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DICEY WAS NOT DICEYAN

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I. INTRODUCTION

THERE is an apparent paradox between Dicey's treatment of parliamentary sovereignty as the central premise of the British constitution and his advocacy of the referendum, a tool of popular sovereignty. Bogdanor wrote:

> [i]t is paradoxical that Dicey should have been the first to advocate the referendum in Britain, for he was the author of the classic work *Introduction to the Study of the Law of the Constitution* (1885). Foremost among the principles there identified as central to the British Constitution was the sovereignty of Parliament—a principle generally held to preclude the referendum.[1]

Cosgrove, who wrote an authoritative biography on Dicey, explained that Dicey turned to the referendum in his search for a device that would prevent Home Rule. Dicey's commitment to defeat Home Rule, he wrote, distorted his judgment.[2]

However, we assert that Dicey's advocacy of the referendum was consistent with his constitutional theory. It represented a personal evolutionary process that followed closely the evolution of the British constitution. Most importantly, the referendum was compatible with the British constitution, as Dicey perceived it. He believed the constitution was in practice, though not in theory, based on popular and not parliamentary sovereignty.

Dicey's evolutionary process consisted of three phases. At first, he identified parliamentary sovereignty as the fundamental norm of the British constitution. But, he distinguished between Parliament as the legal sovereign and the People[3] as the political sovereign.

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[1] Vernon Bogdanor, "Western Europe" in David Butler and Austin Ranney (eds.), *Referendums Around the World: The Growing Use of Direct Democracy* (Basingstoke 1994) 24, 34.

[2] Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London 1980) pp. 105–110, 247. For a similar view, see Lord Bingham of Cornhill, "Dicey Revisited" [2002] Public Law. 39.

[3] "People", with a capital letter, describes the instances in which the people mobilise, deliberate and pronounce their deliberate and sustained opinion on constitutional change. This happens

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Later, primarily after 1890, when his first article on the referendum appeared, he advocated the adoption of the referendum, thus, desiring to officially make the People the legal sovereign. Finally, after the passage of the Parliament Act 1911, in a desperate move he was willing to recognise the People as the legal sovereign even in the absence of a referendum.

II. The Dualist Dicey

Dicey was more consistent in his constitutional theory than is commonly recognised. Until 1911, even though he spoke of parliamentary sovereignty, Dicey distinguished between Parliament as the legal sovereign and the People as the political sovereign. Scholars understood this formulation of political sovereignty to mean only that in the long run the People's will prevails through elections,[4] not that the People decide on specific issues. That is, they treated Dicey's formulation as consistent with a constitutional system that grants plenary lawmaking authority to the winner of the last election; *i.e.*, a monist system.[5] However, Dicey meant more than that. He also wrote that in practice constitutional change cannot pass in Britain without the People's consent.

In a letter to the Unionist journalist Leo Maxse, written in January 1895, Dicey distinguished between the British treatment of executive (normal) and constitutional issues. On executive issues, he wrote, the will of even a small majority of the Commons was decisive. However, on constitutional issues, the British constitutional practice demanded that the permanent will of the People be clearly expressed. Therefore, a small majority of the Commons was not authorised to pass constitutional changes. In his words, "[i]t is I think of immense importance that people should realise that a small & transitory political majority, though it necessarily exercises the powers, has not the authority of the

at times when the people engage in public life with the seriousness they usually accord the most important decisions of their private lives. In all other times, we refer to "the people" without a capital. We follow here the work of Professor Bruce Ackerman of Yale Law School. See Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass. 1991), vol. I; Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass. 1998), vol. II.

[4] This interpretation was based on Dicey's recurrent emphasis that in the British system the People's will ultimately and in the long run prevails. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn., London 1915) pp. 28–29, 285, 287 [hereinafter cited as Dicey, *Constitution*]. We rely on this edition, since it was the last that Dicey himself edited.

[5] Ackerman has coined the terms monism and dualism to describe constitutional systems that are based on parliamentary vs. popular sovereignty respectively. In a nutshell, a monist system is one that does not distinguish between constitutional and regular law, but rather accords the legislature full authority to legislate on all matters. A dualist system is one that distinguishes between the making of constitutional and regular law, by demanding the People's decision on constitutional issues while leaving the legislature to decide all other law. Ackerman, note 3 above.

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nation. On this point my mind is becoming more and more clear".[6] He continued:

> In Executive matters I hold that the Government of the day ought even though put into office by but a small majority, to be whilst it continues the Government, in general supported by good citizens. My reason is this, *viz*:- that in Executive matters the majority must of necessity be treated as the organ of the nation, otherwise the action of the nation is at every turn weakened. A party which is not in a position to carry on the administration ought not to hamper the action of the Ministers of the day. Moreover matters of administration are transitory. On the other hand on matters of constitutional change I do not think a small majority has any moral right to act with vigour. The presumption is in favour of the existing state of affairs, because on the whole it may be assumed to be the permanent will of the nation. Add to this that a constitutional change once made is, or ought to be, final, and therefore ought not to be made by any body of men who do not clearly represent the final will of the nation. Till modern times this has been the practice, though not the theory, of English constitutional government, and it is, as I have pointed out, recognised as a democratic principle in every true democracy.[7]

Dicey attested here that "the practice, though not the theory, of English constitutional government"[8] was that of dualism. By dualism, we mean a constitutional system that distinguishes between constitutional and regular law by demanding the People's explicit, unequivocal and sustained approval for constitutional change.[9] In other words, his discussion of the People as the sovereign cannot be taken to mean, as the scholars understood, that the People's sovereignty is only theoretical.

III. The Dualist British Structure According to Dicey

When Dicey wrote that Britain in practice maintained a distinction between constitutional and regular laws, demanding the People's consent for constitutional change, he was referring primarily to the British mandate or referendal theory.[10] Between 1832 and 1911,

[6] Cosgrove, note 2 above, p. 161.

