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Tierney, S 2014, *The Referendum in Multi-level States: Fracturing or Fostering Federal Models of Government?* Federal Idea: A Quebec Think Tank on Federalism.
<http://ideefederale.ca/documents/Tierney_ang.pdf>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

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The Referendum in Multi-level States: Fracturing or Fostering Federal Models of Government?

Professor Stephen Tierney

Director, Edinburgh Centre for Constitutional Law
University of Edinburgh

March 2014



THE FEDERAL IDEA
A Quebec Think Tank on Federalism

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1 Introduction

The Referendum Challenge for Multi-level States

The use of the referendum, particularly at the level of constitutional decision-making, has proliferated widely in recent decades. A major factor has been the collapse of formerly federal states in Eastern Europe and the constitutional re-ordering of other federal countries: the federal USSR and Yugoslavia each collapsed in the face of popular revolt expressed through the ballot box, while federations such as Canada, Australia and the United States have experienced important referendums at either (or in Canada's case, both) the state or sub-state levels over the past forty years. In other states the referendum has helped bring about devolved models of government, putting formerly unitary states such as Spain and the United Kingdom on a decentralising trajectory, and possibly in the direction of federalism itself. And it is also notable that referendums have played a very significant role in the federalisation of the European Union in two ways – the accession of new states and the ratification of new treaties.

This paper will categorise the proliferation of the referendum, discussing the different ways in which they have played a role in processes of state-collapse and state-restructuring in federal and other multi-level states. Is it the case that referendums act as a destabilising force in federal states by bringing to the surface the existence of multiple political communities within the state, and by giving each of these the capacity to make constitutional demands by way of a direct voting process which can also at the same time build national sentiment at the sub-state level? Certainly the referendum story of the former Union of Soviet Socialist Republics (USSR) and Socialist Federal Republic of Yugoslavia (SFRY) is one of collapse, but this is not the whole story; the referendum has also been used to *build* multi-level systems of government, for example, in Spain and the UK, albeit that the stability of these systems is a constant source of debate.

The paper will consider more broadly how the rise of the referendum has revived the old debate about whether or not referendums are good or bad for democracy. We will discuss some of the democratic problems that are often identified with referendums and will consider how these might be overcome by way of instantiating the practices of deliberative democracy within referendum design. It will be argued that the referendum can be a useful democratic device provided that the process is properly instilled with principles of deliberative democracy. In order to explore this, the paper will look at various examples, but two in particular emerge from federal states. The referendum held in Australia in 1999 on the republic issue and that held in British Columbia in 2006 on the electoral system, are in different ways instructive of how at both the national and sub-state levels referendums can be used to overcome some of the democratic failings which are often laid at their door. This is not to suggest that federal states somehow manage the referendum better than other states, but it should serve to show that the referendum can function within federal states without serving to undermine the salience of the state.



Finally, we will turn to the process planned for the referendum on independence in Scotland in 2014. Here again the process, taking place within a multi-level state, is instructive. The issue of independence is clearly one which does threaten the existence of the state. However, paradoxically, the referendum is being organised with a significant degree of cooperation between the UK and Scottish Governments, which have both agreed the outline for a consensual process. Furthermore, by raising the issue of constitutional change, the referendum has led many to think more broadly about the constitutional future of the UK regardless of the outcome of the referendum, and to future constitutional processes which may in fact lead to some kind of federal arrangement for the UK.

2 Referendums in the Federal Context: The Proliferation of Direct Democracy


Over the past forty years the referendum has become a fixed feature of state and constitution-building across the globe; and much of this proliferation has been a consequence of the break-up, formation or reorganisation of federal and other multi-level states. In Table 1 I offer a breakdown of how referendum use has grown in four main areas of constitutional practice.

Table 1

| 4 types of referendum in the 'new wave' | Examples |
|--|---|
| Founding of new states | New states emerging from former federations - USSR and SFRY. Other cases: Eritrea (1993), East Timor (1999), Montenegro (2006), South Sudan (2011) |
| Creation and amendment of new constitutions | Again former republics of the USSR and SFRY ; Iraq – ratification of the (federal) Constitution of 2005; Egypt – constitutional reforms 2011; Federal Australia – referendums are central to constitutional change, e.g. referendum on the republic issue, 1999. |
| Sub-state autonomy | Spain – devolution referendums: e.g. Basque Country 1979, Catalonia 1979, Galicia 1980. United Kingdom – devolution referendums: Scotland 1997, Wales 1997 and 2011, Northern Ireland 1998. |
| European Union: treaty-making processes in respect of both integration and accession | Accession examples 2004: Malta; Slovenia; Hungary; Lithuania; Slovakia; Poland; Czech Republic; Estonia; Latvia. 2012: Croatia. |

The referendum was a central player in the break-up of the federal USSR and SFRY in the early 1990s. In particular it became a foundational moment for new states emerging from these entities: for example, Croatia, Slovenia and Ukraine.¹ The referendum is indeed now the default mechanism for the emergence of most new states: see for example, Eritrea (1993), East Timor (1999), Montenegro (2006) and South Sudan (2011). We have of course also witnessed the sovereignty referendums in Quebec in 1980 and 1995, while a referendum will be held in Scotland in September 2014 which offers the option of independent statehood to the voters, threatening to break-up the devolved arrangements put in place in 1998 ironically by way of a referendum in Scotland in 1997.


1. Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012), 67-71.



Secondly, referendums were once very rarely used in the creation or amendment of constitutions, but this is changing. Most recently, in Iraq and Egypt we see the referendum emerge in the founding of new constitutions, and notably of course this process served to reconstitute Iraq as a federal state. Another factor is that where a referendum is used to found a new state and constitution it is now common for the referendum to be included within the new constitution as part of the future amendment procedure. A number of those sub-state territories in central and eastern Europe which achieved statehood by way of a referendum then held a subsequent referendum to ratify the new constitution and have since come to see the referendum as an important popular check on elite amendment of the constitution.

