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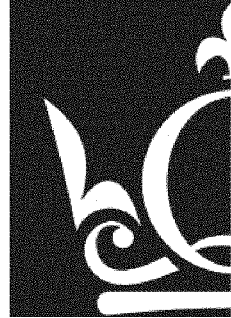
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Power to the People: The rise of referenda in Poland and The United Kingdom

Malwina Anna Wójcik



ABSTRACT

The past few years mark a rebirth of direct democracy in many European countries, including Poland and the United Kingdom (hereafter UK), where referenda seem to have gained in popularity and importance. This article intends to trace the phenomenon of the referendum in the legal orders of both countries. Following a brief outline of the recent emergence of referenda in Poland and the UK, the first section of this article will provide an analysis of the historical role of direct democracy in these countries; evidencing that attempts have been made to introduce the doctrine of popular sovereignty in both legal systems. The article will then describe the breaking point at which referenda began gaining constitutional recognition in both countries. The final sections will focus on the current regulation of referenda in both systems, and closely analyse the case of constitutional referenda.

I. INTRODUCTION

In the 21st century, representative democracy seems to be losing traction as we experience 'a move away from representation and representative politics towards styles and modes of politics that engage us now, immediately.'¹ This essay will seek to analyse the development of direct democracy in Poland and the UK, whose constitutional systems are currently facing a challenge potentially connected with the growing role of popular sovereignty. Due to the considerable breadth of this topic, analysis in this article will be limited to the institution of referenda which, together with citizens' initiatives, constitutes the most important instrument of direct democracy.

¹Simon Torrey, *The End of Representative Politics* (Polity Press 2015) 82.

The comparison between Poland and the UK is considered interesting to the author of this article for two reasons. Firstly, in both states the tradition of referenda has developed following a similar historical pattern. Both in Poland and the UK the role of referenda began to grow only in the second half of the 20th century- up to this point, this legal tradition was largely absent from both states. In recent times, however, for both Poland and the UK, the impact of referenda has been felt significantly. In the last four years, two fundamental referenda were held in the UK: the Scottish Independence Referendum in 2014 and the European Union Membership Referendum in 2016. In Poland, the last national referendum was held in 2015. Now, the relatively young constitutional framework is once again tested in a debate surrounding a constitutional referendum initiated by the President.² In light of these events, it is interesting to trace how the practice of referenda developed and how well it is set out in the constitutional framework of the two countries.

The second point of interest that arises when comparing the impact of referenda in Poland and the UK is some insight into how direct democracy has evolved in two fundamentally different legal systems – civil and common law.

II. HISTORICAL PERSPECTIVE: DIRECT DEMOCRACY IN THE SHADOW OF REPRESENTATION

According to Ewa Popławska, in Poland social consultations cannot be regarded as a 'causative factor influencing the contents of the fundamental law.'³ Popławska claims, somewhat paradoxically, that this was the case both during the communist regime and the young democratic system. Popławska also posits that 44 years of communist past has caused a 'deep alienation' of Polish citizens from the public sphere.⁴ It is the opinion of Uziębło that citizen involvement was weak even before the communist era, the result being that instruments of direct democracy emerged only at the end of the 20th century.⁵ The Polish loss of sovereignty for over a hundred years and a generally negative perception of direct democracy, paired with a preference for strong dominance of political parties, are no doubt contributing factors to this later emergence.⁶

²Lidia Kelly, 'Polish President Wants Referendum On Constitution in Nov 2018' (24 May 2018) <<https://www.reuters.com/article/poland-politics-president-constitution/polish-president-wants-referendum-on-constitution-in-nov-2018-idUSL8N1IQ6P0>> accessed 10 March 2019.

³Ewa Popławska, 'Constitution-Making in Poland: Some Reflections on Popular Involvement' (2008) 45 Zb Radova 279, 285.

⁴*Ibid.*

⁵Piotr Uziębło, *Demokracja partycypacyjna* (Centrum Badań Społecznych 2009) 169.

⁶*Ibid* 170.

The first attempts to introduce measures of direct democracy appeared in 1918, upon the birth of the Second Republic, when a new constitutional order was to be created after regaining independence. In their constitutional projects, the left opted for increasing the role of citizens in direct decision-making. The proposals of the Polish Socialist Party (PSP) were the widest in scope, advocating for the introduction of referenda, direct citizens' initiative, people's veto, and popular vote for dissolution of the parliament. Following a fierce parliamentary debate, none of these proposals were introduced into the constitutional order of the March Constitution 1921. The right had expressed strong dissent to the proposals: this type of democracy was perceived by them as a hindrance to the legislative process in the newly created Republic.⁷

In the People's Republic of Poland, scepticism surrounding direct democracy stemmed from its association with the ideology of bourgeois democracy. It was thus viewed as enabling the 'strengthening of conservative forces' and being 'socially backward'.⁸ In light of this, it may seem peculiar that the first national referendum took place in 1946, shortly after the communists consolidated their power. It considered several issues, including

'liquidation of the Senate, nationalisation of basic branches of the national economy and parcelling out of land, as well as approval of the government's policy against the German aggression, in the defence of the western border.'⁹

The referendum was, however, far from setting out a standard for direct democracy in the Polish constitutional system, as it was in fact designed to be a mere propaganda tool, used to legitimise the policy of an unelected government. Subsequently, evidence has shown that the people disagreed with the dissolution of the Senate. The results of the vote were falsified to obtain uniform support for the party's measures.¹⁰ The political nature of the 1946 referendum is further evident in the lack of any provision for future referenda or other tools of direct democracy in the 1952 People's Republic of Poland Constitution. The legal basis for the referendum was an ad hoc statute on popular voting. In this way, instead of becoming the triumph of the Sovereign's will, the first national referendum became a caricature of democracy itself.

⁷ *Uziębło* (n 5) 170.

⁸ Janina Zakrzewska, *Włochy, zarys ustroju* (Ossolineum 1974) 252.

⁹ *Uziębło* (n 5) 171.

¹⁰ Popławska (n 3) 283.

The late People's Republic of Poland saw a shift in attitude towards direct democracy. In their crucial article published in 1974, Zawartkowski and Rost advocated for the introduction of referenda and citizens' initiatives to the constitutional landscape.¹¹ Referenda, they claimed, should be used to decide on issues of profound importance to the state.¹² The idea, however, did not get wider support until the 1980s, when growing interest in the introduction of institutions of direct democracy finally resulted in an amendment to the Constitution in 1987. The amendment allowed for direct decision-making by the Sovereign by way of a referendum. Nevertheless, it was still very limited in scope for two reasons.

