenda to exceptional circumstances is a means of securing a high turnout and also, most importantly, the only way to ensure that the referendum does not hinder progressive legislation by allowing the People to block necessary - albeit unpopular - reforms<sup>xxviii</sup>. However, the most interesting aspect related to the conservative nature of the referendum is the exclusion of legislative initiative from the

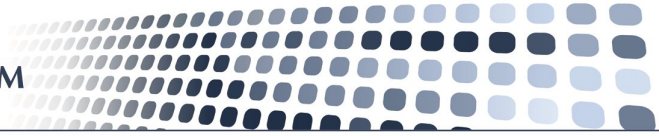


counts of direct democracy. Not only does Dicey fear that if the referendum were to be construed as a channel of legislative initiative, it may surely be employed as an instrument to enact plebiscitary legislation, but he is also aware that the quality of legislation depends upon the committee stage, during which highly regarded members of the legal profession are entrusted with making the clauses of the Bill workable in practice<sup>XXIX</sup>. Therefore, the referendum can only be made compatible with a representative government by ensuring that it operates as a (mere) national veto.

Dicey's support of the referendum intensified after one of the fundamental checks on party dictatorship was annihilated, i.e. the 1911 Parliament Act, which transformed the Lords' veto on legislation initiated by the Commons from absolute to suspensory. Therefore, the House of Lords could no longer limit its consent by referring the issue to the People's decision at the following election, since the House of Commons was enabled to pass legislation without the Lords' approval with a two-year delay. At this point, it is clear that the radicalisation of majority dictatorship in the Commons also radically influenced Dicey's theory on the referendum. The author is well-aware of the fact that a referendum needs a mechanism capable of guaranteeing both the impartiality and the effectiveness of its proposal. For this reason, neutralising the Lords' veto means risking the transformation of the very nature of the referendum, making it a channel through which plebiscitary legislation is carried out or making it obsolete, since the Commons can stand on its own even when dealing with massive constitutional change.

Fearful that the first consequence of the Parliament Act could be the passage of Home Rule, Dicey envisioned several different options to prevent such a change from taking place. In addition, even though his first proposal - a popular petition for a referendum - is based on a purely factual evaluation of public opinion as an indicator of soft power, it is inspired in that it requires a pre-legislative consultation of the People in order to assert the legitimacy of a constitutional reform and avoid a plebiscite. It may not be surprising that when Tony Blair put forward a proposal to hold referenda on devolution in Scotland and Wales, he insisted upon holding them before the pertinent legislation was introduced into Parliament.

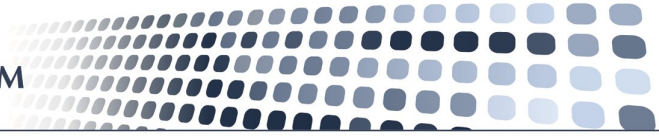
Dicey's second proposal for restraining party dictatorship is the royal prerogative to dissolve Parliament and withhold Royal Assent. There is not much to say about this solution because, despite the fact that in theory these powers can be legitimately exercised,



in practice a sovereign who actually did so would, in this day and age, be perceived as attempting to carry out a *coup d'état*, given that the constitutional conventions which attribute royal prerogatives were tacitly intended to limit and not favour royal power. In other words, an aggressive exercise of royal prerogatives would be contrary to the spirit - if not the letter - of the pertinent conventions.

The final option that Dicey suggests is also the most criticised, since it introduces the idea of unconstitutionality into the British system and hence seems to demolish the very core of his theory of Parliamentary sovereignty. Dicey challenges the idea that a constitutional reform passed without the consent of the People may be declared unconstitutional, even though earlier he acknowledged that judges could not rise to the function of interpreting legislation with regard to its consistency, accordance and coherence with the Constitution. He later goes even further by asserting that unconstitutionality does not need formal recognition, since the People are, in fact, the legal sovereign in that they cannot relinquish their sovereignty and allow Parliament to change the British system from dualist to monist, because they do not simply hold *de facto* sovereignty, but rather their sovereignty is also entrenched as an immutable rule against their will. However, in the light of this, the referendum would be emptied of its purpose, since there would be no need to test the legitimacy of a constitutional reform if there were a clear distinction between constitutionality and unconstitutionality in the British system, as Dicey seems to imply, given the fact that the People's approval could be verified in many other ways, such as the sleeker and more informal opinion polls.

Although Dicey is committed to the principle of popular sovereignty, he finds it hard to overcome the difficulties related to an uncodified constitution, since the mandatory nature of the referendum on constitutional issues can only be achieved through its codification in an Act of Parliament. In a somewhat paradoxical manner, he acknowledges that in order to maintain the British Constitution's flexibility, in the light of which the People enjoy *de facto* sovereignty by deciding issues and not just parties or representatives in elections, an entrenchment of the referendum in an Act of Parliament is needed, a small price to pay for a flexible constitution and the only check compatible with the United Kingdom's constitutional tradition. However, even excluding the possibility that such an Act could be repealed by a subsequent legislation by invoking political rationale, the only way for the People to enjoy any semblance of legal sovereignty would be if referenda on



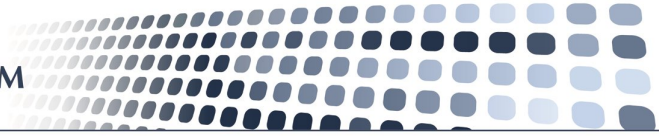
constitutional issues became unanimously legitimised to the point of transforming them into constitutional conventions, perhaps the sole uncodified part of the constitution which is truly almost immovable. Therefore, those who study the referendum must monitor constitutional practice to verify whether the referendum is or has the potential to become an indispensable, or at least highly resistant, part of the British Constitution.

## 2.1 The Devolution Referenda: A new way of discharging power

At this point, the cardinal features of Dicey's referendum can easily be pointed out, but the question remains whether any concrete evidence of these features can actually be found in practice. In order to establish the extent of Dicey's influence on British constitutional practice, the best example to take into consideration is the number of devolution referenda that have taken place from the 1970s until today at the sub-national level. The radically exceptional nature of referenda outside of local interests, even more so than in other European democracies<sup>xxx</sup>, makes it very difficult to measure the fruitfulness of referenda theories. Hence the lengthy devolution process, during which referenda have acquired and still play a primary role to this day, is the only *tertium comparationis* which shows real promise.

