

# **Constitution Committee Inquiry into ‘Referendums in the UK’s Constitutional Experience’**

## **Written submission from Democratic Audit**

### **Summary**

Democratic Audit’s view is that referenda are neither sound nor appropriate instruments of governance and decision-making in a nation, like the United Kingdom, that does not possess a written constitution.

We base this assessment on the following key points:

- There are fundamental tensions between the use of the referendum and the doctrine of parliamentary sovereignty on which the UK’s system of parliamentary democracy is notionally still based.
- Importing referenda into UK politics without clarifying their role within a fully codified constitution would add to the piecemeal changes which have prompted growing constitutional confusion over the past decade.
- Although largely untested, there are grounds to suggest that existing regulatory frameworks would be insufficient to prevent referenda becoming open to abuse by political parties and corporate interests.
- There are alternative means of developing citizen initiatives as a means for putting issues on the parliamentary agenda, rather than bypassing it.
- Turnout in past referenda suggests there may be less popular enthusiasm for them than opinions polls suggest, and that the extent to which they provide a popular mandate may often be questionable, particularly at a local level.
- The inadequacy of the electoral registers would further diminish the claim of any referendum to provide a popular mandate, and would become potentially problematic should thresholds based on the size of the electorate be introduced.

We therefore recommend that the Constitution Committee should not encourage the use of referenda except in one major area – that of constitutional change where there is otherwise meagre protection against a single party in power enacting partisan measures.

## **Introduction**

1. The Constitution Committee's Inquiry into the place of referendums in the UK constitution is a timely one. The appeal of referenda as a means of promoting wider popular engagement with politics has obvious appeal, particularly at a time when representative democracy appears to be in crisis. At the same time, there is growing recognition that recent constitutional change has challenged many of the UK's core constitutional doctrines, suggesting a need to revisit some of the most basic principles of our democratic settlement.

2. In this submission, we place particular emphasis on the third of the ten thematic questions outlined in the Committee's call for evidence – 'how does, and how should, the referendum relate to the UK's system of parliamentary democracy?' We suggest that this question is of such a fundamental importance that it must be considered separately, and prior to, any further questions about the use of referenda.

3. Our submission also raises concerns that referenda would become open to abuse by political parties and corporate interests, and suggests that past experience of turnout, as well as the incompleteness of the electoral registers, would seriously diminish claims that referenda provide a popular mandate. Overall, we feel that the use of referenda for matters other than constitutional reform would be a distraction from the urgent need to pursue a broader and more coherent set of democratic reforms.

### **How does, and how should, the referendum relate to the UK's system of parliamentary democracy? (question 3)**

4. We have given priority to this question because we believe it raises issues of basic principle which must be answered before proceeding to consider any other aspects of the use of referenda. Specifically, it raises the fundamental issue, on which the Committee will clearly need to take a view, as to whether ultimate sovereignty should lie with Parliament, as now, or with the people.

5. If sovereignty is deemed to reside fully and ultimately with Parliament, then it follows that none of the Committee's other preliminary questions is capable of an answer. Conversely, if sovereignty is seen to reside in the people, then issues to do with the fundamental rights of citizens, and the system of representation (composition of Parliament, electoral systems, local government, etc.) are all properly a matter for the citizen body to determine, via a referendum or some other agreed form of direct democracy.

6. That such a fundamental question of principle needs to be raised at all is an obvious consequence of the absence of a written constitution for the UK. In the main, countries which use referenda as instruments for decision-making on a regular basis do so within the context of a fully codified constitution, within which referenda have a defined place. The one exception is New Zealand, where 10 national referenda have been held despite the lack of a written constitution. This should not be taken as an indication that New Zealand offers an international precedent. Rather, the key point is that there is an obvious conflict of principle between the doctrine of parliamentary sovereignty and the concepts of direct democracy and popular sovereignty implicit to referenda.

