INQUIRY OF CONSTITUTION COMMITTEE OF THE HOUSE OF LORDS
REFERENDUMS IN THE UK'S CONSTITUTIONAL EXPERIENCE:

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I. Introduction

The UK's limited experience of running national referendums is quite at odds with its detailed regulation of them. When combined with the expertise accrued from the eight sub-national referendums held since 1973, there is a body of constitutional law and practice that amounts to a regulatory regime of some sophistication. Whether over-engineered or gold plated or merely appropriate, many of our mechanisms for the holding of referendums stand well in comparison with those in jurisdictions that deploy devices of direct democracy more frequently. This is not to say that it is unimprovable. Technical issues such as power sharing and agenda setting, the facilitation of popular involvement and the use of ICTs remain problematic, though far from insoluble. The greater challenge – and one which this inquiry can positively contribute to – is that of the broader malaise of democratic participation. Trends of voter turnout, voter volatility, partisan attachment and cognate measures all point towards a citizenry that is increasingly detached from democratic politics, paired by political elites engaged in a similar process.[2] An appropriately structured system of direct democracy will not reverse this long term (and transnational) phenomenon, but it can at the very least address the process of mutual withdrawal, popular and elite, and in its discrete realm of operation create incentives for engagement.

II. Experience of Referendums

The use of the referendum device in the UK is distinct from most comparable polities in quantitative and qualitative terms, with the two being closely linked. The relative paucity of use can be explained using a definition of constitutional referendums as those which implicate the sovereign relations between the people and government.[3] In this light the referendums relating to Northern Ireland (1973 and 1998), Scottish and Welsh devolution (1979 and 1997) and assemblies in London and the North East region (1998 and 2004), together with that of 1975, can be seen as constitutional referendums, distinct from those relating to matter of social policy. In Canada for example, of the 74 referendums held, the majority have related to the regulation of alcohol (40), with other quintessentially 'social policy' issues such as gaming (2), schooling (2) and day light savings (4) also weighing in. Only recently have constitutional questions been the subject matter of referendums, including Quebec (1980 and 1995), electoral system (BC and PEI in 2005) and Constitutional patriation (1982). An even more extreme skewing towards 'ordinary' referendums is found in the case of the states of the USA, which have conducted approximately 2300 initiatives since 1900. Of European comparators, both Denmark and Ireland have deployed the constitutional national referendum more frequently than the UK – 15 and 21 times respectively. (Such countings are inevitably contentious – is abortion a constitutional matter for these purposes? Arguably not in that it does not pertain to fundamental territorial definitions of the state or the ceding of sovereignty to international organisations, though it certainly does in the case of Ireland go to citizens' authorship of the state.)

Viewed in this way, the UK's modest use of the referendum is less to do with inherent incompatibility with the Westminster system and/or parliamentary sovereignty than a historically laggardly approach to constitutional renewal. Certainly in the future, it is difficult to imagine major changes to constitutional arrangements such as devolution, voting system or European integration without powerful demands for a referendum.

In terms of policy lessons from those referendums that have been held in the UK, the following suggest themselves:

1. Public Funding

Present in 1975, absent in the referendums of 1979 and 1997 and reappearing under the scheme in PPERA (and as such deployed in the NE referendum 2004), public funding of referendum campaigns is decisive. The Referendum Act 1975 provided for equal funding to the 'Yes' and 'No' campaigns in the EEC referendum which in the case of the former accounted for 12.5% of its income and 94% of the latter's. Put another way, but for public subvention, the 'No'

1 This submission draws on my previously published work, most pertinently, "Sledgehammers and nuts? Regulating referendums in the UK" in S. Hug & K Gilland Lutz (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009). Enclosed at Appendix 1.

2 P Mair, *Ruling the Void: the Hollowing of Western Democracy*, 42 New Left Review (2006) pp 25.

3 S Tierney, *Constitutional Referendums: A Theoretical Enquiry* [2009] Modern Law Review 360.

campaign in 1975 would have been unable to organise, mobilise, communicate or campaign. In the event it lost – 67.2% against 32.8%. The argument that a campaign that is unable to engage the political donating classes should not be availed of the crutch of public funding ignores the endogeneities at play. These were laid bare in the case of the Welsh referendum of 1997 where there was no provision for public funding. The 'No' campaign emerged only at the eleventh hour of the campaign, consisting of a disgruntled Labour Party member and a single donor. Nonetheless, it ran the forces of the Welsh political establishment, which were arrayed against it (the seat-less Welsh Conservatives chose not to campaign) mighty close, losing by a short nose – 50.3% to 49.7%. The Committee on Standards in Public Life noted in its report on party funding that "a fairer campaign might well have resulted in a different outcome." The North East referendum of 2004 demonstrates the pivotal role of 'raising all boats' that PPERA's scheme provides for in giving equal public support for each campaign (or "Designated Organisation" in the language of the Act). Each of 'North East Says No' and 'Yes4theNorthEast' received public funding of £100,000, administered by the Electoral Commission. As a percentage of expenditure by answer, public funding represented a mere 18% of the 'Yes' total but 49% for 'No', which campaign defeated the proposition comprehensively – 77.9% to 22.1%.