The devolution process started in the late 1960s, when the Labour party found itself trapped inside its own ideology, which refused the idea of a devolution of power to sub-national entities. This was based on the fear that a dispersion of power would occur, thus undermining the goals of the working class movement, such as the welfare state and employment, and the ever-growing electoral strength that the party had gained in Scotland and Wales, where there was a steady decentralist tradition dating back to the beginning of the Twentieth century<sup>xxxI</sup>.

In 1969, the Wilson Government set up a Royal Commission on the Constitution to resolve the conflict of interest which had arisen and assigned it extremely wide-ranging objectives, requiring it to "examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United

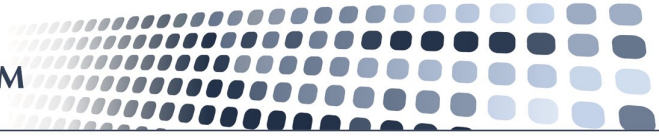


Kingdom [...] whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships”. The members of the Commission interpreted its requirements as mainly ascribable to the possibility of transferring responsibility for the exercise of government functions from the central government to new institutions to be established at a sub-national level. They drew conclusions that have massively impacted the current devolution arrangement and, indirectly, the structure of the devolution referenda. While the Commission’s report, published in 1973, is comprehensive in how it deals with the various aspects of devolution, its impact on the referenda has only been indirect, in that it identifies the issue at hand as being exclusively ascribable to the regions towards which a transfer of power is meant to take place and, therefore, deliberately avoids involving England in questions arising from devolution. This peculiarity has undoubtedly influenced the structure of the referendum.

In 1975, the devolution proposals for both Scotland and Wales were presented by the government<sup>xxxii</sup> as a single Bill, even though the shape of devolution that would eventually take place in each region was unique to that particular territory. Then, in December 1976, the Bill passed its second reading by forty-five votes. However, the Labour government led by Callaghan was well aware that it needed the Liberals’ support for the final passage of the Bill to be successful and that, at the same time, giving into their requests for proportional representation and revenue-raising powers would inevitably cause a mutiny amongst Labour backbenchers. The only way to keep the Labour dissidents at bay was to provide for a referendum on the devolution proposals, a concession that would allow the Welsh Labour opponents of devolution to test the asserted existence of a powerful popular demand for devolution both in Scotland and Wales, while, at the same time, lending their support to a Bill which would avert the threat of nationalism in Scotland. After all, if an English-dominated Parliament rejected devolution, the reaction on the nationalist front would be catastrophic and would fuel the demand for independence.

It was Leo Abse, MP for Pontypool and leader of the Welsh dissidents, who put forward an amendment proposing that the implementation of the Bill not be carried out unless referenda in Scotland and Wales were held. The peculiarity of the amendment was that it was introduced after the Bill had already been published and was approaching its committee stage, an absolute novelty for British constitutional practice. At the time, as witnessed by the 1976 edition of Erskine May, an amendment to a Bill which suggested that





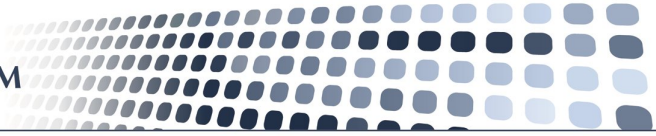
the provisions of that very Bill be subject to a referendum was seen as an authoritative modification of legislative procedure contrary to constitutional practice. Given its wide support<sup>xxxiii</sup>, the amendment was introduced by the government in committee on February 10<sup>th</sup>, 1977 and this infraction of constitutional procedure gave way to bitter objection from backbenchers.

In the midst of all this, many Labour MPs began to ponder whether the difficulties surrounding the Scotland and Wales Bill might be overcome by allowing the electorate to express its views on devolution at the coming general election. It was argued that if the electorate chose the Labour party once more, the government could propose a stronger Bill for devolution<sup>xxxiv</sup>. It was, if nothing else, the assertion of the early Diceyan theory, explained in the first part of this paper, according to which before a fundamental change in the Constitution could take place, the proposing government had to be tested, so to speak, by obtaining a clear-cut victory in two consecutive general elections fought on the constitutional issue that it wished to tackle.

However, a startling turn of events radically changed the parliamentary devolution process. The guillotine mechanism, which Dicey had fervently opposed on the grounds that it would secure a dictatorship for the party that formed the government, worked against the government's intention to cut the debate on the devolution Bill short, and the guillotine motion it put forward on February 22<sup>nd</sup>, 1977 was rejected by twenty-nine votes, with twenty-three abstentions from Labour MPs. As a result<sup>xxxv</sup>, devolution proposals underwent a radical, one might even say surgical, modification. Proposals for Scotland and Wales were divided into two separate Bills and, in November 1977, both of them were successfully guillotined after the second reading. At this stage, the referendum acquired a fundamental role, since many Labour MPs who were opposed to devolution saw it as an opportunity to support the devolution Bills in Parliament - thus avoiding a new general election<sup>xxxvi</sup> - while hoping for a defeat at the referendum stage. Therefore, as S.E. Finer marvellously put it, the referendum became "the Pontius Pilate of British politics" (Finer, 1975, p. 18).

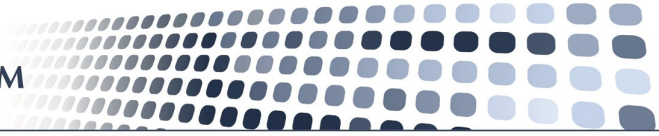
After the second reading, an amendment of crucial importance was introduced: the so-called "forty percent rule". George Cunningham, Labour MP for Islington South and Finsbury, argued that, since devolution would bring about irreversible constitutional





change, convincing evidence that those directly involved were in fact in favour of such a ground-breaking modification was absolutely necessary. The amendment was carried out on January 25<sup>th</sup>, 1978, with 166 MPs voting in favour and 151 against, and clause 82 (2) was introduced into the Scotland Bill<sup>xxxvii</sup>, providing that if the Secretary of State, with respect to the result of a referendum and all other circumstances, believed that the Act in question should not be implemented, he could lay the draft of an Order in Council providing for its repeal before Parliament. According to section 85(2) of the same Act, if fewer than forty percent of Scottish electors voted in favour of devolution, the aforementioned repeal order had to be laid before Parliament, with no discretionary evaluations attributed to the Secretary of State on the matter<sup>xxxviii</sup>. This specific section goes right to the core of issues relating to the legitimacy of the referendum in a nation that, as Benjamin Disraeli famously said “is not governed by logic but by Parliament”. The referendum is the only way of preventing a small majority from changing the constitution and whether this majority is comprised of members of Parliament - *rectius*, of a party majority - or electors is, for the most part, irrelevant. The Cunningham amendment was subtly conceived, inasmuch as it combined a rather high threshold in determining the minimum percentage of the electorate with necessarily unequivocal and considerable support for the measure. Even though the amendment was advisory and not mandatory, by allowing the Parliament to vote down the repeal order and pass the Act, it undoubtedly constituted a very powerful instrument of soft law. In fact, on the one hand, a decisive electoral majority in favour of devolution would force the Parliament to implement the Act and, on the other hand, a low turnout or a small majority would allow those who opposed devolution to present a strong case for the repeal of the Bill and put pressure on the government to reconsider the measure. Recalling Dicey’s conclusions on Parliamentary sovereignty underlined in the first paragraph of this paper it is clear that the aforementioned progressive convergence between external and internal limitations was, in this instance, fully operational.

