

UCL POLICY BRIEFING - OCTOBER 2014

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KEY FINDINGS

- The European Union Act (EUA) risks taking away the UK's power to negotiate in Brussels without increasing either accountability or legal certainty.
- In the event of referenda being triggered, it is likely that the EU would try to find ways to enact changes swiftly with or without UK support.
- The EUA ignores several features of EU law.
- The increasing provision for use of referenda, in circumstances which may not always be appropriate, risks undermining the effectiveness of referenda.

Your Power to Veto EU Changes?

Implications of the referendum provisions of the European Union Act 2011

SUMMARY

The brief discusses the changes brought about by the EU Act 2011, in relation to Britain's position in and attitude towards, the European Union. It considers the **referendum provisions of the EUA; referenda and UK constitutional law; and the role of referenda in democratic deliberation**. It highlights in particular:

- the **legal paradoxes** created by the Act's 'referendum locks';
- the complexity of EU law, meaning **referenda may not always be an appropriate response**;
- the potential **impediments to EU decision-making**;
- the **lack of constitutional basis** for the Act's increased use of the referendum mechanism.

Introduction

The European Union Act 2011 (EUA) was enacted by the Coalition, which had pledged to ensure, as part of its Programme for Government, that there would be "no further transfer of sovereignty or powers" to the EU and that "any proposed treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a 'referendum lock'." The Act received the Royal Assent on 19 July 2011 and all of its provisions duly entered into force over the following month. The EUA is an important legal development, as it introduces a number of safeguards before changes to the EU Treaties can take effect in the UK. Crucially, these safeguards include a commitment to hold a referendum for a series of substantive changes.

Key issues

This briefing discusses three key issues:

- the referenda provisions of the Act;
- the role of referenda in light of the UK Constitution and current political realities;
- the nature of constitutional referenda and their wider role as a mechanism of political deliberation.

The referendum provisions of the EUA

The Act has three headline provisions requiring a referendum, in sections 2, 3 and 6:

- **Section 2** deals with amendments to the EU Treaties effected pursuant to the ordinary revision procedure, under Article 48 (2) – (5) TEU. It thus covers any treaty that amends or replaces the existing EU Treaties. Such amendments require statutory ratification as well as a referendum.
- **Section 3** deals with changes under the simplified revision procedure (Article 48 (6) TEU). The conditions for ratification are the same as those under section 2, with an added ‘significance’ condition. This means that only those changes that are deemed to have a significant impact on Britain’s position in the EU will require a referendum under this provision.
- **Section 6** sets out a number of Treaty provisions which, if used, will automatically attract the conditions for ratification described above, namely an Act of Parliament and a referendum.

There are also several exceptions to sections 2 and 3 in **section 4** of the Act, including important exclusions from the referendum condition regarding existing competences, issues that do not affect the UK and, crucially, the accession of new Member States.

Analysis

Section 3 is highly contradictory, as it is predicated on the assumption that the simplified revision procedure will in fact be used disingenuously, in order to extend EU competences. The section introduces a paradox: **the UK Prime Minister either vetoes a change, or assents but risks a referendum** if Parliament disagrees. At best, the prime minister would look foolish before UK voters; at worst, a political rift would be created between the UK and its EU counterparts.

Section 6 covers both potentially important changes (such as the UK joining the euro or the Schengen Protocol) and technical matters (such as changes to EU legislative procedures). It also covers the general ‘passerelle’ clause, designed to facilitate decision-making at the EU level by allowing for decisions to be taken by qualified majority voting, rather than by unanimity, or through the ordinary, rather than the special, legislative procedure. The ‘passerelle’ clause can cover a series of EU matters, ranging from the common agricultural policy to emissions quotas. However, the in-depth legal expertise required by many of the issues covered means that a vote may not be the most appropriate way of making decisions. Furthermore, section 6 creates another paradox: because ‘passerelle’ changes require the agreement of all Member States, **the UK would either have to veto a decision in the Council in Brussels** (being unable to assent without a referendum) and thus stall decision-making, or it would need to **hold a nationwide referendum before it was even known whether a vote would be called in the Council**.

The Act seems to have been drafted to provoke a referendum on the EU without proper consideration of its legal implications. The paradoxes created by the EUA’s ‘referendum locks’ are written in hard law and are thus likely to stand unless the Act is repealed.

Referenda and UK constitutional law

In the last 50 years, the use of the referendum as a means of responding to legal and political changes has grown and several referenda have been held at local (e.g. local government); regional

(e.g. the status of Northern Ireland and devolution in Scotland and Wales); and national levels (the 1975 referendum about Britain’s continued membership of the European Communities and the Alternative Vote referendum of 2011).

Analysis

Despite the growing number of referenda that have been organised in recent years, **under UK constitutional law, the referendum remains an exceptional tool**, reserved for ‘big’ constitutional questions (there have only been two nationwide referenda post-WW2). The EUA’s wide-ranging use of ‘referendum locks’ arguably challenges this state of affairs. However, it is clear from the legislative process that the EUA served internal politics rather than a wider political goal: that is, the Coalition introduced the EUA in order to appease the Eurosceptic MPs forming a big part of its political backing, without having to take a stand on the ‘in/out’ question.

