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Referendums in the United Kingdom and the European Union: Challenging Federalism?

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SOVEREIGNTY & SELF-DETERMINATION



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Abstract

This paper addresses the issue of borders and self-determination in the context of two seemingly incongruous developments: the application of direct democracy to make fundamental constitutional decisions on the one hand, and the gradual process of federalisation, with its commitment to pluralised consent to constitutional change, on the other. The case studies are the United Kingdom and the European Union itself, each of which is arguably set upon a federal trajectory. Federalism is a form of government designed to address the otherwise disruptive issue of borders and self-determination by balancing autonomy for territories with their wider commitment to the larger polity. It helps to avoid the stark issues of either/or self-determination and the creation of hard borders that come with separate statehood. The focus of the paper is upon the dynamics of constitutional change, and how these take on a particular form in federal polities. The paper reviews the pluralist dynamic of federal constitutionalism before turning to assess the rise of the referendum as a feature of constitutional change in federal systems. It considers how the ways in which the referendum acts as a nation-building or demos-building instrument can serve to strengthen vernacular identities. It addresses how this in turn can harden both borders and self-determination claims in a way that runs counter to the key constitutional purpose of federalism which is to weaken these claims and make borders more fluid in support of constitutional projects that seek to accommodate territorial pluralism within a wider union project.

Keywords: referendums, federalism, constitutional law, constitutional theory, direct democracy, self-determination.

Referendums in the United Kingdom and the European Union: Challenging Federalism?

Introduction

This paper addresses the issue of borders and self-determination in the context of two seemingly incongruous developments: the application of direct democracy to make fundamental constitutional decisions on the one hand and the gradual process of federalisation, with its commitment to pluralised consent to constitutional change on the other. The case studies are the United Kingdom and the European Union itself, each of which is arguably set upon a federal trajectory. Federalism is a form of government designed to address the otherwise disruptive issue of borders and sovereignty by balancing autonomy for territories with their wider commitment to the larger polity. It helps to avoid the stark issues of either/or self-government and the creation of hard borders that come with separate statehood. The focus of the paper is upon the dynamics of fundamental change, and how these take on a particular form in federal polities. Typically federal or other territorially-disaggregated states embed complex models for constitutional change, requiring consent from a plurality of actors or institutional sites. In this way, the process of constitutional change itself acts to contain more fundamental self-determination claims that might be made by the polity's constituent territories by building cross-territorial deliberative consensus into major constitutional decision making.

However, at the same time as federalism proliferates as a model of government, there has been a recent turn within constitutional practice towards the use of referendums, notably within federalising polities such as Spain, the UK, and the EU. Referendums can appear to be directly at odds with the overlapping pluralism of the federal idea. They present a notion of one undifferentiated demos which is capable of taking a decision, including those of the highest constitutional significance, by way of simple majority. This represents a model of constitutional change very different from the carefully crafted models of super-majority and interterritorial consent that characterise federal constitutionalism.

The growth in direct democracy seems therefore to be unsettling entrenched or conventionally understood patterns of constitutional change, with dramatic consequences for how self-determination claims within, and the borders of, multilevel states and the European Union itself are regulated. The EU has experienced the rise of the referendum in relation to accession and treaty-making processes, sometimes threatening to derail the EU's federal trajectory. The United Kingdom has used referendums to bring

about devolution for Scotland, Wales, and Northern Ireland, the latter in a complex agreement with the Republic of Ireland which itself held a concurrent referendum. The most dramatic referendums, however, have been on Scottish independence in 2014 and Brexit in 2016. Spain will not be a main focus of the paper, but referendums were used in the birth of the Spanish constitution in 1978 and the creation of the autonomous communities. The referendum is also a key instrument in demands by Basque and Catalan nationalists for self-determination.

The paper reviews the central pluralist dynamic of federal constitutionalism before turning to assess the rise of the referendum. It considers how the ways in which the referendum acts as a nation-building or demos-building instrument can serve to strengthen vernacular identities. It addresses how this, in turn, can harden both borders and self-determination claims in a way that runs counter to the key constitutional purpose of federalism which is to weaken these claims and make national boundaries more fluid in support of constitutional projects that seek to accommodate territorial pluralism within a wider union project.