One of the main problems related to the provision of a threshold for a referendum is of course that of identifying the electorate and, in this particular case, such a task proved very hard to achieve, since the electoral register was not accurate enough to determine once and for all the exact number of People entitled to vote, its main purpose being that of making sure that all those entitled to vote were included. In order to make sure that mere



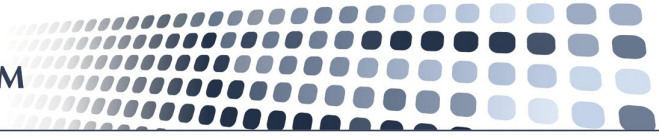
arithmetic did not get in the way of the effective workings of the newly designed referendum, the government made a list of those who were to be considered not legally entitled to vote<sup>XXXIX</sup>, amidst objections that the final discount was much less than required when considering every possible error in the electoral register<sup>XL</sup>. On March 1<sup>st</sup>, 1979 the referenda were held both in Scotland and Wales<sup>XLI</sup>. In Scotland, with a turnout of 62.9 percent, devolution narrowly avoided the forty percent “Yes” threshold and the results were as follows<sup>XLII</sup>:

PREFERENCE	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

In Wales, the results were much more discouraging and straightforward:

PREFERENCE	VOTES	PERCENTAGE OF THOSE VOTING
YES	243,048	20.2
NO	956,330	79.8

The failure of devolution proved to be the last straw for those whose faith in the Labour government had been oscillating for some time, and when the new Conservative government was elected in May 1979, one of its first orders of business was to repeal both Acts. It managed to do so in June 1979<sup>XLIII</sup> and, consistent with its ideology of a strong centralised government, both the Thatcher and the Major administrations accurately delayed or circumvented the issue. However, at the same time, Labour was becoming increasingly committed to devolution, conscious of the fact that, even though England had chosen the Conservatives, the Scottish and Welsh electorate had remained loyal<sup>XLIV</sup>.



In 1994, when Tony Blair became the leader of the Labour party, the devolution issue had already been resurrected, since the Scottish Constitutional Convention had been established in 1989, counting Labour and the Liberal Democrats amongst its participants, and it had laid out a detailed scheme for devolution<sup>XLV</sup> which was supported by the majority of Scottish public opinion. In June 1996, Blair proposed that referenda on devolution be held in Scotland and Wales before the pertinent legislation was introduced into Parliament, and in May 1997, after the Labour victory, a Referendum (Scotland and Wales) Act was passed, providing for referenda which were held in September 1997<sup>XLVI</sup> with the following results<sup>XLVII</sup>:

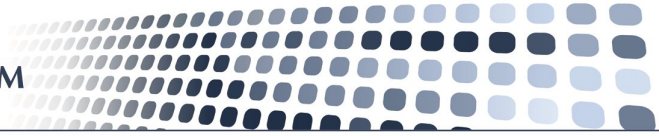
#### SCOTLAND

PREFERENCE <sup>XLVIII</sup>	VOTES	PERCENTAGE OF THOSE VOTING
YES	1,775,045	74.3
NO	614,000	25.7

#### WALES

PREFERENCE	VOTES	PERCENTAGE OF THOSE VOTING
YES	559,419	50.1
NO	552,698	49.9

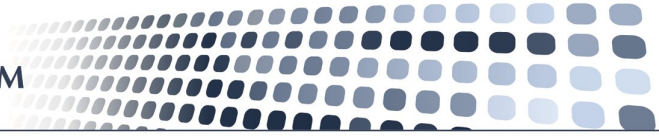
Tony Blair had insisted that the referenda be held exclusively in Scotland and Wales, thus avoiding the involvement of the English regions. His proposal was not a first, since the Royal Commission which had been established in the 1970s had reached the conclusion that devolution had nothing to do with England, but, in this case, it was ancillary to a further proposal, that of holding the referendum before the devolution



legislation was introduced into Parliament. A “Yes” majority on the issue of constitutional change rather than on its formal translation into a Bill, rendered exclusively by those directly involved, would prove to be the strongest endorsement capable of overcoming the strongholds of parliamentary procedure. There is no doubt that, from a strictly constitutional point of view, devolution affects the United Kingdom as a whole and not just the devolved areas, since it changes the distribution of powers across the nation’s territory and therefore the very essence of the British Constitution. Even though devolution has always been construed to avoid separatist threats, thus serving an even higher purpose than that of representative democracy, we can hardly ignore the fact that English voters were left out in favour of a small majority, the kind of majority that the referendum - according to the Diceyan theory emphasised in the first part of the paper - meant to avoid. In 1998 the government continued its bid for devolution by holding a referendum in Northern Ireland on whether to establish a partnership system of devolved government according to the terms set by the Belfast Agreement. On a turnout of eighty percent, seventy-one percent endorsed the agreement and twenty-nine percent rejected it.

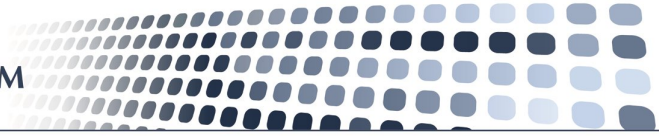
Other cases in which a transfer of power within the United Kingdom was subject to referendum include the 1998 referendum concerning the establishment of a Greater London Authority consisting of a directly elected mayor and an assembly, and the 2004 referendum concerning the establishment of a directly elected assembly for the North-East regions in accordance with the 2003 Regional Assemblies (Preparation) Act. The former was successful, with seventy-two percent of the votes in favour and twenty-eight against, but the turnout was very low, only reaching thirty-four percent. The latter was a defeat for the proponents, with only twenty-two percent of the votes in favour and seventy-eight percent against on a forty-eight percent turnout.

