



## **The Referendum: Direct democracy and the Constitution**

### **Professor Sir Vernon Bogdanor FBA CBE**

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Ladies and gentlemen, I have two apologies to make. The first one, you will gather from my voice. Two days ago I thought I would not be able to deliver the lecture at all because I could not speak, but I have now more or less got back my voice.

Secondly, those who have attended the previous sessions may have felt some slight irritation, not just at the lectures but for another reason. You may say, well, you have been discussing all sorts of reforms: devolution, reform of the House of Lords, the Human Rights Act and so on, yet these do not seem immediately to have much relevance to what we do every day. They seem a bit like a shifting of the institutional furniture about, and indicate changes merely in how the political elite wish to run affairs, how they intend to continue to rule us, the officer class if you like. You may ask what all this has got to do with democratic government? You may say I thought democracy was a form of government in which the people themselves rule, but in Britain, the role of the people seems almost entirely passive. The main choice that we have in a democracy, it seems, is just to endorse or reject the government of the day every four or five years and that is, for most of us, about the limit of our democratic powers. A famous French philosopher, Jean-Jacques Rousseau said, rather famously, the British only thought they were free; in fact, they were free only once every four or five years when they were voting, and other times they were not free.

Now, you may say, all this might have been okay 50 years ago, when people were much more deferential than they are today, and accepted perhaps that there were others better qualified to rule or perhaps even born to rule. 50 years ago, certainly party politics was very much more alive, and one of the signs of that was there were many more members of political parties than there are now.

In the early 1950s, the Conservative Party had nearly 3 million members, and the Labour Party had around 1 million individual members. Today, despite various membership drives, the Conservatives have just a quarter of a million members, and the Labour Party under 200,000. So 50 years ago, the two major parties had nearly 4 million members, and now they have a half a million members. You can put the point another way: 50 years ago, one in 11 of us belonged to a political party; now, just 1 in 88 of us do, times 8.

Turnout in General Elections was also higher 50 years ago than it is now: in the late '70s, about 80%. In the last election, it was 62%, and the election before that, it was 59%, the lowest we have had since universal suffrage, and particularly low, despite some stereotypes in the media, particularly low amongst young people between 18 to 24. In the 2001 election, amongst people who were 18 to 24, just 39% voted, and amongst young women between 18 and 24, just 33% voted, what the social analysts called the high-heeled vote, the 18 to 24 year old woman, just 33% voted. It is worth saying that although the politicians concentrate a lot on the youth vote, the vote of someone over 75 is worth 4 times that of someone under 24, because there are twice as many of them and they are twice as likely to vote. The voting rate amongst over 75s is around 75%, although they find it much more difficult to get to the polls than young people; perhaps worth bearing in mind when we hear about the youth vote and youth radicalism and so on: most young people do not vote.

So turnout is lower than it was, but perhaps the most important change that we have seen is that we no longer live in a deferential society. People are better educated and more able and willing to take decisions for themselves, and people are less willing to say that decisions affecting their lives should be made by people we might call 'political professionals'. Now, you have seen that political party membership has fallen, and you may say the political parties are themselves somehow in decline. The mass parties, you may argue, are dying on their feet. But the institutional and constitutional mechanisms which sustain the old party system are still very much there, and perhaps one important motivation of the whole constitutional reform agenda is to adapt these institutions to a new age, an age in which people wish to participate for themselves in making decisions. The use of the referendum, I think, is symbolic of this change.

I think if we had spoken about the referendum 50 years ago, most people would say that it was unconstitutional. We had our first and only national referendum in 1975, so 50 years ago. I think people would have said it was not possible in Britain, and the reason it was not possible was because Parliament was sovereign. That has been the theme of a lot of these lectures, that Parliament was sovereign, can do what it likes, it is for Parliament to make the decisions, and it says Parliament and not the people should decide, and the British constitution is a parliamentary system not a popular system. But you can turn the argument upside down and say that if Parliament is sovereign, if Parliament can do what it likes, then it can call a referendum if it chooses to do so.

Now we have had, as I said, just one national referendum in 1975, and I will talk about that in a few moments, but we have also had a number of referendums at sub-national level. We have had referendums on Scottish and Welsh devolution - in 1979, when they failed, and in 1997, when they succeeded. We have had a referendum, in which perhaps a number of people in this room voted, on whether London should have a directly elected Mayor and authority, and that too was successful. And then there was a referendum in the year 2004, in the North-East, on whether the North-East should have a regional assembly, regional devolution, and that was rejected by a vote of four to one. There have been a number of referendums in Northern Ireland, all concerned with getting endorsement for new institutions which would enable the two communities, the Unionists and Nationalists, to live peacefully together.