Firstly, it was only complementary in nature. Art. 3(2) of the amended Constitution stated that the 'working people' might 'execute their power also through expression of the will through referendum'(emphasis added), suggesting the instrument of direct democracy is a mere addition to the representative model. Paweł Sarnecki draws attention to the almost self-contradictory wording of the article, noting that 'executing' means ruling or deciding, while 'expressing the will' implies an advisory function, indicating a mere intention to initiate an action.¹³ Moreover, it is specified in Article 14 of the Social Consultations and Referendum Act of 6th May 1987 that the referendum might only refer to specifically identified questions regarding bills or resolutions passed by Sejm (the lower house of the Polish Parliament) concerning basic affairs of the state. This definition of the scope of the referendum seems therefore both narrowly construed and vague, allowing for great legislative discretion. It is of note that the legislature was also the only body with the authority to initiate the referendum, due to the absence of a bottom-up mechanism. This provision also ruled out the possibility of entire bills being subject to revision and legitimisation by referendum.¹⁴

Secondly, the prerequisites for the referendum to be binding were very difficult to fulfil. According to Article 19 of the aforementioned act, the results were decisive only when more than half of those eligible to vote supported the solution presented. The intention behind setting such a high threshold was probably to further diminish the role of referendum in the constitution, limiting it to a theoretical device, impossible to effectively use in practice. Indeed, the referendum on the political and economic reform proposals, organised in 1987, failed to achieve the required standard and therefore was not decisive. The

¹¹Uziębło (n 5) 171.

¹²Uziębło (n 5) 171.

¹³Paweł Sarnecki, 'Ustawa z dnia 14 marca 2003 r. o referendum krajowym na tle Konstytucji Rzeczypospolitej Polskiej' (Przegląd Sejmowy 3(56) 2003), 1.

¹⁴ibid 12.

questions posed were vague and general, so much so that additional explanations were published in the national press.¹⁵ Once again, the referendum functioned primarily to legitimise the policy of the government.¹⁶ The first question addressed to the people sought to justify a difficult economic reform by effectively including a disclaimer as to its potential negative consequences. It read:

'Do you support full realisation of the radical economic reform, resulting in a visible improvement of the standard of life, knowing that it requires enduring through a difficult, two or three year period of rapid economic changes?'.¹⁷

In similar vein, the second question asked:

'Do you support the Polish model of deep democratisation of the political life, which aims at strengthening self-governance, broadening the rights of citizens and increasing their role in governing the country?'.¹⁸

In sum, despite constituting a formal step towards the recognition of direct democracy in the constitutional system, the primary aim of the post-war referenda can hardly be viewed as granting a voice to the people. As Popławska rightly points out, it was impossible to achieve this in a system which was itself undemocratic, lacking in legal and political guarantee of referenda impartiality, and actively fettering the 'untamed expression of preferences by participants'.¹⁹ Referenda appear to be most successful with leaders who possess enough power to enforce them but not enough to 'disdain inconvenient outcomes, or, in extreme cases, determine their outcome'.²⁰

In the UK, just like in Poland, the tradition of direct democracy and popular sovereignty have not been present historically in the constitutional order. The reasons for this are different in to those in Poland. The lack of direct democracy in the UK is mostly attributed to the rise of the Westminster Parliament as the supreme legislative body. The principle of parliamentary sovereignty, along with the rule of law and separation of powers, have become the most important features of the uncoded British Constitution. The orthodox, two fold

¹⁵Jerzy Jaskiernia, 'Prawnoustrojowe i społeczno-polityczne doświadczenia referendum z 29 listopada 1987 r.' in Danuta Waniek, Michał T. Staszewski (eds) *Referendum w Polsce współczesnej* (Instytut Studiów Politycznych PAN 1995) 77.

¹⁶Maria Marczevska-Rytko, 'Direct Democracy in Poland' in Maria Marczevska-Rytko (ed), *Handbook of Direct Democracy in Central and Eastern Europe after 1989* (Barbara Budrich Publishers 2018) 203.

¹⁷Announcement of the Central Commission for Referendum of 30 November 1987 on the results of the national referendum held on 29 November 1987 (Monitor Polski 1987, nr 34, poz 294).

¹⁸*ibid.*

¹⁹Popławska (n 3) 284.

²⁰Henry E Brady, Cynthia S Kaplan, 'Eastern Europe and the Former Soviet Union' in David Butler and Austin Ranney (eds) *Referendums Around the World: The Growing Use of Direct Democracy* (AEI Press 1994) 175.

definition of parliamentary sovereignty advocated by A.V. Dicey states that Parliament 'can make and unmake any law'²¹ and that there exists no body which can 'override or set aside the legislation of Parliament'.²² In light of this rigid interpretation, it seems highly unlikely that direct democracy would have developed in the English legal system.

The British political system is dominated by representative parliamentary democracy. Edmund Burke, one of its most prominent advocates, saw Parliament as a 'deliberative assembly of one nation, with only one interest, that of the whole,'²³ its primary aim being the reaching of a well-informed and independent judgment for the common good. As such, Parliament is more competent to take decisions on complex issues of law and policy than ordinary citizens who cannot be realistically expected to bring sufficient knowledge and expertise to constitutional disputes. While Burke recognised a common right to deliver an opinion, he claimed that any

'[A]uthoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, [...] though contrary to clearest conviction of his judgement and conscience, [...] are utterly unknown to the laws of this land'.²⁴

Burke exhibits a strong preference for a Parliament that acts as an omnipotent representative of the people. Such a model was famously criticised by Burke's great contemporary J.J. Rousseau, who believed that sovereignty cannot be expressed through parliamentary representation:

The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them.²⁵

The clash between Burke and Rousseau illustrates the opposing directions in which the constitutional systems in the UK and continental Europe evolved. While the Burkenian tradition of a sovereign Parliament and representative democracy prevailed in the UK, limiting the role of direct democracy, the ideas of Rousseau flourished in continental Europe, especially after the French

²¹AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 37-38.

²²*ibid.*

²³Edmund Burke, 'Speech to the Electors of Bristol, 3 Nov. 1774', in Philip B Kurland and Ralph Lerner (eds), *The Founders' Constitution*, vol 3 (The University of Chicago Press 1987) 447.

²⁴*ibid.*

²⁵Jean Jacques Rousseau, *The Social Contract* (CreateSpace Independent Publishing Platform 2014).

Revolution, which fostered the growth of popular sovereignty. In light of this, it is important to recognise that the rise of referenda and other instruments of direct democracy in the UK and Poland emerged from considerably different theoretical backgrounds (with the Polish experience largely informed by communism).

Before arriving at the conclusion that the early development of direct democracy in UK was hindered solely by a rigid interpretation of parliamentary sovereignty, it is necessary to analyse one strong, and perhaps surprising, counter-argument premised on historical evidence and careful re-examination of Dicey's constitutional theory.