Most recently, on March 3<sup>rd</sup>, 2011, a referendum was held in Wales on the proposal to grant the National Assembly of Wales legislative powers in all twenty subject areas: with 517,132 votes in favour and 297,380 against - 63.49 versus 36.51 percent on a turnout of 35.2 percent - the result was a clear-cut victory for the proponents, even more so because of the emphasis that had been put on the necessity to consult the Welsh electorate before transferring the exercise of primary legislative powers to the Assembly, to the point of



making it a statutory provision. The 2006 Government of Wales Act is one of the three peculiar cases - at least to this day - in which a statute requires a referendum in order for one or more of its provisions to be implemented. The other two are the 1998 Northern Ireland Act, which requires any proposal concerning the separation of Northern Ireland from the United Kingdom to be put to a referendum<sup>XLIX</sup>, and the 2003 Regional Assemblies (Preparation) Act, which provides for a referendum every time a new directly elected regional assembly is to be established. All of the above-mentioned referenda have one single thing in common: the proposals to endorse for which they were held sought to achieve a transfer of powers from Westminster to a devolved body at a sub-national level. However, when considering various factors, such as the portion of electorate involved, the thresholds and other requirements for the referendum's success or even the nature of the proposed transfer of powers, it seems clear that Dicey's warning to limit the use of referenda to fundamental constitutional issues - as previously reported in this paper - has not been heeded.

To be fair, the lack of a codified constitution basically allows for a flexible use of the referendum. Dicey himself admits that the only way of preserving the British constitution's flexibility is to leave it non-codified, but he concedes that the People need to be put in a position to take advantage of that same flexibility by providing them with a safeguard, i.e. the codification of rules concerning the "if", "when" and "how" of a referendum. Dicey recognises that the elasticity of the British Constitution combined with the conservative nature of the referendum creates a paradox. It is a fact that the government is at leisure to hold or not to hold a referendum, but, if this is the case, how can the latter be a check on the former? In other words, how can a constitutional safeguard, which is conceived to test a legislature's legitimacy amongst its electors by allowing them to limit, if necessary, the decisions made at Westminster, operate effectively, provided that the mechanism which sets the check in motion is at the discretion of those who are meant to be checked and not of those who perform the check? One of the main risks is that the referendum may be led astray from its original purpose and produce the opposite effect, i.e. the enactment of plebiscitary legislation to increase the government's strength and diminish that of their political opponents. The circumstances under which the 1970s devolution referenda were held clearly illustrate this: the government needed to get the devolution legislation through Parliament, but in order to do so it needed to win over

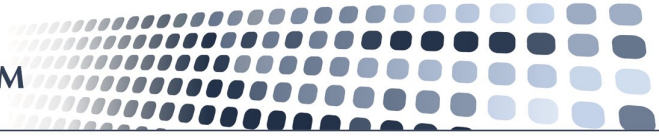


the backbenchers who vehemently opposed the measure. The referenda were thus introduced to keep the government in office by keeping backbenchers of the same party from voting against devolution.

However, it has been argued (Bogdanor, 2009, pp. 190-191) that the referenda which have been held so far have established a precedent no government can easily avoid. The devolution referenda, along with the EC referendum, dealt with issues relating to the extent of Westminster's powers and hence with the principle of Parliamentary sovereignty. It is clear that devolution was an entirely new constitutional arrangement which would interfere with more than merit, since it involved a fundamental alteration in the procedure by which laws were constructed. This is a point Dicey strongly emphasises, when, in accordance with the liberal theory of limited government, he argues that Parliament's law-making powers are the result of a direct transfer from the People, i.e. the political sovereign, and, therefore, cannot be transferred themselves<sup>1</sup>. However, the 1997 referendum held in Wales, the 1998 London referendum and the 2004 North-East referendum mentioned nothing about a transfer of legislative powers, as they were merely intended to create a new tier in the administrative area.

Another problem which makes it difficult to imagine how a constitutional convention regarding the "if" of a referendum is established is actually a question of "when". The interchangeable nature of the pre-legislative and post-legislative phase as the moment in which a Bill is put to referendum creates two radically different situations from a strictly constitutional point of view. A referendum held in the post-legislative phase, such as the 1970s devolution referenda, not only has a merely conservative nature, but, most of all, intervenes on an already perfected Bill, and whether or not it concerns a constitutional issue becomes irrelevant, since there is no option to investigate the merits of the proposed legislation. On the other hand, a referendum held in the pre-legislative phase is by definition a referendum on merit and therefore does not concern provisions but rather issues in their substance. In the latter case, the limitation of referenda to fundamental constitutional issues makes sense, since it would be profoundly irrational for any government to go to the trouble of proposing a pre-legislative referendum, with all the political risks it entails, especially when collective responsibility is concerned, in order to consult the electorate on marginal issues or even issues which could be resolved by



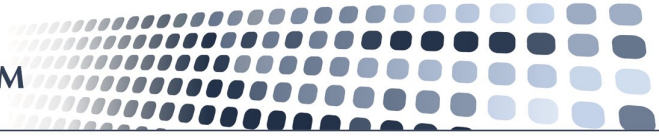


employing ordinary parliamentary procedures, albeit with more obstacles along the way. However, the question of “when” to hold a referendum is completely inadequate to provide a satisfying solution regarding the use of referenda for the purpose of enacting plebiscitary legislation. This particular problem is strictly connected with the difficulty of identifying a clear separation between constitutional and non-constitutional issues. While we might venture to assert that constitutional issues are similar in nature within most nations, where they usually concern questions relating to sovereignty and the division of powers as well as territorial matters and fundamental rights, there is no way of preventing a government from deciding what should be constitutional and what should not, given that the British courts are not enabled, as are most courts in other countries, to identify the substantial nature of a particular measure in spite of its formal designation.

Perhaps the only effective way of providing for a referendum on constitutional issues lies not in merit but rather in procedure. If the Parliament itself declared a referendum mandatory, the principle of Parliamentary sovereignty would undoubtedly suffer no particular fault, providing at the same time the electorate with a legally binding constitutional instrument, albeit through an ordinary legislative procedure. In fact, a precedent has already been set in British constitutional practice. In February 1977, when the Callaghan government added clause 40, the referendum clause, to the Scotland and Wales Bill, it was decided that the devolution referenda would be mandatory<sup>LI</sup>, but that option did not last long since the government soon changed its view and turned the referendum into an advisory one.