[7] *Ibid.*

[8] *Ibid.* Dicey expressed similar views in other writings as well. In March 1894, he wrote:

> The sovereignty of Parliament, I may be reminded, excludes any distinction between the articles of the Constitution and ordinary laws. The sovereignty of Parliament, I reply, is a very different thing from the supremacy of the House of Commons, and influences, I add, which have lost their power have, until recent times, in practice though not in law, maintained a distinction between laws which affect the Constitution and laws which deal with matters of everyday life. A.V. Dicey "The Referendum" (1894) 23 National Review 65, 66 [hereinafter cited as Dicey, "The Referendum"].

[9] For a full account of the dualist theory, see Ackerman, note 3 above.

[10] For a discussion of the mandate theory, see *e.g.* G.H.L. Le May, *The Victorian Constitution* (London 1979) pp. 133–145; Cecil S. Emden, *The People and the Constitution* (2nd edn.,

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Britain conditioned the passage of disputed constitutional measures on the People's consent. When the Lower House proposed fundamental constitutional change, the Upper House initially vetoed it. The Lords justified the exercise of their veto, explaining that they were referring the constitutional issue to the People's decision at election. The next election was fought on the constitutional issue. Only if the promoters of constitutional change won the election, the Lords accepted the result as expressing the People's ratification of the measure and allowed the change to be enacted into law.[11] Dicey acknowledged this dualist structure, writing:

> [t]he legislative authority of the House of Lords meant, and was up to 1911 understood to mean, that the House had the power, and was under the obligation to reject any Bill of first rate importance which the House reasonably and *bona fide* believed to be opposed to the permanent will of the country... no one till 1910 and 1911 seriously disputed the doctrine that the House of Lords in modern times had the right to demand an appeal to the people whenever on any great subject of legislation the will of the electorate was uncertain or unknown.[12]

Under this structure, the sovereign Parliament consisted of four bodies instead of the traditional three. In addition to the Commons, the Lords and the Crown, the People emerged as the fourth and decisive body. Without the People's consent, no fundamental constitutional change could pass into law. Dicey believed that "[w]e have introduced into our constitution the spirit, though not as yet the form, of the referendum".[13]

Oxford 1956) pp. 212–218; Corinne C. Weston, "Salisbury and the Lords, 1868–1895" (1982) 25 Historical Journal 103.

[11] For a full description of the dualist Britain between 1832 and 1911, see Rivka Weill, *The Anglo-american Constitutional Model: Why The British and American Constitutional Systems Are Not As Different As Most Think* (Doctoral Dissertation, Yale Law School, 2002) (unpublished).

[12] A.V. Dicey, "The Parliament Act, 1911, and the Destruction of All Constitutional Safeguards" in W.R. Anson *et al.* (eds.), *The Rights of Citizenship: A Survey of Safeguards for the People* (London 1912) 81, 85–86 [hereinafter cited as Dicey, "The Parliament Act"]. Similarly, in 1893, he wrote:

> It is worth while, however, to repeat a statement which cannot be too often insisted upon, that the most important function of the House of Lords at the present day is to take care that no fundamental change in the constitution takes place which has not received the undoubted assent of the nation. The peers are more and more clearly awakening to the knowledge that under the circumstances of modern public life this protection of the rights of the nation, which is in complete conformity with democratic principle, is the supreme duty of the Upper House. A.V. Dicey, *A Leap in the Dark or Our New Constitution* (London 1893) p. 198 [hereinafter cited as Dicey, *A Leap in the Dark*].

[13] "Democracy in Switzerland" (1890) 171 Edinburgh Review 113, 141 (unsigned) [hereinafter cited as Dicey, "Democracy"].

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IV. The Great Reform Act

Dicey believed that two constitutional Acts passed in accordance with this dualist structure. The Great Reform Act was the first to enfranchise the middle class and change the composition of the Commons. Naturally, Dicey repeatedly included it among the measures in need of constitutional protection.[14] Earl Grey's Whig government proposed the Act and in 1831 held an election focused on the measure. The Whigs won a decisive victory at the polls. Dicey acknowledged the nature of the election, writing in 1890, "[n]ever did an election approach more nearly to a Referendum than that which followed the dissolution of 1831. The country pronounced by a crushing majority in favour of the Bill, the whole Bill, and nothing but the Bill".[15] Twenty years later, Dicey reaffirmed his assessment of the 1831 election, writing,

> [a]t times, no doubt, though the occasions are rare, an election may constitute an almost direct appeal to the people on the question whether a particular Bill shall pass into law? It then is a sort of informal Referendum. One instance of such an informal appeal to the people is to be found in the "leading case", to use legal phraseology, of the Great Reform Act. It was passed in 1832 to the cry of "The Bill, the whole Bill, and nothing but the Bill." No man of competent knowledge doubts that it received the assent of the nation. But in 1832 the peculiar course of events placed the electors in a position very like that occupied by the people of Switzerland when asked under a Referendum to accept or reject a constitutional change which has been formally passed by the Federal Legislature. There have been one or two other crises in which a general election has been a rough kind of Referendum.[16]

Despite the election, the Upper House tried to veto the bill. But the People responded with fierce agitation resulting in the famous nine Days of May, in which the People rioted and threatened a run on the banks. This led the King to threaten the Lords to create peers if they continued to oppose the measure. They therefore reluctantly allowed the Act to pass accepting that the People had authorised it.[17] Dicey believed the Royal prerogative to create peers can be exercised or asserted where it was proven that the Lords

[14] *E.g.*, Dicey, "The Referendum", note 8 above, p. 69. See also note 47 below. Dicey even wrote that a statute revising the constitution is typically called in Britain a Reform Bill. Dicey, "Democracy", note 13 above, p. 135.

[15] A.V. Dicey, "Ought The Referendum to be Introduced into England?" (1890) 57 Contemporary Review 489, 494 [hereinafter cited as Dicey, "Referendum Introduced"].

