



Proposals for a referendum on the new European Constitution

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Author: Oonagh Gay

Parliament and Constitution Centre

This note examines the practical implications of the decision of the Prime Minister, Tony Blair to hold a referendum on the new EU constitution, if agreed at the European summit. UK wide referendums need primary legislation to set the terms of the question being asked, but the *Political Parties, Elections and Referendums Act 2000* regulates the conduct of referendums, setting limits on expenditure. This Note should be read in conjunction with Library Standard Note on 3040 *IGC 2004: Issues surrounding UK ratification of the European Constitution*, which covers much of the background to the decision to hold a referendum. John Maples has introduced the *Constitution for the European Union (Referendum) Bill* but this is not expected to make progress.¹

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¹ Bill 22 of 2003-4. Its second reading debate was adjourned on 23 April 2004

A. Introduction

In the UK treaties are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown (the so-called ‘Royal Prerogative’). Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it. Starting in the 1920s, and continuously since the 1930s, there has been a constitutional practice (not a law) known as the ‘Ponsonby Rule’, which requires that treaties subject to ratification should be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament an opportunity (not always taken) to debate them.²

When the UK joined the European Community in 1973, accession was preceded by the passing of an Act of Parliament which made the obligations under the Treaty and the law deriving from it applicable within the UK. This was the *European Communities Act 1972* (ECA).³ A referendum was held in 1975 following renegotiation of the UK’s terms of entry, but was not linked to legislation to implement a new treaty. Primary legislation, in the form of the *Referendum Act 1975* set out the question and the franchise (see below).

Following press speculation, Tony Blair announced the referendum on 20 April 2004:

It is right to confront this campaign head on. Provided that the treaty embodies the essential British positions, we shall agree to it as a Government. Once agreed—either at the June Council, which is our preference, or subsequently—Parliament should debate it in detail and decide upon it. Then, let the people have the final say. The electorate

"should be asked for their opinion when all our questions have been answered, when all the details are known, when the legislation has been finally tempered and scrutinised in the House, and when Parliament has debated and decided."—[*Official Report*, 21 May 1997; Vol. 294, c. 735.]

If Conservative Members object to that, it is a quote from the right hon. and learned Gentleman the Leader of the Opposition, speaking about referendums in 1997.⁴

B. Referendums

Referendums have become a relatively frequent constitutional device. Since 1973 the following referendums have been held in the UK, but only one, in 1975, has been nation-wide.

- Northern Ireland Border Poll 8 March 1973
- Terms of continuing UK membership of the EEC 5 June 1975
- Devolution for Scotland 1 March 1979

² For detailed information on treaty ratification in the UK and the Ponsonby Rule, see the FCO website at <http://www.fco.gov.uk/Files/kfile/ponsonbyrule,0.pdf>

³ Chapter 68

⁴ HC Deb 20 April 2004 c157

- Devolution for Wales 1 March 1979
- Establishment of the Scottish Parliament 11 September 1997
- Establishment of the National Assembly for Wales 18 September 1007
- Belfast (Good Friday) Agreement 22 May 1998
- Establishment of the Greater London Authority 7 May 1998

In addition, the *Local Government Act 2000* provides for the holding of referendums to enable electors of individual local authorities to express their preferences for the type of executive arrangements within their council. The *Regional Assemblies (Preparations) Act 2003* also allows for the holding of referendums about the establishment of elected assemblies for the English regions. None have yet been held under this Act.

The *Political Parties, Elections and Referendums Act (PPERA) 2000* sets out a scheme to regulate expenditure by political parties and campaigning groups in both elections and referendums, following recommendations from the (Neill) Committee on Standards in Public Life.⁵ Each referendum held subsequently still requires primary legislation to set the terms of the question and the franchise to be used, amongst other provisions. The legislation is administered by the independent Electoral Commission.