Federalism and the dynamics of constitutional change

The proliferation of federalism is one of the most dramatic constitutional developments of the past 70 years. Since 1945, approximately one-third of states have adopted, or appear to be moving towards, a federal system.¹ The United Kingdom is, of course, not generally described as federal and I am not in this paper attempting to argue that it is fully federal. Rather I make two points to justify inclusion of the UK within a federal narrative. The first is methodological. I take a functional approach to federalism, positing it as an idea for a form of government rather than a detailed institutional template: a system combining self-rule and shared rule in Elazar's capacious definition (1987). Secondly, it is now widely recognised in light of the Scotland Act 2016 (a trend continuing with the Wales Act 2017), that the UK is set upon a federal trajectory, particularly in light of the effective entrenchment of self-rule through the declared permanence of the Scottish and Welsh legislatures in these statutes and with commitments to greater shared rule flowing from the many more powers that are now shared across reserved and devolved levels and the development of more formalised models of intergovernmental relations that must inevitably flow from these changes. Given these constitutional changes to the territorial constitution, it is clear that in practice

¹ Michael Burgess calls this the "federal tendency" (2012).

the UK now faces similar issues to federal states concerning the compatibility of the referendum with multilevel democracy. The framework constitutional purpose of federalism is the legal accommodation of territorial pluralism. A major point of focus for constitutionalists today is the issue of amendment. An important question is how best to reach the appropriate balance between open democratic decision making on the one hand and constitutional entrenchment on the other. Within constitutional theory, the issue of constitutional change tends to be considered with a default unitary model in mind. This has led to arguments for constitutional entrenchment in order not only to restrain government, often by separating its institutions on functional grounds, but also by embedding specific liberal political values, articulated in the language of individual rights and liberties.

Federalism is rarely considered as a specific category of government which raises particular issues about the appropriateness of constitutional change or of how it ought to be brought about. However, since the essential purpose of a federal constitution is the facilitation of territorial pluralism it does in fact raise different questions about how rigid or open the constitution ought to be. It can be argued that a federal constitution ought to be difficult to amend, dependent as change should be upon consent among the polity's constituent territories, or at least a supermajority of them. Democracy and consent are also key purposes of unitary constitutionalism, but the issue of consent to constitutional change within a unitary system tends to come down to a discussion of organising a plurality of consent within one set of government institutions, and whether any values should be protected from constitutional change.

A distinguishing feature of a federal constitution, however, is the need to build consent across the polity's constituent territories in reflection of its core purpose. The particular nature of the federal polity tends to lead to more intricate institutional formats designed to construct consent to constitutional change across these territories and not just within the central institutions of the state. This is the story of federations such as the USA and Australia where the constitution as a whole, or in Canada's case many parts of it, are very difficult to amend, requiring territorial as well as central consent. In Germany, the federal nature of the state is actually unamendable.

But a second feature of federal dynamics is the need to work together. A purpose of the federal constitution is to facilitate the cooperation of these territories: territories within a federation must, in Dicey's famous phrase, desire union but not unity (1973). And the union of territories, each with its own government, requires these governments to cooperate for the common good and the success of the polity. The disposition within federal theory seems to be towards a republican conception of government as a vehicle that can achieve the citizen's goals and which ought to be fostered rather than frustrated. It is

also a disposition which relies upon the common sense of the federation's constituent governments to work together to make the system viable. Therefore the dynamics of federal constitution-making are complex and in some ways seemingly contradictory—the prerogatives of the constituent territories are protected through rigorous and demanding amendment processes, but there is also a need for deliberate cooperation to allow the constitution to evolve in a way that will allow the federal model to retain its salience.

Direct democracy and constitutional change in territorial states

At the same time that federalism has proliferated, the referendum has emerged as an instrument of constitutional change in federal systems. We will now address whether direct democracy, as deployed to effect major constitutional change, is capable of responding to the nuances of federalism. Traditional thinking about constitutional change within constitutional theory focusses upon *elite* channels of constitutional change: amendment by institutions, whether exclusively of the central government or including also the governments of constituent territories. Constitutional theory has struggled to situate a direct role for the citizen within processes of constitution-making: in general, modern constitutionalism has eschewed any such role either in making or changing the constitution. However, the practice of constitutionalism is now changing, particularly with the rise of the referendum in major constitutional processes. This is occurring in federal as well as unitary states, raising tensions in relation to constitutional provisions or established constitutional practices. Federal systems tend to focus upon the need for the consent of a super-majority of the federal territories to constitutional change, with the key purpose being to promote plural agreement, the implication being that change should only be brought about through deliberative processes that rely upon good will and a sense of federal comity.

In the next part of the paper we will explore how patterns of constitutional change that have been designed to foster plural agreement for constitutional change, and to facilitate channels for deliberation to that end, are being superseded by the blunt mechanism of the referendum which is often used as an assertive, unilateral instrument in the hands of one territory to bypass already established avenues for deliberative and pluralised agreement. We will examine whether referendum use in the United Kingdom and the EU has served to unsettle the federalising dynamics of each polity.