[16] A.V. Dicey, "The Referendum and its Critics" (1910) 212 Quarterly Review 538, 546 [hereinafter cited as Dicey, "Referendum Critics"].

[17] Bagehot wrote, "Just as the knowledge that his men *can* strike makes a master yield in order that they may not strike, so the knowledge that their House could be swamped at the will of the king—at the will of the people—made the Lords yield to the people". Walter Bagehot, *The English Constitution* (1867) (Reprinted with an Introduction by R.H.S. Crossman, London

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obstructed the People's will. He wrote, "[t]he prerogatives of the Crown have become the privileges of the people".[18]

V. The Irish Church Act

Dicey believed that the Irish Church Act 1869, which disestablished the Irish Church, was the second to pass through the dualist process. The Church enjoyed protection under the Act of Union with Ireland and its disestablishment, therefore, required an amendment of the Act. As such, Dicey recognised the Irish Church Act as one of constitutional nature.[19] The Act established religious freedom in Ireland and thus qualifies as constitutional in modern terms as well.

The Liberal Gladstone proposed the Act while in opposition. Nonetheless, the Lower House approved the measure. Then Parliament dissolved and the 1868 election was fought on disestablishment, resulting in a decisive victory for the Liberals. Dicey interpreted the election results as expressing the People's ratification of disestablishment, writing,

> [t]he nation's assent to a Bill may be given in several different manners. It may be made manifest by the clear absence of any vigorous opposition to a particular measure. It may again be signified by the whole character of a proposed measure (*e.g.*, Gladstone's plan for the Disestablishment of the Church in Ireland), having been laid before the electors and been the main object of debate at a General Election. If under such circumstances the electors should, by their votes, ratify, as they did, Mr. Gladstone's policy, it was surely right to treat such ratification as the deliberate approval by the nation.[20]

Though the Lords opposed the bill on the merits, they passed it, explaining that it won the People's approval at the election.[21] Dicey

1963), p. 128. For the history of the passage of the Great Reform Act, see J.R.M. Butler, *The Passing of the Great Reform Bill* (London 1964).

[18] Dicey, *Constitution*, note 4 above, p. 312. Not all contemporaries shared his views. Hearn, for example, wrote that the creation of peers to coerce a certain policy is "not only unconstitutional but is absolutely unlawful". William E. Hearn, *The Government of England* (Melbourne 1867) p. 177. However, even he acknowledged that the Crown's intervention in the business of Parliament was justified when three conditions were met: *First*, the Crown intervened in order to reconcile the two Houses. *Second*, its intervention was directed towards the House of Lords, which was unelected. Thus, no other method of coercion, such as dissolution, could be applied against it. *Third*, this method was used only in the last resort. *Ibid.*, pp. 177–179.

[19] Dicey, "Referendum Critics", note 16 above, p. 554.

[20] Dicey, "The Parliament Act", note 12 above, p. 85.

[21] Sir William Anson wrote:

> At the general election of 1868 the question of the Disestablishment of the Irish Church had been brought most distinctly before the constituencies, and a great majority of the members returned to the House of Commons were pledged to support such a measure. When in 1869 the Irish Church bill came before the House of Lords, Lord Cairns, in urging the House not to reject a measure of which he personally disapproved, said: "There

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accordingly wrote, "[a]ny one may feel well assured that in 1869 the Bill for the Disestablishment of the Irish Church would have been rejected, and rightly rejected, by the Lords had not the question of Disestablishment been clearly and undoubtedly placed before the people at the General Election of 1868".[22]

VI. Home Rule

While Dicey claimed that the Great Reform Act and the Irish Church Act passed in accordance with the dualist structure, he believed other elections served to prevent constitutional change. In particular, he wrote that in the 1886 and 1895 elections the People vetoed the first and second Irish Home Rule Bills respectively. Again these Acts were of constitutional nature since their enactment would have required an amendment of the Act of Union with Ireland. Further, with their passage, Parliament would have delegated its legislative power to an Irish legislative body. Parliament's composition would have been altered as well with the exclusion of Irish members from it.

Dicey believed that the People expressed their veto of Home Rule in the 1886 election. Before the election, Gladstone attempted to pass the first Home Rule bill. However, he failed to gain support even in the Lower House, with ninety-three members of his own party voting against it.[23] Parliament dissolved over the bill, and the election confirmed, according to Dicey, Gladstone's lack of mandate regarding Home Rule.[24]

Dicey asserted that the People vetoed Home Rule once again in the 1895 election. After Gladstone's victory at the 1892 election, Gladstone attempted to pass Home Rule anew. This time the bill passed the Lower House, but the Lords vetoed it by an overwhelming majority.[25] Dicey believed the 1895 election was fought on the issue and the Conservatives' decisive victory at the

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are questions which arise now and again—rarely but sometimes—as to which the country is so much on the alert, is so nervously anxious and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature in this country what it requires; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do otherwise than the country desires." So too Lord Salisbury: "Reject this bill now, and you will tell the English people that you have determined upon offering an uncompromising resistance to the decision which they have unhesitatingly pronounced." William R. Anson, *The Law and Custom of the Constitution* (4th edn., Oxford 1909), vol. I, pp. 285–286.

[22] Dicey, "The Parliament Act", note 12 above, p. 86.

[23] Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford 1999), p. 19 [hereinafter cited as Bogdanor, *Devolution*].

[24] Dicey, "Referendum Introduced", note 15 above, pp. 494, 506.

[25] Bogdanor, *Devolution*, note 23 above, p. 19.