PPERA established maximum expenditure limits for regional and national referendums - which was contrary to the recommendations of the Neill Committee. Its report argued that controls would be impractical and might be considered an unwarranted restriction on freedom of speech.⁶ Full details are contained in Library Standard Note no 741 *Referendum: the New Rules*.⁷

Briefly, expenditure limits apply during the ‘referendum period’ – a time period set out in the legislation authorising a particular referendum. PPERA set maximum limits on expenditure (as defined in Schedule 13 of the Act). Groups (including political parties, campaign groups and other bodies) must register with the Electoral Commission if they plan to spend more than £10,000 during the referendum period. For permitted participants, the maximum expenditure is 0.5m, for political parties, the limit is related to share of the vote at the last general election, ranging up to £5m. At present, both Labour and Conservatives would qualify to spend £5million, with the Liberal Democrats allotted a maximum of £3 million. Permitted participants must submit returns of expenditure to the Electoral Commission, within 6 months of the poll. The Electoral Commission has expressed concern about the difficulty of regulating expenditure during the short campaign period, when accounts will not be submitted until after the poll.⁸

⁵ *The Funding of Political Parties in the United Kingdom* Cm 4057

⁶ Cm 4057 12.46-12.47

⁷ See <http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-00741.pdf>.

⁸ HC 187-II, Q1327

In evidence to the Transport, Local Government and the Regions Select Committee, the Electoral Commission Chairman, Sam Younger, noted that the legislation:

Did not guarantee that there is an equality of spending in any shape or form. You have not only this limitless number of organizations which could register themselves and spend half a million, you also have a graded list in terms of the parties which can spend £5million maximum if you have more than 30 per cent of the vote downwards.⁹

1. Designated organisations

The Electoral Commission may designate organisations for each side of the outcome of the referendum. These benefit from maximum grants of £600,000 to each organisation, combined with a free referendum address to every household and referendum campaign broadcasts. Umbrella organisations have a maximum spending limit of £5 million. The Commission may decide not to designate, where it does not consider that an organisation exists which represents the body of opinion on one side. It cannot designate one side only.

A registered party, as a permitted participant under sections 105 and 106, would need to indicate the policy it intended to adopt. S106(7) defines ‘outcome’ as ‘a particular outcome in relation to any question asked in the referendum. The declaration must be signed by the ‘responsible officers of the party’, defined in s64(7) as the ‘registered leader’, the ‘registered nominating officer’ and any other registered officer. Under s106, it is necessary to make the declaration in order to become a permitted participant. Campaigners who are not registered as participants cannot spend over £10,000 in a referendum (campaign) period. This presents some difficulties for parties which do not have an agreed line on a referendum issue. Given that Ministers were allowed to campaign on both sides at the last nationwide referendum in 1975, it is quite possible that major parties could be split on a referendum question.¹⁰

2. Referendum period

The draft bill does not give any indication of the likely length of the referendum period. But under PPERA the relevant period for any particular referendum will normally begin on the day the bill providing for the referendum is introduced in Parliament, and end with the date of the poll.¹¹ There is a limit of six months in which, as would usually be the case, the referendum was provided for in a bill.¹² Generally the minimum referendum period for any particular referendum would be ten weeks. This is because participants can apply to be a designated campaign organisation, so that they can qualify for certain assistance (see below). They normally have four weeks to apply, and then after that the Commission must come to a

⁹ HC 1077-1 Session 2001-2, Q85

¹⁰ See Library Research Paper 96/55 *The Collective Responsibility of Ministers: An Outline of the Issues*

¹¹ Explanatory Notes, *Political Parties, Elections and Referendums Act 2000*, paragraph 198

¹² Section 102(4)

decision, usually within two weeks.¹³ Section 103 of PPERA requires that the date of the poll must be no earlier than four weeks after the end of that two-week period.

3. Controls on donations

PPERA also introduced controls on donations made to permitted participants. Political parties were made subject to separate controls for electoral purposes, but other participants must register donations over £5000 with the Commission, and refuse donations over £200 if they are from donors not on the UK electoral register, from blind trusts or from unknown sources. However, during the passage of PPERA, the Opposition expressed concern that non UK citizens might still be able to influence referendums by taking out advertisements in UK newspapers or using direct mail.¹⁴ The draft bill contains no relevant provisions in this area.

