# Legislating for Referendums in the United Kingdom

## Introduction

This paper argues that new primary legislation is required to clarify the role of referendums in the United Kingdom. My argument falls into three parts. The first outlines what the law is concerning the use of referendums in the United Kingdom. The second explains what changes are necessary, and why those changes should be made in law. I will argue that there are three types of guidance that the law should offer about referendums: guidance about their outcomes, procedural guidance about how referendums should be conducted, and content guidance about what sorts of questions should be put to a referendum in the first place. The third part of the paper concedes that new legislation will not address all of the problems with the uses of referendums in the United Kingdom. Nevertheless, changes in the law are necessary given the capacity of referendums to undermine representative democracy.

## The Political Parties, Elections, and Referendums Act 2000

The use of referendums in the United Kingdom is primarily governed by the Political Parties, Elections and Referendums Act 2000 (PPERA). The PPERA is administrative rather than substantive Legislation, the PPERA says very little about the role of referendums in the United Kingdom.[1] The most guidance comes from s 101 which says that enabling legislation is required for the use of referendums in the United Kingdom.[2] The PPERA is open-ended, however, as to how enabling legislation works. Contrast, for instance, the legislation for the Alternative Vote referendum in 2011 with that of the referendum on the United Kingdom's membership of the European Union in 2016. In the case of the Alternative Vote referendum, s 8 of the Parliamentary Constituencies and Voting Act 2011 outlined two possible paths for the legislation depending on the results of the popular vote. [3] If there was a majority of votes in the

[1] Beyond the PPERA, there are two other important sources of guidance with respect to the use of referendums in the United Kingdom. Some substantive guidance about the use of referendums can be found in the Acts that make up the devolution settlement: the Scotland Act 2016, Wales Act 2017, and the Northern Ireland Act 1998. In these Acts, referendums are used as methods of entrenchment to underline the permanence of the devolution settlement. The existence of the Scottish and Welsh Parliaments is not to be abolished but for the consent of people voting in a referendum. The Acts provide no further procedural guidance, however, about how these referendums are to work or how these referendums are to be initiated. The Northern Ireland Act is slightly different in that s 1(2) clarifies if there is a majority vote in a referendum to no longer be a part of the United Kingdom, then there is a duty on the Secretary of State to bring forward proposals for a change in the relationship. This is all to say: the devolution settlement identifies some instances where referendums are legally required but does not give procedural guidance about how they should be conducted guidance. It also does not provide outcome guidance in the Scotland Act or Wales Act. Finally, there was one further way in which the law previously provided some content guidance about what sorts of questions must be put to a referendum. The European Union Act 2011 used to require a referendum on any future European integration; however, this has now been repealed by the European Union Withdrawal Act 2018.

[2] 'Referendum" means a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision.' PPERA s 101 (2) a

[3] '(1)The Minister must make an order bringing into force section 9, Schedule 10 and Part 1 of Schedule 12 ("the alternative vote provisions") if—(a)more votes are cast in the referendum in favour of the answer "Yes" than in favour of the answer "No", and (b)the draft of an Order in Council laid before Parliament under subsection (5A) of section 3 of the Parliamentary Constituencies Act 1986 (substituted by section 10(6) below has been submitted to Her Majesty in Council under section 4 of that Act. (2) If more votes are not cast in the referendum in favour

referendum for the proposed changes, then the Secretary of State was to introduce an order bringing the changes in legislation into force. If there was a majority of votes against the changes, then the Secretary of State was to bring an order repealing it. The enabling legislation for the 2016 Brexit referendum, by contrast (the European Union Referendum Act 2015), made no such provisions for the outcome of the vote.[4] The differences between the enabling legislation for these two referendums are instructive. The Parliamentary Constituencies and Voting Act 2011 demonstrates that the question of how a referendum outcome interacts with existing law is not an unsolvable problem, but rather one that has only sometimes been answered in enabling legislation.

Three are three types of substantive guidance that the PPERA does not offer about the use of referendums in the United Kingdom, and these types of guidance are connected. First, there is no guidance about the outcome of the vote. As seen above in contrasting the Alternative Vote and Brexit referendums, the question of the legal implications of a referendum are currently determined on a case-by-case basis. Second, and relatedly, the law does not offer guidance about the referendum process itself. It does not clarify, in particular, whether a vote in a referendum is beginning or concluding a process of constitutional change. This question of whether referendums are pre or post-legislative is one of the most significant in the academic literature,[5] and one that other jurisdictions around the world have paid significant consideration.[6] Third and finally, current legislation does not offer content guidance: it does not specify what questions should and should not be put to a referendum in the first place. Consider each of these types of guidance in greater detail now.

