

Submission to the House of Lords Constitution Committee

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In this submission I offer some reflections, having conducted some research in this area, on some of the issues that the Committee is considering. Books could be written on the subject, but I have done my best to heed the request that submissions be kept as concise as possible.

In summary, I suggest:

(a) in principle one could make a case either that the referendum is an essential component of a truly democratic state, or, conversely, that the referendum is inherently destructive to coherent government and perhaps to democracy itself. The evidence does not support either of these extreme claims.

(b) while there would be major difficulties in accommodating the citizens' initiative within the UK's system of parliamentary democracy, the referendum could much more easily be accommodated.

(c) it is certainly possible to argue reasonably that certain issues should, and others should not, be the subjects of referendums. Complications, though not insuperable ones, arise in defining these issues in the UK given the absence of a codified constitution.

(d) threshold and turnout requirements are in most cases unnecessary and undesirable, though a case can be made for some combination of the two.

(e) there is little to be said for a referendum that is designated as merely 'advisory'.

(f) the history of the referendum experience of one particular country, Ireland, is on the whole supportive of the claim that the referendum can enhance representative democracy.

I will address a number of the specific questions posed in the Call for Evidence.

About the author:

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Question 1

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

These are fairly well rehearsed so I will refrain from relaying conventional wisdom at length.

On the positive side, the referendum can be seen to enhance democracy by increasing opportunities to participate, educating the voters by enabling them to decide on issues directly, and enhancing the legitimacy of decisions made in this manner compared with those made by parliament. On the negative side, it is accused of weakening representative institutions of government, disrupting the process of government, and allowing majorities to override the rights of minorities.

There is a certain amount of rhetoric and hyperbole in both of these cases, and the most sweeping statements about the supposed transcendent benefits or disastrous consequences of the referendum are difficult to sustain on the basis of the evidence. Democratic societies can function perfectly well with the referendum or without it, and within the USA some states, especially in the south-west, use the referendum extensively while others do not use it at all, without any obvious difference in the 'level of democracy' enjoyed by their inhabitants. Such countries as Belgium, Finland, Germany, India, Japan, the Netherlands, the USA and indeed the United Kingdom are fully functioning democracies despite making little or no use of the referendum. On the other hand, so are Europe's most extensive users of the referendum, such as Switzerland, Italy, Ireland and France, and we cannot point to any case where the referendum has led to the collapse of a democratic system.

If used sparingly (that is, as a supplement to representative democracy, rather than so extensively that we could speak of a 'referendum democracy' or of 'direct democracy', a straw man erected by some of those who oppose referendums in principle) and in a regulated fashion, the referendum can enhance rather than subvert representative democracy.

Question 3

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

The distinction between two states of affairs is important:

- (i) a referendum can take place only after parliament has passed a bill or motion to that effect, specifying the precise proposal to be voted on;
- (ii) extra-parliamentary actors, such as a specified number of electors, can promote an initiative on which the people vote.

Broadly speaking, where the situation is as in (i), there is no reason to doubt that parliamentary democracy and the referendum can co-exist and the referendum can reasonably be seen as enhancing representative democracy rather than challenging or threatening it. Where the initiative exists (situation (ii)) the implications for parliament are much greater, and the potential for conflict and for a fundamental alteration to the existing practices of representative democracy is much higher. In short, introducing provision for the initiative is more 'high risk', and few countries have done this, Italy and Switzerland being the best known examples. I imagine that the Committee is unlikely to recommend the introduction of the initiative, either concerning the introduction of new proposals or the rejection of recently-passed legislation, as in Switzerland, or on the abnegation of existing legislation no matter how old, as in Italy. Consequently, I shall confine most of my comments to the first situation outlined above.