While Dicey's definition of parliamentary sovereignty is a part and parcel of every constitutional law student's toolkit, his ardent advocacy of referenda is not widely known. As Vernon Bogdanor notes, these two positions seem to be self-contradictory.²⁶ The issue is well explained in Rivka Weill's engaging essay 'Dicey was not Diceyan',²⁷ in which she convincingly evidences Dicey's commitment to direct democracy. Other scholars have commonly interpreted this as a temporary distortion of judgment on Dicey's part.²⁸ Weill offers the view that Dicey's theory is in fact a dualistic one, as, from the very beginning, he recognised a practical distinction between the legal sovereignty of Parliament and ultimate political sovereignty of the people.²⁹ This goes beyond a model of parliamentary representation, to promote the involvement of the people in constitutional decision-making.³⁰ Dicey believed that 'the spirit, though not yet the form of the referendum'³¹ was present in the British Constitution.

In Britain, during the 19th century, many landmark statutes were enacted upon the basis of popular sovereignty. The House of Lords used its veto power to trigger new general elections, the result being a procedure, not dissimilar to that of a referendum, that was used to decide on contested issues. Dicey believed that an example of direct democracy could be found upon examination of the enactment of the Great Reform Act. After submitting the bill proposal to Parliament, the government of Earl Grey Whig held elections which concluded with Whig's victory. The victory was indicative of public support for the proposed reform.³² Dicey saw this event as an example of elections

²⁶Vernon Bogdanor, 'Western Europe' in David Butler and Austin Ranney (eds) *Referendums Around the World: The Growing Use of Direct Democracy* (AEI Press 1994) 34.

²⁷Rivka Weill, 'Dicey was not Diceyan' (2003) 62 *Cambridge Law Journal* 474.

²⁸Lord Bingham of Cornhill, 'Dicey Revisited' [2002] *Public Law* 39, 41.

²⁹Richard Cosgrove, *Rules of Law: Albert Venn Dicey, Victorian Jurist* (Palgrave Schol 1980) 161.

³⁰Weill (n 27) 476.

³¹AV Dicey 'Democracy in Switzerland' (1890) 171 *Edinburgh Review* 113, 141.

³²Weill (n 27) 478.

constituting a direct appeal to the nation. It was in light of this that he opined 'never did elections approach more nearly to a Referendum'.³³ Later, as Dicey's views evolved further toward a preference for popular sovereignty, he advocated for the introduction of a separate institution of referendum into the constitutional order. His support for referenda stemmed from his growing distrust of Parliament, which was increasingly dominated by political parties.³⁴ In Dicey's view, referenda could be used as an instrument for constraining the usurpation of power by political elites – a 'royal veto' in the kingdom of democracy³⁵ granting not only political, but also legal sovereignty to the people.

If Dicey's proposal were to be put into practice, the use of referenda and direct democracy in the English constitutional system could have been much more common. Unfortunately, as Dicey feared, the Constitution developed in the opposing direction. Like in pre-war Poland, it became dominated by the political parties, with the historical role of the sovereign nation being gradually abandoned in favour of a strictly sovereign Parliament. Dicey's theory was thus interpreted as a monist one, contrary to its true meaning. Despite this, Dicey's writings, when taken as a whole arguably evidence that parliamentary and public sovereignty can be reconciled. The significance of this conclusion is that it demonstrates there is a place for democracy in the UK constitution.

III. TOWARDS DIRECT DEMOCRACY: GROWING ROLE OF REFERENDA

In the beginning of the democratic transition period in Poland, it became obvious that solid legal foundations of citizens' involvement would have to be established in order to allow popular participation in drafting and legitimising of the new constitution.

In 1992, two laws of constitutional status were passed: The Constitutional Act on the Procedure of Preparing and Enacting a Constitution for the Republic of Poland³⁶ and the Constitutional Act on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government³⁷ (the so-called Little Constitution). The former introduced an

³³ AV Dicey, 'Ought The Referendum to be Introduced into England?' (1890) 57 Contemporary Review 489, 494.

³⁴ Weill (n 27) 484.

³⁵ A.V. Dicey (n 31) 137.

³⁶ The Act of 23 April 1992.

³⁷ The Act of 17 April 1992.

obligatory referendum ratifying the constitution (Art. 1), which in 1994 was complemented by facultative(optional) referendum about the provisions of the future constitution.³⁸ The latter established an institution of facultative referenda on 'matters of particular importance to the state' (Art. 19). Sejm and the President of the Republic were the bodies given the power to hold this referendum.

These constitutional laws, although only temporary in scope, set a crucial background for clarification of the role of direct democracy, which was to be conclusively defined by the 1997 Constitution. However, they were not free from imperfections. The Constitution Act delegated the determination of both the procedure and the conditions of admissibility of a constitutional referendum to the ordinary legislation. While the former is common practice, the latter is rather unusual since questions of turnout and minimal required support are more of a constitutional matter, these considerations being directly connected with defining the scope of a sovereign power. The uncertainty was partially remedied by Art. 19(3) of the Little Constitution which stated that in order for the referendum to be binding, at least half of eligible citizens must participate. As Sarnecki notes, such a determination in itself places a referendum in an inferior position to elections, which have no minimum turnout requirement.³⁹ Such a provision suggests that the role of direct democracy should be limited in favour of the representative system.

Under the temporary laws, three referenda were held in Poland after 1989: the 1996 Referendum on Enfranchisement of Citizens, the 1996 Referendum on Privatised Assets and the 1997 Referendum of Enactment of the Constitution. The first two of these were not decisive because the required turnout was not reached.

In the 20th century, the role of referenda in the UK considerably increased. However, unlike in Poland, no concrete attempt to clarify their status in the Constitution had been made. The 1970's saw four national and sub-national referenda, the EEC Membership Referendum 1975 being the most crucial, as it helped ease the doctrinal controversies previously associated with the use of referenda.⁴⁰ Another note-worthy feature of the 1975 referendum was its referral to an international agreement; previous referenda had only concerned domestic issues.⁴¹ As such, it set an important precedent for recourse to referenda where matters involving international treaties

³⁸The Act of 22 April 1994 Amending The Constitutional Act on the Procedure of Preparing and Enacting a Constitution for the Republic of Poland, Chapter 1, Article 2.

³⁹Sarnecki (n 13) 10.

⁴⁰Anthony King, *The British Constitution* (OUP 2007) 289.

⁴¹Louis Blom-Cooper, 'The Referendum of 23 July 2016: Voting on Europe' Public Law (Brexit Special Extra Issue) 2, 4.

are concerned. Up to this point, these issues had been the prerogative of solely the executive.