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of the answer "Yes" than in favour of the answer "No", the Minister must make an order repealing the alternative vote provisions.' Parliamentary Constituencies and Voting Act 2011 s 8

[4] This point was stressed by the UKSC in *Miller* where the majority stipulate: 'Both sides of the argument proceed on the basis that the referendum on membership of the EU was held under the European Union Referendum Act 2015 ("the 2015 Act"), which resulted in a vote to leave the EU, does not provide the answer. The Secretary of State's argument proceeds on the basis that the Crown has taken the decision under Article 50(1), accepting the result of the referendum. The Miller claimants argue only that Parliament can take that decision. Both the Secretary of State and the Miller claimants proceed on the basis that the referendum result was not itself a decision by the UK to withdraw from the EU, in accordance with the UK's constitutional requirements, and that the 2015 Act did not itself authorise notification under Article 50(2). In these circumstances, there is no issue before the court as to the legal effect of the referendum result. Nor is this an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional changes: a matter on which this court has heard no argument. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [171]

[5] The literature on referendums is defined by taxonomies out of a concern that there is nothing that can be said about them in general as argued in Gordon Smith, 'The Functional Properties of the Referendum' (1976) 4 European Journal of Political Research 1. Most theorists explicitly draw a distinction between advisory and legally binding referendums, and between referendums that approve and conclude processes of constitutional change. Gallager and Uleri's account is especially sophisticated in that it distinguishes between ' a "prescribed" referendum – that is, a "referendum" according to rules" – and a discretionary referendum – that is, a "referendum at the discretion of some person or institution.' Michael Gallager and Pier Uleri, *The Referendum Experience in Europe* (Macmillan 1996). 6-7

[6] Consider Australia, for instance, where a referendum is integrated into the overall process of constitutional change and follows the legislative process. 'The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.' The Commonwealth of Australia Constitution Act 1900 s 128.

## Procedural Guidance

An important feature of the referendum process that could be clarified by the law, which would make a significant difference to the use of referendums in practice, is the switch to post-legislative referendums rather than pre-legislative referendums. This was one of the key recommendations of the Independent Commission on Referendums published in the wake of the Brexit referendum in 2016.[7] The Commission outlined a long list of reasons that post-legislative referendums are better uses of referendums in general, particularly given the United Kingdom's constitutional history and culture. Indeed, I think this is the best way to read Dicey's view of referendums as a 'People's veto' and a limit on the actions of representatives.[8] Post-legislative referendums provide more clarity both for voters on what they are voting on and representatives of what the direction is. Referendums are better able to perform this role, too blunt an instrument to aggregate political will about what those reforms should look like.[9] Post-legislative referendums are not always possible, the ICR concedes, but in those cases there should be an opportunity for a second vote. In these circumstances, however, it is essential that the fact of a second vote is identified in advance so that the rules of the referendum process are clear to all participants at every stage. [10]

## Outcome Guidance

The law should clarify what the legal consequences are of a popular vote. As seen above, this has been achieved in particular cases as it was with the Alternative Vote referendum. Clarity about referendum outcomes and referendum processes are closely connected. If it is clear what the referendum process is, for instance approving a provisional piece of legislation, then it is likely to be clear too what the outcome of this process is. Further, clarifying the outcome of a referendum in advance is essential for the legitimacy not only of the referendum process itself but also the larger process of constitutional change of which it is a part.

A related way that this could be achieved is by creating different tiers of referendums as is the case in Australia.[11] So the terms such as plebiscites or postal votes are used to indicate the statutes or outcome of a referendum, with the term referendum itself reserved for constitutional

[7] 'This is recommendation 18 of the report which says, 'Referendums should be held on proposals that are clear and immediately actionable. This means that, wherever possible, referendums should be held post-legislatively: the relevant parliament or assembly should legislate in detail for the change, subject to the approval by voters in the referendum. Should the result favour the change, the provisions would then be implemented.' 'Independent Commission on Referendums' (Constitution Unit 2018) <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendums>. 86

[8] 'The referendums is sometimes described, and for general purposes well described, as "the people's veto" This name is a good one; it reminds us that the main use of the referendum is to prevent the passing of any important Act which does not command the sanction of the electors.' Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E Michener ed, 8th Revised edition, Liberty Fund Inc 1982). cix

[9] The ICR lays out five categories of reasons in total in support of post-legislative referendums: (i) a closer connection between votes and the outcomes of those votes, (ii) clarity for elected representatives, (iii) higher feasibility of proposals put to a vote, (iv) the pre-legislative process may raise public awareness, and (v) civil servants can prepare for outcomes. 'Independent Commission on Referendums' (n 7). 85

[10] 'In a case where a pre-legislative referendum is necessary, the principles that we have set out above imply that every effort should be made to make sure the proposals for change are as clear as possible so that voters can make an informed decision about which option they prefer…there may be circumstances in which the best option is to allow voters an opportunity to vote again once the precise form of the change is known…However, it would be essential for the whole process to be set out before the pre-legislative referendum.' ibid. 87-88

[11] See n 6

issues. So, another way to achieve the same objective is through clarifying the meaning of different terms.