In theory, even the existence of referendums in such regulated circumstances might be thought to pose a threat to representative democracy. The essence of the argument is that voters are less informed, and less cognisant of the need to respect minority rights, than legislators ('legislators may be ignorant, but not so ignorant as the masses', as Lord Bryce summed up this line of thought over a century ago). In reality, there is no evidence that the quality of democracy is weakened in the extensive list of democracies that hold referendums under these circumstances. Electorates can make ill-considered decisions, but so can legislatures, and if the arguments highlighting the supposed incompetence of voters to decide on specific policy issues are pushed too far they can become an argument against allowing people to vote at elections.

Questions 4, 5

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

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

Analytically it certainly seems that some issues are generally deemed more suitable than others for resolution by referendum. There is a clear logic in putting to a referendum:

- (a) fundamental questions concerning sovereignty or a major constitutional settlement, especially if they concerns steps that would be completely or virtually irreversible once enacted;
- (b) important issues that cut across party lines and upon which the electorate cannot reasonably be said to have delivered a verdict at a parliamentary election.

Conversely, it does not make sense to put to a referendum either:

- (a) questions that relate closely to the left–right spectrum on which the party system is based, since it is reasonable to take the position that a general election broadly indicates the electorate’s decision here;
- (b) issues of secondary importance.

While this makes sense in theory, defining the relevant terms is not straightforward. This applies a fortiori in the UK given the absence of a single document entitled ‘The Constitution’ which, if it existed, could specify the issues on which a referendum could (or must) be held. The absence of any such document constraining the parliamentary majority (ie the government) of the day might well mean that in practice the decision as to whether a particular issue is to be put to a referendum is likely to be influenced by political considerations. This is something that has bedevilled the history of referendums in France, for example, resulting in a perception that the government of the day there chooses to hold or not to hold a referendum on a particular issue depending mainly on where it sees its own partisan advantage to lie.

Perhaps with sufficient thought a legal framework could be devised that would give strong guidelines as to the issues on which a referendum is ruled out, is possible, or is mandatory. The government of the day would still inevitably have freedom through its parliamentary majority to interpret this legislation to its own advantage in any particular case, or to amend the legislation, giving something of an ad hoc character to every referendum, but the risk of losing support through being seen to violate the ‘spirit’ of the rules might constrain governments to some extent. The Danish rule that delegation of sovereignty to international authorities requires a referendum unless there is a five-sixths majority in parliament, or some variant of this rule, would also be worth considering.

Question 8

What comment would you make on key components of a referendum campaign, such as:

(a) 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;

I do not see any justification for a requirement that a super-majority of more than 50% should be required for a proposal to be deemed to have received the support of the people.

A turnout requirement is, in my opinion, definitely a bad idea, because this creates a dilemma for opponents of a proposal, who may be unsure whether to turn out and vote No or not to vote at all. Such a requirement means that a voter who takes the trouble to vote No to a proposal that receives majority support from voters may inadvertently be helping to validate the poll by raising the turnout level.

Such turnout requirements do exist in some countries – for example, in Italy a Yes vote is not valid unless turnout exceeds 50%. This leads to the anomalous situation where if 49% of electors turn out and vote Yes while absolutely no-one votes No, the proposal is deemed not to be approved, yet if 26% of the electorate turn out to vote Yes and 25% vote No, it is carried, even though quite evidently support is much greater in the first case than in the second.

A requirement that avoids these difficulties and is employed in Hungary is that the proposal for change must receive a majority of the votes cast, and the Yes vote must amount to at least 25% of the electorate. This ensures that proposals cannot be passed unless they generate significant support, but at the same time removes from opponents of a proposal both the uncertainty as to whether a negative vote could have the unintended effect of validating the result, and the power to thwart the majority's preferences by simply not voting.

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

A referendum question should be framed in such a way that the answer is unambiguous. Multi-option referendums carry the risk that none of the options receives a majority, leaving it open to debate and interpretation as to what the electorate has said. If no one option receives a majority, some might interpret this as a choice of the one that received most votes, yet it is possible that that option is the 'Condorcet loser', ie the option that would be defeated by any other in a head-to-head contest. Hence a choice between two options – in essence, asking the electorate to give a Yes or No answer to a question as to whether it supports a specific proposed change – is preferable.