In addition to all those referendums we have had, there are one or two referendums possibly in the pipeline, because the Government has promised further ones. It has said there will be a referendum before we join the Euro, and I think anyone who doubts the importance of the referendum might consider that if it had not been invented, we might well now be in the Euro, because Tony Blair is in favour of it and said he would like to see Britain in, but he has been deterred by the fact that he has to call a referendum first, because not one single opinion poll that has been published on the Euro has indicated a majority for it, so the probability is he would not win such a referendum. If we had never had a referendum, I think we might well be in the Euro, and that shows the importance of it.

The Government also promised it would not ratify the European Constitution without a referendum, and that is may be now irrelevant, since the French and Dutch have rejected it in their referendums, and perhaps the Constitution is now dead.

Finally, the Government has promised it will not change the electoral system for elections to the House of Commons, for example to some system of proportional representation, without a referendum getting approval of that as well. So you can see that the referendum is now very much a part of the British Constitution.

But our only national referendum in 1975 did not come about for principled reasons; because politicians sat down and said, 'This is the right thing to do,' but it came about as a result of political vicissitudes, which I will now explain.

The referendum was held in 1975 on the question of whether we ought to stay in the European Community or leave it. It was not held, as some people sometimes suggest, to decide whether we should enter or not. We had already entered the European Community, as it was then called, in 1973, and there was no referendum before entry. We were taken into Europe in 1973 by a Conservative Government led by Edward Heath, who died recently, and that Government had been elected in the General Election of 1970.

One perhaps strange feature of the election of 1970, and difficult to imagine in current circumstances: all three of the major parties in that election said we ought to join Europe – the Conservatives, the Labour Party, and the Liberals. So there was really no way in which a voter who was opposed to our joining Europe could make his or her voice felt in the election. It would be difficult I think to argue that the Heath Government had any mandate to take Britain into the Community.

When Heath did this, the Labour Party was in opposition, and, as I said, in the 1970 Election, when it had been defeated, it had favoured entry, but in opposition it began to change its position and move to a position of opposing British entry. The then Labour leader, Harold Wilson, began to fear that the Labour Party might split in opposition between the left wing, which was on the whole against, and the right wing, which was on the whole in favour. He also felt, more personally, that his leadership could be under threat by attacks on him from the left wing. So he found an ingenious formula to unite his party. What he said was the Labour Party rejected entry on the terms negotiated by the Conservatives – did not reject entry in principle but on the terms negotiated by the Conservatives – and he said a Labour Government would renegotiate the terms and put the result of that renegotiation to the people. Now, the Labour Party, under Wilson, defeated Heath in 1974. There were two General Elections in 1974. It renegotiated the terms, rather mildly in fact, but it then put the result to a referendum. So the referendum was adopted for reasons basically of political pragmatism, not matters of high principle, and it was a kind of life raft in which the Labour Party, whether they were in favour of Europe or against, could all unite on saying that they would put it to the people and it held the party together. It was adopted for pragmatic reasons.

Nevertheless, although it was adopted for pragmatic reasons, you may say there are very important reasons of principle in favour of that referendum. You could argue, first, the decision was one of the most important made by any British Government in the last century, and that it would in practice be very difficult to reverse. It was not, strictly speaking, irreversible, because in theory any government could take Britain out, and there are people campaigning for that, but it is perhaps unlikely that it would be easy to reverse.

One of the reasons it was such an important decision was that it raised for many people very fundamental questions of patriotism, national identity and loyalty, on which people feel strongly. And then, as I said, the major parties were really split – Labour certainly, the Conservatives to a lesser extent, but there were divisions in the Conservative Party. Since all the parties had been in favour in 1970, there was no way the voters could indicate their view.

Therefore, following on from all this, you could argue a decision of this huge magnitude would lack legitimacy with the people, and unless it was endorsed by the people, it would not be accepted. You can say that the Heath Government brought, as it were, the British Establishment into Europe, but it needed a referendum to get the British people to accept Europe.

In 1975, you may be surprised to hear, the vote for staying in Europe was two to one in favour. So that is why we remain part of what is now the European Union. It may be of course that if the referendum had been held before we entered that we would not have entered, but of course that is purely speculative.