The historically rigid interpretation of parliamentary sovereignty gradually gave way to a more flexible view. In his famous passage from the Jackson⁴² case Lord Hope declared that

'parliamentary sovereignty is no longer, if it ever was, absolute. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament is being qualified'.⁴³

An engaging argument regarding the relationship between parliamentary sovereignty and direct democracy is provided by Sionaidh Douglas-Scott, who makes an interesting distinction between the unitary and unionist version of the constitutional order.⁴⁴ The former paints a version of the orthodox dominance of a Parliament, which retains the superiority and at least theoretical right to legislate in all matters, including devolved ones. On this view, the UK is treated as a unified state with an omnipotent legislative. This interpretation seems to be the prevailing one in the case of the Brexit referendum. Scotland, supportive of remaining in the European Union, was not treated as an equal member of the family of constituent nations. Nicola Sturgeon's proposition of introducing a double majority lock for Scotland was rejected by Westminster. This led to an uncomfortable and democratically controversial situation: Scotland was essentially engaged in Brexit against its will. The consequence of this is the burgeoning possibility of a second Scottish independence referendum. Perhaps this bitter outcome could be avoided, if the dominant vision of a constitution were unionist. This is the view that the constitution is a product of legal and political traditions of all the constituent nations, whose interests should be given equal gravity in constitutional disputes. Arguably, according to a unionist view, the Acts of Union of 1707, which created the United Kingdom, should be afforded considerable importance in the constitutional tradition. Despite England's embrace of the doctrine of parliamentary supremacy, Scotland has recognised a profound tradition of popular sovereignty, dating back to the Declaration of Arbroath of 1320. This tradition was never abandoned, but rather brought into the Union. Therefore, it deserves respect and consideration. This view was emphasized in *Mac Cormick v Lord Advocate*⁴⁵ by Lord Cooper who claimed that 'the principle of the unlimited sovereignty of parliament is a distinctively English

⁴² *R (Jackson) v Attorney General* [2006] 1 AC 262.

⁴³ *R (Jackson) v Attorney General* [2006] 1 AC 262 Lord Hope at [104].

⁴⁴ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79 *Modern Law Review* 1019, 1035.

⁴⁵ *MacCormick v Lord Advocate* 1953 SC 396, 1953 SLT 255.

principle, which has no counterpart in Scottish constitutional law'.⁴⁶

This brings us to a surprising constitutional paradox of sovereignty in the post-Brexit landscape. Why should the popular sovereignty of English people be respected, if no such tradition exists in England, while the popular sovereignty of Scottish people is disrespected when such a tradition clearly exists in Scotland? A broader interpretation of the Constitution might be needed to accommodate referenda.

IV. THE CURRENT CONSTITUTIONAL FRAMEWORK: REFERENDA ACCOMMODATED?

The 1997 Constitution of the Republic of Poland explicitly provides for the exercise of power by the nation, which is regarded as the sovereign: Article 4(2) states that 'The Nation shall exercise the power through their representatives or directly'. Compared to the 1987 provision, the new one is undoubtedly a step towards a more clear and precise definition of the role of direct democracy. It is a somewhat classical depiction, similar to those found in other European constitutions, for example the French one.⁴⁷

Uziębło makes two important comments on the above provision. Firstly, the wording of the article clearly suggests that it is representative democracy which prevails as a basic principle of the Polish constitutional order.⁴⁸ While drafting the constitution, the legislator listed the representative model first for the purpose of underlining that it is principally through representation that power is executed in the name of the nation. Hence, direct democracy can only be treated as complementary to this basic principle.

Secondly, Uziębło puts into question the dichotomy between direct and representative democracy in the Polish constitution.⁴⁹ Historically, these two models were perceived as mutually exclusive and contradictory. Does that mean that there is no place for intermediate forms? Uziębło claims that the intention of the drafters was not to exclude semi-direct democracy from the range of ways in which the nation can exercise its sovereign power. According to him, the 'or' conjunction used in Art. 4(2) should be interpreted as meaning that the Polish constitutional order encompasses both forms of strictly defined direct and indirect democracy as well as forms conflating these

⁴⁶ibid.

⁴⁷The Constitution of the Republic of France 1958, Article 3: 'National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum'.

⁴⁸Uziębło (n 5) 183.

⁴⁹Uziębło (n 5) 183-184.

two. The intention of the legislature is therefore to broaden the citizens' involvement in decision making, not to limit it by narrowly defined direct democracy measures, which are rarely used in practice.

This conclusion is crucial as it shows clear recognition of the importance of the nation's involvement on the basic, constitutional level, leaving room for future broadening of direct and semi-direct measures (like the right of petition or citizens' legislative initiative). The right to vote and to participate in the referendum is described as one of the political rights of the citizens in Art. 62 of the Constitution. It is, however, worth emphasizing that the referendum remains only facultative, that is optional - no matters exist under the Polish Constitution, which are reserved to be decided by way of obligatory referendum.

The 1997 Constitution, in its current shape, distinguishes three types of nationwide referenda. The first one, provided for in Art. 125, is the referendum on matters of particular importance to the state. The second type, specified in Art. 90 (3), is the referendum which grants consent to ratification by the President of the Republic, of an international agreement encompassing delegation of competences of the state organs to an international organisation.⁵⁰ The third type of referendum, contained in Art. 235(6), is a constitutional referendum designed to confirm amendments to chapters I,⁵¹ II⁵² and XII⁵³ of the Constitution. The last two instances of referenda can be described as *lex specialis* in relation to Art. 125, as they concern specific cases of importance to the state. Introduction of separate provisions for the ratifying referendum and for the constitutional referendum is to be seen as a positive step, destined to clear doubts and encourage the use of referenda. Compared to the past provisions, it is an indication of decisive broadening of the role of referenda.

A referendum on matters of particular importance is considered decisive and binding if the turnout reaches 50% of those eligible to vote (Art. 125(3)). The same is true for the ratifying referendum, with Art. 90(3) making explicit reference to the procedure set out in Art. 125. The minimum turnout rule does not, however, apply to the constitutional referendum - Art. 235(6) neither refers to previous provisions nor mentions any minimum turnout requirements. The Constitution does not clarify the required level of support needed for a particular measure. It is, however, provided in the National Referendum Act of 14 March 2003, which, although drafted under the

⁵⁰ An example of such a referendum is given by the 2003 EU Membership Referendum.

⁵¹ The Republic.¹

⁵² Freedoms, Rights and Obligations of Persons and Citizens.¹

⁵³ Amending the Constitution.¹

pressure of the need to conduct the EU Accession Referendum in 2003, is generally successful in creating a robust regulatory procedure, remedying common problems observed in the previous referenda practice.⁵⁴ It specifies, among other things: who can participate in the referendum (Art. 2-3), bodies responsible for conducting the referendum (Art. 10-19), the mode of voting (Art. 20-21) and counting votes (Art. 22-32), the conditions of validity (Art. 33-36), the rules of the campaign and its financing (Art. 37-58), the mode of financing of the referendum itself (Art. 59) and relevant criminal offences for the breach of the referendum regulations (Art. 80-88).