In some sense of course these two categories show how the referendum is used in processes that lead to the break-up of federal states. But referendums have also been used to establish new systems of multi-level government. We see this in Spain and the United Kingdom in the late 1970s and '90s respectively. And this has been an on-going story in the UK with a referendum on further devolution for Wales in 2011. A related example is the referendum on the draft Charlottetown Accord in 1992 where distinct referendum processes were held respectively in Quebec and the rest of Canada, aimed at re-working the constitution of Canada as a federal state.

Fourthly, we have also seen a major proliferation in referendum use in the accession to and the transfer of sovereign powers from European states to the European Union – the latter process we might call 'federalisation'. So far as accession is concerned, of the first 15 countries to join the EU only Ireland and Denmark held referendums to ratify the decision. Of the 10 accession countries in 2004 only Cyprus did not; and we see the trend continue in January 2012 with Croatians voting in a referendum for accession in 2013. In relation to federalisation, the use of the referendum has made the path considerably more rocky than European institutions had hoped, with referendums in Denmark and Ireland interrupting the ratification process of the Maastricht and Nice treaties, votes in France and the Netherlands bringing down the draft Constitutional Treaty, and a subsequent referendum in Ireland delaying ratification of the Lisbon Treaty.



We can draw some brief conclusions about the use of the referendum in the context of federations and federalisation. Within multinational federations the referendum can indeed challenge the very existence of the state. It offers sub-state peoples, particularly those which 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. But this cannot be the only conclusion to draw. As we saw in Iraq, the referendum can also be used in the creation of a federal state, and in Spain and the UK it has been deployed to create structures of territorial decentralisation short of full federalism and in doing so to give these the explicit endorsement of the people of the sub-state territories in question. The relationship between the referendum and EU integration remains complex. The process towards an ever closer federal arrangement seems inexorable but at the same time the peoples of Europe have used the referendum from time to time to pull the brake upon these processes. Since so many Member States have now entrenched the referendum as part of the treaty ratification process we must wait to see what effect this might have on future constitution-building processes instigated by Brussels.

3 The Referendum: the Democratic Challenge

In this part I will introduce the democratic debate that surrounds the use of referendums, and argue that principles of deliberative democracy can help to overcome some of the problems in practice that have afflicted referendums. Interesting examples from the federal states of Australia and Canada are used to demonstrate this.


The proliferation of referendum democracy is now resulting in work by political and constitutional theorists that seeks to revisit the fairly stale debate concerning the democratic merits and failings of the referendum. I engage in this myself in my book *Constitutional Referendums*.² A key premise of this book is that the normative dimension of referendum practice needs to be reworked to take account of the new circumstances in which direct democracy is being used. So common now is the referendum that we need to re-think how best to accommodate this phenomenon within our constitutional politics, and not least, how it might best be applied within federal states.

Referendums are paradoxical. For some, they represent an ideal model of democracy. The voters are called upon to speak as one unified people, deciding on an issue directly without the mediation of politicians. The referendum gives a directly determining voice to the demos in a way that captures neatly both the people's popular sovereignty and the political equality of all citizens. What could be more democratic? For others, however, the referendum is a dangerous device because it in fact imperils democracy which can only be properly practised through exclusively representative institutions, and as such the referendum is best excluded from processes of constitutional change.

Elsewhere I have identified three main objections to the referendum. First, that referendums lend themselves by definition to elite control and hence manipulation by the organisers of the referendum. Referendums, it is widely argued, are organised by governments to effect political goals and therefore are only held when the prospect of a successful outcome (from the government's viewpoint) seems propitious. To this end an executive is able to shape – indeed manipulate – the various elements of process design to achieve this result. Elites have an array of exclusive powers at their disposal, such as deciding to initiate the referendum in the first place, setting the question, and determining the process rules by which the referendum will be conducted and the issue decided. This allows them to deploy the referendum only when they are certain of victory. In Lijphart's famous account, 'most referendums are both controlled and pro-hegemonic'.³

2. Ibid.

3. Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press 1984) 203. See also Matt Qvortrup, 'Are Referendums Controlled and Pro-hegemonic?' (2000) 48 *Political Studies* 821.



This criticism leads to another, that public reasoning which allows for the informed reflection and discussion of ideas before decisions are reached is absent from referendum processes. Various assumptions underpin this idea: referendums tend to be held quickly by way of a snap vote organised at the behest of the government; voters are presented with an issue which is often confusing, perhaps rendered through an unintelligible question; voters themselves lack the time, sufficient interest in the matter at stake and competence to understand or engage properly with the issue, and in effect turn up at the polling station, if indeed they bother to do so at all, in an unreflective manner, often following party cues in determining how to vote.

A third objection is that referendums consolidate and even reify simple majoritarian decision-making at the expense of minority and individual interests. This is a particular issue for federal states since one of the key functions of federalism is to pluralise decision-making across different territories and communities.

