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How can Constitutionalism deal with Secession in the Age of Populism?

The case of Referendums

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Abstract

This paper is part of a broader piece of research devoted to the tricky relationship between populism and constitutionalism and will offer a European perspective on a topic which has already been studied extensively by constitutional lawyers and political theorists in the US and the UK. In order to do so it will take the referendum as a case study.

Key - words

Canada, Populism, Constitutionalism, Federalism, Constitutional Democracy

How can Constitutionalism deal with secession in the age of populism? The case of Referendums

Giuseppe Martinico*

I. Introduction

This paper is part of a broader piece of research devoted to the tricky relationship between populism and constitutionalism and will offer a European perspective on a topic which has already been studied extensively by constitutional lawyers and political theorists in the US and the UK¹. In order to do so it will take the referendum as a case study. In Continental Europe political scientists and legal theorists have already reflected on this issue², by clarifying the elements that make the Continental European scenario different³ (although still comparable to a certain extent) to the US and British scenarios where the never-ending debate between supporters of political (or popular, according to another terminology) constitutionalism and those of the so-called legal constitutionalism has offered interesting insights.⁴ The *fil conducteur* of the so to say Anglo-Saxon debate is to be found in the very contested idea of judicial review,⁵ a central instrument of constitutional law in Continental Europe (with some important exceptions though) which has been questioned - for different reasons - both in the US and in the UK.⁶

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¹ For instance: J. Balkin, "Populism and Progressivism as Constitutional Categories", *Yale Law Journal*, 1995, 1935 et seq. A. R. Amar, "A Few Thoughts on Constitutionalism, Textualism and Populism", *Fordham Law Review*, 1997, 1657 et seq.; J. Bell, 1992. *Populism and Elitism. Politics in the Age of Equality*. Regnery Gateway, Washington, 1992.

² Y. Mény- Y. Surel, *Populismo e democrazia*, Il Mulino, Bologna, 2004; Y. Mény – Y- Surel, *Democracies and the Populist Challenge*, Palgrave, 2002; J. W. Müller, *What is populism?* University of Pennsylvania Press, Philadelphia, 2016. M. Canovan, *Populism*, Harcourt Brace Javonovich, New York: 1981; M. Canovan, "Trust the People! Populism and the Two Faces of Democracy", *Political Studies*, 1999, 2 et seq.; E. Laclau, *On Populist Reason*, Verso, London, 2005; K. Abts - S. Rummens, "Populism versus Democracy", *Political Studies*, 2007, 407 et seq.; N. Urbinati, "Democracy and Populism", *Constellations*, 1998, 110 et seq.; C. Rovira Kaltwasser - P. Taggart - P. Ochoa Espejo - Pierre Ostiguy, *The Oxford Handbook of Populism*, Oxford University Press, Oxford, 2017. See also: I. Berlin, "To Define Populism", 1967, <http://berlin.wolf.ox.ac.uk/lists/bibliography/bib111bLSE.pdf>.

³ See L. Corso, *What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, *Rivista di Filosofia del Diritto*, 2014, 443 et seq.

⁴ R. Bellamy, *Political constitutionalism: a Republican Defence of Constitutionality of Democracy*, Cambridge University Press, Cambridge, 2007; C. Mac Amhlaigh, "Putting Political Constitutionalism in Its Place", *International Journal of Constitutional Law*, 2016, 175 et seq.; P. Minkinen, "Political Constitutional Theory vs Political Constitutionalism", *International Journal of Constitutional Law*, 2013, 585 et seq.; M. Tomkins, "In Defence of the Political Constitution", *Oxford Journal of Legal Studies*, 2002, 157 et seq.

⁵ On this debate see, at least, M. Tushnet, *Taking the Constitution Away From The Court*, NJ.: Princeton University Press, Princeton, 1981; M. Tushnet, "Abolishing Judicial Review", *Constitutional Commentary*, 2011, 581 et seq.; J. Waldron, "The Core of the Case Against Judicial Review", *Yale Law Journal*, 2006, 1346 et seq.

⁶ For a constitutional law perspective on populism in Europe see: C. Pinelli, "The Populist Challenge to Constitutional Democracy", *European Constitutional Law Review*, 2011, 5 et seq.; L. Corrias, "Populism in a Constitutional Key:

What can the role of referendum be in this scenario? Referendum has been considered by comparative lawyers as an instrument useful to “proceduralise” secession. This paper explores the relationship between referendum and secession, trying to stress both the positive and negative implications of such a connection.

If secession was seen as taboo for many years (until 1998 at least) referendums have been frequently recalled as part of a possible constitutional procedure able to govern it, by combining the need to guarantee a voice to the claims of minorities and to ensure a minimum degree of loyalty to the other parties of the constitutional compact, so to say.

New lifeblood to the debate on this noble and yet complex instrument of the referendum has been given by the British events connected to the Brexit vote held on 23rd June 2016, the consequent request for a new referendum on Scottish independence and the burning Catalan scenario. Without analysing all the above-mentioned phenomena, this contribution shall explore some comparative reflections concerning the risks connected to the “inappropriate” use of referendum. This work is divided into two parts. In the first part I shall explore the debate on how to proceduralise secession. In the second part I shall highlight some reasons for prudence in the use of referendums in contexts of representative democracy. Comparative lawyers look at referendum as part of a procedural framework able to somehow tame secession and this can be seen as part of a broader trend. Recently, Kössler and Palermo⁷ have stressed the importance of procedures and participation as instruments to manage and arrange diversities. This work starts from similar considerations but also frames the issue by adopting a more critical perspective.

II. A Constitutional Approach to Secession

Without denying or neglecting the political side of secession, this paper maintains that it also presents legal aspects, and indeed courts have devised a set of techniques in order to cope with it⁸. For many years secession was understood as a sort “constitutional taboo”,⁹ at least until 1998 when

Constituent Power, Popular Sovereignty and Constitutional Identity”, *European Constitutional Law Review*, 2016, p. 6 et seq.

⁷ F. Palermo - K. Kössler *Comparative Federalism: Constitutional Arrangements and Case Law*, Hart Publishing, Oxford, 2017.

⁸ G. Martinico, “Identity Conflicts and Secession Before Courts: Three Case Studies”, *Revista General de Derecho Público Comparado*, 21, 2017, 1- 30; J. M. Castellà Andreu, “Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional”, *Teoría y Realidad Constitucional*, 37, 2016, 561-592.

