

House of Lords Select Constitution Committee inquiry into Referendums in the UK's Constitutional Experience

Evidence Submission from the Federal Trust for Education and Research

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1. Please find below our response to the Call for Evidence from the House of Lords Constitution Committee for its inquiry into 'Referendums in the UK's Constitutional Experience'.
2. The Federal Trust is a think tank that studies the interactions between regional, national, European and global levels of government. We approach the subject matter of this inquiry from the perspective both of our general interest in the appropriate tier and means for democratic decision-taking; and a particular focus on the European Union (EU) and the place of the UK within it.
3. We address questions 1-5 from the Committee's paper.

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

4. The main strength of the referendum as a democratic and constitutional tool is that it enables all those on the electoral register within a specific area to participate directly in the taking of decisions that relate to the workings of the constitutional system itself. This approach is of particular value when there may not exist a representative institution appropriate for the taking of a particular decision. For instance, the holding of referendums prior to the establishment of devolved tiers of governance in Scotland, Wales, Northern Ireland and London was appropriate since no such bodies existed in these territories. The only clear means of taking a democratic decision within these territories as a whole was through the holding of referendums.
5. The main general weaknesses of the referendum as a democratic and constitutional tool – some of which are considered in more detail below – are as follows:
 - a) There is a tension between its use and the basic principle of representative democracy;
 - b) It can entail the oversimplification of a complex issue into a simple 'yes' or 'no' option;
 - c) It does not necessarily settle an issue, and can serve to create a demand for more referendums; and
 - d) Rather than widening effective public participation in the political process, it might serve to afford extra influence to already powerful groups such as media and commercial interests.
6. The more UK-specific weaknesses of the referendum include:

- a) There are tensions between it and UK constitutional principles including that of collective Cabinet responsibility;
- b) The UK lacks a codified constitution within which the role of the referendum might be clearly defined; and
- c) The referendum is often conceived of within the UK not as a means of enhancing democratic decision-taking, but as a means of placing a brake on certain developments, most notably increased participation in European integration; or at local level on preventing increases in council tax above certain centrally-determined levels.

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

- 7. A positive feature of referendums in UK history is that they can contribute to the establishment of institutions, such as the Scottish Parliament and Welsh Assembly, which have successfully commanded a high degree of legitimacy and become established features of the un-codified UK constitution. The Northern Ireland peace process as well can be seen as having benefited from the referendum held (on both sides of the border in Ireland) on the Belfast or 'Good Friday' Agreement.
- 8. But the way in which referendums relating to issues of devolution have been handled reveals a series of confusions surrounding their role. To varying extents referendums since 1997 have led to alterations to the constitutional configuration of the UK, but the UK electorate as a whole has not been consulted. In the case of the Irish referendum, voters in the Republic of Ireland were given a direct say, while UK voters outside Northern Ireland were not. Moreover, of the nine English regions, only the electorates of London and the North East have been consulted over whether they want devolution to their regions. All of the referendums on devolution were brought about on the initiative of the UK government; yet at local level in England there is provision for referendums on the introduction of directly elected mayors to be triggered by local voters. Further confusion surrounds the issue of whether additional referendums are required for the extension of devolution. The *Government of Wales Act 2006* granted legislative powers to the Welsh Assembly, without a referendum being held; but the Act also provided for a further extension of devolution which was dependent upon agreement in a referendum, which the current Welsh government is committed to holding.
- 9. Consideration of the only UK national referendum to date, on continued membership of the European Economic Community in 1975, illustrates certain negative features of this device. There were constitutional problems. As well as the difficulty of reconciling the holding of a referendum with the principle of collective Cabinet responsibility, dilemmas arose regarding the activities of ministers who were engaged in various European negotiations but were opposed to continued membership of the EEC; the maintenance of Civil

Service impartiality; and the appropriate role of special advisers to ministers.¹ Debate at the time of the vote tended to focus on economic aspects of the commitment at the expense of the constitutional issues involved, a weakness to which those who disagreed with the 'yes' vote were subsequently able to point when challenging the legitimacy of the referendum. Finally persistence of a lack of consensus about the role of the UK within Europe; and the present-day strength of so-called 'Euroscepticism', show that the 1975 referendum did not produce a final decision, despite its clear result.