4 Overcoming the Democratic Deficit: Referendums and Deliberative Democracy

It is my view that these objections, when valid as descriptions of particular referendums, are largely problems of practice not principle, and secondly that the recent turn in deliberative democratic theory provides practical ways of overcoming these problems. Deliberative democracy is now a well-established school, the emergence of which is often traced back to John Rawls' focus upon 'public reason'.⁴ Over the past two decades in particular, work in this area has proliferated in many directions and in highly diverse ways, becoming infused inevitably with the ideological differences of our time.⁵ Scholarship in the area also divides between those who approach deliberation and politics at a more abstract level within political theory⁶ and those more interested in practical experiments in applied deliberation.⁷

A common commitment among deliberative democracy theorists is that political decisions should be preceded by 'authentic deliberation', or what John Rawls calls 'public reason'.⁸ By this principle people engaged in making decisions should reflect authentically and honestly before they make decisions and should engage publicly with others, prepared to defend their views and open to be persuaded by the arguments of others. The key principles which can be distilled from the proliferation of deliberative democratic theory and which can be translated to referendum design are as follows:

Table 2

| The contribution of deliberation to the decision-making process | Principles of civic republican deliberation | Addressing the following criticisms of referendums |
|---|---|--|
| Who deliberates? | Popular participation – within a broader system of representative government | Elite manipulation – 'the elite control syndrome' |
| How should they deliberate? | Public reasoning: reflection and discussion | Aggregation - 'the deliberation deficit' |
| Under what conditions? | Equality and parity of esteem | Majoritarianism - 'the majoritarian danger' |
| To what end? | Consent and collective decision-making | All of the above. |

4. John Rawls, *Political Liberalism* (Columbia University Press, 1993).

5. John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestations* (Oxford University Press 2000).

6. Emily Hauptmann, 'Deliberation = Legitimacy = Democracy' (1999) 27 *Political Theory* 857; Simone Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307.

7. John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press 2006); Robert Goodin and John Dryzek, 'Making Use of Mini-Publics' in Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press 2008); Shawn Rosenberg (ed), *Deliberation, Participation and Democracy: Can the People Govern?* (Palgrave Macmillan 2007); Janette Hartz-Karp and Michael K Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 *Journal of Public Affairs* 125; James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press 2009).

8. Rawls op. cit.

5 Designing a Deliberative Referendum

Popular Participation

How can popular participation be meaningful if a particular government can manipulate the referendum process? One starting point is to note a tendency, particularly in the existing literature on referendums, to view the referendum as one seamless process from the decision to hold one up to the result. This view it seems is too simplistic, and misses the fact that the referendum is a process of at least five stages and that at each of these stages law can be used to regulate elite actors and to disperse power among a number of different institutions, thus considerably reducing the extent to which the process can be dominated by a particular individual or government. These stages are: the initiation power – deciding to hold a referendum; the framing of the question; the regulation and conduct of the electoral campaign; the vote; and the aftermath. At a number of these stages popular participation can be introduced and encouraged. This will be illustrated below with examples from Australia and in particular British Columbia, beginning in the next section.

Deliberation Deficit: Engaging public reason in a referendum process

The second objection that needs to be addressed is that beyond the issue of manipulation a referendum still remains fundamentally just a voting process which merely aggregates the preferences of uninterested and ill-informed voters. By this caricature the referendum is set quickly, people are hurried into the voting booth as simple ballot fodder, with little information or time to consider the issues.

How can a referendum process be designed in a way that infuses both citizen participation and other deliberative elements, facilitating the informed reflection and discussion by citizens? One of the main challenges is the very scale of such a project. Much of the existing literature on deliberative democracy has focused upon small group deliberation by citizen juries, citizens' assemblies and the like.⁹ But this leaves open the question of how to extrapolate the potential of small group engagement to the macro level. How can a process help facilitate deliberation by large groups of citizens? The challenge of extending successful experiments in micro-level deliberation to the macro-level is clear when we consider the application of micro-level deliberation undertaken in British Columbia in the lead up to a referendum on the voting system in 2005. This was a radical experiment in citizen engagement which broadened the question-setting process beyond elites. The British Columbia Citizens' Assembly (BCCA) was established between 2003-2004, deliberating throughout most of 2004. It was composed of

9. Graham Smith and Corinne Wales, 'Citizens' Juries and Deliberative Democracy' (2000) 48 *Political Studies* 51; Eric Ghosh, 'Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries' (2010) 30 *Oxford Journal of Legal Studies* 327; Horacio Spector, 'The Right to a Constitutional Jury', (2009) 3 *Legisprudence* 111-123; James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (OUP 2009); Robert E Goodin and John S Dryzek, 'Making Use of Mini-Publics' in Robert E Goodin (ed), *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (OUP 2008) esp 16-19; Robert E Goodin and John S Dryzek, 'Deliberative Impacts' in Shawn Rosenberg (ed), *Deliberation, Participation and Democracy: Can the People Govern?* (Palgrave Macmillan 2007); John S Dryzek, *Foundations and Frontiers of Deliberative Governance* (OUP 2011) 155-76.

a randomly selected group of citizens.¹⁰ The remit of the BCCA was to assess models for electing Members of the Legislative Assembly of British Columbia and to issue a report recommending whether the current model should be retained or another model adopted, this issue to be put to the people of the province in a referendum.

There is considerable evidence that the BCCA worked very well in engaging the group and in creating an atmosphere of informed and open deliberation.¹¹ One piece of survey work involved telephone interviews with 18 members of the Assembly after the BCCA had concluded its deliberations. This comprised approximately a 10% sample 'reflecting the main characteristics of the CA member profile.' The researcher's conclusions were that people generally felt honoured to have been selected and that they 'came to value the intellectual enrichment and sense of kinship with other members that the experience provided. The decisions that they reached together gave substance to the rhetoric of "citizen empowerment", and the consensual nature of their decision-making, in what started out as a gathering of virtual strangers, was a testament to the devotion of staff and the unflagging commitment of the delegates.'¹² The exit interviews done by Ratner suggest that members themselves approached the issues in good faith and, in addition to being free of coercion, also attempted to overcome self-deception.

