

Memorandum by Professor Stephen Tierney

1. What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

In a sense the referendum can be seen as ‘pure democracy’. In other words democracy unmediated by representatives; a symbolic reminder that democratic authority finds its legitimacy in the consent of the people. But there are problems with this assumption at the levels of both principle and practice. In theoretical terms it might be argued that representative democracy is not only the most practical way to run a democratic society, it is in fact preferable to direct democracy as a matter of democratic principle. Elected representatives bring expertise and time to problems that ordinary citizens don’t have; they may be more detached and hence objective; and they see the bigger picture of how different issues inter-relate – a referendum addresses single issues one by one without proper regard to this larger canvas.

On the other hand we might say representative democracy could work better: the party system; ministerial patronage; the whip system etc. all conspire to constrict representatives from exercising their expertise and objective judgment free from political control. But the answer to this is not referendum democracy but some reforms of representative democracy where possible. So I am opposed to the idea of referendum democracy replacing representative democracy at any general level.

It may be, however that *limited* room should be made for referendums at the level of ‘sovereignty decision-making’ – in other words, on issues that fundamentally redefine the nature of the state. For example:

- a new constitution;
- fundamental changes to the electoral system or nature of Parliament;
- fundamental changes to the constitutional status of the Sovereign;
- the transfer of substantial constitutional powers to institutions beyond the state;
- independent statehood of a sub-state nation/territory.

There seem to be arguments for referendums if they are only used at this level. First, that the issues are so fundamental that people should be able to reclaim their direct constitutional authority; and secondly, that these decisions involve the very identity of a sovereign people and again, therefore, that people should be able to play a direct role in such an exercise of constitutional ‘self-definition’.

2. What assessment would you make of the UK’s experience of referendums?
What positive or negative features of this experience would you highlight?

In this light the UK’s experience has been fairly positive. Referendums have been used rarely, and usually only for fundamental constitutional issues (although regional assemblies perhaps don’t fit this description). We might argue, however, that if one was used in 1975 for EC membership then there was a strong case for a referendum on one or more of the more recent, and very expansionist EC treaties since the 1990s. Another question is the use of ‘territorial referendums’: in other words referendums on devolution. Should these only be held in the territory in question? Is there an argument for a broader UK say on these issues? Or is that expressed by Parliament in

subsequent 'enabling' legislation? We might say the same on a referendum on Scottish independence. The rest of the UK would still have a say in any negotiation process.

3. How does, and how should, the referendum relate to the UK's system of parliamentary democracy?

One objection of course is that a referendum can upset the workings of a representative system. If referendums are over-used I agree this would be an issue. But the limited use I suggest should not be a problem; and in any case citizens do have the right to determine these questions. A bigger issue is that with an unwritten constitution the use of referendums remains at the discretion of Parliament and of the sub-state legislatures (e.g. Scottish Parliament). This can lead to irregular use: yes for regional assemblies, no for EU Reform Treaty. Some form of regulating how and when constitutional referendums should be used may be worth considering.

4. Is it possible or desirable to define which issues should be subject to a referendum?

It has been done: Northern Ireland Act 1998 s.1 and the Government of Wales Act 2006. Beyond this it could be argued that some kind of convention has emerged that a referendum is needed for devolution or for fundamental changes to a devolution settlement. But no such convention has emerged on Europe. Certainly a law could have been passed requiring a referendum on the ratification of any new EC/EU treaty. This would not be constitutionally problematic. Such a law could also provide for a referendum on future issues such as the secession of a constituent part of the UK; any move to a written constitution; a change in the electoral system; abolition of a House of Parliament etc.

Whether one sees this as desirable would depend upon how one views the current, highly flexible position but it would surely be possible as a matter of legislative drafting.

5. Should "constitutional issues" be subject to a referendum? If so, how should "constitutional issues" be defined?

I think yes for reasons above. The issues I have mentioned seem to be ones that could reasonably be covered. Included in my idea of fundamental constitutional change would be: a move to a written constitution; a questioning of on the status of the Sovereign; on the relationship between the two houses of Parliament; on the sovereign powers of the UK Parliament in relation to the EU or other supra-state institution; on the territorial integrity of the UK.

I would leave the Human Rights Act to one side. This was introduced by Parliament without any call for a referendum and could be modified or repealed by Parliament without necessarily affecting the UK's international obligations. I think in general the ratification of international treaties are not the proper subject of constitutional referendums unless they impact on the other issues I have outlined.

6. Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

I don't have any comments on the details of the Act except to say that how a referendum campaign is funded and organised is fundamental to its democratic and constitutional legitimacy.

7. Is the role of the Electoral Commission in regard to referendums, as set out in PPERA, appropriate? What assessment would you make of the Electoral Commission's work in relation to referendums?

Again I have no specific criticisms of comments to make.

