

REFERENDUMS IN THE UK's CONSTITUTIONAL EXPERIENCE

EVIDENCE TO THE HOUSE OF LORDS' CONSTITUTIONAL COMMITTEE

from

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This paper gives my responses to the ten questions listed in the Committee's call for evidence published on 20th November 2009.

Q1 What are the strengths and weaknesses of the referendum as a democratic and constitutional tool?

Referendums could have the great benefit of making the political system more democratic and more legitimate. At a time when public trust in this system is probably lower than ever in living memory, the greater use of referendums could be an important means of restoring faith in British democracy and underpinning the constitution. They give the citizens a direct say in deciding policy and thus make the system more democratic. Introducing direct democracy into the political system, however, challenges the indirect, representative democracy that has been the essence of UK democracy. If the people vote one way, their representatives another, who should prevail, who is sovereign? This issue needs very careful consideration.

Perhaps the main weakness of referendums is the need for public participation. Most people are prepared to vote every four or five years to choose their representatives, whether national, local or, in Scotland, Wales and Northern Ireland, regional. Even then turnout varies considerably, depending on the perceived importance of the election. Even then, turnout tends to be falling. On the evidence of local and regional referendums held in the UK in recent years, it is doubtful whether voters would turn out to vote in similar numbers in referendums. Low turnout would weaken the legitimacy of the result and thus of the policy decided by the referendum.

Another weakness of referendums is the danger that they can be – some would say are always – manipulated by elected politicians to achieve their desired goals. Special interests and the mass media will also have their say in the referendum campaign. Thus referendums are rarely, if ever, the expression of the will of the people, free from influence by politicians and minority groups. This danger means that referendums, far from actually strengthening democratic politics, have the opposite effect, adding to public disillusionment with the political process.

Q2 What assessment would you make of the UK's experience of referendums? What positive or negative features of this experience would you highlight?

The experience has been mixed. At the local government level, referendums have usually been used with regard to directly-elected mayors and mainly at the behest of central government. Of some 35 such

referendums since 1997, only one-third voted for direct election of mayors. In Doncaster and Stoke-on-Trent, the experience of having mayors chosen directly by the people has not been a success. There have been some local referendums on policy issues, most notably in Edinburgh in 2005 on whether to have a traffic congestion charge; here 74% of the 62% of voters who participated voted against a congestion charge. The 1972 Local Government Act does allow people living in parish councils in England and community councils in Wales to request these councils to hold referendums but there are few examples of the Act being used in this way.

At the regional level, referendums have been used to legitimise constitutional change, mainly with regard to devolution in Scotland, Wales, Northern Ireland and one English region. Two further referendums planned for 2004, in Yorkshire and Humberside and North West England, were cancelled a few months beforehand. All but two referendums (Scotland in 1979 and North East England in 2004) have supported changes which the government had planned. Whether the reforms would have been any less legitimate had the referendums not taken place is impossible to judge.

There has been only one national referendum, in 1975, on whether the UK should stay in what was then the European Community. The vote resulted in a clear majority in favour of staying in the Common Market. Joining this supranational body was such a significant change in the position of the UK that the referendum almost certainly did help ensure popular acceptance of EC membership. Since then, other national referendums have been proposed by political parties, most notably by Labour in 1997 on the voting system for UK elections and in 2004-5 on the EU Constitution. The latter has proved especially controversial, particularly when the Labour government refused to hold a referendum on the 2007 Treaty of Lisbon which replaced the EU Constitution. In this case the failure to hold the referendum made the Lisbon Treaty less legitimate with some sections of the British people. It is almost impossible to imagine the UK adopting the euro as its currency without having a referendum.

Some would argue that these experiences support Clement Attlee was correct when in 1945 he called referendums a device 'so alien to all our traditions'. Since 2000 just one regional referendum has taken place while four have been cancelled or postponed. Incorporating referendums into British political life has proved particularly problematic.

Q3 How does, and how should, the referendum relate to the UK's system of parliamentary democracy?