But looking at the constitutional reform process as a whole there are also shortcomings, not least that for all the effort put into the micro process of the BCCA, the referendum process was notably less successful in fostering deliberation when the process moved to the referendum campaign.¹³ Ian Ward cites one poll carried out in February before the May referendum where 'only half ... of British Columbians sa[id] they [had] read, seen or heard anything about the British Columbia Citizens' Assembly on Electoral Reform'¹⁴ and shortly before the referendum nearly two-thirds of British Columbians still knew 'very little' (39%) or 'nothing' (25%) about the

10. Amy Lang, 'But Is It for Real? The British Columbia Citizens' Assembly as a Model of State-Sponsored Citizen Empowerment' (2007) 35 *Politics & Society* 35, 41; RS Ratner, 'British Columbia's Citizens' Assembly: The Learning Phase' (2004) 27(2) *Canadian Parliamentary Review* 20, 22. And see generally Warren ME and Pearse H (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press 2008).

11. Tierney, *Constitutional Referendums*, 188-208.

12. RS Ratner, 'British Columbia's Citizens' Assembly: The Learning Phase' (2004) 27(2) *Canadian Parliamentary Review* 20, 25. Blais, Carty and Fournier also conclude that the Assembly made a 'reasonable and intelligent choice'. André Blais, R Kenneth Carty and Patrick Fournier, 'Do Citizens Assemblies Make Reasoned Choices' in Warren and Pearse (eds), *Designing Deliberative Democracy*, 144.

13. Dennis Pilon, 'The 2005 and 2009 Referenda on Voting System Change in British Columbia' (2010) 4(2-3) *Canadian Political Science Review* 73. See also Lang, 'But Is It for Real?'; RE Goodin and JS Dryzek, 'Deliberative Impacts' in S Rosenberg (ed), *Deliberation, Participation and Democracy: Can the People Govern?* (Palgrave Macmillan 2007).

14. Ian Ward, 'The British Columbia Citizens' Assembly on Electoral Reform. An Experiment in Political Communication' (Australasian Political Studies Association conference, University of Newcastle, 25-27 September 2006).

electoral system being proposed.¹⁵ It seems that in this process and in a similar one in Ontario in 2007,¹⁶ far more energy and resources were expended on the micro process than in providing information, education and in fostering deliberation at the macro-level, seeking to engage with all the citizens of the province.¹⁷

Another process did not involve ordinary citizens in drafting the question, but it did delimit the control exercised by the government of the day in setting the referendum question. The Australian Constitutional Convention (ACC) was established to deliberate on proposals on whether Australia ought to become a republic and a new constitutional preamble in 1999. Whereas the British Columbia model was composed only of ordinary citizens the Australian model by contrast comprised what we can certainly term elites, but in doing so it included actors who have not traditionally been engaged in such high level constitutional deliberation. It also used a more overtly 'representative' (as opposed to randomly selected) model of micro-level deliberation in distinction to the BCCA. The ACC was established by the government which retained considerably more control over the process, including membership. The ACC had 153 delegates (including a Presiding Officer) appointed on a mixed model system. Half the delegates to the convention were popularly elected and the other half were appointed by the government.¹⁸ Of those appointed, 40 were members of parliament in the Commonwealth and State parliaments. Among Commonwealth representatives were party leaders as well as backbenchers, while State premiers and opposition leaders in addition to the chief ministers of the Australian Capital Territory (ACT) and the Northern Territory were also appointed at sub-national level. The remaining 36 were chosen to represent a range of groups across civil society including former politicians and judges, people from indigenous communities and religious leaders.¹⁹ The other half were elected through a national non-compulsory postal vote. The government retained some influence in appointing the Presiding Officer.

Arguably the ACC model better reflects the complexities of high level constitutional change and also the fact that popular deliberation needs to be built into existing models of representative democracy; it cannot be designed to supplant these. The Australian design sought to accommodate traditional political alignments while bringing these actors together with non-aligned persons and non-conventional interest groups in a mixed appointment/electoral, conventional elite/unconventional elite model. This reflects the fact that deliberation was taking place on matters of the highest constitutional consequence for the nation as a whole, which also concerned Australia's relations with


15. Ward *ibid*.

16. Karen Howlett, 'Referendum? Now What Referendum Would That Be?' *Globe and Mail* (Toronto, 24 September 2007); LeDuc, L, 'Electoral Reform and Direct Democracy in Canada: When Citizens Become Involved' (2011) 34 *West European Politics* 551.

17. LeDuc, 'Electoral Reform', 556-560.

18. *Report of the Constitutional Convention*, Old Parliament House, 2-13 February 1998 (Commonwealth of Australia 1998) vols I and II.

19. Bernard Cross, 'The Australian Republic Referendum, 1999' (2007) 78 *The Political Quarterly* 556, 557; John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants' (Parliamentary Library Research Paper 25 1998-99, Parliament of Australia 1999) 8-9.




the United Kingdom and the Monarch. In addition to being highly sensitive, the matters under consideration presaged potentially highly complex institutional change, fitting a new and possibly presidential head of state model onto an existing parliamentary system.

Since the ACC also reflected some popular element both in its elected dimension but also in the presence of non-traditional elites, one might also envisage other variations, involving hybrids of the ACC and BCCA models, combining a randomly selected popular element with an elite element which itself includes civil society representation. Of course, this in turn leads to many questions about how the latter component would be selected, the numerical balance between the different popular and elite groupings, and the mode of decision-making appropriate for such a model. In the end it is for each polity to determine how best to compose a micro-process in framing a referendum issue. But the BCCA model has shown that a popular model can work at the issue-framing stage, while other innovative processes, such as the ACC, suggest that the focus might be upon a more elite-based issue-framing stage, with more focus upon engaging ordinary citizens in following this process and deliberating upon its outcomes.