Whilst a future government can always invoke the sovereignty of the current Parliament to repeal or amend the Act, its impact on UK constitutional law is significant, whilst it remains in place. It commits Westminster to holding a referendum and, in turn, **reduces its decision-making capacity in Brussels**.

The role of referenda in democratic deliberation

There are several different types of referenda, including those:

- determining the foundation of new states (for example following the fall of the USSR);
- creating and amending new constitutions (e.g. post-communist states, post-war Iraq);
- on sub-state autonomy (e.g. Spain, UK); and,
- on EU Treaty-making processes (2004 accessions, 2005 Constitutional Treaty);
- referenda on issues provided for in national constitutions (e.g. Switzerland)
- which are localised and on smaller-scale issues.

Analysis

The referendum mechanism has been used in recent years as a response to a multitude of political issues. **Questions remain over whether referenda are an appropriate response to political changes**, as well as whether they are **inherently democratic**. Criticisms include:

- the ‘elite control syndrome’ (i.e. that public opinion is in fact manipulated by elites, rather than being a truly open space);
- the ‘deliberation deficit’ (i.e. that the people at large cannot deliberate in sufficient depth, in the same way that Parliament does); and
- the ‘majoritarian danger’ (i.e. that referenda risk marginalising vulnerable minorities by simply sanctioning a dominant view).

On the other hand, there seems to be an intuitive sense that referenda evoke direct democracy in its clearest modern form.

How democratic a referendum is depends on:

- perception of how democracies should work (which varies

according to political outlook);

- particular groups' position in society;
- the issues it seeks to address and whether majorities should be able to determine government policy on these issues.

On the whole, **referenda are well suited to questions of wide-ranging political importance and coverage** and less so to issues requiring broad technical knowledge (such as changes to 'passerelle' clauses). They can be **extremely problematic when used to address divisive issues**, such as ethnicity or the rights and status of minorities, especially in non-homogenous societies.

Additionally, there are a number of organisational concerns in ensuring that a referendum is held in a transparent, fair and effective way, including:

- independent oversight;
- the framing of the relevant issues: posing a clear and easily intelligible question requiring a yes/no answer;
- regulating funding and expenditure;
- monitoring potential problems, such as propaganda.

The EUA entails risks in this regard, by calling a vote on issues with little public coverage, leaving a short-time frame to hold a referendum (so that the legislative process in the EU could resume) and, finally, by draining resources through the potential repeated use of the referendum mechanism.

Further discussion

Discussion in the seminar raised a number of other issues:

- **whether the UK Supreme Court would have the power to intervene to invalidate the Act:** as the EUA was passed by both Houses of Parliament and received Royal Assent, any arguments regarding procedural invalidity are weak. The only clear way to undo the effects of the Act would be for Parliament to amend or repeal it.
- **whether Parliament is still free to repeal certain kinds of statute and whether the EUA is regarded amenable to repeal:** because the EUA is recent, controversial, and may not even produce a referendum prior to being brought before the courts, it would be difficult to argue that it has achieved the status of 'constitutional statute'. It should therefore be considered ordinarily amenable to repeal.
- **whether the Act leaves any margin of discretion to the government:** the outcome of a potential referendum would be binding as the Act leaves little to no discretion to Westminster, meaning that any vote, by any number of people in the UK, will have a binding effect.
- **the risks relating to the representativeness of a potential referendum under the EUA:**
 - o it may be difficult to attract a significant number of voters from across all political affiliations, particularly on matters perceived as relatively unimportant in UK public discourse (such as formal changes to EU law).

BACKGROUND

In the academic year 2013-14, the UCL Faculty of Laws, the UCL European Institute, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe jointly hosted a project on 'Britain & Europe'. Through a series of public debates with experts from academia, the judiciary and policy-makers, and an accompanying resource collection, it sought to shed light on the contentious relationship between the United Kingdom on the one hand, and the European Union and the Council of Europe on the other. The project addressed key issues currently affecting this relationship, with a special focus on their legal dimension.

The opening seminar for the Series was held on 8 October 2013 and concerned one of the most important legal developments in the relations between Britain and the European Union in recent years: the European Union Act 2011 and, more specifically, the implications of its referendum provisions. The seminar, which was chaired by Dr Jeff King (UCL), consisted of presentations by Professors Paul Craig (Oxford), Robert Hazell (UCL) and Stephen Tierney (Edinburgh). This policy brief is based on their contributions as well as background research.

- o voting may attract citizens who feel very strongly about the EU, rather than a representative sample of British voters.
- o voting on a particular issue under the Act would be hard to distinguish from general feelings about EU membership.

Conclusions

- One of the merits of the UK Constitution to date has been its **flexibility**, yet the EUA seems to take away much of the PM's power to negotiate in Brussels without increasing either accountability or legal certainty back home. This is likely to create severe political tensions both in the UK and in Europe.
- It is unlikely that the remaining 27 EU Member States will wait for the UK to accept each Treaty amendment by referendum every time the need arises; rather, the EU would try to find ways to enact changes swiftly **with or without UK support**.
- The EUA ignores several features of EU law, such as the requirement that ministers should have the power to commit their home Parliament in order to be able to vote in the Council, making its application particularly problematic. There is thus a **risk of open conflict between EU and UK law**, which could affect the relations between Britain and the EU fundamentally.