The referendum turn

The use of the referendum, particularly for constitutional decision making, has proliferated widely in recent decades. Europe has very much been at the forefront of this new wave in direct democracy. A major factor was the collapse of formerly federal states in Eastern Europe: the federal Union of Soviet Socialist Republics (USSR) and Socialist Federal Republic of Yugoslavia (SFRY) each dissolved in the face of popular revolt expressed, at least in part, through direct democracy. This process established precedents for further referendums and for the referendum to be embedded within new constitutions in Eastern Europe as a mechanism for future constitutional change.

Certainly the referendum story of the USSR and SFRY is one of collapse, but this has to be contrasted with Spain and the United Kingdom where the referendum was used in the late 1970s and late 1990s respectively to consolidate multilevel systems of government, bringing about devolved models of government, putting unitary states on a decentralising trajectory, and possibly in the direction of federalism itself. As each state devolved—in Spain’s case made more complex by the creation of a new constitution in the late 1970s—the referendum was deployed at the substate level, and notably not at the state-wide level. These processes show that the referendum cannot be painted as a simple pathology that threatens states, but the use of referendums only at sub-state level may well have helped establish a more long-term form of destabilisation by further entrenching vernacular identities. The territories where this type of referendum has been held (e.g., Scotland, Wales, Catalonia) inevitably experience processes of further territorial self-identification, with the citizens coming together as “a public” through a “national” conversation with their fellows.

Constitutional theory alerts us to the way in which the constitution takes on more than one functional role. A constitution serves to regulate political power and to create institutions to that end, outlining the rules and relationships that govern the operation of these institutions. But the constitution can also play an important role in developing patterns of identity and loyalty to the polity. In this respect the process of constitution-making intersects with nation-building itself in complex ways. The citizen’s affiliation to the demos develops a civic turn with the creation of the constitution; existing cultural or ethnic attachments are complemented by a shared commitment to the values and structures established by the constitution. Within a federal constitution this process is more complex than in a unitary state, tending to manifest itself in layered identities and loyalties: to the region and to the state.

The referendum itself, however, can also come to play a particular demos-enhancing role. In the course of a referendum, the people speak as a people and make a determin-

ing decision in this way. At a national level, this can serve to help stabilise the polity by building loyalty to and identity with the state. But in the same way, it seems likely that referendums held at substate level on issues central to the self-determination of the territory will take on a similar dynamic, helping to entrench local identities and consolidate the salience of the regional demos, perhaps at the expense of state affinity and loyalty.

The first attempt to introduce devolution for Scotland and Wales by way of referendums was made in 1979 when the proposal for a Scottish Assembly and Welsh Assembly with legislative powers was put before the Scottish and Welsh people. Here the proposals, the full details of which had been pre-enacted in the legislation, were unsuccessful.² When devolution was proposed again in 1997, a significantly stronger model of self-government than that put forward in 1979 was set out, particularly for Scotland. The process was also different, with the referendums taking place before the legislation detailing the devolution settlement was passed.³ These proposals in the end required post-referendum enactment by way of the Scotland Act 1998 and Government of Wales Act 1998.⁴ In 1978, the devolution plans fell because of a lack of popular support, whereas in 1997, Scottish electors voted overwhelmingly in favour of the devolution proposals, with a much narrower victory for the devolution proposal for Wales.⁵

The referendums of both 1979 and 1997 were in each case an attempt by the Labour Government of the day to offer some measure of self-government in recognition of the rise of nationalism, particularly in Scotland. What was missing however was any attempt to reform the design of the state in a federal direction that would have developed both shared rule as well as self-rule. In fact, what we have seen since the late 1970s has been a strengthening of substate nationalism, leading to a 45% vote for independence in 2014. In part, this can be put at the door of the institutional imbalance of devolution itself, in particular a failure to develop shared rule—binding Scotland and Wales more

² Although in Scotland the proposed model achieved a narrow victory but not enough to meet the requirement that 40% of those eligible should vote yes. In Wales, devolution was soundly rejected.

³ The process rules for the referendum were set out in the Referendums (Scotland and Wales) Act 1997.

⁴ Scotland's Parliament (1997) CM 3658.

⁵ In Scotland on the proposition: "I agree that there should be a Scottish Parliament," 74.3% voted yes against 25.7% who voted no. To the proposition: "I agree that a Scottish Parliament should have tax-varying powers," a yes majority was again achieved by 63.5%–36.5%. In Wales, to the proposition, "I agree that there should be a Welsh Assembly," 50.3% voted yes to 49.7% voting no. Although this was on a much weaker model of devolution than the Scottish model, it still reflected a considerable jump in support for devolution since 1978. In 1998, a further referendum was held in Northern Ireland as a consequence of the Belfast Agreement.

closely to the central state. A question must also be raised however about the referendum itself. Has the use of a popular process at substate level served to help build a sense of national solidarity among citizens in Scotland and Wales, possibly at the expense of their sense of Britishness?