⁹ “A paramount consideration in any secession-related discussion is that, irrespective of the nature of secessionists claims, secessions are not prima facie desirable, because they jeopardize world stability. However, demonizing secession, turning it into a constitutional taboo, often adds fuel to secessionist claims”, S. Mancini, “Secession and Self-

the Canadian Supreme Court broke the taboo, delivering its famous Reference regarding secession of Québec.¹⁰ That was a pretty brave decision, because on that occasion the Canadian Supreme Court dealt frontally with the issue, accepting the challenge going beyond a formalist reading of its constitutional text(s), i.e. rejecting the argument according to which secession was banned since no written provision provided for that in the Canadian legal system. It did so by identifying the untouchable core of its constitution and reading the issue in light of the principles belonging to such a hard nucleus (federalism, democracy, constitutionalism and rule of law, protection of minorities). When offering its view, the Canadian Supreme Court did not limit its attention to domestic law only but, on the contrary, accepted to take international law into account. For all these reasons, this Reference has become a turning point.¹¹ Since then a new debate has started about how to constitutionalise secession,¹² how to tame something which had been considered for a long time as a sort of “beast” hard to domesticate.¹³

In order to tackle secession, the Canadian Supreme Court first contextualised it in a legal scenario, avoiding easy choices and facing the preliminary objections concerning the lack of legal relevance of the challenged acts or of the raised questions. This strategy was perceived as necessary in order to compensate the passivity of the relevant political actors or to try to facilitate a dialogue which had not yet started between the central and regional levels. Second, the Canadian Court gave a complex notion of democracy which cannot be reduced to the mere majority rule. This is a very important point as we will see later which makes this Reference also a powerful tool against populism. Third, it reconstructed the core of Canadian constitutional identity by recalling the untouchable principles that make the Canadian Constitution special.

In so doing the Canadian Supreme Court also presented the referendum as an instrument which needs to be mediated and which should not be considered as a source of automatic political or legal truth. This explains the deference that characterizes the Reference, which is also clear in giving political actors the task “to determine what constitutes a clear majority on a clear question”¹⁴. This

Determination”, in M. Rosenfeld- A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 481-500, 482.

¹⁰ Reference re: Secession of Quebec, [1998] 2 S.C.R. 217.

¹¹ On the increasing importance of references in Canadian constitutional law see: L. McKay-Panos, “The Increasing Importance of Reference Decisions in Canadian Law”, 2014, <http://www.lawnow.org/increasing-importance-reference-decisions-canadian-law/>. As the author recalls: “A reference case is different than a regular civil or criminal case that involves litigating parties. In a reference, the federal or provincial government submits questions to the courts asking for an advisory opinion on major legal issue(s). Often, the question involves the constitutionality of existing or proposed legislation”.

¹² For instance, see: D. Haljan, *Constitutionalising Secession*, Hart, Oxford, 2014; D. Weinstock, “Constitutionalizing the Right to Secede”, *Journal of Political Philosophy*, 9 (2), 2001, 182–203.

¹³ S. Mancini, “Secession and Self-Determination”, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 481-500, 481.

¹⁴ Canadian Supreme Court, Reference Re Secession of Quebec, [1998] 2 S.C.R. 217.

way the Canadian Court avoided treating the referendum as something alternative to representative democracy.

In light of these considerations the legacy of the Canadian Reference is fundamental to challenge the constitutional counter - narrative advanced by populists. In this respect, Corrias tried to go beyond a conflictual analysis (constitutionalism versus populism) by showing that - to a certain extent at least - even populism “contains a (largely implicit) constitutional theory”.¹⁵ Even more recently Fournier defined this relationship by relying on a “parasite analogy”, saying that: “the relation between populism and constitutional democracy is comparable to a process of parasitism where constitutional democracy would be the host and populism the parasite”.¹⁶

In fact, one could say that the real aim of populist movements is to alter the axiological hierarchies that characterize constitutional democracies, for instance by presenting democracy (understood as the rule of majority) as a kind of “trump card” which should prevail over other constitutional values.¹⁷ To question this argument, one could recall one of the most important “lessons learned” thanks to the Canadian Reference, which instead proposed a richer understand of democracy – i. e – non-limited to its formal or procedural sense. Finally, it is important to recall that the Canadian Supreme Court did not recognize a proper right to secession, rather it treated secession as an option that may be tolerated only in presence of some important safeguards. In order to make this point the Canadian Court came up with a sort of “exit related conditionality” as we will see in the next section, this way it guaranteed the respect of the constitutional identity of Canada.

III.Exit Related Conditionality and Secession

Comparative lawyers have analysed the provisions concerning the possibility of secession¹⁸ and also legal and political theorists have dealt with the issue of how to justify the option of secession

¹⁵ L. Corrias, “Populism in a Constitutional Key” cit. “Constitutional theorists have not devoted a lot of attention to the phenomenon of populism [...] There may be two interpretations of this silence. Either constitutional theory has nothing to say about populism, in which case the silence is justified, or constitutional theory does have something to say, in which case the silence is unjustified and (potentially) problematic”

¹⁶ T. Fournier, “From rhetoric to action : a constitutional analysis of populism”, EUI Working Paper 2018/08, <http://cadmus.eui.eu/handle/1814/51725>

¹⁷ “Populist rhetoric can be defined as the political discourse aiming to convince a fictional majority that constitutional democracy gives rise to the tyranny of minorities. The choice of ‘rhetoric’ instead of ‘discourse’ is intentional”, T. Fournier, “From rhetoric to action” cit.

¹⁸ S. Mancini, *Costituzionalismo, federalismo e secessione*, in *Le Istituzioni del federalismo*, 2014, 779 et seq., 791. She also pointed out that: “The charter of the Soviet Union had similarly constitutionalized the right of secession. Recognition of this right, in Lenin’s opinion, in no way led to the ‘formation of small States, but to the enlargement of the bigger ones—a phenomenon more advantageous for the masses and for the development of the economy The Constitution of advantageous for the masses and for the development of the economy.’ [...] Analogously, the guarantee of the right of secession in the Ethiopian Constitution of 1994 seems largely motivated by the desire to strengthen cohesion by dissuading the component subunits of the state from following the example of Eritrea”, S. Mancini,

(even in legal systems whose constitutions say nothing about that, including the Canadian one).¹⁹ Without recalling the very huge debate already mentioned, I would like to briefly recall two reasons that in my view could justify the constitutionalisation of secession in some federal/regional contexts. The first one is linked to constitutional homogeneity: legal systems²⁰ tend to ensure a virtuous connection between diversity and unity with a series of mechanisms aimed at preserving loyalty and adhesion to the fundamental values of the national system. Evidence of this can be found in Art. 51 of the Swiss Constitution which conditions, for example, the contents of the cantonal constitutions.²¹

Similar examples can be found even at supranational level. Here it is sufficient to recall the criteria employed for the accession of new members states. Reasons connected to homogeneity can always suggest forms of control and monitoring and even the possibility of activating forms of centripetal intervention in case of departure from the fundamental values of the constitutional pact. This is the case of Art. 155 of the Spanish constitution and above all Art. 37 of the German Basic Law.²²

How is this connected with the possible introduction of a secession clause? Even the clauses on exit/withdrawal from a federal union can be read as forms of “exit related conditionality”, by ensuring an axiological continuity between the new order and the old one. This might appear paradoxical, but it is actually a process in which the old system accepts the detachment of the seceding entity by making it conditional upon the adhesion to its fundamental values. This way the constituent phase of the seceding legal system is partly guided and influenced by the values of the old constitution. This way the revolutionary character of secession is partly “exorcised”. To understand what I mean by exit related conditionality it is useful to recall the Canadian Reference: according to which, in case of activation of the negotiations with Québec, “The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the

“Secession and Self-Determination”, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 481 et seq., p. 494- 495.

