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UK Constitutional Law Association

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Stephen Tierney: Britain wakes up to the referendum



The referendum has crept up on the British constitution. As late as 1997 it appeared to be a fairly exotic device used only for highly exceptional constitutional situations which also threatened a political split in the party of government. But following the referendum in Wales in March of this year, last week's AV poll and the likelihood of a referendum on Scottish independence in the next five years we need to address the referendum as a fixed feature of our system, recognising that direct democracy looks likely to proliferate in a number of directions in the coming decade.

When a national referendum was first used on continued membership of the EC in 1975 it was taken by many to be a one-off initiative. This was a unique constitutional situation and one which did not align clearly along ideological lines. The referendum was deployed to head-off a damaging split in the Labour Party. James Callaghan's famous reference to the rubber life-raft which the party had to climb into was equally apt in respect of the failed attempts to bring about devolution for Scotland and Wales in the late '70s; again Labour was split on the issue and the referendum served to defuse this problem by handing decision-making power directly to 'the people'.

This process, however, proved to be a watershed by creating a precedent of sorts and since then we have seen the referendum become a fixture in the territorial reorganisation of these islands. Referendums were used of course to found the Parliament in Scotland, Assemblies in Northern Ireland and Wales and the Greater London Authority two decades later. This established a pattern, and the referendum has also been applied relation to the fairly anodyne regional assembly proposal for the North East of England in 2004 (a postal ballot was used) and the somewhat technical extension of powers to Welsh devolution proposed by the [Government of Wales Act 2006](#) s.103 and approved by the Welsh people (or at least by 64% of the 35% who turned out) two months ago.

The relationship between the referendum and devolution marks the emergence of the referendum as a more systematic feature of the constitution. Vernon Bogdanor has gone so far as to argue that there is now a convention whereby a referendum must be held for "any significant devolution of powers away from Westminster" or "when a wholly novel

constitutional arrangement is proposed". [Evidence to House of Lords Select Committee on the Constitution, ['Referendums in the United Kingdom'](#), Report with Evidence, House of Lords Select Committee on the Constitution, 12th Report of Session 2009–10, HL Paper 99, Minutes of Evidence, pages 45–46]. This may over-state matters somewhat, since the Scotland Bill currently proceeding through Parliament proposes to extend significant powers to the Scottish Parliament, including fiscal powers, without a referendum. Nonetheless, it is an important point that the use of the referendum for significant constitutional moments has become an established and seemingly growing practice, and the possibility of emerging conventions should not be overlooked.

And we can point to a number of other areas where the referendum will continue to be important. With AV now seemingly dead, it does nonetheless now seem that in political terms no significant change to the UK voting system could be effected by Parliament without the endorsement of the people in a direct vote. One wonders if we might say the same thing about other significant changes such as House of Lords reform. This is questionable since the [House of Lords Act 1999](#) was passed without a referendum, but at the same time the ground towards a greater direct say by citizens in constitutional matters seems to be shifting all the time. The House of Lords Select Committee report cited above was generally sceptical about the wisdom of using referendums but still concluded: 'they are most appropriately used in relation to fundamental constitutional issues' (para 228); this certainly seems to be the way the wind is blowing.

The [EU Bill](#) currently before Parliament will provide by law that a treaty amending or replacing the current EU treaties may not be ratified without a referendum. Another territorial matter which is often over-looked is the [Northern Ireland Act 1998](#) section 1 which provides that any move to reunify the island of Ireland would require 'the consent of a majority of the people of Northern Ireland voting in a poll'. And with the outcome of the Scottish parliamentary election the SNP government with an overall majority seems certain to re-launch the initiative towards independence which stalled in 2010. There is much to be said about the legal implications of such a move and there will be other occasions on which to explore the particular issues emerging from this specific case, but for now it can be seen as part of a broader trend towards direct democracy across the UK. As we reflect on last week's elections one thing is very clear; the referendum is here to stay and its implications for the UK constitution, while potentially great, remain to be properly worked through.

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