A question arises about the status of a referendum in which the required turnout is not reached. Most of the scholars grant it a non-binding, consultative status.⁵⁵ It is worth noticing that while in some instances the result of this consultation might be vague, in others it can be perfectly indicative, for example, in case of a majority of negative votes or particularly low turnout. If this happens, is the Parliament impliedly bound by the results? Sarnecki claims that such a referendum can only have a politically consultative character, it cannot provoke any legal effects.⁵⁶ Otherwise, a non-binding referendum would be capable of becoming factually binding. Hence, the minimum turnout requirement would be rendered obsolete, contrary to the intention of the legislator. If an impliedly-binding interpretation of referenda was to be put into practice, it would require a positive provision. This argument is supported by examples from other European constitutions, such as the 1945 Austrian Constitution, which differentiates between a binding (Art. 43) and consultative referendum (Art. 49b).

Due to the dominance of representative democracy in the Polish legal system, the constitutional procedure prevents referenda from being capable of substituting a decision of any of the Houses of Parliament. Consequently, the referendum itself cannot be treated as leading to an enactment of relevant legislation expressing its result, because passing of such a law lies within the competence of Sejm.⁵⁷ However, this is a purely procedural requirement, which does not negate the binding aspect of a referendum fulfilling its relevant procedural requirements. The substantial question always remains conclusively decided by the nation. The role of the relevant public bodies is purely technical and limited to presenting the decision as a legal framework. Nevertheless, their formal involvement in the enactment process raises some crucial

⁵⁴Monika Piłat, 'Referendum ogólnokrajowe w procesie integracji Polski z Unią Europejską' (2004) 3 *Studia Iuridica Lublinska*, 154.

⁵⁵Leszek Garlicki, *Polskie prawo konstytucyjne: Zarys wykładu* (Wolters Kluwer 2017) 192.

⁵⁶Sarnecki (n 13) 22.

⁵⁷*ibid* at 13.

questions, the most important being whether the organs responsible for controlling the legislation freely exercise their competences. Or are they limited by the special character of the act? For instance, in the case of a statute, the relevant organs would include the President of the Republic and the Constitutional Tribunal. Sarnecki claims that while the President should not be allowed to exercise his veto power for obvious political reasons, the review of such a statute by the Constitutional Tribunal should not be hindered.⁵⁸ An argument supporting this assertion is that the rule of law and the principle of constitutionalism should be perceived as pillars of the Polish constitutional system, prevailing even over the national sovereignty principle. When passing its decision, the Constitutional Tribunal is limited by the referring motion, which in practice means the questions submitted are likely to consider mostly procedural issues, as the competent bodies will refrain from questioning the substantive result.⁵⁹ The important role of the due process of law principle is also expressed through Art. 125(4), which grants to the Supreme Court a power to determine the validity of a referendum on matters of particular importance, and the validity of a constitutional referendum. Review of the latter might turn out to be particularly important given the absence of the minimum turnout requirement and the gravity of the issues decided.

Unlike the institution of referenda in Polish law, which, despite some inconsistencies and doubts, remains largely codified in a comprehensive manner, referenda in the UK remain a largely uncertain area with no clear and uniform procedural regulations. These would usually be established by legislation providing for the referendum on a case by case basis. Even instances in which a referendum can be held are not defined with any degree of certainty (this problem is further explored in the proceeding chapter).

The nature of referenda in the British Constitution is purely advisory, unlike Polish referenda, which is facultative, but binding. Therefore, from a legal standpoint, Parliament could choose to ignore the referendum's result or even legislate contrary to it, as its legislative powers are not constrained. If Parliament intended to bind itself by the result, it would have explicitly stated so in the enabling legislation. At the time of writing, there have been no Acts of Parliament passed providing that Parliament is bound by the outcome of a referendum. It seems to be an established practice that statutes such as the Referendum Act 1975, the Scottish Independence Referendum Act 2013 and the European Union Independence Act 2015 remain silent on

⁵⁸*ibid* at 13.

⁵⁹Sebastian Służalek, 'Instytucja referendum zatwierdzającego zmiany Konstytucji Rzeczypospolitej Polskiej' (2004) 3(62) *Przegląd Sejmowy*, 59.

the matter, implying that they are not intended to affect the orthodox parliamentary sovereignty. Indeed, a briefing paper for the European Union Independence Act explicitly describes the effect of the referendum as advisory.⁶⁰

However, while the referenda are not legally binding, it can be accepted that they are politically binding, since it would be both undemocratic and unreasonable for Parliament to disrespect the will of people which it represents. Therefore, on a political level, one can see a clear pattern of respect for the people's will, expressed in the impact of a referendum. In both the EEC Referendum 1975 and the European Union Independence Referendum 2016, the government explicitly consented to be bound by the result. The White Paper on the EEC Referendum⁶¹ states that 'the Government agreed to be bound by the verdict of the British people'.⁶² Similarly, in the policy paper regarding the process of withdrawal from the EU,⁶³ there is a declaration acknowledging that there exists 'a democratic duty to give effect to the electorate's decision'.⁶⁴

However, as Douglas-Scott notes,⁶⁵ the argument that referenda are effective in the sense that they are politically binding, may be undermined when considering comparative approaches to referenda in other European countries. Foreign referenda demonstrate that it is politically possible not to respect the referendum results. Following the Greek July 2015 referendum, the government undertook tougher austerity measures, though the people had spoken against it by a 20% majority. Further to this, when the referendum on the Lisbon treaty produced a result unfavourable to the Irish government, another referendum was held to yield the desired outcome. Such a situation is surely undesirable from a democratic stand point as it undermines the already limited role of direct democracy, dangerously shifting the balance of powers towards the executive, and opening the possibility for use of arbitrary power. If the referendum, as advocated by Dicey, is to act as a method of checks and balances, its result must be respected, to grant it political and legal credibility.

Unlike the Polish Supreme Court, the UK Supreme Court cannot determine the validity of a referendum. Nevertheless, as a matter of principle, the English common law courts can review the

⁶⁰House of Commons, *European Union Referendum Bill 2015-16* (Briefing Paper Number 07212, 3 June 2015) 25.

⁶¹Lord President of the Council, *The Referendum on UK Membership of the European Community* (White Paper Cmnd 5925, 26 February 1975).

⁶²*ibid* [6].

⁶³HM Government, *The Process of Withdrawing from the European Union*, (Cm 9216, 29 February 2016).

⁶⁴*ibid* [para 2.1].