¹⁹ See: W. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*, Oxford, Oxford University Press, 2006. *Secession: The Morality Of Political Divorce From Fort Sumter To Lithuania And Quebec*, Routledge, Abingdon, 1991,

²⁰ Recently on this see: G. Delledonne, *L'omogeneità costituzionale negli ordinamenti composti*, Napoli, Editoriale Scientifica, 2017.

²¹ “Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.

Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law”.

²² Art. 37 Basic Law: “(1) If a Land fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the Land to comply with its duties.

(2) For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all Länder and their authorities”.

protection of minorities”.²³ This axiological continuity would guarantee the rights of that population residing in the territory of the new State which had not voted for the independence. Thanks to a secession clause, in other words, the constitutional system could tame secession.²⁴ A possible counter argument is due to the threat of constantly exposing a legal system to the blackmail of the exit, in a sort of game to negotiate further forms of autonomy. Actually, the Spanish scenario shows that a risk like this exists even in the absence of a secession clause. In this sense the lack of a provision like this has led to the explosion of a constitutional crisis in the absence of constitutional paths other than the constitutional amendment. Having said that, I think that a constitutional clause on secession should be coordinated with possibly the norms (if any) governing secession. If the clauses on asymmetry expressly excludes some areas from their application the risk of activation by one of the units of the system should never lead to the concession of further powers in these areas. What has happened with Art. 50 TEU then gives us another clue. The irrevocability of the notification of the will to leave the union should be provided for *expressis verbis*. This would exclude the uncertainty characterising the post 23rd June vote. In this sense, if the *Miller* decisions²⁵ revolved around the irrevocability of the notification scholars and politicians have frequently recalled the possibility that the EU could change its mind.²⁶

Scholars have already explored the question of how to design a norm concerning the exit from the federal entity. However, examples that could be taken into account are not missing and many of the models recalled by comparative lawyers have acknowledged an important role to referendums²⁷.

However, what I would like to stress is the high risk connected to the avoidance of issue secession as the Spanish case shows and here we come back to the initial reflections on the importance of fear in the genesis of the constitution of a legal system and on the role that such fundamental laws have in the management of the political risks connected to these fears.

As Norman recalled when listing the “democratic rule of law reasons”: “the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as ‘political’ issues that lie outside of, or are presumed (by the secessionists) to supersede, the law”.²⁸

²³ Canadian Supreme Court, Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, par. 90.

²⁴ W. Norman, *Negotiating Nationalism* cit., p. 178.

²⁵ High Court of Justice Queen’s Bench Division Divisional Court, R (Miller) -v- Secretary of State for Exiting the European Union, [2016] EWHC 2768, <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>; Miller and others (Appellants) v Ministry of Justice (Respondent), UKSC 2015/0246, <https://www.supremecourt.uk/cases/uksc-2015-0246.html>.

²⁶ Sia nei circoli accademici che sui giornali. A. Sari, *Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*, <https://ukconstitutionallaw.org/>. N. Gutteridge, *How Labour's vow to veto Brexit 'no deal' is likely to be completely POINTLESS*, <https://www.express.co.uk/news/politics/867141/Brexit-news-MPs-Labour-withdraw-Article-50-prevent-no-deal-EU-exit>

²⁷ S. Mancini, *Costituzionalismo, federalismo* cit., pp. 800 ss; R. Ziegler- J. Shaw - R. Bauböck (eds), *Independence referendums: who should vote and who should be offered citizenship?*, European University Institute, RSCAS, 2014, n. 90, http://cadmus.eui.eu/bitstream/handle/1814/32516/RSCAS_2014_90.pdf

In this sense the Canadian case shows how even in the absence of explicit constitutional clauses it is possible to attempt to proceduralise this phenomenon, by contributing to its domestication and in that the Canadian Supreme Court has indeed sent a message of hope: law - especially constitutional law - can and must have a role, avoiding delegating this issue to violence and a power relationship.

IV. The Constitutional Risks of Referendums

Comparative constitutional law²⁹ offers examples of provisions which give referendums an important role in the procedure devised to govern secession: Ethiopia³⁰, Uzbekistan³¹, (former) Serbia Montenegro³², Liechtenstein³³, Northern Ireland³⁴, Nevis and Saint Christopher.³⁵

Scholars have traditionally pointed out the ambiguities of referendum and the risks connected to an appropriate use of the instrument. It is a very long debate and³⁶: already Max Weber, for instance, recalled such risks and stressed how it can be used to deresponsibilise the political forces:

“The referendum does not know the compromise, upon which the majority of all laws is based in every mass state with strong regional, social, religious and other cleavages [...] Moreover, the plebiscitary principles weaken the autonomous role of the party leader and the responsibility of the civil servants. A disavowal of the leading officials through a

²⁸ W. Norman, *Negotiating Nationalism* cit., p. 189

²⁹ On this see: İ. Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law*, Springer, Heidelberg, 2015. M. Qvontrup, “Referendums on Independence 1860-2011”, *Political Quarterly*, n. 1, 2014, 57 et seq. L. Frosina, “Profili giuridici e aspetti problematici del referendum di secessione. Un’analisi comparata”, *Nomos*, 2017, 1 et seq. See also the 1947 Constitution of Burma: “201. Save as otherwise expressly provided in this Constitution or in any Act of Parliament made under section 199, every State shall have the right to secede from the Union in accordance with the conditions hereinafter prescribed.

202. The right of secession shall not be exercised within ten years from the date on which this Constitution comes into operation.

203. (1) Any State wishing to exercise the right of secession shall have a resolution to that effect passed by its State Council. No such resolution shall be deemed to have been passed unless not less than two-thirds of the total number of members of the State Council concerned have voted in its favour.

(2) The Head of the State concerned shall notify the President of any such resolution passed by the Council and shall send him a copy of such resolution certified by the Chairman of the Council by which it was passed.

204. The President shall thereupon order a plebiscite to be taken for the purpose of ascertaining the will of the people of the State concerned.

205. The President shall appoint a Plebiscite Commission consisting of an equal number of members representing the Union and the State concerned in order to supervise the plebiscite.

206. Subject to the provisions of this Chapter, all matters relating to the exercise of the right of secession shall be regulated by law.”

³⁰ Art. 39 of the Ethiopian Constitution:

³¹ Art. 74 of the Constitution of Uzbekistan.