In both models the challenge of helping to foster macro-level deliberation remains to be faced. And in facing this challenge a number of important issues need to be addressed when constructing the referendum process. First, how much time is allocated to the micro-stage, and what then is the timescale leading to the referendum: in particular; is there enough time for deliberative elements to work at both stages? Secondly, what is the issue to be decided and how is it to be framed as a question? The UK referendum on the AV electoral system in 2011, like that in British Columbia, showed that it was very difficult to mobilise much public interest in electoral reform²⁰, while the Australian referendum on the republic issue did generate a lot of interest. The opportunity to foster a deliberative process seems to hinge on the extent to which people are interested in, and therefore fully engage with, the subject at stake. Thirdly, how is the micro-process constructed, is it by way of citizens assembly, constitutional convention etc.? What remit does it have? Where citizens are involved, is their role to inform elites or to frame the question? There are many issues that need to be thought through depending upon the constitutional culture of the state in question and issue at stake. There are also issues of inclusion/exclusion and representativeness. But also, how is this deliberative process then rolled out to inform other citizens more generally? A significant issue then is public education at the macro level. How does the process attempt to engage with and help inform the voting public as a whole about the issue at stake? Fifthly, a crucial matter can be the finance and funding arrangements for the campaign: how can a level playing field be created, and in particular one in which voters do not suffer from the distortions of big business in their attempts to make sense of the issue they face?

20. Voter turnout was only 42%.



Finally, this leads to the role of the media and civil society: legal regulation can only play a partial role in regulating how a campaign is conducted. In the end much will depend on the health of a particular civic culture to generate debate from the ground up and to create an atmosphere which is not excessively aggressive and in which the media or at least much of it attempts to offer a dispassionate and fact-based account of the issue and allows all viewpoints a fair airing. All of these issues are of course susceptible to legal intervention.

These examples from federal states highlight different ways to instantiate good practice in the design and regulation of the referendum based upon principles of popular participation and public reasoning. In particular, properly constructed electoral law and models of regulation can help construct a ‘deliberative referendum’.

Majoritarian danger – parity of esteem

Turning to the third objection, what can be done to ensure that in a referendum a minority is not simply overrun? It is the danger to minorities that raise the most forceful objections, and this can be a particular issue in plurinational states where the fear of host state societal dominance is such a feature.²¹

It seems that legal regulation and the building in of citizen deliberation can each go a considerable way to broaden the inclusion of all citizens in the referendum process. It can also be observed that referendums do not occur in a constitutional vacuum. Other mechanisms exist such as bills of rights enforced by courts to take account of minority interests. But nonetheless we do need to confront the fact that a major constitutional decision can be taken which antagonises minority groups which feel powerless to prevent the decision being taken by a simple majority of voters.

Two examples are the referendum in Northern Ireland in 1973 and Bosnia Herzegovina 1992. The referendum held in Northern Ireland in 1973 served to expose rather than settle the demotic question. This sovereignty referendum which became known as the Border Poll, was held on the question of whether or not Northern Ireland should remain part of the United Kingdom or join with the Republic of Ireland to form a United Ireland.²² The outcome was never in doubt. 99% voted for the ‘remain in UK’ option on a 58% turnout. Irish nationalist parties including the moderate Social Democratic and Labour Party (SDLP) called upon voters to boycott the referendum as a

21. Alain-G Gagnon, André Lecours and Genevieve Nootens, eds, *Dominant Nationalisms* (University of Montreal Press, 2008).

22. The referendum was held on 8 March 1973 and asked: ‘Do you want Northern Ireland to remain part of the United Kingdom?’ or ‘Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?’


democratic farce with the Yes vote secured by the unionist majority in Northern Ireland. It is perhaps no coincidence that 1973 was Northern Ireland's bloodiest year. Bogdanor, who is highly critical of this referendum, has argued that in such a situation of polarised conflict, 'the referendum has little to offer.'²³

In 1992 Bosnia Herzegovina sought the recognition of European states and, as a republic of the collapsing SFRY, was encouraged by the western powers to hold a referendum in order to indicate a democratic mandate for independence. Given the ethnic mix of the territory and prevailing tensions, the referendum had a disastrous impact on inter-ethnic relations. The ethnic composition in Bosnia Herzegovina in 1992 was approximately 43% Muslims (later known as Bosniaks), 31% Serbs, and 17% Croats. Despite this complex demotic composition and the levels of animosity across communities, a referendum was duly organised by the Assembly of Bosnia Herzegovina. This took place between 29 March and 1 April 1992. On a turnout of 63.4% there was overwhelming support (99%) for independence. It became clear well before the referendum that a smouldering civil war in the territory would only be inflamed by such a vote and a subsequent process of state recognition.

This is a particular issue for divided societies and it is therefore no surprise that the general conclusion in such situations is that referendums are inherently unsuitable. There are indeed powerful arguments in this direction but even here we need to ask if the prognosis need be as negative as it often appears. One option even in situations of deep disagreement is to regulate the mode by which the decision is taken. There seem to be two options for building greater consensus into decision-making itself. One is to reach agreement across communities before the referendum takes place as occurred through the Belfast Agreement in advance of the referendum in Northern Ireland in 1998. The referendum on the Belfast Agreement is remarkable for the fact that it was conducted against the backdrop of deep divisions. And yet despite this its result was generally accepted. This seems to be primarily because a detailed agreement was reached by a majority of the elites prior to the issue being put to the people.