Taking Scotland as the main instance, it is notable that the period between 1979 and 1997 was marked by a local movement for self-government. The devolution proposal set out in the Government's 1997 White Paper stemmed largely from this local political process, culminating in the unofficial Scottish Constitutional Convention. In other words, nationalism was already developing in part through a semi-formal institutional and constitutional process, offering constitutional vehicles for popular mobilisation, which helped turn the 1997 referendum into something of a national constitutional moment. People were voting only in Scotland, as Scots, for a model of government which had been designed largely through a Scottish constitutional process.

The detailed history of the UK territorial constitution gives us a glimpse of how the referendum can sit in tension with an attempt to reconstitute a multilevel democracy. The process was one of devolution: of granting autonomy but also of seeking thereby to reintegrate the region within the state, restoring a lost sense of affinity with the state, and to consolidate a common commitment to its success. At the same time however, the referendums by which devolution was endorsed were held only in each region, one by one. In such a scenario, inevitably the citizen's interlocutors are exclusively fellow citizens in the region. The citizen was not interacting with citizens elsewhere in the state, and only tangentially with elites at central level. Insofar as the referendum acted as nation-building tool, it is hard to see how in these circumstances it could do other than build citizen attachment to the region rather than the state: it presented the demos of the region as the self-determining entity for the region's constitutional future.

A similar relationship to the referendum has emerged in Spain. A referendum was held in Catalonia in October 1979 which led to the Cortes approving the status of Catalonia as an autonomous community in December of that year. Thus a process of constitution-making at pan-Spanish level was also a moment in which the regions with a particular territorial identity, including Catalonia and the Basque Country, embarked upon processes of national consolidation. These processes were assisted by the constitutional symbolism of the referendum through which the substate regions were able to assert their own place within the nascent constitution as self-determining entities. It is very difficult to show empirically that the mere fact of the referendum had any major effect upon national identity in these regions, but as in the UK, the region was able to assert itself as a discrete demos by way of the referendum, and citizens embarked upon constitutional processes in which their interlocutors were exclusively the citizens of their own substate territory.

Sovereignty referendums: the ultimate self-determination challenge to a federal trajectory and state borders

The relationship between the referendum and territorial government in the United Kingdom becomes more complex still when we consider the Scottish referendum on independence held in 2014, and other ways in which the referendum has now been constitutionally embedded as a way of dealing with self-determination issues—s.1 of the Northern Ireland Act 1998 being the most dramatic example.⁶

In January 2012 the Scottish National Party government announced its intention to hold a referendum on independence,⁷ some two and a half years before the vote itself. There was an immediate rebuttal by the United Kingdom government which challenged the legislative competence of the Scottish Parliament to pass this bill.⁸ For a time the disagreement was intractable and it seemed as though the issue might find its way to the United Kingdom Supreme Court for adjudication. But in the end on 15 October 2012 a deal was struck between the two governments to permit the referendum to take place.⁹ The referendum was held on 18 September 2014 and the question asked was “Should Scotland be an independent country? Yes/No.” Fifty-five percent voted no, 45% yes.

The 2014 referendum’s relationship to federalism is complex. On the one hand, of course, the referendum was a straightforward vote on independence—yes or no. In fact however, when we look more closely we see that the referendum while not bringing about independence had a transformative effect upon the UK constitution, moving it in a federal direction. It is also the case that the process served to expose how difficult it is to make complex constitutional decisions by way of a referendum which offers such a limited range of options. If the essential feature of constitutional change in a federal or territorially disaggregated system is plural and thorough deliberation across the polity, the 2014 referendum exposed this inherent limitation of the referendum

⁶ This provides for the possibility of a referendum on the unification of Ireland and s.1 (2), “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.”

⁷ “Your Scotland – Your Referendum – A Consultation Document,” Scottish government White Paper, 25 January 2012, <http://www.scotland.gov.uk/Publications/2012/01/1006>

⁸ “Scotland’s Constitutional Future,” UK Government Command Paper 8203, January 2012 <http://www.scotlandoffice.gov.uk/scotlandoffice/files/17779-Cm-8203.pdf>

⁹ Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (October 15, 2012) – “The Edinburgh Agreement”

and called into question its suitability as an instrument in reforming the complexities of multilevel systems.

This reality was apparent from the start of the referendum campaign. In fact, given that opinion polls showed that further devolution of powers to the Scottish Parliament was a more popular option within the country than either independence or the status quo, in 2012 a debate emerged about whether it would be possible to have a multioption referendum. The Scottish government originally left this possibility open in its 2012 White Paper (setting out its independence proposal), and a debate ensued as to whether a third option should be on the ballot, what it might contain, and whether it was even feasible in practical terms to hold a referendum with more than two alternatives.