The fundamental principle of the UK system of government is the legal – if not the political – sovereignty of parliament. This principle has been challenged by the UK's membership of the European Union (EU); some commentators believe that this membership in effect means the end of that legal sovereignty while others argue it is still intact. Whether the UK parliament is sovereign or not in relation to the EU, its sovereignty within the UK is certainly threatened by the use of referendums. Referendums put the people before parliament. The sovereignty of parliament becomes the sovereignty of the people. The problem

arises with national referendums and regional referendums on regional independence. Thus if referendums of these types do become a regular feature of British politics, they do pose problems for the position of parliament. This is why the scope and processes of referendums need to be considered very carefully.

Q4 Is it possible or desirable to define which issues should be subject to a referendum?

It could be possible but it would not be desirable. Democratic politics requires an open debate on all issues and how they are best decided. It is more important to define the processes by which issues might be subject to a referendum.

Q5 Should 'constitutional issues' be subject to a referendum? If so, how should 'constitutional issues' be defined?

Major constitutional issues, those which concern the fundamental structure of politics and government, would seem to be the most obvious subjects for referendums. If the structure and rules of politics are to be changed, then the people rather than the political players should decide on those changes. This was the reason for holding regional referendums on devolution to Scotland, Wales and Northern Ireland. In recent years, however, there have been important constitutional changes which no one proposed should be subject to a referendum. These include the 1998 Human Rights Act and the 2005 Constitutional Reform Act. (The latter is especially noteworthy as it had not been included in Labour's 2001 election manifesto and thus lacked a democratic mandate.) And no one is suggesting a referendum on the issue of making the House of Lords fully elected. Yet changing the UK's voting system and introducing the euro currency will almost certainly require referendums to go ahead. Why are referendums proposed for some constitutional issues and not for others? They are decided by the balance of political forces, almost always within the governing party. If those political forces could be widened to require a free vote in the House of Commons, then that is probably the best way of deciding the topics on which referendums should be held.

Q6 Is the Political Parties, Elections and Referendums Act 2000 (PPERA) an effective piece of legislation? How, if at all, could it be improved?

The Act covers national and regional referendums only and makes the Electoral Commission responsible for the conduct of referendums. Thus this question is better answered as part of Q7.

Q7 Is the role of the Electoral Commission in regard to referendums, as set out in PERA, appropriate? What assessment would you make of the Electoral Commission's work in relation to referendums?

The role of the Electoral Commission (EC), according to the Act, would seem broadly appropriate. The practice of this role raises concerns, however. There has been one referendum since 2000 for which the EC has had responsibility and that is the all-postal referendum in North East England in November 2004. A year later, the EC published a report on the referendum which included nine recommendations about future referendums. It is unclear whether the government has acted to implement any of these changes. If

it hasn't done so, then the EC, which reports to parliament, would appear to be ineffective in influencing the administrative and legal framework essential to the proper conduct of referendums. This concern is further reinforced by an interview given to *The Times* on 24th April 2004 by the then chairman of the EC, Sam Younger. He identified a series of loopholes in PPERA concerning how much money could be spent in a referendum and by whom. He said, 'The legislation is flawed. There appears to have been an oversight and it is something we are making representations to the government about'. Again, it is hard to find any evidence that the government has acted to close these loopholes. The EC needs to be more effective. It needs greater status, greater powers. It should more clearly be a part of Parliament. As the Audit Commission is to government expenditure so the Electoral Commission should be to democratic politics.

Q8 What comment would you make on the key components of a referendum campaign such as

- *Whether or not there should be any threshold requirements, e.g. in terms of the percentage of the vote required, or the level of turnout required, for a vote to be carried;*

There probably should be a threshold in terms of the level of turnout required for a vote to be carried, as was the case in the 1979 referendum on Scottish devolution.

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

The EC's duty to comment on the wording of the referendum question should continue; the government's power to ignore the EC's comments should be taken away.

There should be no multi-option questions as almost certainly they will confuse many voters.

- *The design of the ballot paper;*

This needs to be as clear and as simple as possible.

- *Whether there should be formal, constitutional triggers for referendums;*

I don't know what 'formal constitutional triggers' look like. Every national or regional referendum must require an Act of Parliament, approval of which must be by a free vote of MPs.

- *Whether a referendum should be indicative or binding;*

Given the concept of parliamentary sovereignty, referendums should be indicative in law. In politics, however, even an indicative referendum will bind the government.