4. The wording of the question

The 1996 report of the independent Commission on the Conduct of Referendums, set up by the Constitution Unit and the Electoral Reform Society contained the following analysis.¹⁵

9 Wording of the Question

The wording of the question should be short and simple and should not be open to either legal or political challenge after the result is known. Its significance should be fully understood and it should therefore emerge from a thorough process of Parliamentary and public consultation and media discussion. The exact character of the consultation will depend on the substance of the issue; but the final decision on the wording can best emerge in the context of Parliamentary debate on the legislation which includes the text of the ballot paper.

10 Multi-Option Referendums

The choice of a multi-option referendum or a 'Yes' and 'No' referendum will depend on the nature of the issue (or issues) to be put to the electorate; it will be considered by the Government and by Parliament as part of their consideration of the wording of the question. If the electorate is being asked to endorse legislation approved by Parliament, a 'Yes' and 'No' referendum is appropriate. If a multi option referendum is used, it is important that a clear outcome is achieved. Voters could be given the opportunity to record votes in favour of their second or third choice; furthermore, or alternatively, a second confirmatory ballot could be used. Multi-option referendums can be confusing for voters. clear instruction on the ballot paper will be essential.

PPERA requires the Electoral Commission to consider the wording of the referendum question and publish a statement of any views it has about the question's intelligibility.¹⁶ This must be done as soon as practicable after the bill is introduced. The Electoral Commission is not required to consider the wording until the bill is introduced into

¹³ Section 109

¹⁴ HL Deb 21 November 2000 c804

¹⁵ Report of the Commission on the Conduct of Referendums - summary November 1996

¹⁶ Section 104

Parliament. In practice there are likely to be contacts at official level before the publication of any legislation. In evidence to the Treasury Select Committee, the Commission Chairman noted that the Commission's opinion can be disregarded.¹⁷

The Commission have already had to produce an opinion on the referendum question in the *Regional Assemblies (Preparations) Act 2002*, which produced amendments to the question as initially drafted.¹⁸ At present the bill does not include a multi-option question. However, the Commission produced its *Question Assessment Guidelines* in November 2002, as an indication of the principles to be used in assessing intelligibility. These guidelines are at http://www.electoralcommission.org.uk/files/dms/QuestionAssesmentGuidelines_7509-6664_E_N_S_W_.pdf

It is normal practice for the referendum bill to contain the question to be asked. For example, clause of the draft Euro referendum bill published in December 2003 sets out the question.¹⁹ Although there is likely to be informal contact with the Electoral Commission about the wording of the question, the Commission is not obliged to comment on the question until the wording is finalised by the Government.

5. The franchise

The electorate to be used is usually a simple choice between the local and parliamentary franchise. The local electorate includes other EU nationals resident in the UK and peers who sit in the House of Lords, but not British citizens who have registered as overseas voters. The parliamentary franchise includes these overseas voters but not EU citizens or members of the House of Lords. In the case of the 1975 EC referendum, the electorate was the parliamentary franchise, with the addition of peers and special arrangements for the armed forces electorate.²⁰ Since 1997, the local electorate has been used for referendums in Scotland, Wales and London, and the parliamentary for the Northern Ireland referendum. There was press speculation that the franchise for any referendum on the single currency would include EU citizens resident in the UK, but the draft single European currency referendum bill makes clear that these will be excluded, since the franchise will be based on the parliamentary one, with the addition of peers.²¹ Based on the current draft single European currency bill, the franchise would be:

- Anyone aged 18 or over (an elector can register once they are 16 but cannot vote until their 18th birthday)
- British or Commonwealth citizens who are resident in the UK
- Citizens of the Irish Republic who are resident in the UK

¹⁷ HC 187-II 2002-3, Q1310

¹⁸ HC 187_II 2002-3, Q1308

¹⁹ Cm 6851 December 2003, available from <http://www.dca.gov.uk/elections/euro/secbill-draft.pdf>

²⁰ *Referendums Act 1975*, s1(3),(5)

²¹ *Financial Times* 4 August 2003 'EU citizens may vote on pound'