A second possibility is a supermajority requirement. This is a not infrequent measure attached to a referendum. It can either be based on turnout – e.g. 50% of registered voters must vote Yes for a measure to pass; or it can require a particular majority among those voting, one example being the 55% threshold in the Montenegro referendum of 2006. We might also imagine the possibility of a 'consociational referendum'. In such a situation there could be a requirement that separate majorities among the different communities composing the territory must be secured to endorse the measure. In such a situation not only have the people decided directly, but in a

23. Vernon Bogdanor, 'Western Europe' in David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan Press 1994) 38. Another example of the referendum intensifying national divisions is Canada where in 1942 a referendum held on the subject of conscription resulted in different outcomes in Quebec and the other provinces. According to Marquis this 'exacerbated the division' between the two parts of the country on the issue. Pierre Marquis, 'Referendums in Canada: The Effect of Populist Decision-Making on Representative Democracy' (Government of Canada, Political and Social Affairs Division 1993).



multinational society the peoples have spoken directly. This was not explicitly used in Canada in relation to the draft Charlottetown Accord, but as noted above separate referendum processes were held respectively in Quebec and the rest of Canada and ratification would only have been viable in the event of majority consent in each.

And this is surely crucial to deliberation. For the whole community to be willing to take part in a constitutional process and to vote in it, people on all sides need to believe their voices are being listened to. The referendum has risks if it can lead to one group dominating another. But on the other hand it seems to offer much to a federal, multinational or divided society. If the process is commonly agreed to, the people across a divide have shown themselves willing to vote together as one public, as co-authors of a constitutional decision which gains added legitimacy through popular endorsement; this is the ongoing legacy of the Belfast Agreement referendum.

6 Case Study in Constructing a Deliberative Referendum within a Multi-level System

The Independence Referendum in Scotland and Two Levels of Regulation

In January 2012 the Scottish Government announced its intention to hold a referendum on independence in the Autumn of 2014. A draft Referendum Bill to this effect was published which asserted the authority of the Scottish Parliament to hold such a referendum, while a public consultation exercise was set in motion.²⁴ Although the United Kingdom Government immediately challenged the legislative competence of the Scottish Parliament to pass this Bill and in doing so launched its own consultation process,²⁵ to the surprise of many on 15 October an agreement ('The Edinburgh Agreement'²⁶) was reached between the two governments. A draft Order in Council was attached to the Agreement.²⁷ Under the powers contained in section 30 of the Scotland Act 1998 this devolves to the Scottish Parliament the competence to legislate for a referendum, providing that a referendum must be held before the end of 2014 on whether Scotland should become independent of the rest of the United Kingdom, paving the way for the referendum to be organised through legislation of the Scottish Parliament. It is of considerable significance that the UK government has accepted the fundamental principle that the Scottish people have the right, by way of referendum, to determine whether or not they will remain within the United Kingdom and that both Scottish and UK governments have been able to reach agreement as to the referendum process, bearing in mind the protracted and ill-tempered way in which the issue of secession has played out in many parts of the world, including developed liberal democratic states such as Canada and Spain.²⁸

This is an interesting case study in the various issues which arise concerning elite control and the deliberative quality of the referendum within a multi-level constitutional system. A number of issues have come to the fore since the Scottish Government's announcement and it is interesting to see how law has played its part in helping to set the terms for the referendum, and ultimately for progress towards an agreed process between the two governments.

Significantly, the trigger power of the Scottish Government was contested and the ensuing period resulting in the Edinburgh Agreement and the s30 Order in Council has led to a complex regime of regulation encompassing three distinct elements: the first is the primary role of the Scottish Government and Scottish Parliament. The former has drafted two key bills: the Scottish Independence (Franchise) Bill – now an Act, passed on 7 August 2013 - and the Scottish Independence Referendum Bill which were introduced to the Scottish Parliament in, respectively, March

24. <http://www.scotland.gov.uk/Publications/2012/01/1006>

25. <http://www.scotlandoffice.gov.uk/scotlandoffice/files/17779-Cm-8203.pdf>

26. *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

27. This has now been passed: Scotland Act 1998 (Modification of Schedule 5) Order 2013.

28. Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: OUP, 2004).

and April of 2013. The second is the Scotland Act 1998 itself which regulates the powers of the Scottish Government and Scottish Parliament but which is itself silent on referendums and so leaves open to debate whether or not the Scottish Parliament could legislate to hold a referendum on independence. The third is a combination of the Edinburgh Agreement and the s30 Order in Council, with the latter, for the avoidance of any doubt, transferring any necessary powers to the Scottish Parliament to do so. Notably the main UK statute on referendum law - the Political Parties, Elections and Referendums Act 2000 (PPERA) - only applies to referendums organised by the Westminster Parliament and so does not regulate the proposed referendum in Scotland. However its terms have been an important benchmark for the Scottish Government in drafting the Bills, and for the Scottish Parliament deliberating upon these. For example, as we will see, the Scottish Government has already been willing to refer to the independent UK regulator, the Electoral Commission, for advice and to defer to its judgment even though not required to by law.

Beginning with the initiation power, which as we have seen is central to the 'elite control' criticism of referendums, given the dispute as to whether the devolved institutions of government in Scotland had the power to hold a referendum,²⁹ for a time it did appear as if this issue might find its way to the United Kingdom Supreme Court for adjudication. The reality that the authority of the Scottish Parliament to hold a referendum was subject to judicial review is itself a reminder of the role of legal regulation, which as I have suggested is so often overlooked or at least underplayed in much of the political science literature on referendums. Law of course can play a role without the issue ending in the courts. The threat of litigation was on the minds of both governments leading to the Edinburgh Agreement and it would seem that neither wanted a court case. Thus the Agreement itself sets out the some of the terms for the detailed legal regulation of the Scottish referendum, including that the referendum rules 'should be based on PERA'.³⁰

Given the extent to which such a complex legal environment circumscribes the planning for the 2014 referendum, the legislative process is instructive. A major issue for much of 2012 was whether the referendum would include more than two options, possibly framed through more than one question. The Scottish Government took seriously the possibility of a multi-option referendum³¹, but in the end this proposal was withdrawn and a core part of the Edinburgh Agreement is that the referendum will be a single question affair, based only on independence. It is important to note that the fact that the power to initiate the referendum was in dispute led each to compromise on