After the 1975 referendum, Harold Wilson, who was then the Prime Minister, said that it had ended a great national debate, which had gone on for 14 years, and that we were now finally settled in as members of the

European Community. He said the debate was over. Now that, as you will be aware, was very premature, and it turned out not to be the case. Indeed, soon afterwards, politicians continued to campaign, as of course they are entitled to do in a democracy, for Britain to leave the Community. The referendum did not permanently settle the issue. It's still very much alive, and I suspect there may be people here today who would like to see Britain leave the European Union. You may argue that no institutional mechanism like the referendum can permanently settle an issue; it can settle it for a short while, but not permanently. You may also say that use of the referendum defused the conflict and helped secure some legitimacy at the time for Britain's membership.

It is an interesting question as to whether you think it would be legitimate for us to leave the European Union without a referendum. If a party, let's say the UKIP Party, gained a majority in Parliament, or the Conservative Party moved against the membership, could they leave, would it be legitimate if they just got a majority in Parliament to leave, or should they also need a referendum before we leave?

When the 1975 referendum was being proposed, there was a big argument about it, as you can imagine, and Harold Wilson, and the Labour Government in general, said that this was not a precedent for anything to be held in the future, that the European Community was a unique issue, there was no other issue like it, for roughly the reasons I have given earlier, a decision of great magnitude, and this should not be regarded as a precedent, it was the only occasion on which we would ever have a referendum. But of course, once you had introduced a referendum, it was not for any particular set of politicians to say that we could never have another one, and a precedent had been set whether the politicians liked it or not.

Less than four years after this referendum, in early 1979, there were two further referendums, on devolution in Scotland and Wales. These referendums, by contrast with the European referendum, were not proposed by the Government, and indeed the Government did not welcome them. The Labour Party said devolution is Labour Party policy, it should go through Parliament in the normal way, we do not want referendums, thank you very much; this is our policy. But the Labour Party was divided on this issue, on devolution, as they had been on Europe, and some back benchers, not only from England, but also from Wales and Scotland, were opposed to devolution. They were met by the argument from the leadership that there was tremendous demand in Scotland and Wales for devolution, and if it was not given, if they did not have devolution, the country might break up completely as a result of nationalist pressures.

The back bench opponents of devolution were rather clever, they wanted to test this argument. They said, 'We are not going to reject the legislation – it is produced by our own Government – but we are going to test this assertion the Scots and Welsh really want it by inserting into the Bill a referendum clause, and we are going to say, we are not going to vote for the Bill unless it contains this clause.' The Government had to give way because otherwise they would not have got the Bill through. So the devolution legislation was subject to referendum and it never came into effect in fact.

But there was a further twist to all this which I think is very interesting, because back bench Labour rebels said, 'Well, if you are saying that the Scots are really so desperate for devolution as all that, a simple majority, perhaps on a low turnout, is not enough. Suppose you get a turnout of about, shall we say 40%, and a majority of 1%, does that really show they are that desperate? Surely not! We want a better test than that.' So they inserted a further clause into the Bill, saying that a simple majority was not enough, but in addition to a 'yes' vote, 40% of the electorate had to support devolution in Scotland and Wales for it to go through. This was a very clever hurdle, because the size of the hurdle depended on the size of the turnout. If 80% voted, a simple majority would be enough on a 40% clause; if only 40% voted, you would have to have 100% vote in favour of it. The more likely is it would be somewhere between, but you can see that the lower the turnout, the higher the majority would have to be, so it tested the enthusiasm, whether the Scots and Welsh could really be bothered to vote this – rather clever in its way.

In Wales, devolution was heavily defeated. The 40% was irrelevant. It was defeated by a four to one

majority. But again, if you are tempted to doubt the importance of the referendum, Wales would have had devolution in 1979, without that referendum clause, even though, in the referendum, four to one rejected it. You can draw, no doubt, a number of lessons from that.

In Scotland, there was a small majority for devolution. 33% of the electorate voted yes, and 31% voted no – a very narrow majority, much below the 40% level, and so it failed for that reason. Again, the 40% clause really stopped it, because there was a small majority for devolution but nowhere near enough for the 40%.

Devolution in Scotland and Wales had to await the election of another Labour Government, which took 18 years, the Blair Government in 1997, when there were further referendums, without a 40% clause, and they passed. The 40% clause has not been used again, the so-called qualified majority, and every other referendum has been decided by simple majority. But you may say there is a case for the qualified majority, and let me give you an example.