³² Art. 60 of the Constitution of Serbia Montenegro

³³ Art. 4 of the Constitution of the Principality of Liechtenstein

³⁴ Section 1 of the Northern Ireland Act 1998

³⁵ Art. 113 of the Constitution of Saint Christopher and Nevis

³⁶ M. Luciani, *Il referendum: questioni teoriche e dell’esperienza italiana*, in *Revista catalana de dret públic*, 2008, 15 et seq.; M. Luciani, *Commentario della Costituzione. Art. 75 Referendum*, Bologna, Zanichelli, 2005; M. Luciani, *Introduzione*, in M. Luciani, M. Volpi (eds), *Referendum*, Roma- Bari, Laterza, 1992, 3 et seq. A. Di Giovine, *Referendum e responsabilità politica*, in *Dir. pubbl. comp. Eur.*, 2005, 1214 et seq.

plebiscite which rejects their proposals does not and cannot enforce their resignation, as does a vote of no-confidence in parliamentary states, for the negative vote does not identify its reasons and does not oblige the negatively voting mass, as it does a parliamentary majority voting against a government, to replace the disavowed officials with its own responsible leaders.”³⁷

These are considerations that have inspired generations of social scientists and that are dramatically topical nowadays. Comparative lawyers have reflected a lot on the complicated relationship on referendums and representative democracy³⁸, British lawyers have regained the topic in light of the recent debate on Brexit³⁹ and also EU law scholars have developed a mass of literature on that, due to the several examples of consultations celebrated on European issues, starting from the referendum conducted in 1975, for instance.⁴⁰

Recently, Morel has identified at least two research strands in the debate on referendum and argued that:

“Theoretical accounts on referendums belong either to the constitutional debate or to democratic theory. What distinguishes the two debates in a rather precise way is the set of questions raised: while the classical, constitutional, debate questions the issue of the compatibility of the referendum with representative democracy and the extent and modalities of its use, the democratic debate rather focuses on the democratic quality of the referendum and whether its extension could help to improve the quality of contemporary democracies”.⁴¹

³⁷M. Weber, *Economy and Society*, 1978, https://archive.org/stream/MaxWeberEconomyAndSociety/MaxWeberEconomyAndSociety_djvu.txt.

³⁸ R. Carré de Malberg, *Considérations théoriques sur la question de la combinaison du referendum avec le parlementarisme*, in *Annuaire de l'Institut international de droit public*, 1931, II, 256 et seq.; B. Mirkine Guetzévitch, *Le référendum et le parlementarisme dans les nouvelles constitutions européennes*, in *Annuaire de l'Institut international de droit public*, 1931, II, 285 ss.; C. Schmitt *Democrazia e liberalismo. Referendum e iniziativa popolare Hugo Preuss e la dottrina tedesca dello Stato* Milano, Giuffrè, 2001; D. Butler, A. Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy*, 1984, London, Macmillan, 1994; M. Qvortrup, *A Comparative Study of Referendums: Government by the People*, Manchester, Manchester University Press, 2002. P. V. Uleri, *Referendum e democrazia. Una prospettiva comparata*, Bologna, Il Mulino, 2003. S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford, Oxford University Press, 2012; D. C. Lewis, *Direct Democracy and Minority Rights: A Critical Assessment of the Tyranny of the Majority in the American States*, Abingdon, Routledge, 2013.

³⁹ See also: A. V. Dicey, *Ought the referendum to be introduced into England?*, in *Contemporary Review*, 1890, 508 et seq. Su Dicey: R. Weill, *Dicey Was Not Diceyan*, in *Cambridge Law Journal*, 2003, 474 et seq. See also: House of Lords. Select Committee on the Constitution 12th Report of Session 2009–10, *Referendums in the United Kingdom. Report with Evidence*, 2010, <https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>; A. Torre, *Un referendum per tutte le stagioni: sovranità del Parlamento e democrazia diretta nel Regno Unito*, in *Dir. pubbl. comp. Eur.*, 2005, 1339 et seq.; A. Torre, J. Frosini (ed.), *Democrazia rappresentativa e referendum nel Regno Unito*, Rimini, Maggioli, 2012.

⁴⁰ See: F. Mendez, M. Mendez, V. Triga. *Referendums and the European Union: A Comparative Inquiry*, Cambridge, Cambridge University Press, 2014. More recently: F. Mendez, M. Mendez, V. Triga (eds), *Referendums on EU Matters*, the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament's Committee on Constitutional Affairs, 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU\(2017\)571402_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf). See also: E. Özlem Atıkcın, *The Puzzle of Double Referendums in the European Union*, in *Journal of Common Market Studies*, 2015, 937 et seq.

⁴¹ L. Morel, *Referendum* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*,

The ideal starting point of this debate is obviously the well-known exchange between Carré de Malberg and Mirkine Guetzévitch.

According to the former the referendum was compatible with parliamentary systems,⁴² especially if understood as a way of solving the conflicts occurring between parliament and government and to limit the parliamentary almightiness.⁴³ According to the latter the referendum implied a tension that could hardly be solved with the idea of rationalisation of parliamentarism.⁴⁴ It is necessary to recall that Mirkine Guetzévitch partly changed his mind as noticed by Morel.⁴⁵ Actually, as Luciani pointed out, the two scholars started from different premises represented by the antiparliamentary flavour of the referendum.⁴⁶

This debate is partly connected to the qualification of the referendum as an instrument of direct democracy. This position is for instance quite widespread in the Italian debate but there are important scholars that have rejected this view by understanding the referendum as a device of popular participation⁴⁷ on the basis of an interesting historical excursus. It is the case of Luciani, for instance, who stressed the necessary physical coexistence as an essential connotation of direct democracy.⁴⁸ Similar considerations have been shared by political scientists who argued that direct democracy does not exist as a modern form of government and is a misleading category⁴⁹, also in light of the continuity that exists between referendum and political competition. If comparative law

Oxford, Oxford University Press, 2012, 502 et seq.

⁴² See also: G. Guarino, *Il referendum e la sua applicazione al regime parlamentare*, in *Rassegna di diritto pubblico*, 1947, 30 et seq.

⁴³ R. Carré de Malberg, *Considérations théoriques sur la question de la combinaison du referendum avec le parlementarisme*, in *Annuaire de l'Institut international de droit public*, 1931, II, 256 et seq., 262 et seq.

⁴⁴ B. Mirkine Guetzévitch, *Le référendum et le parlementarisme dans les nouvelles constitutions européennes*, in *Annuaire de l'Institut international de droit public*, 1931, II, 285 et seq., 334 et seq. “The discussion of the Russian constitutionalist focused in particular on a new variety of referendums and popular initiatives aimed at solving conflicts between the executive and the legislative, which could lead to the dissolution of parliament or the revocation of the head of the state. Mirkine-Guetzévitch regarded this as contradictory with the trend toward a ‘rationalization’ of parliamentarism, by means of a strengthening of executives, which he welcomed as the great novelty of these Constitutions”, L. Morel, *Referendum* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, 504.