29. Gavin Anderson et al: The Independence Referendum, Legality and the Contested Constitution: Widening the Debate, UK Constitutional LawGroup blog, 31 January 2012 <http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>; and Adam Tomkins, 'The Scottish Parliament and the Independence Referendum', 12 January 2012 <http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>

30. Edinburgh Agreement op cit, para 3.

31. 'Alex Salmond could stage multi-option Scottish independence referendum', The Guardian, 25 January 2012.

a number of issues in order to secure agreement on the referendum process. As part of this, one casualty was a broader range of issues being offered to the people. And it must be asked, did legal constraints have a negative effect here upon the relationship between the referendum and popular choice? Opinion polls consistently show that some model of devolution short of full independence but considerably stronger than the status quo is the most favoured by Scottish voters. Here one elite, the UK Government, was able to use the legal power it possessed, or at least was widely believed to possess, to constrict the referendum ballot options. And this process was delivered in the end by the two governments who together had complete control over the issues at stake. What we didn't see was either a strong popular role in setting the issue as in British Columbia, or a broader elite process as in the Australian Constitutional Convention.

But a role for independent regulation did kick in after the Agreement however. Despite the fact that PPERA does not regulate the Scottish process, and therefore the Electoral Commission has no legally guaranteed role in relation to the 2014 referendum, the Scottish Government decided to send its proposed question for review by the Electoral Commission. This process was concluded quickly and the Commission reported back suggesting a change to the question.³² This has been accepted by the Scottish Government and this new question has been published in the Scottish Independence Referendum Bill.³³

The Electoral Commission has also offered the view that the clarity of the question hinges not only on its syntax but upon the content of the independence proposal which has still to be fully articulated: 'clarity about how the terms of independence will be decided would help voters understand how the competing claims made by referendum campaigners before the referendum will be resolved.'³⁴ This is an interesting comment, reflecting as it does the requirement that a fully deliberative process is only possible if citizens know what they are voting for. The Scottish Government proposes a White Paper in the latter part of 2013 which will set out what is meant by independence.

32. The Scottish Government's proposed question was: 'Do you agree that Scotland should be an independent country? Yes/No'. The Electoral Commission took the view that 'based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase 'Do you agree ...?' could lead people towards voting 'yes'. They therefore recommended the following question: 'Should Scotland be an independent country? Yes/No'. 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', (The Electoral Commission 2013) http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

33. Scottish Independence Referendum Bill 2013, section 1(2). 'Scottish independence: SNP accepts call to change referendum question', BBC 30 January 2013. <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701>

34. Electoral Commission, Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question, 30 January 2013. http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf para 5.41. See generally paras 5.41-5.44. e.g. 'We recommend that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative - two different explanations - could cause confusion for voters rather than make things clearer.' (para 5.43).

In this context it might be noted that one of the main criticisms of the Quebec referendum in 1995 was that the proposal of sovereignty and partnership was not well understood by citizens.³⁵ The UK Electoral Commission's conclusion that both Governments have a duty here to help explain the implications of either a Yes or a No vote and that a joint position on this would benefit voters seems to be a bold attempt to improve the deliberative environment for citizens, even if in political terms such a joint position seems highly unlikely to be achieved.

The timing of the Scottish referendum is also regulated. The Scottish Government and Scottish Parliament have some degree of control but this is also limited by the intergovernmental agreement since the s30 Order sets out a condition that the referendum must be held before the end of 2014. The date of 18 September 2014 has also been announced by the Scottish Government and the Scottish Independence Referendum Bill also details the length of the 'referendum period' (16 weeks leading up to the referendum) etc.,³⁶ regulating expenditure by campaigners within this period and a 'relevant period' of 28 days prior to an election poll³⁷ in relation to central and local government which must not engage in promotional activity in the four weeks prior to the referendum. The UK Government also committed to be bound by equivalent restrictions in the Edinburgh Agreement.³⁸ As noted, one of the standard criticisms of referendums from the perspective of deliberation is that they are held too hastily without time for proper deliberation of the issues. This is clearly not a problem in the Scottish context where the referendum was proposed almost three years before it will be held and where both campaigns will have had almost two years from the conclusion of the Edinburgh Agreement to explain their respective cases to the voters.

Another issue is the provision of information to citizens. This is indeed generally left to both governments, both campaign groups and civil society, including the media. As observed, the section 30 Order also extends the power from PPERA to offer to designated organisations – if the campaigns register themselves as such - a free mail shot to citizens. However the Scottish Independence Referendum Bill provides a role for the Electoral Commission here. Among a number of statutory duties the Commission is given the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum.³⁹ This is likely to be a challenging role, particularly in explaining the referendum question. There is already a heated debate between the UK and Scottish Governments as to what 'independence' will mean for Scotland. It is hard to see how the Electoral Commission can attempt to produce an objective account of a number of highly technical and fiercely contested issues, concerning not only international relations but also defence, economic relations, the question of a

35. Tierney, *Constitutional Law and National Pluralism*, 293-299.

36. *Scottish Independence Referendum Bill 2013*, Sched 4, part 3.

37. *Referendum Bill*, section 10 and Schedule 4, para 25.

38. For comment on this by Deputy First Minister Nicola Sturgeon see *Scottish Parliament Referendum (Scotland) Bill Committee*, 13 June 2013, Official Report, cols 554 and 560.