- In Northern Ireland, electors must have been resident in Northern Ireland during the whole of the three-month period prior to the relevant date of 15 October
- British nationals living overseas are entitled to vote for up to 15 years after moving abroad. An overseas voter should register in the constituency covering the address for where they were last registered within the UK. (someone who has never been registered as an elector in the UK is not be eligible to register as an overseas voter unless they left the UK before they were 18, providing that they left the country no more than 15 years ago)
- Service/Crown personnel serving overseas in the armed forces or with Her Majesty's Government
- Residents of mental hospitals, homeless people and remand prisoners can register Using a declaration of local connection
- Hereditary peers who do not have a seat in the House of Lords

The Government have indicated that the franchise will be set out in the bill.²²

6. The regulation of campaigns

PPERA places restrictions on promotional material published during the 28 days (known as the “relevant period”) before a referendum by the Government, local authority or other publicly funded body, apart from the Electoral Commission.²³ This has caused some difficulties, according to the Commission. It’s Chairman, Sam Younger noted:

1342 (John McFall). I note that section 125 of the 2000 Act prohibits public bodies publishing information on the referendum up to 28 days prior to the referendum. In the light of the points I have been making to you earlier, is there a way that a neutral document could be produced and given to each household or do you think that would be unlawful?

(*Mr Younger*) I think it is possible. There are problems in law about the way the legislation is at the moment, but it is worth noting—and this goes back to our discussions with Government over the Regional Assemblies (Preparations) Bill, that one of the things that came out of a review that we did on the mayoral referendums a couple of years ago was that because of the 28 day restriction on anything coming out of a local council, if there were not a campaign on either side of the issue and if the local press were not particularly interested in it, you got to referendum day without the public being aware of what the issues were.²⁴

On the other hand, the Referendum Commission in Ireland experienced considerable difficulties in publishing neutral material on the Nice Treaty in 2001,²⁵ and as a result,

²² HC Deb 27 April 2004 c746

²³ section 125

²⁴ HC 187-II, Session 2002-3, Q1342

²⁵ Karin Gilland *Ireland and the No to Nice: Once is Unfortunate* at <http://www.iri-europe.org/reports/York-KarinGilland.ppt>.

legislation removed from this Commission the obligation to provide literature to explain both sides of the question.²⁶

The Treasury Select Committee called for the Electoral Commission to be given statutory authority to promote participation in referendums, noting the precedent for this in the *Regional Assemblies (Preparations) Act 2003*. It also recommended a power for the Commission to provide ‘objective information’, while acknowledging the difficulties of preparing such information.²⁷ Clause 6 of the draft single European currency bill gives the Commission specific authority to promote voter turnout. Clause 7 allows the Commission to provide information aimed at promoting awareness about the pro and anti arguments only where there are no designated umbrella organizations. The wording of both clauses is closely modeled on sections 8 and 9 of the *Regional Assemblies (Preparations) Act 2003*.

There are no specific statutory restrictions on government publicity before the 28 day period. However, specific guidance has been issued for civil servants on their role and conduct. In the referendums on regional assemblies in autumn 2004²⁸

PPERA provided that any material to do with the referendum, which is published in a referendum period, must carry the name and address of the printer together with the name of any person or body on whose behalf it is published.²⁹ This was intended to help the Electoral Commission identify who is behind publications, and therefore who has incurred referendum expenses.

Only designated organisations can have referendum campaign broadcasts.³⁰ This is to ensure that, in any referendum, each side of the campaign will have equal access to free airtime for campaign.³¹

7. The administration of the referendum

PPERA provides that the Chief Counting Officer for the referendum is the chairman of the Commission, who may delegate responsibility to counting officers for each relevant area. The Commission have pressed for legislation to clarify delegation powers.³²

There have been different arrangements for counting in referendums in the UK so far. For the Northern Ireland Border Poll in 1973 results were available only on a province wide basis

²⁶ See S3 of the *Referendum Act 2001*, which now requires the Commission to produce explanatory material only

²⁷ HC 187 2002-3, para 117

²⁸ *Referendums on establishing elected regional assemblies: Guidance for civil servants on their role and conduct* 16 March 2004

²⁹ section 126

³⁰ section 127

³¹ Explanatory Notes, paragraph 223

³² HC 1077-I 2001-2

(despite interest in discovering the breakdown by county). For the 1975 EEC referendum the Government decided to use a central count. The Liberals sought to allow for a constituency count, but their amendment was defeated.³³ However a back-bench Labour amendment, drafted with government encouragement according to Butler & Kitinger³⁴, was moved by Roderick MacFarquhar to provide for a county/regional count (other than in Northern Ireland, which would be treated as a single unit).³⁵ This amendment was carried by 270-153, despite the opposition of Ted Short, the government minister in charge of the bill.³⁶ Attempts to introduce a count by constituency in the Lords were however, unsuccessful.³⁷ For the 1979 and 1997 devolution referendums, results were available by local government areas.