**Content Guidance**

The law should clarify what questions should and not be put to a referendum. It cannot be for a Government to pick and choose. The matter of what questions should and should not be put to a referendum in the United Kingdom has been addressed by a number of thorough and significant reports. The HLCC considered this question in 2009 and concluded, reluctantly, that there was a place for referendums in the UK constitutional order but only regarding 'fundamental constitutional issues.'[12] The HLCC did put forward a list to provide examples of what could count as a fundamental constitutional issue while emphasising their qualification that: 'This is not a definitive list of fundamental constitutional issues, nor is it intended to be.'[13] The list of fundamental constitutional issues includes:

- To abolish the Monarchy;
- To leave the European Union;
- For any of the nations of the UK to secede from the Union;
- To abolish either House of Parliament;
- To change the electoral system for the House of Commons;
- To adopt a written constitution; and
- To change the UK's system of currency.

The ICR reconsidered these arguments from the HLCC, and affirmed both the reasoning and conclusions of the HLCC.[14] The argument taken by both the ICR and the HLCC is puzzling for three reasons. The first is that setting the standard of 'if there cannot be an exhaustive list then there should be no list at all' is not the standard for legislating in the United Kingdom, even for the most fundamental constitutional issues. Further, as Raz argues, it does not follow from raising examples of borderline cases that there are no clear-cut cases.[15] Indeed, it is easy to imagine some borderline cases given this list. Perhaps the adoption of a British Bill of Rights, or a new flag.[16] Both of these examples are outside the scope of this list, but it is plausible to make the case that they are questions of a similar form to those that are. Nevertheless, the standard set for passing ordinary legislation is not absolute certainty. It is expected, and indeed part of the purpose of legislating in the United Kingdom, to create legal rules that can then be amended if they are not fit for purpose. It is natural that unanticipated constitutional issues might arise, and there is a need then for Parliament to debate how they are related to fundamental constitutional issues that have been addressed before. The material point is this:

[12] Constitution Committee, 'Referendums in the United Kingdom' (2009) 12th. 49
[13] ibid. 49
[14] This is recommendation 14, 'Referendums are already required by law in certain circumstances. However, beyond these specific circumstances the Commission does not consider it appropriate to attempt to legislate for all of the topics on which referendums should be required. Although there is broad consensus that referendums should be held on "constitutional issues," there is a lack of cross-party agreement on what should be considered a 'constitutional issue' and whether all 'constitutional issues' are appropriate to put to a referendum.' 'Independent Commission on Referendums' (n 7). 77
[15] Raz is making this point in response to an argument from Dworkin. Raz says 'Dworkin's is a very weak argument, which rejects a distinction because it admits the existence of borderline cases.' Joseph Raz, 'Legal Principles and the Limits of the Law' (1972) 8 Yale Law Journal 823. 854
[16] There were two parts to the process of choosing a new flag in New Zealand, the first in November-December 2015 and the second in March 2016.

any list is a starting point. It is not meant to be unchangeable any more than any legislation is meant to be unchangeable.

Further, the fact that there are some categories of questions that have been consistently put to a referendum suggests that there are some cases that clearly fall on one side of the line or the other as fundamental constitutional issues. This was the case with the devolution settlement. As Leyland argues, a constitutional convention developed that referendums were necessary for changes to the devolution settlement, and this change is now outlined in the settlement in the manner outlined above.[17] This is not to suggest it would be simple to create a list of what amounts to a fundamental constitutional issue, or (alternatively) to create a test for what counts. [18] The point instead is that it is possible to come to a provisional conclusion about the meaning of a fundamental constitutional issue and to enshrine that conclusion in legislation. The meaning of a fundamental constitutional issue is not an unsolvable riddle. Furthermore, it is unacceptable that the question of what amounts to a fundamental constitutional issue should be determined by the government of the day. This alone would be unreasonable but combined with the power that comes to dictate the process and meaning of referendums, this runs directly into the risk of referendums as tools that can be manipulated by elites. This gives far too much power to the government, as the next section of the paper will argue.