Politics took over. The very idea of a multioption process was firmly opposed by the UK government and in the end this threat helped lead to the Edinburgh Agreement¹⁰ between the UK and Scottish Governments, the aim of which was to ensure the referendum delivered “a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.” Under the agreement, the Scottish Government was given considerable discretion as to the date of the referendum, the franchise, and the wording of the question. The main conditions for the UK government’s consent were that the referendum be held before the end of 2014 and that it contain only a single question on independence.

As we look back today on the 2014 referendum we nonetheless need to ask: Were the options presented to voters really those of independence on the one hand and the status quo on the other? What the independence referendum led to was in fact the emergence of a proposal for further devolution, precisely what the UK government has attempted to see off in the Edinburgh Agreement. Shortly before the referendum, as the yes side appeared to be moving into the lead, “the Vow” was given by the unionist parties of the UK, committing the UK government and other main parties to further devolution for Scotland and to a federal-type commitment to the permanence of the Scottish Parliament and government.

The no option thereupon became a vote not for the status quo but for enhanced devolution. It is also the case that the yes campaign had spent much of its time explaining how independence would in fact be as much about ongoing connections with the UK as full statehood for Scotland: its stated aim was to have no borders with the rest of the UK; to keep sterling as a currency through a currency union; and to retain UK passports for those Scottish citizens who wished to keep them.

¹⁰ The Edinburgh Agreement.

Although in the end only two options appeared on the ballot, it is arguable that neither the status quo nor independence as traditionally understood was an option put to voters. The yes question offered a deeply inchoate version of independence; the content of the no question to an open-ended change in the devolution settlement. It seems that the referendum provided the setting for a wider debate about reform of the UK's territorial constitution (many of the promises made in the Vow in relation only to Scotland are reflected also in the changes to Welsh devolution captured in the Wales Act 2017). The question arises then as to whether the referendum was an appropriate way to deal with these issues. It did not offer the choices it purported to offer, and only Scots had a vote on a measure which would in the end bring about major change for the whole UK and not just Scotland. The type of pluralised decision making, engaging the citizens of the different territories of the union in a deliberative conversation, was arguably very much absent from this process.

The reflexive relationship between the referendum and federalism

It is therefore the case that the story becomes more complex. Of course, a referendum held on the subject of independence in only one part of the state seems to go against the need for plural consent to constitution-making in a multilevel polity. The curious story of the 2014 referendum is that it has led to further devolution and arguably to a trajectory towards federalism as we discussed at the start of the paper. The terrain moved rapidly in the days following the referendum. The UK government's line having changed from a commitment to the status quo to a willingness to embrace further and open-ended devolution, this undertaking was quickly secured in the Scotland Act 2016. The federalising potential of this Act is clear. In the first place, it puts in place a range of shared powers which had largely been avoided in the 1998 devolution model.¹¹ This reorientation of the nature of devolution will necessitate a change in the system of intergovernmental relations, strengthening the shared rule dimension of devolution.

Other provisions of the Act also serve to formalise the devolved system. Section 1 guarantees the permanence of the Scottish Parliament and government, which can only be removed—notably—after a referendum in Scotland. In its report in March 2015, the Constitution Committee of the House of Lords observed that this provision appeared “to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved

¹¹ House of Lords Constitution Committee, “Scotland Bill Report,” (6th Report, Session 2015–16, HL Paper 59), para 8.

institutions in a way that has hitherto not been the case.”¹² In any event, since Parliament is extremely unlikely ever to attempt to repeal the provision without a preceding referendum, this may also serve to consolidate its constitutional significance.

Section 2 also recognised the existence of the Sewel convention to the effect that Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament. Despite statutory recognition, the convention remains a convention and was not given *legal force* by section 2. Its political salience has been enhanced by the provision, and the political consequences of over-riding it have been greatly increased. Despite this, the Supreme Court of the United Kingdom in the *Miller* case which concerned whether an act of Parliament was required to trigger notification to the European Council of the UK’s intention to leave the EU,¹³ reiterated constitutional orthodoxy that conventions are essentially political constraints that depend upon the behaviour of political actors for their effect.

We are left with something of a paradox. A referendum that seemed to assert the existence of the substate demos as sovereign decision maker, and potentially as the agent that would break up the United Kingdom, has led in fact to the closer integration of Scotland within the United Kingdom, seemingly reducing the threat to the UK’s borders.¹⁴ The lesson may be that the referendum is ill-suited to the complex process of plural agreement across a polity, but it may also be that a referendum which is badly framed in reflecting true popular opinion, will in the end be superseded by the wider, more pluralised and more deliberative processes which are essential to the workings of any multilevel territorial constitution.