7. Given these observations, it is our considered view that importing referenda into the UK constitution without the overall framework of a codified constitution would be a further example of ill-considered piecemeal change. The widespread use of referenda would further undermine established constitutional doctrines, but would also take place in a context in which alternative constitutional principles have yet to be articulated. We do not seek to defend traditional constitutional conventions – the issue is that, without a codified constitution defining their role, the use of referenda would give rise to an even more confused constitutional settlement.

#### **Should constitutional issues be subject to a referendum (question 5)**

8. Given the above, any answer to this questions hinges on the above interpretation of where sovereignty should rest. It is Democratic Audit's view that issues such as fundamental rights, the powers of the executive, and the terms on which it and elected representatives serve should be set out in a written constitution which has been subject to wide-ranging public debate and endorsed by a popular vote; any subsequent revisions should be similarly subject to a popular referendum. Elections to a particular Parliament are secondary, and logically cannot determine either the terms of that election or the powers of the Parliament so elected. This basic democratic principle, that the nation's constitution belongs to the people and not to the government of the day, is fully realised, for example, in the Republic of Ireland, where all constitutional amendments require the direct consent of the people.

9. At the same time, there are clearly issues on the current political agenda that are germane to the Committee's inquiry and which cannot simply be dismissed because of the absence of a written constitution. These include the Prime Minister's commitment to a referendum on a choice between the existing electoral system for elections to Parliament and the Alternative Vote; and possible Conservative proposals for reducing the number of parliamentary seats. Such reform proposals raise profound democratic issues

that ought to be preceded by deliberative public participation and should certainly not to be determined by an unrepresentative single party government which may wish to accomplish partisan objectives.

10. In these specific circumstances, the use of referenda to determine answers to constitutional issues seems preferable to allowing such matters to be determined by Parliament. However, we would reiterate that we would regard this position as one of several 'stop gap' measures made necessary by current constitutional confusion and one which would quickly become untenable should the use of referenda become widespread in the absence of a written constitution.

### **Referenda and citizen initiatives (question 9)**

11. Democratic Audit takes the view that there is a place for citizen initiatives, though only as a means for putting issues on the parliamentary agenda, rather than bypassing it. More accessible and effective arrangements for petitioning Parliament and other representative bodies would be preferable to advancing the place of referenda in our governing arrangements, accompanied by a clear and principled distinction between what is a proper subject for the people's decision in a representative democracy, and what for Parliament, and work to preserve the integrity of both. Such work should form the basis of the response to popular anger and distrust of members of Parliament and disillusionment with formal politics.

### **The effectiveness of PPERA 2000 and the role of the Electoral Commission (questions 6 and 7)**

12. As the Committee's call for evidence notes, the current UK legislation governing referenda is largely untested. While the current legal framework provides for expenditure limits, the Electoral Commission has raised important concerns about the scope to enforce these within the context of a relatively short referendum campaign. These concerns are significant for two key reasons. First, experience elsewhere, particularly in California, highlights how referenda can effectively be hijacked by organised interests, particularly those which have access to substantial financial resources (i.e. private corporations, political parties and large campaign organisations). The role of major companies in providing support for the 'no' campaign in the referendum seeking to establish a Greater Manchester congestion charge in 2008 offers a clear evidence of the role which corporate power could play in influencing future UK referenda, locally, regionally and nationally. Second, the Electoral Commission's own experience of attempting to enforce regulation relating to party finance have revealed the extent to which both political parties and donors to political parties seek to exploit loopholes in the law (and, in some

case, show blatant disregard for it). Since the passage of PPERA 2000, the Electoral Commission's remit has had to be refocused, its powers bolstered and regulations tightened in order for it to become a more effective regulatory of party finance. We would strongly urge that every attempt is made to learn from the Electoral Commission's existing experience with party finance, since there is every reason to believe that similar deficiencies would be revealed in the regulatory framework for expenditure on referenda campaigns should referenda become widespread.

### **Assessing the UK's experience of referenda (question 2)**

13. Because of the historical assumption that parliament is sovereign, the UK's experience with referenda has necessarily been limited. Moreover, with the exception of the 1975 referendum on UK membership of the EEC, referenda in the UK have only been used to settle constitutional issues with a territorial dimension. As table 1 highlights, there was an initial wave of such referenda in the 1970s, followed by a second wave beginning in the late 1970s.