⁶⁵Douglas-Scott (n 44) 1023.

constitutionality of a referendum's procedure. No such explicit challenge has however been made to date, with the *Miller*⁶⁶ case-dubbed the "Brexit challenge"⁶⁷ only briefly referring to the nature of the referendum itself. Just like the Constitutional Tribunal in Poland, the courts in the UK are constitutionally constrained from reviewing the substance of the referendum.⁶⁸ Perhaps the desire to avoid a quasi-substantive review of the referendum is what caused both the High Court and the Supreme Court in *Miller* to address the sovereignty issue in a somewhat evasive manner. Furthermore, they refrained from analysing an emerging tradition of referenda, and thus, the potentially growing role of popular sovereignty. The High Court seemed to embrace constitutional principles of parliamentary sovereignty and representative democracy. The decision recognised the referendum as a crucial political event, but simultaneously emphasised that it 'can only be advisory for the lawmakers in Parliament.'⁶⁹ In the Supreme Court, Lord Neuberger underlined that any ministerial statements regarding the binding character of the referendum 'are not law: they are statements of political intention. Further, such statements are, at least normally, made by ministers of behalf of the UK government, not on behalf of Parliament.'⁶⁹ Following the court's reasoning, it could theoretically be possible for Parliament, from a constitutional stand point, to overrule the referendum, as legally it retains a non-binding character. However, this theory remains untested. An interesting argument is raised by Blom-Cooper who claims that further clarification of the issue could, in theory, be obtained through the rarely-used mechanism in s.4 of Judicial Committee Act 1883: an ancient provision which allows the Monarch to seek the legal opinion of the Judicial Committee of the Privy Council on unclear matters.⁷⁰

V. THE CONSTITUTIONAL REFERENDUM

The institution of constitutional referendum in Poland can be understood as either the referendum expressing consent for enactment of a new constitution or a referendum expressing consent to amending certain chapters of the Constitution, as provided for in Art. 235(6) of the Constitution.

⁶⁶ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁶⁷ *ibid* [3].

⁶⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [106].

⁶⁹ *Miller* (n 66) [119].

⁷⁰ *Blom-Cooper* (n 41) 8.

Surprisingly, the first type of constitutional referendum is not regulated by the current Constitution. As Sarnecki rightly points out,⁷¹ the direct democratic framework is left incomplete as there is a major loophole in the basic law regarding the procedure of enacting a completely new constitution. Art. 235 clearly cannot be used as it applies only to specific constitutional amendments. Considering the historical doctrine of separation between laws amending the constitution and those enacting a new one, it is highly unlikely that the intention of the legislator was for Art. 235 to apply to both. Provisions of the Constitution Act 1992 are not applicable anymore, because the law has been explicitly repealed by Art. 242(2) of the current Constitution, so the matter remains unregulated. This is regrettable, especially in light of ongoing debate about the transition from the Third to the Fourth Republic, accompanied by calls for a revised constitution. The recent presidential proposals for constitutional reform do not rule out the possibility of enacting a completely new constitution, if the Sovereign supports a decisive change of government form. If this is the case, the procedure for enacting a new supreme law would have to be established by an ad hoc statute, similar to the procedure in the UK. As evidenced by the experience of the Constitutional Act of 1992, this form of regulation might lead to imperfections in the law.

According to Art. 235(6), the second type of constitutional referendum can be held only by the bodies competent to submit the bill to amend the Constitution. This would be 'at least one-fifth of the statutory number of Deputies, the Senate, or the President of the Republic' (Art. 235(1)). The sovereign Nation alone is therefore not capable of initiating the referendum. As Szuląlek claims, this provision is designed to intentionally limit the use of direct democracy in favour of the representative model,⁷² and it is therefore in line with Art. 4(2) of the Constitution. In the absence of a provision to the contrary, the power to submit the bill to a referendum is vested equally in the body which initiated the bill, and other bodies listed in Art. 235(1).⁷³ This is crucial, because in this way the referendum can act both as a device of checks and balances, allowing the bodies opposing the amendment to submit it to popular vote (akin to Dicey's theory), as well as a social consultation device, confirming the merits of the amendment. The second function is especially important because it is a gateway for recognising the increasing importance of direct democracy. It is precisely the idea of social consultation that underpinned the recent presidential proposals for constitutional

⁷¹Sarnecki (n 13) 12.

⁷²Szuląlek (n 59) 47.

⁷³*ibid* at 48.

amendments.

In light of the above, it is worth discussing an ambiguity connected with the power of the president to initiate the Art. 235(6) referendum. It is not clear whether such a motion would need a countersignature from the Head of Government. Art. 144(3) of the Constitution does not mention, among the prerogative powers of the President, the power to initiate a confirmatory referendum or to introduce a bill amending the Constitution. On one hand, therefore, it could be argued that in the absence of an explicit provision to the contrary, the aforementioned powers should not be perceived as exceptions to the general rule of a countersignature requirement (Art. 144(2)).⁷⁴ On the other hand, however, the powers connected with amending the constitution can be classified as a power to 'introduce legislation', which is caught under the exceptions listed in Art. 144(3).⁷⁵ Such a broad interpretation is also possible, as the Constitution, somewhat peculiarly, does not use different terms to distinguish between constitutional legislative initiative and ordinary legislative initiative. Moreover, it is in line with the interpretation of Art. 235 itself, which deprives the government of the power to initiate a constitutional amendment bill. It is therefore unlikely that the President of the Republic should be constrained by the countersignature requirement while exercising his powers under this article.

The last important point to be made concerns the scope of the referendum. It seems unclear whether the Nation should decide on the entire constitutional amendment bill or just those provisions which introduce amendments to chapters I, II and XII. If the first option was true, it could lead to a peculiar result where the people would, in fact, be allowed to decide on all the constitutional amendments, not only those referring to the assigned chapters. If the second option was true, it would not sit comfortably with Art. 235(2), which reads that the amending bill adopted by Sejm should be adopted in the same wording by Senate. It follows then, that if the second House of Parliament only has the possibility to adopt or reject the bill in its entirety, that the same should be true for the people in a referendum. The author makes this speculation based upon the implication that the legislator did not intend the integral nature of such a statute to be disrupted.⁷⁶ Such an interpretation is also clearly supported by Art. 78(1) of the National Referendum Act 2003, which stipulates that the format of the Art. 235(6) referendum question must be: *Do you support the amendment*

⁷⁴Jerzy Ciapała, *Prezydent w systemie ustrojowym Polski 1989-1997* (Wydawnictwo Sejmowe 1999) 350.

⁷⁵Marzena Laskowska and Wojciech Sokolewicz, 'Procedura zmiany Konstytucji RP na tle porównawczym' (2002) *Studia Prawnicze* 22, 45.

⁷⁶Śluzalek (n 59) 54.

of the Constitution of the Republic of Poland of 2 April 1997? Hence, the conclusion is in favour of the first option—the Nation is expected to decide on the entire bill. However, this solution is not perfect and would require increased caution on the part of the legislature during the drafting procedure. Otherwise restrictions laid down in Art. 235(6) can be rendered obsolete.