EU federalisation: the direct democracy roadblock

A further twist in the tale has come with the Brexit referendum. The European Union has also been widely affected by the spread of referendums. Direct democracy has played a significant role in the accession of new states and in the federalisation of the European Union through the ratification of treaties designed to integrate EU member

¹² House of Lords Constitution Committee, “Proposals for the Devolution of Further Powers to Scotland,” para 77.

¹³ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union, [2017] UKSC 5, para 148.

¹⁴ It also helped shape the Wales Act 2017 which, as well as giving the Welsh National Assembly more powers, also requires more involved intergovernmental relations to make these operable.

states ever more closely within the European project. It is notable that of the first 15 countries to join the EC/EU, only Ireland and Denmark used referendums, as provided for by their constitutions, as part of the accession process, whereas of the ten states to accede in 2004 only Cyprus did not.

It has, however, been in relation to treaty reform that the referendum has, in fact, grown to be a problem for EU integration. What we have seen in the use of referendums within the EU is that they have given national peoples the opportunity to consolidate their identities at a time of erstwhile diminution of sovereignty. At certain points the referendum has led to an assertion of national sovereignty that flies in the face of the EU's federal trajectory.

Alarm bells started to sound as a result of referendums in Denmark and Ireland which, respectively, held up ratification of the treaties of Maastricht and, in Ireland's case, Nice and Lisbon. Since Denmark joined in 1973, there have been numerous referendums: in 1986 on the Single European Act; in 1992 on the Treaty of European Union (Treaty of Maastricht) and subsequently in 1993 on the Edinburgh Agreement which modified Maastricht; in 1998 on the Treaty of Amsterdam; and in 2000 on Economic and Monetary Union.

The Danish people said no to the Maastricht Treaty.¹⁵ In the end, this did not hold things up dramatically. A compromise was agreed by the EC with Denmark by way of the Edinburgh Agreement and this was approved in the 1993 referendum. Again, although the Danes rejected EMU in 2000, by then the Eurozone had been created for participating states and so Denmark merely opted out of this initiative. Danish referendums have been more an irritant than a serious obstacle to integration, however, the preparedness of Danish voters to say no in 1992, the only country to do so, was a shock to the relentless centralisation of the system. For some, this has been seen as the beginning of a new strain of political contestation (Franklin 1994) which has had lasting effects across a number of states, articulating "the reservations that many observers outside the political elites felt about the speed and direction of European integration." (LeDuc 2003).

In Ireland, too, the constitutional requirement of a referendum has resulted in two famous cases of rejection. The first was the refutation of the Treaty of Nice in 2001. Following a minor concession by way of the Seville Declaration recognising Ireland's

¹⁵ Maastricht was supported by 80% in the Folketing but was rejected by the voters in the referendum by 52%-48%.

policy of military neutrality, a second referendum was held and the Nice Treaty was eventually accepted by Irish voters in 2002. But the more dramatic rejection was that of the Treaty of Lisbon in 2008 (O' Brennan 2009). Once again the Irish government negotiated minor compromises and Lisbon was eventually accepted by the Irish people in 2009. Although Ireland was pushed into line by the EU, the result of each of these referendums vexed elites and raised the question whether people were voting in reaction to a perceived loss of national control.

A more significant popular challenge to integrationist momentum came in response to the draft Constitutional Treaty which was put to a referendum in four states. To the surprise of many, the draft Treaty was rejected by voters in France and the Netherlands.¹⁶ This led to the watered-down Lisbon Treaty which in substantive terms continued the integrationist march of the EU. But psychologically, these rejections by two influential and traditionally Europhile states were a shock to the system: two countries that had always been in the vanguard of EU integration seemed to be asserting their still resilient national identity. This, coupled with Ireland's initial rejection of the Lisbon treaty, hinted at an emerging scepticism with Europe's relentless federal drive.

These developments display once more how the referendum brings self-determination to the table, giving the national demos (this time at the level of the state) not just the chance to speak and decide, but a platform for the consolidation of the vernacular identity. The most incendiary development came in June 2016, of course, when an act of popular democracy challenged the federalising trajectory of the EU in an unprecedented way with the Brexit vote. Against most predictions, the British people voted 52%-48% to leave the EU: once again a national people, when given a direct say on the EU, used this to say no, this time on the most fundamental issue of all—membership.