If a referendum were to become mandatory, the issue of thresholds would certainly be unavoidable. Even though at the 1998 Greater London referendum the turnout was thirty-four percent, the government interpreted the seventy-two percent in favour of the proposed measure as a sufficient indication that it should be implemented, on the grounds that a simple majority was required and, in this case, the numbers in favour were high. However, a simple majority may not be the best solution for a referendum concerning a fundamental constitutional issue, since it would create the same kind of inequity that Dicey condemns when pointing out that a small majority in the Commons could change the constitution. If that small majority were a portion of the electorate instead of a group of MPs, it would make very little difference and it could actually be argued that in this case no

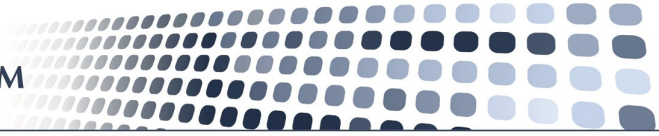




one may be held accountable. A government that manages to bring about a constitutional reform without the People's consent may be delegitimised once the successive general election is held, whereas a small majority amongst the People is a fact that is not sanctioned or opposed by any legal rule. Perhaps it is not too far-gone to suggest that a government which implements a measure approved by a marginal portion of the electorate may be held collectively responsible, but, once again, this is a solution which can be made effective through practice rather than theory.

As regards the mandatory nature of the referendum, a question that must be resolved prior to a debate on the opportunity of introducing a certain type of threshold, it has been suggested (Bogdanor, 2009, pp. 194-196) that the best way to entrench the referendum as a requirement for the passage of fundamental measures is to redefine the validity of legislation on a particular topic. This theory has been construed for the purpose of making the devolved bodies immune to the absolute discretion that a legislature has in preserving or repealing the laws enacted by its predecessors and it proposes that a referendum be made the condition for the Royal Assent given to a Bill, the aim of which is to abolish the devolved bodies.

This kind of mechanism already has a precedent which has proven very solid: the 1911 and 1949 Parliament Acts. By establishing that Bills, at first only those of a financial nature and then any type, may be passed without the consent of the House of Lords provided that the House of Commons expresses its approval in two subsequent sessions, these Acts redesign the rules concerning the validity of legislation, a hurdle which is difficult to overcome due to the fact that a successive legislature cannot redesign the rule in question without actually implementing it. In the case of devolution, for example, a decision to repeal the mandatory referendum for the abolishment of the devolved bodies would have to be submitted to mandatory referendum in order for it to be implemented. However, we cannot help but notice that the success of this device depends upon the willingness of a legislature to entrench the referendum to its own detriment. In fact, judging by the referenda which have been held so far at the national or regional level, devolution referenda in particular, they appear to be the main instruments of parliamentary appeasement, allowing governments to saw up fractures within their parties or contain backbencher opposition, rather than being considered a necessary step towards changing the constitution. The reason for this does not only attest to the resilience of the doctrine of

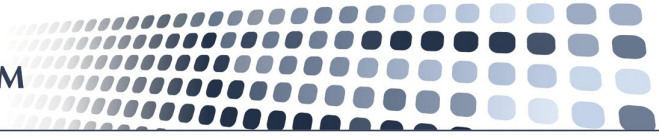


Parliamentary sovereignty, but also lies in the fate of European history. Until the 1970s, the referendum was considered the main political instrument employed by totalitarian governments to monitor mass consensus and, therefore, it appeared not only alien to the British legal system, but also profoundly unconstitutional, since it had proven to be the ideal instrument to substantially bypass the basic principles of democracy while formally retaining a democratic façade. The first referenda to be held in the United Kingdom were largely a matter of reinforcing support rather than actually weighing the mood of the voters, to defeat a certain policy, whether it concerned the European Community or devolution, and it is not surprising that this has been the case until the end of the Twentieth century.

Be that as it may, the way in which referenda have been proposed and held over the years is very significant and must be carefully considered. The proposed devolution for Scotland and Wales in the 1970s was put forward by the Labour government with a meagre 39% of voter support. The referendum on EU membership was held while disregarding all constitutional objections. The 1990s settlements concerning Northern Ireland were explicitly committed to referenda by the Conservative government led by John Major, irrespective of the actual issue brought before the People of the region. These are just a few examples of the singular use that has been made of the referendum which, far from dealing with fundamental constitutional issues, has become a very convenient instrument for Commons minorities or even the Cabinet in order to propose legislation which otherwise might have had difficulty getting past mere informalities.

Nowadays, the stigma which has eerily surrounded the notion of referendum has seemingly vanished, but, nevertheless, this undoubtedly constitutional instrument is only capable of imposing a mere moral obligation upon Parliament, provided of course that Parliament decides to exercise its supreme power by consulting the People and that the result of the referendum is fairly clear-cut.

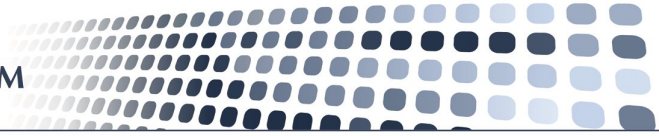
The absence of a written constitution contributes to the uncertainty encompassed in discussions concerning “if” and “when” a referendum should be called. It is clearly perceptible that governments usually resort to popular consultations where constitutional issues are affected, but in the United Kingdom the constitutional nature of a particular



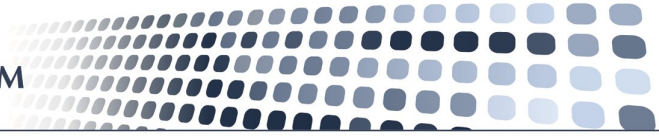
issue is discretionary, since it is up to Parliament to make the distinction, if it wishes to do so.

However, it is still possible to identify an established practice which may not easily be disposed of: so far the referenda held in the United Kingdom have concerned a proposed transfer of powers from the Parliament to another body, either in Europe or in the devolved territories. Therefore, it could be argued that one of the traditional themes of liberal constitutionalism, the idea of transferring power from the People to their representatives for specific purposes which the latter cannot divert from, has somehow been channelled into the practice of consulting the People before a transfer of powers which they previously entrusted solely to Parliament takes place, thereby suggesting that the People retain a small measure of sovereignty which consists in deciding if some of the powers which they transferred to the Parliament in the first place should be exercised by another body or not. At this point, Dicey's theory seems to have come full circle: setting aside all discussions on the nature of the referendum, it is clear that constitutional practice has set a pattern in the light of which the People have managed to preserve their political sovereignty, thus proving that the flexibility derived from the very absence of a written constitution has achieved a relatively favourable effect towards implementing direct democracy, as previously highlighted in the first part of this paper. The true question is whether there is any indication that they may be on their way to acquiring legal sovereignty or whether the dogma of Parliamentary sovereignty is determined to remain untainted.