Generic regulations under PPERA govern the administration of the referendum. The question of combining referendums with elections has been controversial internationally on occasion. In New Zealand the question of changing the electoral system was combined with a general election in 1993. The combination increased turnout for the referendum considerably to a figure of 82.6 per cent. A consultative referendum held on electoral systems in 1992 had produced a turnout of 55 per cent in 1992.³⁸ In evidence to the Transport, Local Government and the Regions Select Committee, the Electoral Commission Chairman, Sam Younger, has drawn attention to the 'danger of an election on a party basis cross cutting with a major issue of principle which is not on a party basis'.³⁹ Clause 4 of the single European currency bill enables the referendum to be held together with other polls by allowing for an order for the combination of polls.⁴⁰ This draft bill does not state whether the count will be broken down on a local authority or constituency basis, which is likely to be set out in subordinate legislation. Similar arrangements can be expected for the legislation on a referendum on the European constitution.

8. All postal ballot?

The three referendums due to be held in the north-east, north-west, and Yorkshire and the Humber in autumn 2004 on regional assemblies will use all postal ballots. The details of the process will be closely modeled on the ballots taking place in pilot areas in the local and European elections on 10 June. All-postal ballots are perceived as an effective method of boosting turnout, and so might be considered valuable in a nationwide referendum. The Electoral Commission has expressed its belief that individual registration of electors should be in place to ensure the effectiveness of security measures in all-postal voting.⁴¹ The ODPM

³³ HC Deb vol 890 cc1491, 1492, 23.4.75

³⁴ *The 1975 Referendum* David Butler and Uwe Kitinger 1996 p63

³⁵ s2(3)-(7) of the *Referendum Act 1975*

³⁶ HC Deb 23 April 1975

³⁷ , HL Deb 5 May 1975 cc144-154

³⁸ For further details, see Library Research Paper 98/112 *Voting Systems: The Jenkins Report*.p13-14

³⁹ HC 1077-1 Session 2001-2, Q44

⁴⁰ Cm 6081 December 2003 <http://www.dca.gov.uk/elections/euro/secbill-draft.pdf>

⁴¹ See in particular the Commission report *The Electoral Registration Process* May 2003

Select Committee has also recommended a move to individual registration.⁴²No nationwide election or referendum has yet been held by all-postal ballot.

The use of all postal ballots may affect the working of the 28 day relevant period in practice. PPERA was not designed with postal ballots in mind, as it assumes one polling day. However it is likely that postal votes will be posted over a number of days up to a final cut-off point. This makes campaigning strategies difficult for organisations and parties. It has also affected the requirement for the Government to cease providing information for the 28 day period before the poll. For the regional referendums, the Government have undertaken to stop their information campaign 28 days before the first postal ballot paper is despatched.⁴³

9. Thresholds

The practice of setting a threshold in a referendum incorporates the idea that major constitutional change is something more important than the result of ordinary elections, and therefore should be the result of something more than a simple plurality of the votes. Thresholds were set for the referendums held in 1979 on devolution in Scotland and Wales, following backbench amendments to the legislation. None have been set since then, and there has been no suggestion that one will be set for the EU constitution referendum. A private member's bill introduced by Gordon Prentice and designed to introduce thresholds, is not expected to make progress, the second reading having being adjourned on 27 February 2004.⁴⁴

C. The form of the referendum legislation

Primary legislation is required for a referendum to be held. It is common for this to be a stand-alone bill. However, it would appear possible to combine the relevant provisions in a bill to give legal effect to those parts of the treaty that need to have the force of law in UK courts. Any decision as to the form is likely to be based on practical considerations of parliamentary management, rather than constitutional principle. Library Standard Note no 3040 *IGC 2004:issues surrounding UK ratification of the European Constitution* looks in more detail at the possible timing of the referendum.