⁴⁵ “The author had, however, expressed a rather different position one year earlier, in *Les Constitutions de l'Europe nouvelle* (1930), where he wrote that ‘the referendum is the logical conclusion of the process of rationalization of parliamentarism’ (ibid 28)”, L. Morel, *Referendum* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, 502 et seq., footnote n. 9.

⁴⁶ M. Luciani, *Commentario della Costituzione. Art. 75 Referendum*, Bologna, Zanichelli, 2005, 33.

⁴⁷ M. Luciani, *Il referendum: questioni teoriche e dell'esperienza italiana*, in *Revista catalana de dret públic*, 2008, 157 et seq., 163.

⁴⁸ M. Luciani, *Commentario della Costituzione. Art. 75 Referendum*, Bologna, Zanichelli, 2005, 11. “Ad essere precisi, anzi, si dovrebbe dire che l'espressione ‘democrazia diretta’ si risolve in un pleonasma e che l'espressione ‘democrazia rappresentativa’ costituisce un ossimoro: dove c'è democrazia, infatti, c'è decisione popolare diretta (nel senso indicato nel testo); dove, invece, vi è rappresentanza non v'è democrazia. È solo la sedimentazione degli usi linguistici, pertanto, che ci fa parlare, oggi, di «democrazia rappresentativa»”, M. Luciani, *Il referendum: questioni teoriche e dell'esperienza italiana*, in *Revista catalana de dret públic*, 2008, 157 et seq., 161.

⁴⁹ P. V. Uleri, *Referendum e democrazia. Una prospettiva comparata*, Bologna, Il Mulino, 2003, 17..

offers a variety of typologies of referendum (constitutional, legislative, conventional, preventive, successive, mandatory, optional, advisory).⁵⁰ such a variety does not impede the finding of common concerns and trends. This does not deny the analytical validity of the distinction between experiences in which the referendum initiative belongs to constitutional bodies only and experiences where the initiative is, so to say, diffused (as opposed to centralised/institutionalised) in civil society. In these contexts referendums have been seen as a “counter-power”⁵¹ or a manifestation of the “right of resistance.”⁵²

However, all the legal systems know forms of limitation of the political risks connected to the referendum or strategies emerged over the years to challenge shared concerns.

For instance, in an essay devoted to the Swiss⁵³ and American experiences Auer once recalled the fear of the American founding fathers towards “pure democracy”⁵⁴ and in light of that he went on to explain the lack of the referendum at federal level in the US.

These remarks do not come as a surprise if it is true, as Elster argued, that constitutions are frequently the product of violence and fear.⁵⁵

Obviously, the British experience is very particular due to the only partially written nature of its constitutional sources⁵⁶ and to the relatively recent practice of an instrument which has been, however, studied by eminent British lawyers such as Dicey.⁵⁷ Dicey analysed that in light of the

⁵⁰ M. Volpi, *Referendum (dir. cost)*, in *Dig. disc. pubbl.*, IV ed., XII, Torino, UTET, 1997, 434 et seq.. More recently: M. Volpi, *Referendum e iniziativa popolare. Quale riforma*, 2016, *Costituzionalismo.it*, http://www.costituzionalismo.it/download/Costituzionalismo_201602_567.pdf.

⁵¹ S. Fois, *Il referendum come «contropotere» e garanzia nel sistema costituzionale italiano*, in AA.VV., *Referendum, ordine pubblico, Costituzione*, Milano, Bompiani, 1978, 130 et seq.

⁵² G. Volpe, *Referendum abrogativo e diritto di resistenza*, in AA.VV., *Il giudizio di ammissibilità del referendum abrogativo*, Milano, Giuffrè, 1998, 284 et seq.

⁵³ On Switzerland see also: L. Raible, L. Trueblood: “The Swiss System of Referendums and the Impossibility of Direct Democracy”, 2017, <https://ukconstitutionallaw.org/2017/04/04/lea-raible-and-leah-trueblood-the-swiss-system-of-referendums-and-the-impossibility-of-direct-democracy/> “Exploring the interaction between voters and the representative branches of government is helpful. It is necessary to take into account that the influence of the representative branches of government is considerably more pervasive than is acknowledged. Consider how the Federal Assembly may respond to popular initiatives for instance; the relationship is an iterative one. The Federal Assembly may submit a counter-proposal to popular initiatives, that is, partial revisions of the constitution requested by the citizenry (art. 139(5)). Whenever such initiatives take the form of a specific draft of a provision (as opposed to a general proposal) the Federal Assembly may decide to take up some or all of the concerns expressed by the initiative to form the basis of its own draft. The electorate then vote on the initiative and the counter-proposal at the same time (art. 139b(1)). In addition to the two questions about the two different proposals, the ballot also contains a third question where the electorate are asked to indicate a preference in case both drafts are accepted (art. 139b(2)). The value of this example is that it demonstrates that there is nothing particularly direct about democracy in Switzerland. Of course, there are more referendums in Switzerland than in, for example, the UK. But it is not the volume of referendums that makes the system distinctive, and it should not be understood to make it direct”.

⁵⁴ A. Auer, *L'esperienza del referendum in Svizzera e negli Stati Uniti*, in M. Luciani, M. Volpi (eds), *Referendum*, Roma- Bari, Laterza, 1992, 61 et seq., 64.

⁵⁵ J. Elster, *Constitution-making and violence*, in *Journal of Legal Analysis*, 2012, 7et seq.

⁵⁶ See V. Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, 1981, 75et seq.

⁵⁷ See: A. V. Dicey, *Ought the referendum to be introduced into England?*, in *Contemporary Review*, 1890, 508et seq.

well-known distinction between “political sovereignty” and “legal sovereignty”.⁵⁸ However there have been attempts to extend to the British case some of the considerations made with regard to Continental Europe⁵⁹ and British constitutional lawyers have stressed that the UK peculiarity does not impede fruitful comparisons.⁶⁰ It is sufficient to compare the Italian discussion about the advantages and disadvantages of referendums⁶¹ with what was written by the Select Committee on the Constitution of the House of Lords some years ago.⁶² Even though these cases are different some of the arguments employed in this debate are identical and it is no coincidence that the issue of the referendum has given new lifeblood to the need for a (further) codification of British constitutional law⁶³. Another element of comparability is given by the common influence exercised by the EU. This also explains why the first important consultation celebrated in the seventies in the UK was that on the British membership in the European Economic Community. It is also known that the referendum in the history of European integration often goes back for seconds: this happened in Ireland and Denmark for instance, on the occasion of the ratification of some European Treaties.⁶⁴ With regard to the EU the “referendum on sovereign powers” (“referendum sui poteri sovrani”), as described by Baldassarre, have been trialed⁶⁵ and, here again, it is possible to recall the different uses of the instrument. Within the almost 70 referendums celebrated on European matters⁶⁶, scholars have identified at least four groups: 1) “membership referendum”; 2) “treaty revision

⁵⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, New York, St. Martin's Press, 1959. “At this point comes into view the full importance of the distinction already insisted upon between ‘legal’ sovereignty and ‘political’ sovereignty. Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every Court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation. That the conduct of the different parts of the legislature should be determined by rules meant to secure harmony between the action of the legislative sovereign and the wishes of the political sovereign, must appear probable from general considerations. If the true ruler or political sovereign of England were, as was once the case, the King, legislation might be carried out in accordance with the King's will by one of two methods. The Crown might itself legislate, by royal proclamations, or decrees; or some other body”, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, New York, St. Martin's Press, 1959. In 2013 edition (*The Law of the Constitution*, Oxford, Oxford University Press) edited by J. Allison this passage can be found at p. 429.