- *Whether a referendum should ask broad questions of principle or refer to specific legislation;*

They should refer to specific legislation and/or specific policies. It is hard to think of examples of 'broad questions of principle' which could usefully be subject to a referendum vote, which would not be better being left to debate in parliament. Even the question of a reformed voting system for the UK

parliament, which might be the subject of a referendum before too long, would be better expressed in terms of a specific voting system rather than whether the voting system should be changed.

- *Whether a referendum should precede or follow statutory enactment;*

It should precede the proposed parliamentary statute about which it is being held as then it will help inform parliament's decision on the law.

- *Campaigning organisations and the funding of campaigns;*

The loopholes mentioned in answer to Q7 concerned this issue. There is much work to be done in order to ensure that the funding of campaigns does not favour one side at the expense of the other. It needs more detailed consideration than can be given here. The current laws on campaigning organisations and campaign funding need to be changed.

- *Public information campaigns and media coverage;*

In the 1975 national referendum, if I remember correctly, the government published two pamphlets, one setting the case for remaining in the EEC, the other the case against. The government's official position was to recommend staying in. The print media was also in favour of staying in.

Media coverage of referendums influences the outcome of the referendum, though to what extent is impossible to quantify. Future referendums will be covered by a greater range of media, old and new, especially the internet. Even compared with 2004, when the last regional referendum was held, the latter has grown in importance. The print media, however, continue to lead the news agenda, despite the internet and the public service broadcasting requirement imposed on the terrestrial television channels. It therefore remains important that public information campaigns put both sides of the argument in a dispassionate manner. However old-fashioned they now seem, official pamphlets detailing the cases for and against the referendum issue still have an important part to play in the referendum campaign.

- *Party political activity;*

Issues which become the subject of referendums usually divide parties and attract cross-party support. A referendum on the euro would be one such example of this tendency. Thus individual political parties are less effective in referendum campaigns. Given the continuing decline in membership and support for the main parties and the rise of single interest groups (which also include single interest political parties such as UKIP), the main parties might struggle even more to make their voices heard in future referendums.

The main issue is the influence on the campaign of the party in government. The UK has a system of party government. Even if divided, that party can use its control of the government machine to its advantage, which gives power to the party's frontbench ministers, as was seen in the 1975 campaign.

This danger could well be offset by the unpopularity of the party in power. Voters often use a referendum vote to express their views of the governing party rather than the specific issue. However, the advantage the party in government might gain from its position in power is an issue which needs to be addressed. If the public believes that party is manipulating public opinion, it could well become even more cynical about referendums and the whole democratic process.

- *Whether referendums should coincide with other elections or not;*

In order to reduce the danger of voters voting on party political lines, referendums should not coincide with elections.

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

Voting in person is best, postal voting needs more careful monitoring and electronic voting is not yet secure enough to be trusted.

Q9 How does the referendum relate to other tools, such as citizens' initiatives? Should citizens be able to trigger retrospective referendums?

If the UK is to make greater use of referendums as a form of direct democracy, then it should allow citizens the opportunity to decide on referendum issues. Part of the problem with the current use of referendums is that they are 'top down', decided on – or avoided – by party politicians. Whether local, regional or national, referendums should take place if (a) a certain minimum percentage of the voters of that constituency request it and (b) parliament supports that request. The involvement of parliament provides some kind of check on the 'bottom up' process, which might be taken over by special interests.

The idea of retrospective referendums has nothing to commend it, however, even if accompanied by various safeguards. Presumably such referendums would apply to laws and not policies. The best form of retrospective vote would be a general election. Retrospective referendums would give special interests and minority groups the potential to block almost all change.

The greater danger of retrospective referendums, however, comes from governments requiring them rather than the people, as shown by the example of Ireland and the European Union. Governments need to accept the results of referendums just as much as the people are required to.

Q10 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?

The state of California serves as a warning of the dangers of too much direct democracy while Switzerland would seem to provide an example of a state which has successfully combined direct and indirect democracy. The political culture of a state will determine whether referendums are successful forms of democracy or not. The political culture of the UK combines deference and dissent in an unusual mix. The less deferential attitudes of many modern voters mean that referendums could become a useful means of

expressing dissent and reconciling different interests. So far, they have been used in an hoc way to benefit politicians. It is important that from now on they are used more systematically and for the benefit of the people.

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