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

10. At present the result of a referendum could not in formal terms be binding upon Parliament. Even if Parliament had committed through an Act of Parliament to abide by the outcome, it could in theory repeal such an Act. However the political pressure upon a government seeking to ignore the outcome of a referendum would be immense.
11. Parliament could become bound in practice not only to abide by the outcome of referendums, but to the holding of them in certain circumstances. The Conservative Party proposal to, in the words of David Cameron, 'prohibit, by law, the transfer of power to the EU without a referendum' would introduce a new practical constraint upon the freedom of action of a government (and arguably undermine the parliamentary sovereignty that advocates of such a measure might claim to be defending). Though in theory a future Parliament could repeal such a statute, there might be strong political imperative not to do so.
12. Finally there are certain institutions such as the Scottish Parliament which were established following referendums and have become an entrenched part of the un-codified UK constitution. Though it might in theory possess the power to do so, the Westminster Parliament could not in practice abolish or even significantly alter them without resort to a further referendum.
13. The ideal relationship between mechanisms such as referendums and representative democracy in general is in the view of the Federal Trust that the former can in some circumstances enrich the latter – helping to make it more responsive and better informed – but they should not supplant it.

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

14. The definition of which issues should be subject to a referendum is an essential – if complex – task which should be undertaken before any further move to increase the use of this deliberative mechanism.

¹ As revealed in official files made available in the National Archive/Public Record Office thirty years later, such as: BA 7/10 'EEC Referendum guidelines for conduct to Ministers and special advisers'.

15. There have been a number of policy decisions over which it might be argued that referendums should have been held, but they were not, and no demand was made that they should be. For instance, major constitutional changes have been introduced in the UK since the 1975 European referendum without referendums taking place. They include the passing of the *Human Rights Act 1998* and the *Freedom of Information Act 2000*; and the establishment of the UK Supreme Court, which became active in 2009. As already noted, the devolution programme enacted since Labour took office in 1997 has never been subject to a full UK-wide referendum, but only in the prospective devolved territories (and the island of Ireland as a whole for the Belfast Agreement).
16. At present discourse around UK-wide referendums seems to be focussed largely on issues associated with the EU (the most obvious exception being the recent Labour pledge to hold a referendum on electoral reform if returned to office at the 2010 General Election). This tendency can be traced to the calls for a referendum which culminated in the vote of 1975; and was sustained subsequently by such groups as the Referendum Party and its demand for another referendum on continued membership; the commitment of the main parties not to join the single currency without a referendum; the more recent debate about the EU Constitution then Treaty of Lisbon and whether it required a referendum; and finally the Conservative Party commitment to an Act of Parliament requiring it to hold referendums on the further sharing of sovereignty.
17. This focus on the EU and the apparent rationale behind it can be challenged in a number of ways. Advocacy of EU referendums often rests on the idea that they are required to legitimate further sovereignty sharing by the UK. But the EU is by no means the only body within which the UK shares its sovereignty. Yet there are no demands for referendums in relation to UK membership of bodies such as NATO or the Council of Europe, despite the significant consequences of UK participation within them. Second, it might be asked, if the extension of sovereignty sharing requires a referendum, then should not its reduction as well? In other words, it could be argued that a policy such as the UK withdrawal from the EU Social Charter should be subject to a referendum, a stipulation not currently being called for in political debate.
18. If the idea of further sovereignty sharing requiring a referendum takes hold, it is not clear whether it would apply to the accession of new EU member states, which entails further sharing of sovereignty. Such a practice could create substantial problems for the functioning of the EU as a whole.

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

19. This question is central to the subject of referendums in the UK. Arguably the most appropriate use of referendums would be in relation to ‘constitutional issues’; and most referendums which have been held to date have been over matters which could be regarded as constitutional.

20. But it should be noted that other methods exist of introducing ‘hurdles’ which must be cleared in order to alter the constitutional settlement of a country, such as a requirement for the support of more than a simple majority in the legislature.
21. Moreover, in the UK context, the constitution is not codified. Consequently, it is impossible to establish with a sufficient degree of exactitude what are ‘constitutional issues’; and a blanket requirement for referendums in this area cannot therefore be introduced.
22. In other words, to dabble with the idea of requiring referendums for ‘constitutional issues’ without first clearly codifying the UK constitution is to approach the issue from the wrong end. A codified constitution must be established first. Within such an arrangement referendums could be provided with a clearly delineated role, integrating them within an overarching system of representative democracy.
23. The establishment of a formal settlement of this sort would be a substantial task, and would presumably require the use of deliberative mechanisms, probably including final endorsement (or rejection) by a UK-wide referendum. It is perverse to consider establishing the principle that a *change* to the constitution demands explicit democratic assent of some kind, without the constitution as a whole having an equivalent form of legitimacy.

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