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polls proved that the Lords rather than the Commons represented the will of the People on this issue. He wrote,

> [t]he Lords again in 1893 rejected the Home Rule Bill of 1893, which had been passed by a small but unwavering, majority of the House of Commons. The Ministry of the day, after their defeat, held office unconstitutionally till 1895. The appeal to the people which ought to have been made at once was, when it took place, decisive. The return of a large Unionist majority was the approval by the people of the rejection by the House of Lords of the Home Rule Bill of 1893. It was the solemn condemnation by the people of the United Kingdom of the whole policy of Home Rule. This condemnation should never be forgotten; it is of infinite significance, it means that at a great crisis in the fortunes of England, the hereditary House of Lords represented, whilst the elected House of Commons misrepresented, the will of the nation.[26]

VII. Dicey's Introduction to the Study of the Law of the Constitution

That Dicey had this dualist structure in mind when writing of the People as the political sovereign is revealed when paying close attention to his words. Though scholars interpreted political sovereignty to mean monism, Dicey took pains to explain what he meant when writing that "[t]he electors can in the long run always enforce their will".[27] In a footnote amplifying the term "long run", Dicey compared the workings of the American, British and Swiss constitutions. He found the People politically sovereign in all three countries. However:

> [a]s things now stand, the people of England can change any part of the law of the constitution with extreme rapidity. Theoretically there is no check on the action of Parliament whatever, and it may be conjectured that in practice any change however fundamental would be at once carried through, which was approved by one House of Commons, and, after a dissolution of Parliament, was supported by the newly elected House. The paradoxical and inaccurate assertion, therefore, that England is more democratically governed than either the United States or Switzerland, contains a certain element of truth; the immediate wishes of a decided majority

[26] Dicey, "The Parliament Act", note 12 above, p. 86. He expressed a similar opinion earlier, writing in 1910:

> The events of those years [1893–1895] show that in the matter of Home Rule the deliberate will of the country was expressed, not by the representative and elected House of Commons, but by the hereditary and unelected House of Peers. An assembly freely chosen by the electors may fail then to represent the nation. This is the truth which was first forced home upon Englishmen in 1895. Dicey, "Referendum Critics", note 16 above, p. 541.

[27] Dicey, *Constitution*, note 4 above, p. 28.

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> of the electorate of the United Kingdom can be more rapidly carried into legal effect than can the immediate wishes of a majority among the people either of America or of Switzerland.[28]

In other words, Dicey explained that the British People were the political sovereign since constitutional changes in Britain required a "decided majority of the electorate" manifesting itself in two consecutive elections to Parliament. To enact constitutional change, the promoters of change had to win two consecutive elections, with the second election focusing on the proposed change. Dicey believed the right of dissolution served as a constitutional safeguard performing a like function to that of the American constitution:

> Where, as in the United States, no legislative assembly is a sovereign power, the right of dissolution may be dispensed with; the constitution provides security that no change of vital importance can be effected without an appeal to the people...Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right of dissolution, which enables the Crown or the Ministry to appeal from the legislature to the nation...under the conditions of modern political life, the understandings which exist with us as to the right of dissolution afford nearly, if not quite, as much security for sympathy between the action of the legislature and the will of the people, as do the limitations placed on legislative power by the constitutions of American States. In this instance, as in others, the principles explicitly stated in the various constitutions of the States, and in the Federal Constitution itself, are impliedly involved in the working of English political institutions. The right of dissolution is the right of appeal to the people, and thus underlies all those constitutional conventions which, in one way or another, are intended to produce harmony between the legal and the political sovereign power.[29]

Again while scholars interpreted Dicey's writing in this passage to mean that one election was enough to allow constitutional change, he was rather requiring two consecutive elections with the body, usually government, proposing the constitutional change standing for election on the very change. Only if it won the election, the change would be allowed to pass into law. Dicey saw dissolution as a constitutional safeguard because it would trigger an election focused on the proposed change. By dissolution, he meant an election that would function as a referendum rather than merely allow a choice of representatives as conventionally interpreted.

[28] *Ibid.*, p. 28 n. 51.
[29] *Ibid.*, p. 291.

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Moreover, not only did Dicey analyze specific constitutional moments in light of the British dualist theory as aforementioned, he further elaborated the common structure of such moments. In the third part of his *Introduction to the Study of the Law of the Constitution*, he dealt with constitutional conventions, in particular how the Crown and Lords should exercise their discretionary powers; *i.e.*, their prerogatives and privileges respectively. His answer was in accordance with the People's sovereignty:

> The same thing holds good of the understanding, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new Peerages. How, it may be said, is the "point" to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.[30]

As the constitutional constraints on Parliament, including primarily the veto power of the Lords, weakened, Dicey began to fear that constitutional change would be passed without the People's consent. At that point, Dicey began to call for the adoption of the referendum as the new mechanism for guaranteeing the consent of the People to constitutional change. The significance of this advocacy of the referendum was that it would make the People officially the legal sovereign of Britain.

[30] *Ibid.*, pp. 286–287.

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VIII. Disillusionment with Parliament

The first edition of Dicey's classic treatise, *Introduction to the Study of the Law of the Constitution (1885)*, did not mention the referendum. Only later did he start advocating it. Dicey did not support the referendum out of great belief in it, but rather out of a loss of confidence in Parliament. In an 1894 letter to J. St. Loe Strachey, the Unionist editor of the *Spectator*, he wrote, "I am sure we are right in agitating for the Referendum. Wherever I go I find it popular. Personally I think that I should have preferred real Parliamentary government as it existed up to 1868".[31]

His disillusionment with Parliament was both specific and general. It was specific regarding Parliament's handling of Home Rule. It was general in that Dicey knew that Parliament's flaws would manifest themselves in other contexts, unless a cure was found. In fact, Dicey thought that neither major party represented the majority opinion on the great issues of the day. He wrote in 1905:

> The Unionist Government has ceased to represent the belief in Free Trade which to all appearance commands the assent of the nation; the Opposition does not represent the national and unshaken faith in the maintenance of the Union. Both Government and Opposition seem inclined to use their party machinery to crush out of existence the small but vigorous body of Free Trade Unionists who share the beliefs which constitute the political creed of the nation.[32]