Public funding of this sort is unusual in comparative perspective, even in polities with regular recourse to direct democracy.[4] Occasionally it is mistaken with government neutrality – an entirely different matter. What core funding provides is a vital means for organised opinion to argue its case against what may often be a near consensus among political elites. In its absence, those lacking tradition channels of support would be starved of funding and unable to mount a meaningful challenge.

2. Power Sharing – Citizens' Initiatives

The calling of a referendum in the UK is, as a matter of substance, not in the gift of Parliament, or even the government so much as the Prime Minister. As such, and like so much in the UK's system of government, it depends on the office holder's position of strength within the party, cabinet and so on. A 'weaker' PM may have to seek consensus with colleagues – the non-referendum on the Euro between 1997-2001 has some of this. A consequences is that Prime Ministers are reluctant to call for referendums unless they are assured of victory – a loss being too closely associated with their own, or their party's, fortunes.

Citizens' initiatives (CI) provide mechanism by which power can be shared with the citizenry, kicking against a too tightly controlled agenda setting capacity. The details of its implementation are crucial and ensuring 'fit' with the UK's broader constitutional arrangements is key (which makes 'abrogative' referendums problematic). As such, the configuration of the (i) relevant number of signatures, (ii) timeframe within such signatures must be accumulated, and (iii) any territorial requirement assumes great importance.[5] If direct democracy in the UK is to remain the preserve of 'constitutional' matters, the threshold for CIs can justifiably be moderately high. A trigger threshold of 400,000 signatures (approx. 1% of the registered electorate), collected in an eight week period, with at least 1000 signatures in each of one quarter of all Westminster constituencies may satisfy that requirement. Such a scheme would ensure that a successful CI would need to generate nationwide activism in order to trigger a poll. Evidently, an attendant funding regime would be necessary.

3. PPERA's Effectiveness

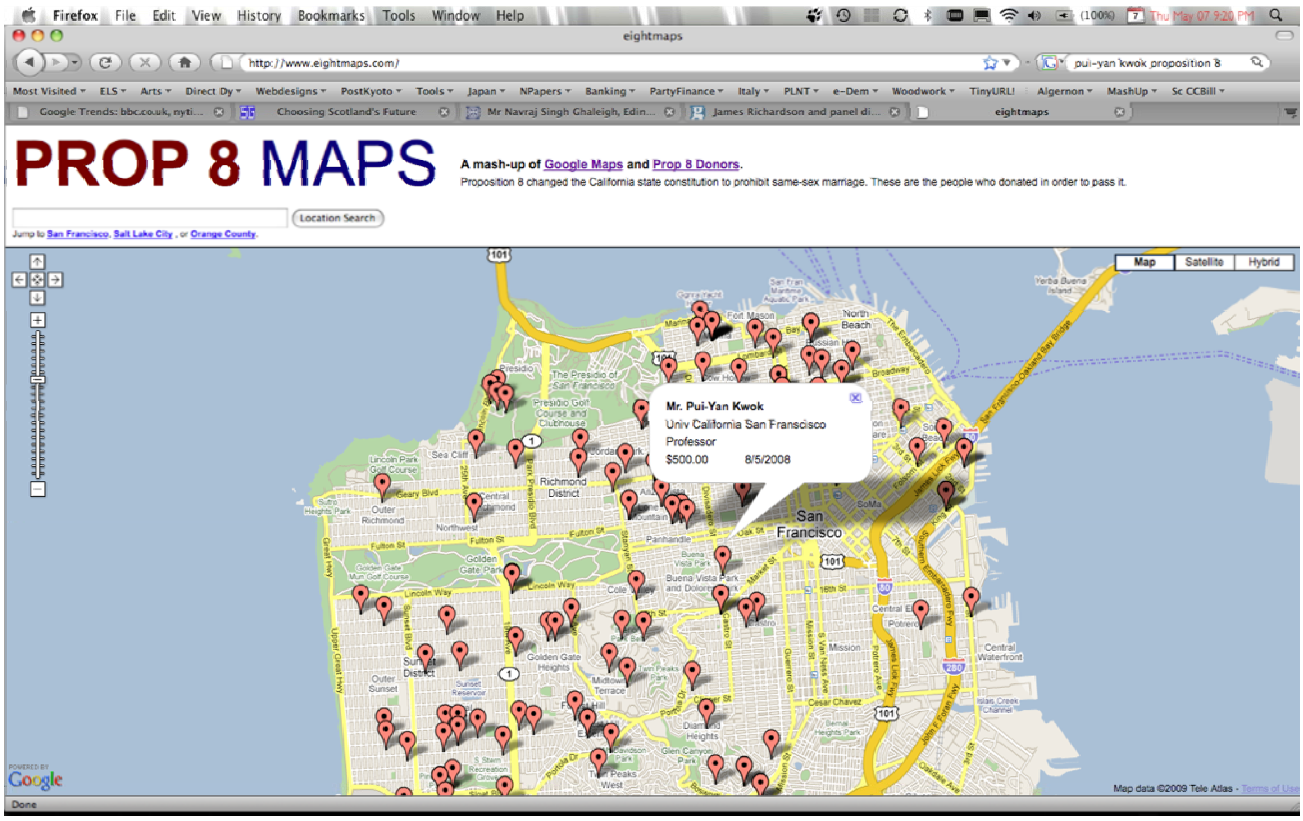
PPERA's regulation of referendums draws heavily on the broader scheme of electoral and party funding. Notwithstanding the unfortunate amendments wrought by the *Political Parties and Elections Act 2009* in terms of partisan Commissioners (s.5) and substantial increases in donation and reporting thresholds (s.20), this remains a broadly successful scheme. The experience of the NE referendum – the only such poll held pursuant to the PPERA regime – pleasingly demonstrates that the preponderance of income, expenditure and political elites do not determine outcome.