Suppose the SNP won a majority in Scotland, and they said they should have a referendum on the issue of independence. But suppose very few turned out in this referendum, suppose say 30%, and the vote came, let's say, 17% yes and 13% no. I think many people might say you cannot have independence just on that very narrow majority, on such a low turnout, surely you need a better test than that? So you may say that a qualified majority is an important safeguard against easily changing the basic laws of the country, and you can see how we are beginning to develop a constitution, certain basic laws which should not be easily changed, and you may say you should not break up the country on a very small majority on a low turnout.

If you now look at the general issues on which a referendum has been called, they all seem to be territorial issues of one sort or another – Europe and devolution – and they are all concerned with transferring the powers of Parliament, of Westminster, either upwards, if you like, to Europe, or downwards, to Scottish and Welsh Assemblies, or Northern Irish Assemblies, or London, or wherever it may be. You may say there is a very good argument for that, because we elect our leaders to operate within Parliament, but we do not elect them to transfer the powers of Parliament away to someone else, and you may say if they want to do that, they have to secure a specific mandate for it, a specific vote and support from us, endorsement from us.

What the referendum does is give us all an equal voice in deciding on a specific issue of public policy and to do so without reference to our party, and we cannot otherwise do that, because, for example, you may be a strong Labour supporter, but very hostile to Europe, and then when it comes to a General Election, you have to decide what to do. You may say, 'Well, I am broadly in sympathy with the Labour Party. I do not want to switch to the Conservatives because I do not like their policies very much, although I do agree a bit more with them about Europe.' So you are in a dilemma, and a lot of people in that situation would probably stick to their party, but you may say I don't want my vote to be interpreted as support for Europe, I do not support Europe, but of course there is no way in which that can be shown. You have to vote for your party, you have to vote for the whole range of policies. Someone once compared it to saying that a jury could only convict one person of an offence if at the same time it convicted another 10 or 12 people of an offence because, in an election, we have a whole number of issues, and I suppose it is a very rare voter who agrees with his or her party on all of them, but there is no way to discriminate. But the referendum allows you to make a specific decision, on a specific item of policy, without affecting your party allegiance.

The traditional argument against the referendum in the past is that it was an attack on representative government, but some would say that it is an instrument to remedy the defects of representative government, in particular with a rather rigid party system. I think people divide, but on the whole, those who are opposed to the referendum tend to be happy with the party system, those who favour the referendum tend not to be happy with the party system, and I think you can say, reasonably, that anyone who is happy with the party system will not be sympathetic to the referendum, but I think you can also say the percentage of people happy with the party system is probably less than it was 50 years ago.



There is a further point worth noting. On all of these referendums, it is the Government, the politicians themselves, who have decided whether we should be consulted and when we should be consulted – it is not us who decide, it is the Government, for reasons of its own. Some people say, but why don't we have a referendum on capital punishment or immigration? Whether that is a good idea or not, the Government have not decided that we should have such a referendum, and it is their decision that counts, not ours, so it is, if you like, a top-down weapon from the Government. It does enable popular participation, but it is a top-down weapon. The role of the people is still fairly passive: it is to decide whether or not a Government proposal should be accepted. What we can do, if we want to, we can reject a proposal put forward by the Government. We cannot, of ourselves, put forward an alternative proposal or put our own agenda forward for a referendum.

At the local level of government, people have been given the power to put their own issues on to the agenda, and there are two examples. The first comes from the Local Government Act of 2000, which may sound very boring, but it is in fact quite important, because what it did was to propose a reform of local government and in place of the traditional system, it said that local authorities should either have a cabinet-type of system, which most of them do have, or a directly elected mayor, but the Government said, if you want a directly elected mayor, there must be a referendum first, there must be a local referendum. However, the trouble with that point of view was that survey evidence showed that, whereas there was some support amongst people for a mayor, that the councillors themselves did not support it and would not therefore call a referendum, and you can see why councillors might not be too keen on the idea. A lot of people wanted it, but the councillors, the people who would call the referendum, did not actually do so.

So the Government added a very interesting twist to this. They said that 5% of the registered electorate locally could require a referendum to be held. It was this 5% nationally could require a referendum to be held, shall we say on capital punishment – 5% can require a referendum to be held. Some of you may have been involved in signing this. I signed a petition in Oxford, where I live, to have a referendum on a directly elected mayor, but, from my point of view regrettably, when the referendum was held, the proposal was defeated, but still, we got the referendum.

So that is one way in which the people can themselves secure a referendum. So far, it is interesting that the results have still been fairly negative. Only 14 authorities have directly elected mayors under this provision, plus London, which is perhaps slightly different, and one of the mayors is the famous, or infamous, monkey candidate in Hartlepool, you may have read about, but it has not been taken up in a widespread way, and the Government is, I think, a bit upset about this.