It is no coincidence that his important article on the referendum appeared in 1890 as a response to the near passage of Home Rule in 1886. He wrote, "[t]he experience of 1886 has taught the country one lesson which will be remembered when the agitation for Home Rule is at an end. A Bill which in effect repealed the Act of Union with Ireland might conceivably have become law without the country having ever expressed assent to a change amounting to a constitutional revolution".[33] Dicey was not only against bills contrary to the popular will, he also vehemently opposed Home Rule on the merit.[34]

That Home Rule figured significantly in Dicey's advocacy of the referendum was evident in his correspondence as well. Following the Liberals' victory at the 1892 election, Dicey, fearing the Liberals

[31] Cosgrove, note 2 above, p. 107 (quoting Dicey to Strachey, 29 January 1894, Strachey Papers).
[32] A.V. Dicey, "The Paralysis of the Constitution" (1905) 88 Contemporary Review 305, 311.
[33] Dicey, "Referendum Introduced", note 15 above, p. 506.
[34] A.V. Dicey, *England's Case Against Home Rule* (1886) (Richmond 1973); A.V. Dicey, *Letters On Unionist Delusions* (London 1887); Dicey, *A Leap in the Dark*, note 12 above ; A.V. Dicey, *A Fool's Paradise* (London 1913).

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would attempt to pass Home Rule anew, tried to convince the Conservative leader, Lord Salisbury, to support the referendum. He wrote that the referendum was required "in order to guard the rights of the nation against the usurpation of national authority by any party which happens to have a Parliamentary majority".[35] Dicey thought the Upper House could introduce the referendum "into any measure such as a Home Rule Bill which involved a fundamental change in our institutions".[36]

Dicey enumerated Parliament's shortcomings.[37] Parliament had lost its power of restraint; the restraints of aristocracy, tradition and even the middle class were gone. An appreciation of the need to discuss constitutional change fully had disappeared. After a period of more than a century (1689–1828) with no fundamental constitutional change, Parliament had engaged in rapid change. Indeed, Dicey saw his period as a revolutionary one.

Further, the party system was "fully developed".[38] Members of Parliament had lost their independence and were subject to party discipline. They became representatives of their party instead of the People. In addition, the party system eliminated the need to reach consensus rather than coerce arrangements. The internal proceedings of Parliament changed with the use of closure and guillotine[39] to curtail discussion. Dicey claimed that a change of values occurred. "Party becomes everything, the Nation sinks to nothing".[40]

Ironically, these faults in the functioning of democracy were brought about by the very democratisation of Britain through the enfranchisement of the people. The Reform Acts of 1867 and 1884 had contributed to and facilitated the growth of the party system.[41] No wonder Dicey pointed to the year 1867 at one time, and the

[35] Cosgrove, note 2 above, p. 106 (quoting Dicey to Salisbury, 11 November 1892, Salisbury Papers).

[36] *Ibid.*

[37] See A.V. Dicey, "Will the Form of Parliamentary Government be Permanent?" (1899) 13 Harv. L. Rev. 67; Dicey, "Referendum Introduced", note 15 above, pp. 505–506.

[38] Dicey, "Referendum Critics", note 16 above, p. 543.

[39] In 1881, during Gladstone's ministry, the House adopted the closure rule to check obstructive speaking (filibustering) by members opposed to the passage of legislation. It enabled the Commons to close debate and move for a vote on the bill under discussion. See Edward Hughes, "The Changes in Parliamentary Procedure, 1880–1882" in R. Pares and A.J.P. Taylor (eds.), *Essays Presented to Sir Lewis Namier* (London 1956), p. 289; E. Porritt, "Amendments in House of Commons Procedure Since 1881; The Aims and Tendencies of the Newer Standing Orders" (1908) 2 Am. Pol. Sci. Rev. 515. The Guillotine rules adopted in 1887 allow restriction of the time allocated for the discussion of a bill in the Commons by setting the dates and times at which the specified provisions of the bill must be voted upon. It is also known as closure by instalments or closure by compartment. *Ibid.*, pp. 524–525.

[40] Dicey, "The Referendum", note 8 above, p. 68.

[41] Dicey supported the passage of reform in 1867. He believed that Parliament should represent the people rather than the three classes of British society, Royalty, Aristocracy and Commoners. A V Dicey, "The Balance of Classes" in *Essays on Reform* (London 1867), p. 67. But he lamented the growth of party government, which resulted.

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year 1884 at another time, as the years when these changes occurred.[42]

The House of Lords, though serving as a constitutional guardian, was not a sufficient safeguard for Dicey. The House's exercise of its veto power subjected it to constant and vehement attacks, especially after its handling of the Reform Act 1884. The Lords initially vetoed the reform bill and removed their opposition only after the Liberal government accepted Conservative demands. The House's use of veto was portrayed as partisan and biased in favour of the Conservatives, who dominated it. It was also claimed that as an unelected chamber, it should not obstruct the will of the nation as expressed by the elected Commons.[43] Dicey was not alone in searching for alternatives to the Lords' veto. In fact, the Conservative leader, Lord Salisbury answered him on 26 November 1892, that "some form of referendum is the only solution towards which we are tending, and indeed the only one by which a termination can be put to the entire divergence of view which has grown up between the two Houses of Parliament".[44]

IX. The Features of Dicey's Referendum

This disillusionment with Parliament shaped the features of the referendum that Dicey proposed. It would function as a veto power, not an initiative. Thus, it would replace the restraints that Parliament had lost. "Where democracy is king", he wrote, "the referendum is the royal veto".[45] Dicey preferred that the referendum not be used to resolve deadlocks between the two Houses, since in such a case it would facilitate change rather than restrain it. He wanted it to be used to guarantee that fundamental constitutional changes that passed both Houses would not become law without the People's consent.[46] He even suggested a list of such fundamental constitutional issues that required the protection of the referendum.[47]

[42] *E.g.*, Dicey, "The Parliament Act", note 12 above, p. 84. Moreover, Dicey recognised the logical nexus between enfranchisement and the referendum. The same considerations that supported the extension of the franchise supported granting the People the veto power by way of referendum. Dicey, "Democracy", note 13 above, p. 141.