This also implies that the questions that should be put to voters are precisely those that can be answered with a clear Yes or No. It makes more sense to put to the electorate a proposal put together by political actors which is then referred to the

people for their verdict, rather than to bring in the electorate by referendum at an earlier stage in an attempt to define the options.

(c) the design of the ballot paper;

(d) whether there should be formal, constitutional triggers for referendums;

That would be the ideal, ie a referendum could not be triggered simply by a possibly opportunistic decision made by the government of the day. As discussed re Qns 4 and 5 above, while the problems of institutional design involved in achieving this are not insuperable, they would require some thought.

(e) whether a referendum should be indicative or binding;

Binding, in my opinion. An indicative referendum is little more than an expensive opinion poll. If the electorate knows that the result is not binding, then there is an obvious temptation either not to vote or to use the referendum to express a view on something other than the issue at stake, such as the current performance of the incumbent government.

Given the UK's absence of a codified constitution, it may be impossible to treat a referendum as being legally or constitutionally binding, but it could certainly be politically binding. That was the case with the UK's only national referendum, for example; the 1975 referendum on whether the UK should leave the EC could not be formally binding, in that parliament could not have been prevented from disregarding the decision of the people had it chosen to do so, but there was never any question of that happening. A number of other countries, including Denmark, Finland, Italy, Norway and Sweden have held referendums that, while formally only advisory, have been effectively binding.

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

As indicated at 8(b) above, a referendum makes sense only if it carries a specific question to which voters may respond with a Yes or a No. Asking about broad principles ('Should the membership of the upper chamber be broadened?', 'Should the Scottish parliament have greater powers?') has the effect of turning the referendum into an expensive opinion poll, and leaves huge scope for argument as to what specific proposals are required by, or are compatible with, the broad principles that the electorate has said that it supports.

(g) whether a referendum should precede or follow statutory enactment;

In principle it would be more logical for parliament to receive the approval of the electorate before enacting a piece of legislation. That said, there is provision in some countries (such as Switzerland) for a bill passed by parliament to enter a short state of suspension, typically three months or so, pending the outcome of a referendum. Provided the people are asked to vote on something specific, as opposed to a broad principle, the precise sequencing does not seem to be crucial.

(h) campaigning organisations and the funding of campaigns;

(i) Public information campaigns and media coverage;

(j) Party political activity;

(k) whether referendums should coincide with other elections or not ;

There are advantages and disadvantages in holding referendums on the same day as other elections, or in holding more than one referendum on the same day. On the plus side, this is likely to increase turnout compared with the result of holding each contest on a separate day. On the minus side, there is a risk that the, or a, referendum issue will be submerged by what voters see as a more important contest.

In practice, many referendums around the world have taken place on the same day as an election or another referendum, and voters seem able to distinguish the two contests.

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

Question 9

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

As noted above in answer to Q3, provision for the initiative is a step further – probably several steps further – than introducing provision for the referendum. The initiative could be presented as a device that empowers citizens, but critics would be more likely to see it as empowering well organised lobbies who are able, if necessary by employing commercial signature-gathering organisations as in California, to obtain the requisite number of signatures.

Retrospective referendums would be another adventurous option; even Switzerland does not employ this device. They exist in Italy, where a specified number of citizens can launch an initiative to strike down or amend any piece of legislation, no matter how old, which enables citizens or interest groups to launch 'random shocks' against the political system. I very much doubt whether this option is under serious consideration in the UK, and nor, do I imagine, would many people recommend that it should be.

Question 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 is difficult to summarise worldwide experience of the referendum in a paragraph or two, but I believe that the evidence supports the view that the referendum (as opposed to the initiative) is perfectly compatible with, and indeed enhances, representative democracy.