The story of referendums and the European Union seems to be that when the issue of sovereignty arises in a way that also implicates national identity, voting behaviour can become volatile and hence unpredictable, and in light of this, elite control is harder to effect as highly mobilised cross-party yes campaigns across Europe have begun to realise to their cost. We must also factor in the likelihood that the use of the referendum in the ratification process is here to stay and may well proliferate. One trend is a domino impact or “multiplier effect” in those countries where the referendum is discretionary. We are seeing evidence that once one state commits to holding a referendum, pressure

¹⁶ Meaning that planned referendums in Ireland and Denmark were postponed indefinitely. The treaty was approved in referendums in Spain and Luxembourg.

can grow on others to do so.¹⁷ Also the requirement to hold referendums which we find in so many of the constitutions of recently acceding states may also have long-term implications (Thomson, 2001). As with referendums by substate territories on devolution or independence it seems that referendums in the EU context also become vehicles to articulate and empower resilient national identities and national aspirations that may not have been taken seriously in broader constitutional processes.

Here we see again, however, how the referendum brings a one-sided approach to self-determination that lies in tension with the needs of a federalising process to respond to multiple actors and the concomitant requirement for plural and deliberative decision making across the polity. If we view the referendum as part of this broader deliberative process it becomes impossible to set it exclusively within the old style paradigm of a self-contained demos exercising its popular sovereignty. The referendum in one member state has knock-on consequences for all. One demos is speaking directly, but other actors, from other member states to the institutions of the EU itself, feel entitled to intervene to represent their own constituencies, which arguably include the incipient *people of the EU*. The people of distinct polities are speaking directly, recalling at least symbolically their vernacular sovereignty. But they do so in processes whose substantive outcomes belie the viability of constitutional authority as internally complete. The people are speaking—and therefore forming distinctive constitutional relationships—not only with the representative institutions of the state but also with those which claim a representational legitimacy at the level of the European Union. Once more, as in the devolution referendums in the UK, decisions which seem substantively to be about plural polity-building, are procedurally shaped to accentuate rather than weaken internal territorial identities, and in doing so perhaps to consolidate the salience of territorial borders.

Conclusions: What are the implications of referendum democracy for self-determination and borders?

A tension now exists in Europe between a deepening of vernacular identities on the one hand, which brings with it a growing opposition to the integrationist and globalising trajectory of the European Union on the other. This is exacerbated by the perceived

¹⁷ In France President Chirac committed to a referendum on the draft Constitutional Treaty under political pressure, mainly due to an earlier commitment by the UK government to hold one. The irony is that the French no vote, which in effect killed the draft Treaty, saved the UK government from having to stage a referendum.

democratic deficiencies of the EU and its overbearing approach to member states. The UK Brexit referendum has as yet unforeseeable implications for the EU's borders beyond the obvious departure of the UK. But this referendum is not an isolated example and one further development may in time be the further use of referendums across Europe on the issue of EU reform and enlargement; the process surrounding the draft Constitutional Treaty suggests such a trajectory. Referendums are, for example, likely to challenge the extension of the EU's borders. Any attempt to expand the EU to include Turkey, for example, could well lead to referendums by member states before ratification of any treaty to that effect. For example, such a referendum has for some time now been a political commitment in France.

The UK has long had an uneasy relationship with the integrationist project of the EU. It has managed this as best it can through opt-outs and rebates. But the *via media* of a renegotiated UK position has been blown out of the water by a hard binary decision taken in a stark either—or referendum. That is not to say that an assertion of national identity by the UK is somehow blameworthy but simply that such assertions sit very uneasily within a federalising project. The failure of comity works in two directions. It can also be claimed that the EU with its hurried and democratically-deficient centralising trajectory has moved away from a federal commitment to recognise and respect territorial pluralism. Will increased use of the referendum be the price the EU has to pay for its high-handed approach to elite-driven federalism?

What therefore can we say about how the referendum intervenes in multilevel constitutional processes, asserting itself as the vehicle for democracy and hence as the ultimate legitimator of political action and constitutional regulation? The referendum enters constitutional thinking in a novel way. In fundamental constitutional referendums, which involve instantiations of constituent power, “the people” intervene directly to make sovereign decisions in a way which affirms that legitimate democratic authority ultimately emanates from popular consent rather than the institutions of state (Tierney 2009). The UK government's concession of a referendum on Scottish independence to be held in 2014, and its understanding that in political terms the legitimacy of the referendum could not be resisted, was in some sense recognition of this.

The spread of referendums across Europe is the result, at least in part, of popular disaffection. This has encouraged certain elites to bypass regular processes of representative government and go straight to electorates. But the referendum still sits uneasily in the context of federations and federalisation. Within multinational federations it goes so far as to challenge the very existence of the state. It offers substate peoples, particularly those who already enjoy institutional autonomy, a vehicle through which to voice their constitutional ambitions, and with which to legitimise claims to independence or

sovereignty; this is the story not only of the collapsed states of eastern and central Europe but also of Scotland and Quebec, and possibly Catalonia.