[43] See *e.g.*, Roy Jenkins, *Mr Balfour's Poodle* (London 1954), p. 33. On the passage of the Third Reform Act, see William A. Hayes, *The Background and Passage of the Third Reform Act* (New York 1982).

[44] Andrew Roberts, *Salisbury: Victorian Titan* (London 1999), p. 586.

[45] Dicey, "Democracy", note 13 above, pp. 136–137.

[46] Dicey, "Referendum Critics", note 16 above, pp. 556–557; Dicey, "Referendum Introduced", note 15 above, pp. 502–504.

[47] Dicey enumerated the following Acts:

> These scheduled Acts should at first, at any rate, be few in number, and should in any case be statutes of the highest importance, such, for example, as the Act of Settlement, the Union with Scotland Act, 1707, the Union with Ireland Act, 1800, and the various

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He suggested alternative methods of introducing the referendum into the British constitutional system. Existing constitutional mechanisms such as the Lords' veto or the Crown's withholding of consent could be used to refer issues to the People. Alternatively, Parliament could introduce general legislation authorising referenda or specific legislation for referenda on a case-by-case basis.[48]

The referendum as formulated by Dicey violated his own characteristics of a sovereign parliament. He enumerated these characteristics under three headings. The first is "the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws".[49] The second is the lack of a marked distinction between ordinary and fundamental laws; in other words, the lack of a British written constitution. The third is the lack of a body, judicial or otherwise, with the authority to pronounce upon the validity or constitutionality of laws passed by Parliament.[50]

Dicey's proposed referendum "may undoubtedly be so used as to establish a clear distinction between laws which effect permanent changes in the Constitution and ordinary legislation".[51] This contradicts Dicey's second characteristic of parliamentary sovereignty, which is the absence of a distinction between these two types of legislation. Dicey included in his suggested Referendum Act a provision for judicial review to enforce it. "Any Bill, or so-called Act, passed by both Houses of Parliament and assented to by the Crown, which, whilst affecting any one of the scheduled Acts, had not been sanctioned by and on an appeal under the Referendum Act, should be held invalid by every court of law throughout the British Empire".[52] This contradicts Dicey's third characteristic of parliamentary sovereignty, the absence of any body reviewing the validity of acts of Parliament. Of course, the referendum by definition means that the legislature cannot repeal fundamental laws in the same manner as ordinary laws. This contradicts the first characteristic of parliamentary sovereignty that is the power of Parliament to change any law by the same procedure as other laws.

Under Dicey's proposed constitution, Parliament would no longer remain the legal sovereign. The existing British constitution already recognised the People as the political sovereign. Dicey,

Parliamentary Reform Acts. Among such scheduled Acts ought to be included the Referendum Act itself. Dicey, "Referendum Critics", note 16 above, p. 554. See also Dicey, "The Referendum", note 8 above, p. 69.

[48] Dicey, "Referendum Introduced", note 15 above, pp. 497–500.

[49] Dicey, *Constitution*, note 4 above, p. 39.

[50] *Ibid.*, pp. 36–41.

[51] Dicey, "The Referendum", note 8 above, p. 69.

[52] Dicey, "Referendum Critics", note 16 above, p. 554.

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therefore, suggested methods for adopting the referendum, thus officially making the People also the legal sovereign. His advocacy of the referendum amounted to supporting a dualist constitution for Britain governed by popular sovereignty. Dicey emphasised that the referendum is a democratic tool expressing popular sovereignty, and he considered this "its highest recommendation...the final decision of the nation's destiny must be referred to a more august tribunal than the House of Commons, or even than Parliament".[53]

X. Referendum vs. Elections

While Dicey asserted that elections could function as referenda,[54] he believed the referendum had a few advantages over an election in expressing the British People's verdict on constitutional change. In some aspects, his proposed model would have improved on the referendal or mandate model.

First, elections involved a mixture of issues, requiring the People to simultaneously decide both the Commons' personnel and a variety of topics. Only rarely did the measure and the identity of the government merge. It was therefore difficult to interpret election results as expressing the People's verdict on a given topic. An election also required the People to choose either the government they desired or the policy they believed in, in cases of conflict between the two. The referendum on the other hand, could isolate a topic better, leading Dicey to describe it as expressing the verdict

[53] Dicey, "The Referendum", note 8 above, p. 71. Already, in 1890, when writing his first article on the referendum, Dicey did not disguise the fact that he was considering a dualist constitution governed by popular sovereignty. He concluded his article:

> The time approaches when we may import from the United States the "Constitutional Convention," which in the domain of politics is by far the most valuable result of American inventiveness. The time has come when we ought all to consider the possible expediency of introducing into England that appeal to the people which is by far the most original creation of Swiss democracy. Dicey, "Referendum Introduced", note 15 above, p. 511.

Interestingly, in 1910, while Dicey advocated the referendum, he wrote that Parliament could legally, though not politically, evade a Referendum act by exempting any bill from its operation, in accord with parliamentary sovereignty. Dicey, "Referendum Critics", note 16 above, p. 555. However, as we demonstrated, under Dicey's proposed referendum, Parliament would no longer remain sovereign according to Dicey's own definition of parliamentary sovereignty. It is possible that in his last efforts to block the passage of the Parliament Act 1911, Dicey, in 1910, tried to minimise the effects of a possible adoption of the referendum. He therefore tried to present it as compatible with parliamentary sovereignty, thus making it easier for the British to adopt it, though it was not compatible.

Another point worth mentioning is that Dicey supported at first women's suffrage. However, later, he changed his mind and opposed it. Cosgrove, note 2 above, pp. 216–217. This fact does not change our claim that he was a supporter of popular sovereignty, as that term was understood at the end of the nineteenth century. Even the United States that is considered the archetype of popular sovereignty did not enfranchise women until 1920, when it passed the XIX Amendment to the US Constitution.