In an article which recently<sup>LII</sup> appeared in "The Guardian", the question of the Scottish devolution referendum to end all devolution referenda was clearly laid out for the benefit of UK-wide public opinion. The leading political figures in Scottish politics are preparing for a referendum on devolution which, judging by the current state of affairs, may be held as soon as 2014. It will undoubtedly involve the most revolutionary development since the 1997 referenda, as the questions brought into play in the most recent debates have had to do with the degree of independence that Scotland can achieve without actual secession, and therefore with the very concept of sovereignty. The issue at the heart of the widespread call for a devolution referendum is welfare: if Scotland controlled about 90% of its taxes, the process of devolution would reach its maximum<sup>LIII</sup>, since the area would depend on Westminster for little more than foreign policy. However,

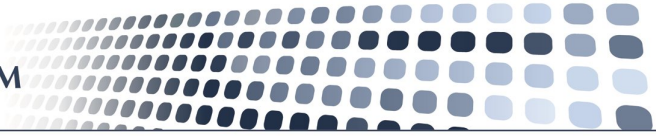


it seems that there is some confusion within Holyrood as to the structure of the proposed referendum. Whereas important figures in the Scottish National party - currently the majority party in the Assembly - have taken into consideration the idea of proposing two separate questions, one for a stronger devolution and the other for independence, key members of the Labour party have noted that independence has nothing to do with devolution, the purpose of which is to make sure that Scotland remains in the United Kingdom. Devolution is, in fact, a process which has always been propelled by Labour and, therefore, it is hard to imagine that the referendum will be successful if the current majority does not abandon the independence question. While the Scottish Liberal Democrats are presently heading a Home Rule Commission aimed at updating proposals for greater devolution in Scotland and, at the same time, lending continuous support to the idea of a federal United Kingdom as the final step of the devolution process, a Bill approaching its Committee Stage in the House of Lords<sup>LIV</sup> makes provisions for an increase in tax control by the Scottish Assembly. It is unclear whether such an adjustment is enough to prevent a referendum, but what is certain is that in constitutional practice no major changes involving a new dent in Parliament's sovereignty can take place without a referendum. As far as devolution is concerned, it is far from obvious that the preferred means to introduce - or at least affirm - constitutional change is that of direct democracy and even less obvious that such a tendency only increases as the issues at hand become more controversial. Perhaps the extent to which referenda have been used in the devolution process is a worrisome sign on the one hand of the shortcomings in the legal structures holding together the devolution process as a whole and on the other of the inability to put forward constitutional changes within the traditional political system, or it may simply represent a defining feature of the new constitutional order that devolution has established. If this is the case, there is no reason to believe that if and when fundamental questions of sovereignty are taken into consideration on the political scene, the referendum will not be the decisive instrument to resolve the matter once and for all.



## 2.2 Dicey's Influence in 21st Century Britain

It is no secret that the referendum as originally theorised by Dicey has not made it to our time. The principle of Parliamentary sovereignty has proved even stronger in practice than in theory, and the introduction of the referendum at a national or regional level<sup>LV</sup> was due more to the necessity of overcoming harsh political conflicts within Parliament than to answering to a call for the entrenchment of the principle of popular sovereignty. However, the referenda which have been held so far seem to have been blessed with a life of their own, which has transcended the intentions of their respective proponents, all in all creating solid precedents which have helped scholars to identify a semi-constant pattern of issues on which referenda are expected to be held. Nowadays, referenda may not be legally confined to fundamental constitutional issues as Dicey intended, but there is certainly a tendency in constitutional practice which suggests that such a restriction may be actually taking place. In some cases, referenda have been entrenched in Acts of Parliament, thus acquiring the function of a national veto set to hinder ill-formed or unwarranted legislative reforms, as Dicey himself pointed out, or go even further by suggesting that the People may use it to channel their constituent power. Dicey sought desperately to make the referendum untouchable and this is probably the reason why his theory was not accepted in full, but rather found its way through the cracks of constitutional practice with regard to specific, but nevertheless fundamental, aspects. The vacuum left by the Lords' check, the persistence of an uncodified constitution, the absence of a Court qualified to protect popular sovereignty with declarations of unconstitutionality... these are all issues that Dicey struggled with and tried to overcome. However, after the 1911 Parliament Act he reached a point where he could no longer support his conclusions if not by making them appear self-evident and later scholars punished him for it by delegitimising his entire theory on the referendum. However, it would be extremely unfair to limit Dicey's legacy to Parliamentary sovereignty, given that he strenuously supported the referendum for the better part of his life. Therefore, we can undoubtedly conclude that his theory was not so much followed as it was demonstrated by practice. It is a theory which finds it difficult to overcome the hurdles connected with the discretionary nature - for the government, of course - of the referendum, but, at the same



time, allows for a systematic reorganisation of constitutional practice, giving it the coherence necessary to perhaps bring about the establishment of a constitutional convention in the not too distant future. A constitutional convention would be the only way of transforming the referendum from a weapon of political appeasement into a check on the conduct of parliamentary affairs in the name of the principle of popular sovereignty, a principle which is in fact implied by Parliamentary sovereignty - the result of a transfer of powers from the political sovereign - and therefore cannot weaken it.

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<sup>I</sup> Dicey writes that "English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament" (Dicey, 1915, Part I: The Sovereignty of Parliament).

<sup>II</sup> In 1694 an Act was passed whereby the term of a legislature was limited to a maximum of three years. However, since a general election could not be deferred beyond 1717 and King George I, supported by the Ministry, feared that the forthcoming election would reignite the Jacobite cause, the Parliament was induced to pass a law under which the legal term of a legislature was extended from three to seven years.

<sup>III</sup> Dicey supports the view of the thirty-one peers who protested against the Bill by pointing out that "it is agreed, that the House of Commons must be chosen by the People, and when so chosen, they are truly the representatives of the People, which they cannot be so properly said to be, when continued for a longer time than that for which they were chosen; for after that time they are chosen by the Parliament, and not the People, who are thereby deprived of the only remedy which they have against those, who either do not understand, or through corruption, do willfully betray the trust reposed in them; which remedy is, to choose better men in their places" (Dicey, 1915, Part I: The Sovereignty of Parliament).

<sup>IV</sup> Dicey believes that the so-called "public rights" can be subject to absolute power much more easily than "private rights", which are entirely ascribable to the individual and do not concern the exercise of public powers.

