

THE USE AND DESIGN OF REFERENDUMS AN INTERNATIONAL IDEA WORKING PAPER *

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Nota del Consejo Editorial

Abstract: Introduces an International IDEA working paper on referendum and direct democracy as result of an investigation carried out in Europe and Latin America. It analyzes matters such as the use of direct democracy and its impact in representative democracy, as well as the adoption of the referendum mechanism, referenda types, matters of situations where a referendum can take place, participation thresholds, financial controls, the writing of the question to be consulted, etc..

Key words: Direct democracy / Referendum / Popular consultation / Plebiscite / Latin America / Democracy.

Resumen: Presenta un ensayo práctico de IDEA Internacional sobre el referéndum y la democracia directa producto de un trabajo investigativo realizado en Europa y América Latina. Analiza temas como el uso de institutos de democracia directa y su impacto en la democracia representativa, la adopción del mecanismo del referéndum, los tipos de referéndum, los temas o situaciones en que un referéndum puede ser celebrado, los umbrales de participación, los controles financieros, la redacción de la pregunta a consultar, etc.

Palabras claves: Democracia directa / Referéndum / Consulta popular / América Latina / Democracia.

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Part I: Introduction to direct democracy

International IDEA's work on referendums and direct democracy

In February 2004, International IDEA launched a project focusing on the use of direct democracy in a global context. The project is focusing on the three main direct democracy mechanisms:

- Referendums;
 - o Allowing the electorate a direct vote on a specific political, constitutional or legislative issue.
- Citizen initiatives;
 - o Allowing the electorate to vote on a constitutional or legislative measure proposed by the people if the proponents of the measure gather enough signatures in support of it.
- Recall;
 - o Allowing the electorate a recall vote on whether to end the term of office of an elected official if enough signatures in support of a recall vote are collected.

IDEA's interest in direct democracy concerns whether, when and how the use of direct democracy mechanisms is appropriate to enhance democratic systems. By involving voters directly in decision making processes, does the use of direct democracy increase voter participation? Does allowing voters the opportunity to initiate their own laws and to vote on others increase their satisfaction that political outcomes more accurately reflect their preferences? Does direct democracy reduce dissatisfaction with elected representatives, and does the existence of direct democracy mechanisms act as a discipline on the behaviour of elected officials? Criteria by which the success of direct democracy as a component of a democratic system might be judged include: levels of participation and engagement, or levels of satisfaction with the democratic system.

IDEA's project aims to produce a series of tools outlining options for the design of direct democracy institutions. In doing so, the project is pulling together comparative experience of direct democracy from Europe, Latin America and the rest of the world. Following a meeting in London in March 2004, five smaller working groups have now been established to focus on key areas of work relating to direct democracy. A global conference bringing together the work of the working groups was held in March 2006.

It is in the context of its ongoing project that IDEA has prepared this briefing paper. This paper does not aim to encourage policy makers to choose certain options rather than others, but simply to outline the different alternatives available to countries which incorporate the referendum mechanism into their political and institutional framework.

Use of direct democracy

The use of direct democracy is usually contrasted with the wider use of representative democracy. Under representative democracy, voters choose which candidates and parties they want to elect to make decisions on their behalf. Conversely, when direct democracy is used, citizens are able to decide themselves about specific issues and do not delegate the decision making process to their representatives. For example, in referendums voters rather than their elected representatives make decisions about constitutional or policy issues; when using citizen initiatives, voters can actually seek to introduce constitutional or legislative measures themselves. Finally, the recall tool provides voters with a mechanism by which they can replace their elected representatives if they are not satisfied with their performance (i.e. with the decisions that have been taken on their behalf).

Impact on representative democracy

Critics of direct democracy argue that it weakens representative democracy by undermining the role and importance of elected representatives. Since it is unlikely that any democratic system will ever be purely direct, weakening elected representatives has a negative effect on the democratic system. However, supporters of the use of referendums argue that, in the context of increasing voter apathy and disenchantment with traditional forms of democracy, direct democracy can help to re-engage voters with politics and democracy. It is also argued that direct democracy acts as a useful discipline on the behaviour of elected representatives, ensuring that they fully consider the likely views of voters when taking decisions on their behalf.

Part 2: Options when adopting the referendum mechanism

Introduction

'Referendum' is the term given to a direct vote on a specific issue, in contrast with votes cast at elections, which are made in relation to parties or individual candidates and generally reflect voters' preferences over a range of different issues. Referendums may be held in relation to particular circumstances (e.g., to amend a country's constitution) or in relation to particular political issues (e.g., whether or not to join an international organisation) but are in general held in relation to issues of major political significance.