Since the Constitution Committee may be receiving many submissions that evaluate worldwide experience or experience in particular countries, I will briefly discuss Ireland's experience with the referendum.

Ireland has a written constitution, dating from 1937, and this can be changed only by referendum. The referendum, then, is intrinsically tied to constitutional change. If a particular step requires an amendment to the constitution, then there must be a referendum; if it does not require an amendment to the constitution, then there is no referendum. The question of whether there should be a referendum is thus taken out of the hands of political actors; while they have discretion as to whether to try to bring about some change (eg the legalisation of divorce in 1995), they have no discretion as to whether there should be a referendum on the issue once it has been decided to go ahead. As already noted re QQ 4 and 5 above, there is an obvious contrast here with the UK given that the UK does not possess a document called 'The Constitution'.

There is surprisingly little debate in Ireland about the merits of the referendum as a decision-making device, which could be taken as an indication that it does not give dissatisfaction, or that it is taken for granted as an unmoveable part of the institutional furniture. The last time there was a sustained debate on the subject appears to have been in 1928, when the government of the day used its parliamentary majority to remove provision for the initiative from the 1922 constitution, despite vehement protests from the then main opposition party (which took a rather different view once it came to government).

Ireland held 31 referendums in the period 1937–2009, all tied to constitutional change. The direct involvement of the people in deciding issues such as abortion, divorce, and constitutional recognition of Northern Ireland may have resulted in a slower pace of change than would have occurred had parliament alone been able to make these decisions, but it has conferred much greater legitimacy and finality upon these decisions once they were taken. A good example is the legalisation of divorce, a long-running issue in Irish politics from the 1960s to the 1990s, which was approved very narrowly in a 1995 referendum and which then ceased overnight to be a political issue; opponents immediately folded their tents following this decision in a way that they would have been very unlikely to do had the decision been made by parliament alone.

In recent years the issue most commonly put to the people by referendum has been Ireland's relationship with the European Union, an issue that has been responsible for 5 of the most recent eleven referendums to take place (1998–2009). As is well

known, Ireland was one of the few EU member states to decide by referendum on the Nice Treaty, and was the only EU member state to hold a referendum on the Lisbon Treaty. The initial No vote on both treaties led to major problems for Irish governments within the EU, and after an initial period of uncertainty on each occasion the government eventually re-ran the referendums, having achieved clarifications on some points that seemed to underlie the opposition to the treaty, and on the second occasion each time the treaty was ratified by a comfortable majority, with the Yes vote exceeding 60%.

There is undoubtedly a feeling among some commentators in Ireland that treaties of this nature are too complex to be suitable objects of referendums, and that the requirement that there should be a referendum on each EU treaty (a requirement resulting from a 1987 Supreme Court that raised eyebrows at the time) is an encumbrance to Irish governments when it comes to taking part in the European project. Others maintain that when questions of sovereignty arise it is right that the people should have the final say, though the fact that the other 26 member states did not require a referendum on the Lisbon Treaty raises the question of whether every such delegation of sovereignty, no matter how minor, should require a referendum. However, there are no proposals to change the requirement that a referendum be needed for constitutional change, if only for the simple reason that any such change would itself require approval from the people in a referendum.

Overall, an evaluation of Irish experience of the referendum would be more supportive of the institution than critical of it. Partly because the question of whether or not it should be used to resolve a particular question is determined by the constitution and not by political actors, the institution has not become discredited by partisan deployment. Even though the number of referendums is high by European standards, referendums are still sufficiently rare (fewer than one every two years since 1937) that the electorate does not appear to be jaded or resentful. While turnout is low at what are seen as unimportant referendums (for example, in a 1996 referendum on changing the bail laws, turnout was only 29%), when the issue is seen as important it is not much less than at a general election (it was 58% in the second referendum on the Lisbon Treaty, held in October 2009). Every country is different and has its own conventions, practices and traditions, but comparative experience strengthens the basis for assessments about how an institution will operate in a new setting.