<sup>V</sup> Such Acts cover a very wide range of topics, from dissenting to accepting municipal offices without the necessary qualifications.

<sup>VI</sup> Dicey refers to such enactments as "the legalisation of illegality".

<sup>VII</sup> John Austin (1790 - 1859) is a legal theorist who embraced positivism and, amongst other things, dedicated some of his works to the concept of sovereignty.

<sup>VIII</sup> Austin writes that "the members of the Commons' House are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*. It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the Commons empower their representatives in parliament to relinquish their share in the sovereignty to the King and the Lords" (John Austin, 1879).

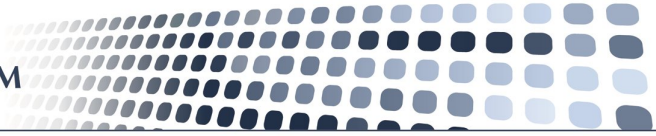
<sup>IX</sup> It is of fundamental significance to repeat that the strictly legal validity of parliamentary legislation, whatever its nature, remains unstained, despite the existence of limits imposed upon the legislature.

<sup>X</sup> Dicey quotes (Dicey, 1915, Part I: The Sovereignty of Parliament) a passage from Hume, who in his *Essays* writes that "as force is always on the side of the governed, the governors have nothing to support them but opinion".

<sup>XI</sup> Dicey notes that enlightened sovereigns knew that in order to preserve their throne they could not cross the line where external and internal limitations no longer converged.

<sup>XII</sup> Dicey quotes (Dicey, 1915, Part I: The Sovereignty of Parliament) Edmund Burke, who writes that "the House of Commons was supposed originally to be no part of the standing government of this country. It was





considered as a control, issuing immediately from the People [...] It was hoped that, being of a middle nature between subject and government, they would feel with a more tender and nearer interest everything that concerned the People, than the other remoter and more permanent parts of legislature”.

XIII Simply put, Home Rule is a devolution of powers from Parliament to a newly appointed body. In the case of Northern Ireland, it was the result of a movement, the Home Rule League, replaced in 1882 by the Irish Parliamentary Party, that put pressure on the government to create an Irish Parliament.

XIV In *The Referendum and its Critics* (1910) Dicey writes that the Great Reform Act “was passed in 1832 to the cry of ‘The Bill, the whole Bill, and nothing but the Bill’ [...] the peculiar course of events placed the electors in a position very like that occupied by the People of Switzerland when asked under a Referendum to accept or reject constitutional change which has been formally passed by the Federal Legislature. There have been one or two other crises in which a general election has been a rough kind of Referendum”.

XV In *The English Constitution* (1867) Walter Bagehot writes: “Just as the knowledge that his men can strike makes a master yield in order that they may not strike, so the knowledge that their House could be swamped at the will of the king - at the will of the People - made the Lords yield to the People”.

XVI “At the general election of 1868 the question of the Disestablishment of the Irish Church had been brought most distinctly before the constituencies, and a great majority of the members returned to the House of Commons were pledged to support such a measure. When in 1869 the Irish Church Bill came before the House of Lords, Lord Cairns, in urging the House not to reject a measure of which he personally disapproved, said: ‘There are questions which arise now and again - rarely but sometimes - as to which the country is so much on the alert, is so nervously anxious and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature in this country what it requires; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do so otherwise than the country desires’ (Sir William R. Anson, 1909).

XVII The implications of Dicey’s theory with regard to the reformed House of Lords shall be discussed further on.

XVIII In *Introduction to the Study of the Law of the Constitution* Dicey writes: “How, it may be said, is the ‘point’ to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? [...] This reply is, that the point at which the Lords must yield or the crowd intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation”.

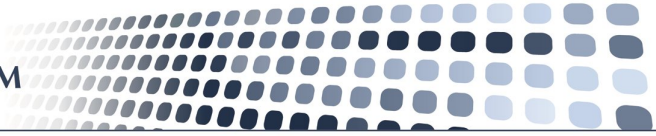
XIX In *The Paralysis of the Constitution*, *Contemporary Review*, 88 (September 1905), p. 311, Dicey writes: “(the) Unionist government has ceased to represent the belief in free trade which to all appearance commands the assent of the nation; the Opposition does not represent the national and unshaken faith in the maintenance of the Union. Both government and opposition seem inclined to use their party machine to crush out of existence that small but vigorous body of Free Trade Unionists who share the beliefs that constitute the political creed of the nation”.

XX Dicey suggests that the Unionists should push for a referendum formulated in the following terms: “The one course of safety is to take care that at the next general election the country has laid before it for determination a clear and unmistakable issue. The question for every elector to answer must be reducible to the form Aye or No; will you, or will you not, repeal the Union and establish an Irish Executive and an Irish Parliament in Dublin? If the question be so raised Unionists have no reason to fear an answer. The policy of Unionism has always relied on an appeal to the nation. The one desire of Unionists has always been to fight their opponents on the clear unmistakable issue of Home Rule. The policy of Separatists has been to keep Home Rule in the background whilst making its meaning indefinite, and to mix up all the multifarious issues raised by the Newcastle programme, as well as many others, with the one essential question whether we should or should not repeal or modify the Act of Union” (Dicey, 1893, p. 106).

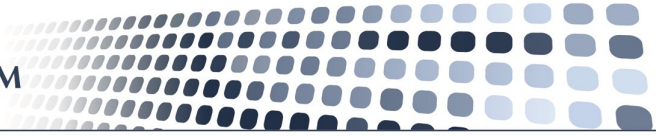
XXI The House of Lords was perceived as the stronghold of aristocracy and the fact that it did not exercise the power of veto when the Conservatives were in office as much as they did when the Liberals headed the government posed some serious threats to its credibility as a body committed to protecting the rights of the nation as a whole against unwarranted fundamental changes in the constitution.

XXII Dicey’s persistent uncertainty regarding the method via which to hold a referendum has been a source of much criticism from scholars who believe that his support of the referendum is exclusively related to his opposition to Home Rule Bills.