There is a second example, in ballots for grammar schools. Parents can petition for a referendum on abolishing a grammar school, though not to establish a new grammar school, but to abolish existing ones, in line with the Government's policy of abandoning selection.

Now, these two examples, they are local examples, they show that you can go further than the referendum in the way I have described it, that you could have a referendum which is triggered not by the Government but by us, the people, in a petition, and this carries, if you like, the participation of the people, direct democracy, a bit further. I can imagine some people saying, well, these two examples that I have given, they set interesting precedents, because why should we be entrusted only with making decisions about directly elected mayors and grammar schools, but not with things that are really much more important to us locally that we care a lot about? What about other issues, like for example the size of the local authority budget, if we think our Council Tax is too high? What about the state of the local hospitals or the way the Health Service is run? Why shouldn't we be allowed to make decisions about those issues as well? Why is it confined so very narrowly?

I spoke earlier about the decline of the mass political party, but, although the parties have declined, there is

no real evidence, despite what people say, of a decline in the popular desire to participate. Although few belong to political parties, many more people, around 40% of the country, belong to one voluntary organisation at least. 81% of British adults gave to the tsunami appeal, and that, I should say, was disproportionately amongst the young, so having said the young don't vote, they did give to the tsunami appeal. 81% of British adults gave to the tsunami appeal, twice as many as in the United States, and two to three times as many in a number of European countries, a very high rate of giving. If you look at an organisation like the National Trust, it has around a million members, which is more than all the political parties put together. So there is a desire to participate, but it is not met by the existing structure of the political parties.

The point was very well put some time ago, in 1992, by Gordon Brown – he was then in opposition – in a Fabian pamphlet that he contributed to. Gordon Brown said this: 'In the past, people interested in change have joined the Labour Party largely to elect agents of change. Today, they want to be agents of change themselves.' He gave various examples of popular participation in such bodies as tenants' associations, residents' groups, school governing bodies and other community groups.

It seems to me that if we look ahead to the democracy of the future, new forms of direct democracy of this type may come to supplement, though not to replace, the traditional machinery of representative government, so the referendum, it seems to me, is the beginning of the argument and not the end. All these forms of participation are made much easier by the development of information technology, which makes it easier for us to communicate our views to each other.

The traditional argument against direct democracy was that we could never really replicate the Greek city state, which was composed of a small number of people, because political units in the modern world were simply too large. We cannot all meet together easily to decide issues, beyond the level of a parish council perhaps. But this argument may not be as powerful as it once was, and information technology does enable us to communicate with each other, and to communicate our views, without actually meeting.

I suspect that many people here would be in favour of what I have said so far: in favour of more measures of direct democracy, more participation; but there is one great danger, and I want to conclude by pointing it out.

Participation rates in referendums are generally lower than participation rates in general elections. For example, in the Welsh referendum on devolution, which was successful, in 1997, just 50% voted, just half of the possible voters. In London, the rate was even lower. Many people had said, from the time the GLC was abolished in 1986, that this was a shocking thing for London and that Londoners were straining at the leash to get a form of London Government restored; that there was a tremendous demand and, if not met, there would be outrage and so on. Well, when the referendum on the London mayor and elected authority was held, just 36% voted, so it did not seem that this argument was a very strong one, if only just over a third of London voters could be bothered to turn out.

We also know that those who do not vote tend to be drawn disproportionately from the poor, the less educated, and also from members of ethnic minorities. You might argue that those who do not vote are precisely the people who need the vote the most so as to defend their interests. You may say, therefore, the more we have referendums, the greater the power that will accrue to the rich, the powerful, and the well educated. You may say they are the people who need the vote least, and they can already defend their interests. The great danger of direct democracy is a democracy of the articulate, a democracy composed of people like ourselves, who go to meetings, give up our spare time to listen to lectures on participation, but we constitute, perhaps sadly, a small minority of the electorate. By definition, we are untypical in being interested in politics in the first place. You often hear in general elections the argument that since people do not vote very much, perhaps there should be more party political broadcasts, but the party political broadcasts will turn even more people off! The people who are not interested in politics will not watch

those either, so it is utterly bogus. By definition, anyone interested in politics is already a member of a small minority, and anyone who comes to a lecture like this on participation is a member of an even smaller, much smaller, minority. Oscar Wilde once said the main objection to socialism was that it took up too many evenings!

So the great danger with direct democracy is that it becomes a democracy of the articulate rather than a democracy of the people.

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