⁵⁹ For instance M. Calamo Specchia, *Quale disciplina referendaria nel Regno Unito? Brevi note su di un approccio sistematico per un modello a-sistematico*, in A. Torre, J. Frosini (eds), *Democrazia rappresentativa e referendum nel Regno Unito*, Rimini, Maggioli, 2012, 146 et seq.

⁶⁰ P. Leyland, *Referendums, Popular Sovereignty, and the Territorial Constitution*, in R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law*, Oxford, Oxford University Press, 2013, 145 et seq..

⁶¹ M. Luciani, *Commentario della Costituzione. Art. 75 Referendum*, Bologna, Zanichelli, 2005, 82 et seq.

⁶² House of Lords. Select Committee on the Constitution 12th Report of Session 2009–10, *Referendums in the United Kingdom. Report with Evidence*, 2010, <https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>

⁶³ P. Leyland, *Referendums, Popular Sovereignty, and the Territorial Constitution*, in R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law*, Oxford, Oxford University Press, 2013, 145 et seq..

⁶⁴ E. Özlem Atıkan, *The Puzzle of Double Referendums in the European Union*, in *Journal of Common Market Studies*, 2015, 937 et seq..

⁶⁵ A. Baldassarre, *Il «referendum» costituzionale*, in *Quad. cost.*, 1994, 235 et seq.

⁶⁶ “To date there have been 60 referendums on EU-related matters making the referendum a key feature of the European integration process since the 1970s”, F. Mendez, M. Mendez, V. Triga (eds), *Referendums on EU Matters*, the Policy

referendum”; 3) “policy referendum”; and 4) “third-country referendum”⁶⁷. Within these four groups it is possible to identify other sub-typologies due to the reasons that have led to the consultation and the subject of the question.⁶⁸ All this confirms not only the topicality of the issue but also the multi-functional nature of this device in European and comparative constitutional law. Even in the UK concerns about the use of the referendum have not been missing. First of all in the UK there is legislative discipline which governs the use of this tool,⁶⁹ although it is not easy to understand what the formula “constitutional matters” means. Indeed, although it is unquestioned that “referendums undoubtedly have a constitutional role to play”⁷⁰, in this context, as Bogdanor said, “the problem is that in Britain constitutional issues can easily arise out of seemingly non-constitutional legislation”.⁷¹ Without mentioning that “without clear rules referendums can be manipulated politically”⁷². The report of the Select Committee on the Constitution of the House of Lords gave an important contribution to this debate. First, it offered an account of the *pros*⁷³ and

Department for Citizens’ Rights and Constitutional Affairs, European Parliament’s Committee on Constitutional Affairs, 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU\(2017\)571402_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf).

⁶⁷F. Mendez, M. Mendez, V. Triga (eds), *Referendums on EU Matters*, the Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament’s Committee on Constitutional Affairs, 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU\(2017\)571402_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf).

⁶⁸ “Referendums on EU matters vary considerably in terms of (1) their functional properties or type and (2) the reasons for calling them. Taking into account these two dimensions is crucial to understanding the dynamics of EU-related referendums. There are four main types of EU-related referendum: (1) membership referendums (which can be divided between the frequently deployed accession referendum and the rarely used withdrawal referendum); (2) treaty revision referendums, which were generated by all six main rounds of treaty revision from the SEA to Lisbon; (3) policy referendums, which are held by EU Member States on an EU-related policy matter but are neither about membership nor treaty revision; (4) third-country referendums, which are held on the topic of European integration by states that are neither EU Member States nor are they Candidate States voting directly on an accession treaty; There are three broad categories of motives for referendums on EU matters which operate under distinct decisional logics: (1) the logic of constitutionality where referendums are either clearly constitutionally mandatory or at least considered to be; (2) the logic of appropriateness where the overriding rationale for deployment of a referendum is due to legitimacy concerns; (3) the logic of partisan calculus where the referendum is held for partisan motives whether to boost the popularity of an incumbent leader or to mediate divisions within a political party”, F. Mendez, M. Mendez, V. Triga (eds), *Referendums on EU Matters*, the Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament’s Committee on Constitutional Affairs, 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU\(2017\)571402_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf).

⁶⁹“ The Election Commission is placed under a duty to advise on the intelligibility of any referendum questions and the legislation also

establishes control over donations and expenses and many other issues. However, no clear rules have emerged to determine under what precise constitutional conditions referendums can be held”, P. Leyland, *Referendums, Popular Sovereignty, and the Territorial Constitution*, in R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law*, Oxford, Oxford University Press, 2013, 145et seq.

⁷⁰P. Leyland, *Referendums, Popular Sovereignty, and the Territorial Constitution*, in R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law*, Oxford, Oxford University Press, 2013, 145et seq., 146.

⁷¹ V. Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, 1981, 73.

⁷²P. Leyland, *Referendums, Popular Sovereignty, and the Territorial Constitution*, in R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law*, Oxford, Oxford University Press, 2013, 145 ss., 146.

⁷³ “That referendums enhance the democratic process”; “that referendums can be a ‘weapon of entrenchment’”; “that referendums can ‘settle’ an issue”; “that referendums can be a ‘protective device’”; “that referendums enhance citizen engagement”; “that referendums promote voter education”; “that voters are able to make reasoned judgments”; “that referendums are popular with voters”; “that referendums complement representative democracy”, House of Lords. Select Committee on the Constitution 12th Report of Session 2009–10, *Referendums in the United Kingdom. Report*

*cons*⁷⁴ in the use of the referendum, second, it recalled some of the fundamental constitutional issues that would require the celebration of a referendum (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).⁷⁵

There are, finally, two other considerations that make referendum fascinating to comparative lawyers: the fact that on this instrument many constitutional lawyers have changed their mind which confirms its very complex nature and, above all, the chameleonic nature of this instrument. The first consideration can be explained in light of the fact it is always necessary to look at it from the systemic impact that it might have on the context of representative democracy. This partly explains the changing position of Dicey. This point has been explored by Weill in a very important article which revolved around the reasons for this (apparent) departure from the principle of parliamentary sovereignty.⁷⁶

Many criticised Dicey for this change of mind, others have tried to find continuity in his thought by stressing the parliamentary disappointment that would have caused that.⁷⁷

This was due to the 1911 *Parliament Act* which had removed, in Dicey's own words, "[the] last effective constitutional safeguard"⁷⁸, by recognising the supremacy of the House of Commons over the House of Lords and creating a system where the majority of the Commons "can arrogate to itself that legislative omnipotence which of right belongs to the nation".⁷⁹ In other words, according to Dicey, the referendums could compensate the new institutional scenario after the weakening of the House of Lords.