39. *Referendum Bill*, section 21.

currency union, the disentanglement of the welfare state, national debt etc., particularly when so many features of the post-referendum landscape would be contingent upon negotiations between the two governments in the event of a majority Yes vote. And indeed in evidence to the Committee in May John McCormick, the Electoral Commissioner for Scotland, said that the Commission would ‘not seek to explain to voters what independence means’ but would offer information ‘aimed at ensuring that all eligible electors are registered and know how to cast their vote.’⁴⁰

A major issue in the construction of a deliberative referendum is of course funding and spending. Again the s30 order contains some comment on this, but is relatively silent as to specifics. The Scottish Parliament therefore has some degree of discretion in terms of the extent to which it will follow the PPERA rules. The Electoral Commission has also commented on this issue and has recommended a level playing field between the two campaigns.⁴¹ This is the declared goal of the Scottish Government and the spending rules for the referendum campaign do endeavour to achieve a balance between parity for the two campaigns and the right of groups to spend sums on the referendum based upon what they can generate. The first thing to note is that there will not be public funding for either designated campaign organisation. This is provided for in PPERA but the Scottish Government has decided not to offer such funding for the referendum.

The Edinburgh Agreement also covers funding and expenditure issues.⁴² Building on this, the Referendum Bill contains detailed provisions on a range of funding issues. A ‘Campaign Rules’ provision creates a regulatory regime through which funding, spending and reporting will be administered.⁴³ This is generally in line with standard PPERA rules. A ‘Control of Donations’ provision⁴⁴ indicates what types of donations are allowed and what constitutes a ‘permissible donor’.⁴⁵ Under these provisions an application must be made for this status. There are also reporting requirements which mean that reports on donations received will require to be prepared every four weeks during the referendum period.⁴⁶ These rules will all be overseen by the Electoral Commission.

40. Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 431.

41. Electoral Commission, ‘Electoral Commission advice on spending limits for the referendum on independence for Scotland’, 30 January 2013. http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf

42. Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, *op. cit.*, paras 24-29.

43. Referendum Bill, section 10 and Schedule 4.

44. Referendum Bill, Schedule 4, Part 5.

45. Referendum Bill, Schedule 4, para 1(2).

46. Referendum Bill, Schedule 4, para 41.

Within the Referendum Bill there are four categories of actor entitled to spend money during the campaign period: Designated Organisations (which can each spend up to £1,500,000);⁴⁷ political parties as ‘permitted participants’ (see below);⁴⁸ other ‘permitted participants’ who may spend up to £150,000⁴⁹; and any other participants spending less than £10,000, which means they do not require to register as permitted participants.

Political parties as ‘permitted participants’ have a spending limit of either £3,000,000 multiplied by their percentage share of the vote in the Scottish Parliament election of 2011, or £150,000 (whichever is greater).

By this formula the spending limits for political parties represented in the Scottish Parliament is as follows:

| | |
|--|------------|
| Scottish National Party : | £1,344,000 |
| Scottish Labour Party : | £834,000 |
| Scottish Conservative & Unionist Party : | £396,000 |
| Scottish Liberal Democrats : | £201,000 |
| Scottish Green Party : | £150,000 |

The Referendum Bill also defines ‘campaign expenses’. These include campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media relations, transport, rallies, public meetings or other events. This also extends to notional expenses such as use of/sum of property, services or facilities etc.⁵⁰ There are also detailed rules on reporting of expenditure.⁵¹

It seems that these rules will lead to a generally level playing field in terms of expenditure within the Regulatory Period. For example, the total spending limit for the two pro-independence parties (SNP and Greens) is almost equal to that for the three unionist parties – Labour, Conservative and Liberal Democrat. But given that these spending limits only apply in the 16 weeks before the referendum, this does leave the possibility of spending differentials between the two campaigns before this period begins. It should be observed, however, that these rules reflect the spending limits recommended by the independent Electoral Commission.⁵²

47. Referendum Bill, Schedule 4, para 18(1).

48. Referendum Bill, Schedule 4, para 18(1).

49. Referendum Bill, Schedule 4, para 18(1).

50. Referendum Bill, Schedule 4, paras 9 & 10.

51. Referendum Bill, Schedule 4, paras. 20-24. The Electoral Commission has a power to issue guidance on the different kinds of expenses that qualify as campaign expenses: Schedule 4, para 10.

52. Electoral Commission, ‘Electoral Commission advice on spending limits for the referendum on independence for Scotland’, 30 January 2013.

7 Conclusion

The referendum is now being used more than ever in major constitutional decisions. What is often overlooked is the extent to which it has been used in the dissolution, rearrangement and indeed the creation of federal and other multi-level systems. Given that this is the case the referendum must be a subject of serious examination by federal scholars and others interested in the health of federal and other decentralised models of government.

It is therefore essential that a systematic re-examination of the democratic credentials of the referendum be undergone. In this paper I have suggested that the stereotypical failings of the referendum are in fact mainly issues of practice not principle but that nonetheless they must be taken seriously. I have turned to deliberative democracy as a way of identifying key principles which in turn can be used to inform practical solutions to these perceived problems.

Within federal states such as Australia and Canada it is clear from recent referendums that there are innovative experiments available that attempt seriously to apply principles of deliberative democracy in ways that can enhance citizen participation and improve the quality of deliberation in decision-making. It is also the case that there are available devices which can help overcome perhaps the most significant challenge facing referendum practice in federal and other multi-level states, that of crude majoritarianism.

Of course the referendum at sub-state level can be a vehicle to break-up the multi-level state as we see in the current Scottish process. But interestingly here we have seen a consensual approach adopted by both governments in a serious attempt to arrive at a fair and democratic process. This referendum may or may not lead to Scotland's independence from the UK, but an agreed and fair process is vital for a number of reasons. One is that both winners and losers should be able to have faith in the result. This in turn should help make more consensual any post-referendum negotiations towards independence in the event of a majority Yes vote. And in the event of a No vote it also promises a healthy starting point for an ongoing conversation across the UK about future constitutional change, and just as important, about an agreed process by which to bring it about.