[54] Cf. Bogdanor, who wrote that Dicey "did not believe that a general election could fulfil the function of a referendum". Vernon Bogdanor, "Dicey and the Reform of the Constitution", [1985] Public Law 652, 659.

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of "Philip sober" as against an election expressing "Philip drunk".[55]

Second, Dicey believed that different people would turn out to vote at a referendum than at an election. Since the electoral system was First Past the Post, those who perpetually found themselves a minority in their constituencies did not bother to vote at an election. These people might show up at a referendum.[56] Moreover, Dicey supported a referendum system that aggregated the People's verdict "*en masse* throughout the United Kingdom".[57]

Third, Dicey feared that "[t]he Act finally passed after a general election, would not be the Bill on which the nation had pronounced a verdict".[58] This was especially so when the Lords referred the bill to the People by veto. He believed a referendum could serve to pronounce the People's verdict on a final bill better than an election.

Fourth, Dicey believed the referendum would cure the Conservative bias found in the Upper House's exercise of its referendal veto. "The true defect of the House of Lords as a constitutional safeguard is not that it rejected Bills too often, but that it did not reject them often enough...Its weakness was that it did not criticise with sufficient severity Bills proposed when Conservatives were in office".[59]

Fifth, the Lords' exercise of the referendal veto "excites indignation because it may be represented as a defiance offered by the aristocracy to the will of the people".[60] In contrast, the referendum was a direct appeal to the People. As such, Dicey believed it "will never offend the electors".[61] It would lift the constitutional burden from the Lords.

Last, while party considerations dominated elections, Dicey thought that a referendum would enable the people to focus on the particular issue.[62]

[55] Dicey, "Referendum Critics", note 16 above, p. 559. See also Dicey, "Referendum Introduced", note 15 above, pp. 494–495.

Dicey described the confusion of issues that was sometimes present at election as "madness" or "grotesque". Dicey, "The Referendum", note 8 above, p. 66; Dicey, "Referendum Critics", note 16 above, p. 548 respectively. He wrote:

> The judge who should direct a jury that they could not properly give a verdict upon one most difficult case, unless they at the same time gave a verdict on twenty others as difficult, would not be allowed to remain a day longer upon the Bench. But the behaviour which would argue madness in a judge when asking for the verdict of a jury, is considered the wisdom or astuteness of politicians when appealing to the verdict of the country. Dicey, "The Referendum", note 8 above, p. 66.

[56] *Ibid.*, pp. 71–72. Dicey, "Referendum Introduced", note 15 above, p. 508.
[57] *Ibid.*
[58] *Ibid.*, p. 498.
[59] Dicey, "The Parliament Act", note 12 above, p. 87 n. 1.
[60] Dicey, "Referendum Introduced", note 15 above, p. 500.
[61] *Ibid.* See also Dicey, "Democracy", note 13 above, p. 142.
[62] Dicey, "Referendum Critics", note 16 above, pp. 559–560.

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XI. The Parliament Act 1911

Not only was Dicey's proposal of the referendum rejected, by eliminating the Lords' veto, the Parliament Act 1911 made Parliament, and more particularly the Commons, sovereign in practice and not just in law. The Act constituted a watershed for Dicey. He opposed its passage and believed it represented the victory of party rule.[63] The Act transformed the power of the Upper House from an absolute to a suspensory veto on legislation initiated by the Commons. With a two-year delay the Commons could pass even constitutional measures without the Lords' consent.[64] The Lords, therefore, could not condition their consent to constitutional measures on their referral to the People's decision at election. The Act removed the "last effective constitutional safeguard"[65] on decisions made by the majority of the Commons. A majority of Commons "can arrogate to itself that legislative omnipotence which of right belongs to the nation".[66] The Act transformed Britain from dualism to monism.

Dicey still believed that constitutional changes should not be effected without the People's sanction. Although under the Parliament Act the Commons purportedly represented the People, Dicey distinguished between the People's and the Commons' sanction. It was clear that the first application of the Parliament Act would be on Home Rule,[67] and Dicey therefore repeatedly demanded that Home Rule, be submitted either to a referendum or to an election before becoming law.[68]

[63] Dicey, *Constitution*, note 4 above, p. cxviii ("The Parliament Act is the last and greatest triumph of party government".)

[64] The Parliament Act 1911 abolished the Lords' veto on money bills. With one exception, it transformed the Lords' veto on non-money bills into a suspensory veto capable of imposing a two-year delay of legislation. Only on extension of Parliament's term, did the Lords retain their absolute veto power. The Parliament Act 1949 further reduced the Lords' suspensory veto power to one-year.

[65] Dicey, "The Parliament Act", note 12 above, p. 81.

[66] *Ibid.*, p. 91.

[67] Dicey wrote, "[t]he world knows that one motive at least, for the passing of the Parliament Act by the House of Commons, and forcing it by means of a ministerial misuse of the prerogative through the House of Lords, was that the Act makes it possible to pass a Home Rule Bill...without an appeal to the nation". Dicey, "The Parliament Act", note 12 above, p. 89.

In fact, the Irish Members of Parliament demanded the enactment of the Parliament Act in return for their support of the passage of Lloyd George's disputed budget of 1909. Dicey wrote of the budget's passage, "[n]o bribe which leads Irish Nationalists to accept for the moment financial proposals which all Ireland abhors, will deprive of their true meaning facts which no man can dispute". Dicey, "Referendum Critics", note 16 above, p. 548. Since the first election of 1910 was held on the budget, Dicey denounced its results writing, "[t]he general election of 1910 will remain for ever a satire upon the attempt to identify a general election with a Referendum". *Ibid.* Dicey claimed that only legislative logrolling enabled the budget's passage.