**The Limits of Legislating for Referendums in the United Kingdom**

Legislating for referendums is not a panacea that will address all of their shortcomings in the United Kingdom. It is also possible that some problems may arise from legislating for referendums too. The risk of legislative rigidity is that the law passed is not fit for purpose, and then it may be very difficult to change it. This rigidity may inhibit rather than encourage positive evolutions in the practice of referendums. The argument here does not rely on the premise that new primary legislation must be perfect, or can address at once all of the challenges with the use of referendums in the United Kingdom. Neither is primary legislation a guarantee against abuse, as referendums have presented challenges in countries with clear legislative frameworks.[19] The claim instead is that legislation would do more good than harm in governing the use of referendums in the United Kingdom, particularly because the government have so much discretion about the process, outcome, and content of referendums. This is not to overstate how distinctive the abuses of referendums are to the United Kingdom. Referendums have been used poorly in countries such as Canada where there is little legislative guidance on their use either, and the referendum question on Quebec's secession in 1995 created confusion and nearly constitutional chaos.[20] There is also no legislative framework for

[17] 'Viewed in the round, the experience of devolution demonstrates that there has been much more than a general trend towards participatory decision-making. The practice of holding a referendum as a prelude to introducing devolved institutions has been established as a constitutional convention.' Peter Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution', *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2014). 159

[18] In the evidence the HLCC took they considered a range of possibilities including: 'Fundamental constitutional issue' (Morris), 'If the structure and rules of politics are to be changed' (Browning) "highest issues of constitutional principle" (Tierney) Committee (n 12). 65

[19] The challenges and debates around the Australian postal vote on same-sex marriage show that no framework on its own can guarantee the clear and consistent use of referendums.

[20] This was caused, at least in part, by confusion about the meaning of the question. As with the Brexit referendum in 2016, confusion over the meaning of the question translated into confusion about the meaning of potential outcomes. The question read: 'Do you agree that Quebec should become sovereign after having made a formal

constitutional referendums in France, and they were employed by Charles de Gaulle to shore up his own personal legitimacy.[21] So the existence of legislative frameworks is not in itself a guarantee against their abuse, what is required is a healthier democratic culture. But in providing guidance, the law plays an important role in shaping that democratic culture. I am arguing here that there is an important role for the law to play in providing substantive guidance in order to foster a democratic culture where referendums are used in a clear, consistent, and constructive way. Currently, the process, content, and meaning of referendums are largely determined by the Government of the day. This is an unacceptable amount of power.

## Conclusion

At their best, referendums are ways to involve voters in the process of constitutional change. They may provide some finality and legitimacy to democratic processes.[22] This paper has argued that referendums are more likely to perform these roles when supported by the structure and clarity of a new legislative framework outlined in primary legislation. A consensus is required about how referendums should be used in order to avoid their tactical abuse and to limit the discretion of the government of the day. Without this consensus among voters, representatives, and other democratic actors such as members of civil society, referendums become tools of elites rather than ways for voters to be involved in the process of constitutional change. Achieving this consensus requires a combination of processes and institutions. It requires constitutional conventions, legislation, and a healthy democratic culture. I have not argued here that new primary legislation is a necessary and sufficient condition for improving the use of referendums in the United Kingdom, just that it is a necessary one.[23]

New primary legislation governing the use of referendums in the United Kingdom should clarify three features of their role. First, the legal implications of the voting stage: what the outcome of referendums are. Second, the process, how should referendums be used and what role do they play in the process of constitutional change. Third and finally, new primary legislation should clarify what questions must be put to a referendum in the first place. Referendums are not a passing fad that can be addressed on a case by case basis. Their use has been steadily rising both worldwide and in the United Kingdom since the 1970s.[24] Referendums are here to stay in the United Kingdom's constitutional arrangements. As Dicey warned, 'I am quite certain that once established the Referendum would never be gotten rid of by anything short of a revolution.[25] The referendum is now a permanent feature of the UK's constitutional arrangements. It is necessary that this shift is reflected in primary legislation.

offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?'

[21] '[De Gualle] show[s] how executives use the referendum to make "personal" connections with the people – a connection they always see as an important legitimizing factor in bargaining with other political elites.' M Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Springer 2003). 19

[22] Although query whether finality is always a strength of referendums. Indeed, irreversibility of outcomes may undermine the quality of debate as Chambers suggests in Simone Chambers, 'Constitutional Referendums and Democratic Deliberation', *Referendum democracy: citizens, elites, and deliberation in referendum campaigns* (Palgrave 2001). 232

[23] And possibly even a necessary one, although the stronger necessity claim does not need to succeed for the conclusion of this paper to hold: that legislating for referendums would do far more good than harm in the United Kingdom.

[24] 'The use of referendums around the world has proliferated remarkably in the past 30 years.' Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012). 1

[25] Dicey to Leo Maxse, 2 February 1894 (Maxse Papers)