1. Pre-legislative referendum?

Referendums can be classified as pre or post-legislative. Pre-legislative referendums are held before the relevant bill is introduced into Parliament. This is what happened with the devolution referendums in 1997. A short bill was introduced giving the Government power to hold a referendum on devolution in Scotland and Wales and then the *Scotland Bill* and the *Government of Wales Bill* were introduced following yes votes in the referendums in

⁴² *Postal Voting* HC 400 Session 2003-4

⁴³ HC Deb 15 March 2004 c61w

⁴⁴ Bill 10 of 2003-4

September 1997. White papers were issued allowing voters access to the likely legislative provisions.

Alternatively, referendums can be held after the relevant legislation has been passed. This is what happened with the devolution referendums in 1978, where there were provisions in the *Scotland Act* and the *Wales Act* disapplying the legislation if there were not sufficient support in referendums in Scotland and Wales.⁴⁵ The indications are that the referendum will be held after the legislation on the EU constitution has completed its passage through Parliament. It is possible that this legislation will include a part allowing a referendum to be held. The Conservative John Maples set out some scenarios when introducing his private member's bill on 23 April:

If the treaty is adopted in June, the Government can set about this in two ways. They can combine ratification and the referendum in one Bill. They can set out the treaty in the Bill and then say that it will not be ratified unless and until there has been a referendum, and that Bill could go through the House. Alternatively, they could separate the matters into two Bills, and it would be possible to pass the referendum Bill and seek the referendum before even introducing the ratification Bill. The simplest way is probably to make the referendum a pre-condition for ratification and to have them in the same Bill, but the point that I was seeking to make is that the constitution itself, when it comes before the House, will not be amendable by us. We either have to accept it or reject it in total. Therefore, the legislation will be fairly simple, and it could go through Parliament fairly quickly.

My Bill calls for the referendum to be held within six months of the treaty being adopted, and I understand that that technically means the point at which it is agreed at the intergovernmental conference. There will then be a delay during which the full text is made available for signature, which usually happens a few weeks later, and then ratification. I want the six months to run from when our Government and every other Government agree the constitution and adopt it at an intergovernmental conference. It looks as though that will happen between 18 and 20 June. It could run longer, but I do not think that there is any need to delay past that. There is a serious issue, for reasons that I will come to, and if the British public are to be invited to settle the matter, they should be invited to do so fairly soon.

The only matter of substance in my Bill to which the Government might object is the call for that referendum to be within six months. Who would want to delay the referendum beyond six months? Not even the most Eurosceptic Conservative Member would want to delay the referendum, because that is what we have been asking for. We are willing to abide by the decision of the British public, so we will not try to delay it. The House of Lords will not try to delay it. One of the reasons why the Government have changed their policy is that they feared that the House of Lords would introduce into the Bill a provision for a referendum.⁴⁶

⁴⁵ See s85(2) of the *Scotland Act 1978*

⁴⁶ Constitution for the European Union (Referendum) Bill HC Deb 23 April 2004 c567

However in theory it would be possible to hold the referendum first, to judge whether there is sufficient support for the legislation to be introduced. This would make the timing difficult for the Government, because the statutory regulation of referendums inhibits speedy implementation of a poll. The matter of timing has been raised on a number of occasions. The Conservatives have emphasised their desire to see a referendum held as soon as possible. See for example, the Leader of the Opposition, Michael Howard, when responding to the announcement of a referendum by the Prime Minister:

The Government will have our full support for the speedy passage of the legislation necessary to hold a referendum, but there is no case whatever for asking Parliament to spend months on ratification legislation before obtaining the consent of the British people. *[Interruption.]* After all, it was this Prime Minister who held referendums for the Scottish Parliament and the Welsh Assembly before this Parliament had passed the necessary legislation. He did it, and while at that time many of the details remained unclear, on this constitution all the details will be clear. That is the difference: we shall know what they are. How can the Prime Minister say, "Trust the people—but not just yet"?⁴⁷

⁴⁷ HC Deb 20 April 2004 c159