The story of the referendum in the UK gets even more complex when we look at the intersection between the referendum in 2014 and in 2016. Although the 2016 referendum resulted in a UK-wide vote to leave the EU, one of the consequences of the 2014 referendum and the subsequent process through the Scotland Act 2016 towards the federalisation of the UK, was that Scottish nationalists have begun to demand the type of territorial pluralisation of the constitutional amendment process.

The First Minister of Scotland, fresh from the unilateral independence referendum, claimed that Brexit would require four majorities in the referendum—Scotland, England, Wales, and Northern Ireland. The Scottish government also intervened in the *Miller* case to argue that, as a matter of constitutional convention, the consent of the Scottish Parliament was essential to trigger Article 50 notification. The court, as we have seen, refused, however, to read Scotland Act 2016 section 2, which recognised this convention in law, as providing it with any legal force, declaring that conventions are no more than political forms of regulation.

What does all of this mean for the issue of borders within the UK and between the UK and the EU? The Brexit referendum may seem like a nation-affirming move, but it is not clear whose self-determination we are talking about. For many, the Brexit result is not about British nationalism but more about English nationalism, although this needs to be tempered by the fact that a majority in Wales also voted for Brexit. Wales aside, the referendum seems to have further destabilised the national fault lines not only between Scotland and the rest of the UK, but also in Northern Ireland between nationalists and unionists. What we have seen is the mobilisation not so much of a UK demos, but of four or five distinct demoi within the UK, each with a different vision of how a federalising UK ought to relate to a federalising EU.

A further irony is that the Brexit referendum took place as a singular, pan-UK demotic event, with no distinctive voice for the UK's constituent devolved territories, at a time when the Scotland Act 2016 and the new Wales Bill were affirming the increasing diversification of identity within the UK and redesigning institutions of government to reflect these diverging identity patterns. Just when the need for pluralised consent expressed through open channels of deliberation should have been becoming a greater feature of the constitution, in which a gradual move towards federalism was widely coming to be seen as the only way to bring the devolved territories closer to the central government and hence to make the central state seem relevant to citizens, the question arises: Was the unilateral and singular self-determining voice offered by the Brexit

referendum anomalous? This question depends upon one's political outlook. But it does seem that two innovations of our time: the innovative application of federal thinking to territorially complex polities on the one hand, and the rise of direct democracy on the other, pose challenges for the future of these polities, their borders, and the self-determining power of the people—or peoples—that they contain.

References

- Burgess, Michael. *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism*. Oxford: Oxford University Press.
- Venn Dicey, Albert. 1973. *Introduction to the Study of the Law of the Constitution*. London: MacMillan.
- Elazar, Daniel. 1987. *Exploring Federalism*. Alabama: University of Alabama Press.
- Franklin, Mark, Michael Marsh, and Lauren McLaren. 1994. "Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht." *Journal of Common Market Studies* 32: 455.
- LeDuc, Lawrence. 2003. *The Politics of Direct Democracy: Referendums in Global Perspective*. Toronto: Broadview Press.
- O'Brennan, John. 2009. "Ireland says No (Again): the 12 June 2008 Referendum on the Lisbon Treaty." *Parliamentary Affairs* 62: 258-277.
- Roberts-Thomson, Patricia. 2001. "EU Treaty Referendums and the European Union" *Journal of European Integration* 23: 105-137.
- Tierney, S. 2009. "Constitutional Referendums: A Theoretical Enquiry" *Modern Law Review* 72: 360-383.
- Van der Eijk, Cees and Mark Franklin. 2004. "Potential for Contestation on European matters at National Elections in Europe." In *European Integration and Political Conflict*, edited by Gary Marks and Marco Steenbergen, 32-50. Cambridge: Cambridge University Press.

Government and parliamentary papers, statutes, and legal cases

Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (15 October 2012)

House of Lords Constitution Committee. "Scotland Bill Report." (6th Report, Session 2015-16, HL Paper 59)

House of Lords Constitution Committee. “Proposals for the Devolution of Further Powers to Scotland.”

R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union. 2017. UKSC 5

Referendums (Scotland and Wales) Act 1997

“Scotland’s Constitutional Future,” UK Government Command Paper 8203, January 2012 <http://www.scotlandoffice.gov.uk/scotlandoffice/files/17779-Cm-8203.pdf>

Scotland’s Parliament (1997) CM 3658.

“Your Scotland – Your Referendum – A Consultation Document,” Scottish Government White Paper, 25 January 2012 <http://www.scotland.gov.uk/Publications/2012/01/1006>



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