Given the existence of a clear, separate provision for constitutional referenda, it seems very peculiar that the President of the Republic proposed his referendum on constitutional issues under the basic provision of Art. 125. A possible motivation of the President could have been the considerable breadth of the issues covered by the referendum, which would not be caught by Art. 235. The referendum, planned to take place on the symbolic date of the 100th anniversary of independence, was to encompass 10 questions on a number of matters including: administrative division, introduction of the presidential system, entrenchment of the right to social benefits and the role of referenda itself. The President's decision to rely on Art. 125 generated a lot of confusion and was questionable from the standpoint of constitutional legitimacy. As the intention of the legislator was clearly to distinguish between referenda on constitutional changes and other, less crucial issues, a constitutional referendum held under an article other than Art. 235, disregarding the safeguards established by it, would render it obsolete. The reception of the referendum proposal was mostly critical. Some commentators explicitly referred to it as 'absurd',⁷⁷ underlining its lack of a clear focus, and its offer of a range of vague questions of varying constitutional importance. The Presidential referendum proposal was rejected by the Senate,⁷⁸ whose consent is required according to Art. 125(2). Only 10 out of 92 Senators supported the referendum, 30 opposed it, while the majority, 52, refrained from voting. It suggests that although the Senate was not supportive of the referendum, it was also reluctant to strike an explicit blow against direct democracy. Surprisingly, the reasons for rejection did not include legal uncertainties, but pragmatic, political justifications, such as the fear of a low turnout or doubts about the suitability of the symbolic date.⁷⁹ Both the negligent design of the referendum, and the lack of substantive procedural reasons for its rejection by the Senate, seem to indicate that the constitutional

⁷⁷Łukasz Lipiński, 'Prezydent dalej brnie w absurdalne referendum' *Polityka* (12 June 2018) <<https://www.polityka.pl/tygodnikpolityka/kraj/1752254,1,prezydent-brnie-w-absurdalne-referendum.read>> accessed 10 March 2019.

⁷⁸Agata Kondzińska, Paweł Wroński, Michał Wilgocki, 'Prztyczek w nos prezydenta Dudy: referendum konstytucyjne odrzucone w Senacie' *Gazeta Wyborcza* (25 July 2018) <<http://wyborcza.pl/7,75398,23716939,prztyczek-w-nos-prezydenta-dudy-referendum-konstytucyjne-odrzucone.html?disableRedirects=true>> accessed 18 August 2018.

⁷⁹*ibid.*

referendum is still a foreign device to the Polish Constitution. It appears to be treated as a predominantly political tool and its legal foundations are not fully understood and respected.

Unlike most civil law countries, including Poland, the UK, being a common law jurisdiction, does not have a separate legal provision for constitutional amendments, whether enacted by referendum or by other means. In the absence of a codified constitution, determining with a high degree of certainty what constitutes a constitutional referendum in the UK, is very difficult, if not impossible. A reference to the definition of a constitutional statute, that is, an Act of Parliament of a special, constitutional importance, can be a good starting point for the investigation. The existence of hierarchy of statutes, which can be divided into 'ordinary' and 'constitutional', was recognised in *Thoburn v Sunderland City Council*,⁸⁰ in which Laws LJ proposed the following definition:

'In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.'⁸¹

The author of this essay proposes that analogous criteria could be applied to define a constitutional referendum, which would thus encompass issues capable of altering the legal relationship between the citizen and the State, as well as issues relating to fundamental rights. In its report on the referendum in the UK, the Select Committee of the House of Lords⁸² named some instances in which a constitutional referendum would most likely be required. These included: abolishment of the Monarchy, leaving the EU, secession, abolition of either House of Parliament, changing electoral system for the House of Commons, adoption of a written constitution, and changing of the UK's system of currency.⁸³ However, just like the list of constitutional statutes, the above list is by no means certain.

The opinions of witnesses gathered by the Select Committee suggest that referenda should not be a common constitutional practice in the UK, only an exception for a legal and political landscape dominated by Parliamentary democracy.⁸⁴ Indeed, many scholars think of referenda as limited to cases of fundamental constitutional importance, since, as

⁸⁰ *Thoburn v Sunderland City Council* [2002] EWHC (Admin) 195.

⁸¹ *ibid* [63].

⁸² House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (HL Paper 99, 2010).

⁸³ *ibid* [94].

⁸⁴ House of Lords Select Committee on the Constitution (n 82) [64]-[65].

Caroline Morris contends, 'any alteration to the democratic fundamentals of a state should have the endorsement of its people'.⁸⁵ The view is supported by Dicey himself who claimed that 'on the matters of constitutional change [...] a small majority has any moral right to act with vigour'.⁸⁶ Dicey here was advocating for the involvement of the people in deciding constitutional questions. This assertion, however, remains very vague and is not consistently mirrored in political practice. Although it can be argued that the practice of referenda creates sufficient precedents to establish that some constitutional issues, like devolution,⁸⁷ should be subject to popular consultation by means of a referendum, it is easy to list fundamental changes to the constitutional order, like the introduction of Human Rights Act 1998 or establishment of the Supreme Court, which were not tested in a referendum. This inconsistency brings about a rather unexpected conclusion. All the nationwide referenda conducted to date seem to be constitutional, and thus, it is perhaps possible to claim that there exists no other institution of referenda on a national and sub-national level. However, at the same time, not every issue of constitutional importance requires a referendum. In light of this, the definition proposed by the author of this paper seems obsolete, as it is simply too broad. An adequate definition would require a distinction between a mere constitutional issue, and a constitutional issue so fundamental that it requires a referendum be held to resolve it. However, such distinctions are very difficult to make, due to there being a large degree of subjectivity involved in making them. Professor Stuart Weir attempted to illustrate the problem with the following metaphor: 'we all know what a camel actually looks like but would find it perhaps difficult to give a very accurate description of the beast'.⁸⁸ Weir is making the point that, in the UK, the decision as to whether a constitutional referendum should be held seems to ultimately lie within the discretion of the government. This is different to the Polish Constitution, which does not grant such powers to the executive. It is particularly the UK legal tradition concerning the executive's discretion that is very different from the discretion that Sejm and other constitutional bodies possess under Art. 235(6). The thrust of the problem is summed up well in the words of Bogdanor:

The referendum, in countries with a codified constitution, is intended to constrain the government of the day. In Britain, by contrast, if use of the referendum lies at the discretion of

⁸⁵ *ibid.*

⁸⁶ *Cosgrove* (n 29) 161.

⁸⁷ Northern Ireland Independence Referendum 1973, Scottish Devolution Referendums of 1979 and 1997, Welsh Devolution Referendums of 1979, 1997 and 2011, Scottish Independence Referendum 2014.