**Table 1:** UK referenda, 1973-2004: issues and turnouts

Date	Territory	Issue	Turnout (%)
8 March 1973	Northern Ireland	Should Northern Ireland remain part of the UK?	58.7
5 June 1975	UK	UK membership of the EEC	64.6
1 March 1979	Scotland	Devolution for Scotland	63.0
1 March 1979	Wales	Devolution for Wales	58.3
11 September 1997	Scotland	Establishment of Scottish Parliament	61.2
18 September 1997	Wales	Establishment of Welsh Assembly	50.6
7 May 1998	Greater London	Creation of Greater London Authority and Mayor of London	34.5
22 May 1998	Northern Ireland	Good Friday Agreement	81.1
4 November 2004	North East England	Establishment of North East Assembly	47.8

**Sources:** F.W.S. Craig (1989) *British Electoral Facts, 1832-1987* (Aldershot: Gower); G. Miller (2009) 'Turnout at UK Referendums', paper presented to Elections, Public Opinion and Parties conference, University of Strathclyde, Glasgow, 28-30 August;

O. Gay (2009) 'Referendum on Electoral Reform', Standard Note SN/PC/05142, House of Commons Library.

14. Two key conclusions can be reached from this past experience. First, while referenda are advocated as a means of definitive decision-making, they do not necessarily settle an issue, or may only do so for a generation. The referenda which resulted in Northern Ireland remaining in the UK, and devolution to Scotland and Wales being rejected in the 1970s clearly did not bring an end to Irish, Scottish or Welsh nationalism within UK politics. Rather, these debates were revisited in referenda twenty years later, with very different outcomes. Current plans for a referendum on Scottish independence and a referendum on granting additional powers to the Welsh Assembly underline this point. Likewise, the only UK national referendum to date, on membership of the European Economic Community in 1975, has never been accepted as having settled the issue of the place of the UK in Europe. In practice, referenda often create a demand for more referenda. It is also noteworthy that the experience of other EU member states which have held referenda on EU treaties is that governments are generally best placed to force, and resource, a repeat referendum with the aim of getting the outcome they want.

15. Second, the apparent public enthusiasm for referenda voiced via opinion polls rarely translates into high turnouts when referenda are actually held. As table 1 shows, turnouts in referenda held in the UK since 1973 have ranged from 34.5 to 81.1 per cent, with the referenda on devolution in Greater London and North East England prompting fewer than half of the eligible electorate to participate. While the average turnout of 57.8 per cent compares favourably to turnouts in local elections, and falls only slightly short of turnout in recent General Elections, it remains the case that referenda have not tended to result in high levels of public participation. Given the experience of referenda turnouts of less than 50 per cent, the issue of whether thresholds should be imposed is inevitably raised- which in turn highlights concerns about the state of the electoral registers (see paragraph 19, below).

16. The use of referenda in English local government has grown significantly over the last decade – largely because of legal provisions enabling a referendum to be called on the issue of whether a local authority should have a directly-elected mayor. In addition to the 35 mayoral referenda held from 1997-2007, there have also been 20 non-binding referenda organised by local authorities as part of their submissions to the Boundary Committee on local government re-organisation, and 4 binding referenda held by local councils to set local council tax rates. Again, the experience of local referenda suggests that they have not become a focal point for widespread citizen engagement with the political process. Turnouts in the 35 local referenda on mayors have

varied enormously, although there were only two instances where they exceed 50 per cent (Berwick-upon-Tweed, 2001: 63.8 per cent; the Isle of Wight, 2005: 62.4 per cent). The average turnout has been about 30 per cent; and it has been below 20 per cent in six cases, including Ealing where a turnout of 9.8 per cent resulted in the rejection of proposals for a directly-elected mayor in 2002. While average turnout in local referenda on local government reorganisation and council tax levels has been somewhat higher, it remains well below 50 per cent.