If future referendum campaigns are to satisfy the demands of deliberative democracy they must engage with technological developments and in particular what is known as 'web 2.0'. This is an approach to online communication that is familiar though tools such as YouTube, Wikipedia and social media platforms. As opposed to conventional forms of authorship, web 2.0 is authored by an *in*finite number of contributions, users may post anything at anytime (as opposed to strict editorial limits), external contributions are encouraged and the channels of communication are dynamic and various. Web 2.0 has been most famously deployed in the political context with the US Presidential

[4] See more generally, S. Hug & K Gilland Lutz (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009).

[5] The range of qualification rules in the US states is to be found in CJ Tolbert et al, "Election Laws and Rules for Using Initiatives" in S Bowler, T Donovan & CJ Tolbert (eds), *Citizens As Legislators: Direct Democracy in the United States* (Ohio State University Press, 1998), Table 2.1.

Election of 2008. In the context of direct democracy, the 2008 Californian ballot measure on same sex marriages raised an important issue – namely, is the reporting requirement for address information of donors to be published 'protected speech'. The below image (from http://www.eightmaps.com/) illustrates how donors' address data can be deployed when 'mashed up' with online mapping services.[6]



Such innovations would be impossible in the UK owing to s.69(4) PPERA which exempts individual donors' address information from disclosure. This is an odd exemption in the absence of any evidence or even risk assessment of threats, harassment or reprisals. Nor is there any evidence of such disclosure having a chilling effect on donations. Combined with PPERA's staggeringly high disclosure thresholds, the regime gives scant regard to the electorate's legitimate entitlement to have adequate information as to where campaign money comes from and how it is spent. This provides crucial information in evaluating who back or oppose referendum propositions, a key heuristic shortcut for citizens. In an online world, this is even more true.[7]

III. Conclusions

Updating of the UK's approach to direct democracy requires a more modest approach constitutional reform than might be imagined. Much of the constitutional apparatus is already in place, operates well (to the extent that it has been tested) and is consistent with comparative best practice. Reforms which have no pedigree elsewhere, such as multi-option referendums, should be treated with caution. In terms of power sharing – a failing apparent across various constitutional settings – there is a clear need for reform. Similarly, any recommended reform will need to harness the energies and opportunities yielded by ICTs.

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[6] For an unsuccessful challenge to California disclosure rules in this context see, *ProtectMarriage.com v. Bowen (2009)*, Case No. 2:09-CV-00058-MCE-DAD, U.S. District Court for the Eastern District of California, Sacramento Division.

[7] See my presentation, 'Donors, data and speech: Mashup!" at http://tinyurl.com/18r .

Appendix I
"Sledgehammers and nuts? Regulating referendums in the UK" in S. Hug & K Gilland Lutz (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009)