- xxiii Dicey seems to include amongst such principles that of the nation's assent to the government's policies, although he does not give a clear justification of why it is so. Such designation is probably best explained by reading Dicey's argument against the 1911 Parliament Act, which shall be taken into consideration further on.
- xxiv The rule was meant to place a check on filibustering, i.e. obstructive speaking by members opposed to the Bill in question.
- xxv These rules can also be found under the designation "closure by instalments" or "closure by compartment".
- xxvi In *The Law of the Constitution*, p. CXI, Dicey writes: "[to substitute] the authority of the electorate for the authority of the House of Commons and the House of Lords [would be] to transfer the government from the rule of intelligence to the rule of ignorance".
- xxvii Dicey's view on the referendum as a conservative instrument places him in the Liberal tradition of limited government which includes John Locke and Friedrich Hayek, but it has one fundamental difference, which can be found in the theories of the radical American populists, in that it identifies in the People the main check on elected politicians rather than a particular élite.
- xxviii A pertinent example of this is the issue of women's vote, on which Dicey himself had mixed feelings.
- xxix J. St. Loe Strachey, a personal friend to Dicey, writes that "under the initiative you do not get the committee stage for legislation. The stage under which trained advocates, critics, and lawyers debate the Clauses of the bill and render it workable in practice as well as sound in theory" (Strachey, 1924).
- xxx To date only Germany has not employed the referendum at a national level.
- xxxi After its introduction into the political scene, the Labour Party very soon began to support the idea that a centralisation of party power would favour the achievement of the class policies it pursued, but, nevertheless, in its earlier years it had been strongly committed to Scottish and Welsh Home Rule.
- xxxii In November 1975 the government published the White Paper "Our Changing Democracy: Devolution to Scotland and Wales" (Cmnd. 6348).
- xxxiii By the time it was introduced, the amendment had already received eighty signatures.
- xxxiv John Mackintosh, MP for Berwick and East Lothian, believed that the Bill "should be thrown out and the electorate should make their views known at a General Election, so that the government can come back with a better bill at a later stage" (cited in Bogdanor, 1999, p. 182).
- xxxv The Liberals had a rather advanced plan for devolution, which included proportional representation and revenue raising powers, but they had to give up their requests in order to give devolution a chance. However, the separation of the Bill for the two regions was a result of negotiations with the Liberals.
- xxxvi In November 1977, Enoch Powell, backbench opponent of devolution and an Ulster Unionist, stated that it was "an event without precedent in the long history of Parliament... that members openly and publicly declaring themselves opposed to the legislation and bringing forward in debate what seemed to them cogent reasons why it must prove disastrous, voted nevertheless for the legislation and for a guillotine, with the express intention that after the minimum of debate the Bill should be submitted to a referendum of the electorate, in which they would hope and strive to secure its rejection" (cited in Bogdanor, 1999, p. 185).
- xxxvii "If it appears to the Secretary of State, having regard to the answers given in a referendum and all other circumstances, that this Act should not be brought into effect, he may lay before Parliament the draft of an Order in Council providing for its repeal". All of the 1978 debates can be found at [www.theyworkforyou.com/debates](http://www.theyworkforyou.com/debates).
- xxxviii "If it appears to the Secretary of State that less than 40 percent of the persons entitled to vote in the referendum have voted "yes"... he shall lay before Parliament the draft of an Order in Council for the repeal of this Act". The use of the term "appears" seems to be more a question of symmetry with the previous Clause 82(2).
- xxxix The discount consisted of four categories: those on the electoral register who had not yet reached the age of eighteen by March 1<sup>st</sup>, 1979; those who had died between October 1978 and March 1979; students and student nurses away from home, registered both at home and at their college or hospital address (in Scotland); prisoners legally disbarred from voting but registered at their home address. The total discount amounted to 90,002 votes.
- xl Examples of this included hospital patients, the severely disabled, those nursed at home, etc.
- xli Similar provisions to that of the Scotland Act were added to the Wales Act before the referendum.
- xlII The following figures are reported in Bogdanor, 1999, p. 190.
- xlIII The repeal of the Wales Act passed 191 votes to 8, that of the Scotland Act 301 to 206.



XLIV The back-bone of Thatcherism was to avoid the dispersal of power in favour of a more uniform system of government and, during the years of the Conservative government, the dual polity, which had allowed Scotland and Wales to enjoy a considerable degree of autonomy at the local government level. After the highly unpopular poll tax was introduced in Scotland in 1989, a year earlier than the other regions, devolution was brought up again from its warm ashes, since it now seemed the only way to prevent further centralisation.

XLV The Convention produced two reports: "Towards Scotland's Parliament" (1990) and "Scotland's Parliament, Scotland's Right" (1995).

XLVI There was a week's gap between the two referenda, especially designed to encourage the undecided Welsh voters, whose support of devolution had faltered in the past, to approve the measure. Therefore, the Scottish referendum was held on September 11<sup>th</sup>, 1997 and the Welsh referendum followed on September 18<sup>th</sup>, 1997.

XLVII The following figures are reported in Bogdanor, 1999, p. 199.

XLVIII The Scottish referendum was more complex than the other one, since there were two questions posed at the polls, aptly construed in affirmative sentences: "I agree that there should be a Scottish Parliament" or "I do not agree that there should be a Scottish Parliament"; "I agree that a Scottish Parliament should have tax-varying powers" or "I do not agree that a Scottish Parliament should have tax-varying powers". The latter question was approved with 63.5 percent of votes in favour (while thirty-six percent voted against), but had the forty percent rule been kept in place, it would not have made it, since only 38.1 percent of the electorate voted for tax-varying powers.

XLIX This provision is probably inspired by a precedent set in history. In 1973, the electorate in Northern Ireland was asked to express a preference on whether or not Northern Ireland should remain part of the United Kingdom. On a sixty-five percent turnout, around sixty-five percent of the votes were in favour of remaining part of the United Kingdom.

<sup>L</sup> In his *Second Treatise of Government* John Locke wrote that "the Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others".

<sup>LI</sup> "If the decisions in the referendum are that no effect is to be given to the provisions of the Act, this Act shall not take effect" (House of Commons Debates, Vol. 926, cols. 275 ff, February 15<sup>th</sup>, 1977). In case of a favourable result, the government would have been under legal obligation to put forward a commencement order for the establishment of the devolved bodies.

<sup>LII</sup> Severin Carrell, *Scottish devolution: what questions will future referendum ask voters?*, "The Guardian", Wednesday November 23<sup>rd</sup>, 2011.

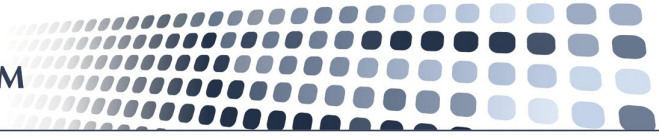
<sup>LIII</sup> It comes as no surprise that this option has been called "devolution max" or "devolution plus".

<sup>LIV</sup> Scotland Bill 2010-11 (HL Bill 79).

<sup>LV</sup> Local referenda are quite different both in scope and operation, posing a different set of problems compared with other kinds of referenda.

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