⁸⁸ House of Lords Select Committee on the Constitution (n 82) [68].

government, it can be used to augment the power of government rather than limiting it, by allowing a government to bring the people into play against Parliament. The referendum could then become a tactical device, 'the Pontius Pilate' of British politics.⁸⁹

Unfortunately, this is exactly what happened in the Brexit Referendum. In his excellent article, Paul Craig unpacks the political background behind the leave vote. Using the analogy of a Shakespearean sequential structure, he describes how 'in six acts' David Cameron's uncomfortable political promise became reality, because of an unexpected outright Conservative Party victory in the 2015 election.⁹⁰ In her 1988 article, Suzanne Bailey also underlines that, historically, referenda have mainly been used 'for reasons of political expediency',⁹¹ while their constitutional background remained of secondary significance. Baldwin's 1930 Free Trade referendum proposal was an instrument intended to block his political opponents, while Harold Wilson supported the 1975 EEC referendum to preserve party unity.

The author concludes that the constitutional referendum is too often limited to a political tool as opposed to acting, as Dicey had hoped, as a safeguard against arbitrary power and the unconstrained legislative competences of the Parliament. Unfortunately, his proposal of the Referendum Act, containing an exhaustive list of constitutional acts, whose change would require a referendum, was not followed. A similar, equally unsuccessful attempt was made in 1978 by a Conservative party sub-committee, which proposed a Constitution (Fundamental Provisions) Bill, specifying issues on which a referendum should be held. Nowadays, in light of the growing use of referenda, the introduction of such a list is worth reconsidering, as it would be very helpful in clarifying their uncertain role in the constitutional system. Nevertheless, the principal problem with such a list is that it should not be so narrow as to limit the possibility of recourse to referendum, nor so broad as to create a catch-all mechanism, thereby increasing the probability of its use as a tactical device. Achieving such a balance might prove very complicated in the flexible environment of uncodified constitution. A possible solution, therefore, would be to broaden and clarify the doctrine of constitutional precedent, gradually leading to the establishment of conventions specifying constitutional amendments and novelties requiring consultative referendum. The author of this article disagrees

⁸⁹*ibid* [70].

⁹⁰Paul Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *European Law Review* 447.

⁹¹Suzanne Bailey, 'Referendum is a Foreign Word' (1988) 138 *New Law Journal* 181.

with Bailey's sceptical conclusion that 'to give the referendum obligatory colour as a "convention of the constitution" would be to place it higher on the constitutional scale than it deserves'.⁹² The growing recourse to national referenda makes it inevitable that their place on the constitutional landscape will soon have to be clarified, as evidenced by the robust constitutional questions and dilemmas raised by Brexit. In light of so many fundamental issues, like the position of devolved nations, which are left undecided, one wonders if the British Constitution is still fit for purpose.⁹³

VI. CONCLUSION

Both Poland and the UK share a general lack of constitutional historical recourse to referenda and other forms of direct democracy. Different reasons underlie the absence of this tradition. In the case of Poland, it is mainly the experience of the communist regime that hindered the development of popular sovereignty, as it was incompatible with the political doctrine. The experience of post-war referenda in Poland was overtly negative, because referenda became a mere tactical device of the regime, as opposed to a device of direct democracy. In the UK, the English doctrine of parliamentary sovereignty precluded the development of the sovereignty of the people. It must, however, be underlined that the father of the theory of parliamentary sovereignty, A.V. Dicey, did in fact argue for a dualist system, in which the people are the political and legal sovereign. However, the Burkenian idea of representation prevailed over Dicey's ideas of popular sovereignty through referenda, leading to the growing influence of political parties. A similar trend prevailed in Poland, where the experience of lost independence led to a preference for strong party dominance.

While it might be said that both states start their engagement with direct democracy on an equal footing, it is undoubtedly Poland that came up with a more precise and workable constitutional pattern for accommodating direct democracy. While it firmly embraces the representative model of democracy, the Polish 1997 Constitution makes quite a broad and clear commitment to direct democracy, distinguishing three instances in which a referendum may be held, and specifies the relevant procedure for its execution. The Polish institution of referenda is always facultative, but, if the technical

⁹²ibid 186.

⁹³Douglas-Scott (n 44) 1022.

requirements are fulfilled, binding in nature. The constitutional framework, however, leaves some important gaps that require filling, one of them being a lack of clear regulation on referenda concerning the enactment of a new constitution. It is worth noting that while a good constitutional framework is an important step towards expanding the role of direct democracy, such an expansion will not take place until the Nation recognises its role as the legal sovereign. A turnout of a bare 7% on the last national referendum⁹⁴ indicates that the Polish people might not yet be ready for such an acknowledgement. Furthermore, the fear of a low turnout was one of Senate's justifications for rejecting the President's recent referendum proposal.⁹⁵ Unfortunately, this failure indicates that the referendum's role in the Polish Constitution is still uncertain and misunderstood, both politically and legally.

In terms of the place of referenda in the constitutional order of the UK, more questions were perhaps raised than answered in the course of discussion in this article. Despite an evident trend of recourse to referenda, the UK, unlike Poland, did not develop a clear pattern for their accommodation. The only well-established principle seems to be the advisory character of referenda, at least from a legal standpoint. With every new referendum, the absence of this pattern becomes more evident, leading to serious constitutional disputes, as it did in the case of Brexit. Solving this problem would require finding the right balance between legal sovereignty, the black letter of law and representative democracy on one hand, and political sovereignty, reality-check approach and direct democracy on the other. This, however, is by no means easy in the absence of a codified constitution. Some of the suggested solutions might include an unionist interpretation of constitution or the introduction of a 'citizen-assembly style Constitutional Convention'⁹⁶ for the UK, bringing together the people and the constitutional bodies to deliberate upon constitutional tensions as they arise.

To conclude the investigation, the author would like to point out that while the rise of referenda and direct democracy can be seen as a positive development, acting like a check on the government and embracing popular constitutional conscience, it can also be interpreted as an indicator of constitutional crisis, leading to the establishment of a populist rule, disrespecting the rights of minorities.

⁹⁴The Single-Member Constituencies Referendum of 6 September 2015.

⁹⁵Agata Kondzińska et al. (n 78).

⁹⁶Silvia Suteu, 'Developing Democracy Through Citizen Engagement: The Advent of Popular Participation in the United Kingdom's Constitution-Making' (2015) 4 Cambridge Journal of International and Comparative Law 405, 422.

Dressing the populist theory in a legal attire, Luigi Corrias draws our attention to its dangerous character, preference for the rule of people over the rule of law, coupled with decisive recourse to national identity and politics of immediacy.⁹⁷ We have seen how referenda have been used as political tools in the People's Republic of Poland and the UK. The unfruitful Polish constitutional referendum, which was to be held on the symbolic date of 11th November 2018, the 100th anniversary of independence, could have been a positive change, engaging the Nation in the important constitutional amendment debate. Regretfully, the perfunctory legal preparation of the referendum gave it the appearance of a populist device, rather than a legal blueprint for constitutional reform. Hopefully, the doubts and uncertainties surrounding the unrealised referendum will constitute a valuable lesson for the future.

⁹⁷Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 *European Constitutional Law Review* 6, 8-9.