**Table 2:** Referenda in English Local Government, 1997-2007: issues and turnouts

Type of referendum	No. referenda	Mean turnout
Mayoral	35	29.2
Local government reorganisation	20	45.4
Council Tax	4	38.8

Source: Miller, 2009, *op cit*, p.6

### **The state of the electoral registers and threshold requirements**

17. While not included as part of the scope of the Inquiry, we would suggest that the state of the electoral registers represents a major challenge to the legitimacy of referenda in the UK. If referenda are to confer popular mandates on specific issues, then everyone who is entitled to vote must be able to do so. However, the last published research on the completeness of the UK's electoral registers estimated that around 3.5 million (8-9 per cent) of eligible electors were absent from the registers following the annual canvass in Autumn 2000.<sup>1</sup> In addition, given that around 10 per cent of the adult population change address each year, a further 3-4 million electors are likely to become disenfranchised during the period in which the registers are in force. Depending on the timing of a referendum, it is therefore likely that anywhere between 8 and 18 per cent of the eligible voters will be unable to participate, with these proportions being significantly higher in metropolitan area. It is also clear that non-registration rates are significantly higher among young people and some ethnic minority groups.

18. Clearly, these concerns about the electoral registers apply with equal force to elections. However, given existing patterns of under-registration, it is important to underline the risk that referenda will serve to widen existing

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<sup>1</sup> Electoral Commission (2005) *Understanding electoral registration: the extent and nature of non-registration in Britain*, London: Electoral Commission

political, economic and social inequalities. Given that the motivations for their use would be to promote political participation and enhance the popular legitimacy of decisions, this would clearly be a paradoxical outcome. It is therefore Democratic Audit's view that every effort should be made to ensure that the electoral registers are as complete as possible before any consideration is given to extending the function of the franchise to include forms of direct democracy such as referenda. The significance of this point is underlined by the recent passage of legislation making provisions for the phased introduction of individual voter registration in Great Britain over the next five years – the most significant reform of voter registration procedures for over 100 years.

19. The issue of the completeness of the electoral register is particularly significant where threshold requirements based on the size of the electorate are imposed, as they were in the referenda on Scottish and Welsh devolution in the 1970s. In both cases, it was stipulated that in addition to securing the support of more than half of those casting ballots, 'yes' campaigners were required to secure the support of at least 40 per cent of the electorate. As Balsom and McAllister noted at the time, such thresholds were deeply problematic in view of the state of the electoral registers since the 'requirement gives a political significance to the electoral registration system for which it was not designed and is quite inappropriate'.<sup>2</sup>

## **Conclusion**

20. The appeal of referenda as an instrument that will encourage a more participatory politics in the UK is understandable. However, they must not be seen as a magic bullet. More wide-ranging work would first be necessary to reform the defects in our constitutional arrangements, to ensure the electoral registers are fit for the purpose and to take wider steps to fashion a more deliberative and participatory democracy. Moreover, without a written constitution the use of referenda would risk becoming purely *ad hoc*, exposing further contradictions in the UK's existing constitutional arrangements. The immediate appeal of referenda as a form of direct democracy cannot be a substitute for some hard thinking about what role people's direct input could or should play in government, and through which mechanisms.

21. Given the basic defects of the UK constitution, it is not currently a worthwhile exercise to try to define when and how referenda should be used, and we should not allow contingent problems about particular uses of the referendum to obscure the fundamental point about their necessity in the

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<sup>2</sup> Denis Balsom and Ian McAllister (1980) 'Whose vote counts? Electoral registration and the "40 per cent" rule', *Parliamentary Affairs*.

context of a written constitution which recognises the ultimate sovereignty of the people.

22. In the absence of a written constitution, however, we should give serious consideration to any reforms which would strengthen and deepen democracy in the UK. Given our majoritarian electoral system, the risk that such reforms may be motivated by the partisan objectives of governing parties suggests that major constitutional changes, such as reforms to the electoral system, should be subject to referenda. However, we would strongly advise against the Committee supporting the use of referenda in relation to non-constitutional issues. At this time, the focus of reform needs to be on strengthening Parliament against the executive, rather than encouraging popular sounding initiatives which will only undermine its diminished authority still further.

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