[68] While we believe Dicey was consistent with his constitutional theory in advocating the referendum, he was not consistent regarding the method he required for expressing the People's verdict on Home Rule. In some of his writings, especially when he felt he could

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He envisioned several alternatives for forcing a referendum on Home Rule and even listed them in descending order of preference. The first was popular pressure on the Commons to submit Home Rule to the People either in an election or a referendum. Popular pressure would manifest itself through, for example, gatherings and petitions to the Commons.[69] The election or referendum had to take place before Home Rule was enacted. He believed that obtaining the people's consent ex-post would diminish from the legitimacy of their consent and would appear to be a mere plebiscite.[70] The second was for the King to dissolve Parliament and cause an election on Home Rule. This royal prerogative would be exercised to protect the sovereignty of the People. As a check on Parliament, the royal prerogative became especially important after the passage of the Parliament Act 1911.[71] The third was for the Crown to withhold Royal Assent after Home Rule passed the Commons.[72] The fourth was to declare Home Rule unconstitutional if it did not receive the People's consent.[73]

This last option in particular appears to be the ultimate contradiction of Dicey's conception of parliamentary sovereignty. "Dicey himself had done most to banish the idea of unconstitutionality from English law".[74] Now, he was willing to declare a fundamental law unconstitutional if it did not secure popular consent. Constitutional scholars did not understand that the British system was, according to Dicey, de facto dualist until 1911 and therefore denounced Dicey's position as not worthy of him. Cosgrove went as far as to say, that "[t]hese novel doctrines contradicted a career of rare distinction in constitutional scholarship; as such they were not worthy of Dicey. Deeply committed to the Home Rule question, he allowed his emotions to interpret the constitution instead of his intellect".[75]

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achieve no more, he required an election focused on Home Rule. A.V. Dicey, "The Appeal to the Nation" (1914) 75 The Nineteenth Century and After 945 [hereinafter cited as Dicey, "Appeal"]. However, during the 1890's he demanded a referendum, writing that he would not have even considered two consecutive Liberal victories at the polls as sufficient proof of public support for the measure. Dicey, A *Leap in the Dark*, note 12 above, pp. 197–199.

[69] Cosgrove, note 2 above, pp. 248–249.

[70] Dicey, "Appeal", note 68 above, p. 948. By plebiscite Dicey meant a "sham appeal to a popular vote by which revolutionary and imperial tyranny has fraudulently obtained the moral consecration of the *vox populi*". Dicey, "Democracy", note 13 above, p. 137.

[71] Dicey, "Appeal", note 68 above, pp. 951–954.

[72] Cosgrove, note 2 above, p. 250.

[73] *Ibid.*, p. 246.

[74] *Ibid.*

[75] *Ibid.*, p. 247.

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XII. The Ultimate Dualist Commitment

Since the constitutional system in 1911 had formally rejected Dicey's call to treat the People as the legal sovereign, he insisted that the People were in fact the legal sovereign and that there was no need to formalise this to prevent constitutional change from occurring without their approval. In other words, any parliamentary attempt to pass constitutional change without the People's approval would be unconstitutional, and it was not necessary to have a referendum mechanism in place for this to be the case.

This was a particularly dramatic shift for Dicey because he had previously recognised that an election could rise to the level of a referendum. He had identified the election of 1831 as a referendum on the Great Reform Act,[76] the election of 1868 as a referendum on the disestablishment of the Irish Church[77] and the election of 1895 as a referendum confirming the Lords' rejection of Home Rule.[78] If there ever was an act passed in the aftermath of such an election, it was the Parliament Act 1911, which was subject to two consecutive elections held within the same year, 1910,[79] yet Dicey undermined the legitimacy of the Act. Dicey argued implicitly that the Parliament Act could not institute monism because Britain's dualist system did not permit the People to relinquish their sovereignty. The British constitutional system was not just dualist de facto, its basic norm of popular sovereignty was entrenched even against the People's will.

XIII. Conclusion

The conventional understanding of Dicey's distinction between Parliament as the legal sovereign and the People as the political sovereign is that only through elections and in the long run will the People's will ultimately prevail. Instead, this article suggested that with political sovereignty Dicey meant more than that. In his articles, he acknowledged the possibility that elections could function as referenda, and that in fact both the Great Reform Act and the Irish Church Act 1869 passed in the aftermath of such elections. In contrast, the People rejected, according to Dicey, the first and second Home Rule bills in the 1886 and 1895 elections respectively. Political sovereignty, therefore, meant that the People were de facto sovereign, expressing their sovereignty by deciding

[76] See notes 15 and 16 above and accompanying text.
[77] See note 20 above and accompanying text.
[78] See note 26 above and accompanying text.
[79] See Neal Blewett, *The Peers, The Parties and the People: the General Elections of 1910* (London 1972), p. 326; Weill, note 11 above.

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issues, and not just personality, at elections. British constitutional change, Dicey wrote, demanded the People's consent expressed in two consecutive elections, with the government or body proposing the change standing for election on the very change.

But, Dicey was not satisfied with this constitutional structure. He believed that Parliament suffered from many shortcomings resulting primarily from the growth of the party system. He therefore advocated the referendum as an alternative model. His proposed referendum would have made the People, not only the political sovereign, as they already were, but also the legal sovereign. His advocacy of the referendum was not contradictory to his scholarship as conventionally perceived, but rather presented an evolutionary process that followed closely the development of the British constitution.

With the passage of the Parliament Act 1911, Britain officially rejected Dicey's advocacy of the referendum by making the Lower House sovereign. Dicey suspected that the first constitutional bill to pass under the new constitution would be Home Rule. At that point, desperate, he considered recognising the People as the legal sovereign of Britain even without the adoption of the referendum and notwithstanding the passage of the Parliament Act. He was, thus, willing to declare a Home Rule Act unconstitutional if it was not preceded by an election or a referendum. While scholars interpreted this move as not worthy of Dicey, it rather represented his ultimate commitment to the principle of popular sovereignty. Though we customarily identify parliamentary sovereignty as Diceyan, Dicey was not Diceyan, but an ardent supporter of popular sovereignty.

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