Because of the fact that the British institutional equilibrium had changed, Dicey's point was necessary to involve the people in the "constitutional changes".

with Evidence, 2010, <https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>

⁷⁴ Among others: "That referendums are a tactical device"; "that referendums are dominated by elite groups"; "that referendums can have a damaging effect on minority groups"; "that referendums are a conservative device"; "that referendums do not 'settle' an issue"; "that referendums fail to deal with complex issues"; "that referendums tend not to be about the issue in question"; "that voters show little desire to participate in referendums"; "that referendums are costly"; "that referendums undermine representative democracy", House of Lords. Select Committee on the Constitution 12th Report of Session 2009–10, *Referendums in the United Kingdom. Report with Evidence*, 2010, <https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>

⁷⁵ House of Lords. Select Committee on the Constitution 12th Report of Session 2009–10, *Referendums in the United Kingdom. Report with Evidence*, 2010, <https://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>;

⁷⁶ R. Weill, *Dicey Was Not Diceyan*, in *Cambridge Law Journal*, 2003, 474 et seq., 475 and 481.

⁷⁷ R. Weill, *Dicey Was Not Diceyan*, in *Cambridge Law Journal*, 2003, 474 et seq., 475.

⁷⁸ A. V. Dicey, *The Parliament Act 1911 and the Destruction of All Constitutional Safeguards*, in W. Anson, F. E. Smith, W. de Broke (eds.), *Rights of Citizenship: A Survey of Safeguards for the People*, London, Frederick Warne, 1912, 81 et seq., 81.

⁷⁹ A. V. Dicey, *The Parliament Act 1911 and the Destruction of All Constitutional Safeguards*, in W. Anson, F. E. Smith, W. de Broke (eds.), *Rights of Citizenship: A Survey of Safeguards for the People*, London, Frederick Warne, 1912, 81 et seq., 91.

The referendum has also had a chameleonic nature; it is sufficient here to notice what has happened in the UK where once Bogdanor defined the referendum as a “conservative device”⁸⁰:

“The referendum is generally seen as an instrument of popular sovereignty, an institutional expression of the doctrine that political authority derives from the people. Yet, as the history of the debate in Britain shows, the urge towards popular participation or self-government has not played a very important part in its advocacy. On the contrary, since first proposed by Dicey, the referendum has been suggested primarily as a means of checking disagreeable legislation [...] It has been, in the words of Beaverbrook, 'not a spear but a shield', an adjunct to representative government and not a replacement for it”.⁸¹

This explains why referendums “could serve to increase its [of the government] power” and it is no coincidence that over recent years the debate has been focusing on how to discipline it to avoid possible abuses. This intuition was confirmed in the nineties when it was used as an instrument to enfranchise the leadership from the internal influences of the party and to create a direct connection with the people. This has led to forms of plebiscitary drift⁸².

This explains why the referendum - once defined by Bogdanor as a “conservative device” - has become part of the reformist season.⁸³

All the procedural caveats surrounding the celebration of the referendum matter: while many perceive the only significant difference between the Scottish and the Catalan referendums in the unilateral nature of the second, what really makes the Catalan scenario non-consistent with the local constitutional framework is the fact that there the Autonomous Communities have no competence to call these types of referendums as scholars clearly pointed out reading Art. 149.1.32 of the Spanish Constitution.⁸⁴ This might appear as a procedural element but it affects the substance of the issue even more than the generic content of Art. 2 of the Spanish Constitution according to which: “The Constitution is based on the indissoluble unity of the Spanish Nation.”⁸⁵

V. An Instrument to be Handled with Care: Referendum in Comparative Constitutional Law

⁸⁰ V. Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, 1981, 69.

⁸¹ V. Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, 1981, 69.

⁸² A. Torre, *Il referendum nel Regno Unito: radici sparse, pianta rigogliosa*, in A. Torre, J. Frosini (eds), *Democrazia rappresentativa e referendum nel Regno Unito*, Rimini, Maggioli, 2012, 11 et seq., 73.

⁸³ G. G. Carboni, *I referendum mai realizzati e ancora da realizzare*, in A. Torre, J. Frosini (eds), *Democrazia rappresentativa e referendum nel Regno Unito*, Rimini, Maggioli, 2012, 399 et seq., 401.

⁸⁴ Art. 149.1.32: “1. The State shall have exclusive competence over the following matters [...] :32. Authorization of popular consultations through the holding of referendums”

⁸⁵ Art. 2 Spanish Constitution”.

This work revolved around four main points.

The **first** one is the concept of constitutions as risk management devices, an approach recently endorsed by Vermeule⁸⁶, for instance, according to whom “constitutions and public law generally are best understood as devices for regulating and managing political risks”.⁸⁷ Something similar has been argued even in Europe where this idea is frequently associated with the nature of post WWII constitutionalism and to what philosophers have called “memory of evil”.⁸⁸ In the selection of the emotions operated by national constitutions a key role is of course played by the history of each legal system: the horror, the conflicts, the past. In other words, everything that has led to the rupture with the previous legal regime and to the creation of the new system of norms.

This also explains, after all, the mission of comparative law in constitutional law studies: if it is true that there has been convergence – at least in Europe - in the constitutionalisation of values to be codified in constitutional principles, it is also true that there are still differences which fuel comparisons by reading the constitutional “text” in different contexts.

As Bobbio said, after all, rights are the products of history⁸⁹, but the same applies to other constitutional good or instruments. Scholars interested in “constitutional transitions”⁹⁰ reminded us of the dangers connected to the instability of new legal systems. Comparative lawyers, instead, have stressed the risk of rejection of the “transplants” legal solutions experimented elsewhere when they are applied to different contexts.⁹¹ All these considerations concur to explain why “fear is part of social cognition in that it warns others of nearby danger and solicits help. Emotions function as ‘commitment devices’ in situations where the temptations of defection are high, which makes signaling to others credible. Because of the commitment signaled by intensive emotions, people can count on others in future cooperation”.⁹² While scholars tend to read constitutionalism and constitutions in an attempt to rationalise power, this should not be understood as excluding any type

⁸⁶ A. Vermeule, *The Constitution of Risk*, Cambridge, Cambridge University Press, 2013

⁸⁷ A. Vermeule, *The Constitution of Risk*, Cambridge, Cambridge University Press, 2013, 2.