8. What comment would you make on key components of a referendum campaign, such as:
 - Whether or not there should be any threshold requirements, for instance in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;

This is a difficult question as there is no settled agreement on, or even on the reasons for, threshold requirements on constitutional change in general. The UK has traditionally not imposed any special majority requirements for constitutional change and for this reason it is difficult to see why they would appear in referendums (as they did in 1978/79). If other aspects of the process are appropriate and transparent then arguably this issue becomes less important.

- the wording of the referendum question (including the appropriateness of multi-option questions);

It seems that the key to a legitimate referendum is process, and by this I mean proper deliberation that engages the public. The pre-referendum deliberation process should include the framing of the question and here some form of citizens' assembly might be useful. Experiments in this type of activity can be found before the referendum on the head of state in Australia 1999 and in British Columbia on Electoral Reform 2004. Clarity was a big issue in Quebec in 1995, but we should remember that complex questions may not be clear. The crucial issue is to get agreement on the question beforehand and to test it on citizens to see if they find it accessible. Multi-option referendums are to be avoided if possible. Two options seem to be the clearest model on offer. There may be arguments for more than two options but how decisions can be made on this basis become much more complex. For example, will there be a run off on the two most popular options?

- the design of the ballot paper;

I have no particular comment beyond the general principle of clarity.

- whether there should be formal, constitutional triggers for referendums;

As I say, this is difficult in an unwritten system. An Act could be passed trying to specify the types of issues that would need referendums but interpretation could be difficult. E.g. which EU constitutional reforms would need referendums and which would not?

- whether a referendum should be indicative or binding;

In the UK system arguably all referendums are indicative, since each would need parliamentary ratification by way of legislation to become law. This could come before the referendum takes place (1978/79) or afterwards (1997/98). Even a referendum on Scottish independence would need negotiation, and presumably UK legislation, to be accepted by the UK Parliament as having lawful force. The option of a second referendum after negotiations should perhaps remain where these lead to very different outcomes than were anticipated by the parties.

- whether a referendum should ask broad questions of principle, or refer to specific legislation;

It is obviously better for the question to be clear and based on principles, but clarity and simplicity are not synonyms. A clear question might be something like: Do you want Scotland to be an independent state? Do you approve of the UK signing and ratifying the EU Constitutional Treaty?

But often such simple questions beg more complex ones – what will this mean? And in that case a reference to e.g. a white paper on what an independent Scotland (including social union(?) with the UK) would look like, or a paper explaining what the Constitutional Treaty will mean for UK powers etc. would be needed to inform voters. In 1998 every voter in the referendum on the Belfast Agreement received a copy. In Australia in 1999 they received information from each side on their respective views of the issue at stake. This would seem like a fairer model – giving voters a short summary written by each side of the outcomes they foresee. So a broad question is good, but background explanatory material will inevitably be needed.

- whether a referendum should precede or follow statutory enactment;

It makes sense for it to precede statute so that parliamentary time is not wasted as in 1978/79. On the other hand, the statute should be faithful to the referendum and should mirror as much as possible the white paper or other explanatory paper that preceded the referendum.

- campaigning organisations and the funding of campaigns;

I have little to add beyond the view that there should be one campaign for each position in the referendum and the regulation of funding upon the 'equality of arms' principle should be followed as much as possible. The danger of a partisan media is very difficult to overcome (e.g. on the EU).

- Public information campaigns and media coverage;

Very important. There are good models from Australia and British Columbia.

- Party political activity;

This should be regulated through the official campaigns so far as possible.

- whether referendums should coincide with other elections or not;

Given that I advocate the very rare use of referendums only for very important issues – precisely because they should be taken to stand apart from regular representative democracy- it would be better if they are free-standing events.

- the strengths and weaknesses of in-person, postal or electronic forms of voting.

No strong views.

9. How does the referendum relate to other tools such as citizens' initiatives? Should citizens be able to trigger retrospective referendums?

This is a tricky issue and stems from particular constitutional cultures. The UK has a strong representative tradition and so an initiative process would not seem to be appropriate in our country. Initiatives may also work better in smaller countries than in the UK. If a small group could initiate referendums in the UK, the danger of the tail wagging the dog emerges.

10. How would you assess the experience of other countries in relation to the use of the referendum? What positive or negative aspects of international experience would you highlight?

It seems that where referendums are constitutionally required for major issues the people do retain important powers while not unsettling the norm of representative democracy – Ireland, Denmark. This seems like a good balance. The Swiss experience seems to turn the balance too much the other way. This may suit a small, relatively homogeneous state like Switzerland, but would not seem to suit our country.

On the other hand, if you use referendums for every type of constitutional change but make the threshold too high, as is arguably the case in Australia, then you would make constitutional change very difficult to achieve.

I think for the UK the best model would be: limited use of referendums for very important constitutional matters; simple majority decision-making; a transparent question broadly agreed by different groups; a deliberative, and if needs-be a lengthy, process involving citizen participation and education.

Those responding to this call for evidence are not necessarily expected to address all these points but instead to focus on those issues on which they have special expertise or about which they are particularly concerned. Respondents should not feel constrained by the above list from drawing attention to any other points about referendums thought to be of significance to the United Kingdom constitution.