⁸⁸ S. Veca, *La priorità del male*, Feltrinelli, Milano, 2012, 15. See also T. Todorov, *Memory as a Remedy for Evil*, Seagull Books, Kolkata, 2010.

⁸⁹ N. Bobbio, *Sul fondamento dei diritti dell'uomo*, in N. Bobbio, *L'età dei diritti*, Torino, Einaudi, 1997, pp. 5-16.

⁹⁰ G. de Vergottini, *Le transizioni costituzionali. Sviluppi e crisi del costituzionalismo alla fine del XX secolo*, Bologna, Il Mulino; L. Mezzetti, *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico*, Padova, Cedam, 2003.

⁹¹ For similar considerations see the debate on “legal transplants”: A. Watson, *Legal Transplants. An approach to Comparative Law*, Philadelphia, University of Pennsylvania, 1993; E. M. Wise, *The Transplants of Legal Patterns*, in *American journal of Comparative Law*, 1990, 1 et seq.; P. Legrand, *The Impossibility of Legal Transplants*, in *Maastricht Journal of European and Comparative Law*, 1997, 111 et seq.; P. G. Monateri, *La circolazione dei modelli giuridici e le sue conseguenze per l'Unione europea*, in A. M. Petroni (ed), *Modelli giuridici ed economici per la Costituzione europea*, Bologna, Il Mulino, 2001, 87 et seq.;

⁹² A. Sajó, *Emotions in constitutional design*, *International Journal of Constitutional Law*, 2010, 354 et seq., 358.

of role for emotions in constitutional law. On the contrary, emotions, especially fear, have played a key role as pointed out by Sajó:

“For rationalism, emotions are separate from reason; the passions’ interference in reasoning, even if irresistible, is only a troubling external nuisance. Law is described as a mechanism to counter such interference, institutionally reinforcing reason’s shelter. This isolationist position, based on the reason-emotion divide, is unsustainable. Emotions participate in building a constitution and a culture of constitutionalism, and then these creatures of constitutional sentiment patrol emotion display [...] How do constitutional sentiments (the specific constitutional and public affairs– oriented part of public sentiments) contribute to constitution building? There are several models for this relationship, beginning with theories that advocate that law should follow emotions and moral intuitions, in particular. I argue that modern societies are emotionally and morally divided, and that constitutions approach public sentiment in a selective way”⁹³.

This is also true looking at two key moments in the history of constitutionalism, as said by Elster: “contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in period of social unrest, constituent moments induce strong emotions and, frequently, violence”⁹⁴.

The **second** point is the idea of referendum as a graft transplanted into contexts of constitutional representative democracy. While referendums are normally seen by populist movements as a kind of “catch all” appeal to the people which should be used to react against the corruption or passivity of the institutions, constitutional lawyers tend to handle referendums with care, looking upon them as a noble instrument whose compatibility with representative democracy must be guaranteed. This perspective can be justified in light of the political risks connected to a massive use of referendum, in other words referendums, if used as a full alternative to the instruments and institutions representative of democracy risk creating parallel channels of legitimation which could destabilise and delegitimise parliaments.

In order to prevent this, constitutions (even in contexts provided with partly written constitutions, this is the UK example for instance) come up with solutions designed to divide the labour so to say between representative and direct/participatory (depending on how scholars understand referendums⁹⁵) democracy. The **third** point is about the artificial concept of majority:

⁹³ A. Sajó, *Emotions in constitutional design*, in *International Journal of Constitutional Law*, 2010, pp. 354- 384, pp. 354- 355. Sul concetto di paura e sulle sue metamorfosi si veda: R. Escobar, *Metamorfosi della paura*, Bologna, Il Mulino, 1997.

⁹⁴ J. Elster, *Constitution-making and violence*, in *Journal of Legal Analysis*, 2012, pp. 7- 39, p. 7.

⁹⁵ M. Luciani, *Il referendum: questioni teoriche e dell'esperienza italiana*, in *Revista catalana de dret públic*, 2008, 15 et seq.;

“A majority is not something you will find in nature. It is an artifact of law. You need legal rules to determine who counts, and in which way. You need legal safeguards of liberty, equality and diversity of opinion. You also need legal rules to determine what the majority will be able to do, which necessarily implies that the majority gets told what she is not allowed to do. In short, you need constitutional law”.⁹⁶

It is possible to find confirmation of this in comparative law. Both the *Clarity Act* in Canada and Schedule I of the *Good Friday Agreement* give political actors an important role in detecting the existing majorities. The Clarity Act was a follow up to the secession Reference in the part in which the Canadian Supreme Court had said that: “in this context, we refer to a ‘clear’ majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves”.⁹⁷

In light of this the *Clarity Act* listed some factors that should be taken into account by the House of Commons to verify *a posteriori* the existence of a majority:

“Factors for House of Commons to take into account (2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account (a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant”.⁹⁸

This has caused a harsh reaction in Québec as we know. A similar role - but to be played in the phase before the celebration of a referendum - is acknowledged to the Secretary of State by Schedule I of the *Good Friday Agreement*:⁹⁹

“1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.a

⁹⁶ M. Steinbeis, *Majority is a Legal Concept*, 2017, <http://verfassungsblog.de/majority-is-a-legal-concept/>

⁹⁷ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217

⁹⁸ An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference S.C. 2000, c. 26, <http://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html>

⁹⁹ “ANNEX A 1. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland”. The Northern Ireland Peace Agreement. The Agreement reached in the multi-party negotiations 10 April 1998, http://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf

2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 **if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.**
3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule”.

These two examples show that the majority is not a neutral or easy concept; on the contrary, it is an artificial one which can be constructed through political and legal decisions, by excluding or including someone from the right to vote, for instance. That is why procedural caveats are important since they contribute towards ensuring the preservation of that core of untouchable values that is up to constitutionalism to defend.

Finally, the **fourth** point lies at the heart of the alleged tension between formal and substantial democracy or, better, between democracy and rule of majority. This point has been clarified in the already mentioned Reference on Québec and secession by the Canadian Supreme Court in 1998 when it said that:

“Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values... Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer [...] While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize... However, it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken”¹⁰⁰.

These words confirm the strong counter-majoritarian.¹⁰¹ nature of constitutionalism as such. When applied to referendums – frequently recalled by populists as a *mantra* - this means that the good reasons for the introduction of participation and direct democracy must be balanced with other values that are connected to the need to protect the untouchable core of a legal system.

¹⁰⁰ Canadian Supreme Court, Reference Re Secession of Quebec, [1998] 2 S.C.R. 217.

¹⁰¹ Here the reference is of course to da A. Bickel, *The Least Dangerous Branch*, Yale University Press, New Haven, 1986.