The terms used to define referendums may differ in different countries. IDEA is currently working on a glossary of common terms used.

Arguments for and against referendums

Several arguments are advanced in support of and in opposition to referendums.

Supporters of the use of referendums argue that, in the context of increasing voter apathy and disenchantment with traditional forms of democracy, direct democracy can help to re-engage voters with politics and democracy. Another argument advanced in favour of referendums is that they can be used to resolve political problems, particularly for incumbent governments; where a governing party is divided over an issue, for example, holding a referendum can help reach a solution on the issue without splitting the party (examples of this are the 1975 UK referendum on whether the UK should remain in the EC, over which the ruling Labour government was deeply divided, and Sweden's 1980 referendum on nuclear power, where partner parties in the government coalition supported different options).

There are also a number of arguments made *against* the use of referendums. One is that it weakens representative government by undermining the role and importance of elected representatives. Another is that voters do not always have the capacity or information to make informed decisions about the issue at stake, and instead may make ill-informed decisions based on partial knowledge or on the basis of unrelated factors such as the economy or support for the government. This trend may be exacerbated in the case of referendums on complex issues such as constitutional change or international treaties, with which voters are likely to be unfamiliar.

Opponents of referendums also argue that, if the executive has the power to determine when referendums are held, they can be used as a political tool to suit the needs of the governing party rather than in the interests of democracy. They also claim that, since in many countries turnout at referendums is lower than at national elections, the argument that referendums increase the legitimacy of political decisions does not stand up. However, in Switzerland, where several referendums take place each year, the average turnout at referendums of 45% appears to mask a considerably greater willingness by the electorate to participate in direct democracy, with different people participating in the different votes that interest them.

Types of referendum

When is a referendum mandatory, and when is there an option to hold a referendum?

Mandatory referendum

A mandatory referendum is a referendum that must be held in certain circumstances, or in relation to certain issues. The outcome of a mandatory referendum is usually binding.

Mandatory referendums may be required in relation to pre-determined issues. Typically, these are issues of major national significance, for example joining a supra-national organisation (as in Switzerland). In addition, in many countries, proposed amendments to the constitution must be affirmed by a referendum. Alternatively, mandatory referendums may be required in pre-determined situations. One example is in a presidential system, where in the case of disagreement between the president and the legislature, a referendum may be required to resolve the dispute.

The requirement for mandatory referendums is usually specified in a country's constitution or other law.

Optional referendum

The second category of referendum is the optional referendum. These are referendums which do not by law have to be held, but can be initiated by the government, and in some cases by other parties. Optional referendums may or may not be binding.

A government can decide to initiate a referendum on a major political issue. It might do so because public pressure for a referendum forces it to hold one, or it might choose to hold a referendum because it is divided on the issue at hand. Optional referendums initiated by the government have been held frequently in Europe on the issue of European Union integration (although in some cases, such referendums have been mandatory because they involve an amendment to a country's constitution). These referendums may not be legally binding, although it may be politically difficult for a government to ignore the outcome.

In addition, in some countries, the legislature, or a legislative minority, may also be able to call a referendum.

A further type of optional referendum is the *abrogative referendum*. Abrogative referendums are held when citizens force a vote on a piece of new law passed by the legislature, usually by collecting a certain number of signatures in support of a vote (see the companion paper in this series on citizen initiatives). In some countries, abrogative referendums can also be used in relation to existing legislation. If the law is defeated in a vote on the issue, it may be required to be repealed or amended.

Will the referendum be binding or advisory?

In holding a referendum, it must be clear from the outset what the status of the referendum is. Are the President and government bound by the result of the referendum, or is it purely advisory? To avoid uncertainty, which can reduce the legitimacy and validity of the referendum, the answer to this question must be clearly stated within the referendum law.

It may not be in a government's interest for the referendum law to state that the outcome of a referendum is binding, since this means that it has no room for manoeuvre in the event that the outcome of the referendum is not the outcome that it supports. However, it may be difficult for a government to ignore the outcome of a referendum in practice, even if the referendum is technically only advisory. Politically, it might be very unwise for a government to be seen to go against the wishes of the majority of the electorate even if it wants to. These issues should be given full consideration when designing the referendum mechanism.

Key issues in referendum design

When will the referendum be used?

It is important that the relevant legislation makes it clear when referendums can be held and who can initiate them. In some countries, for example the United Kingdom, referendums are held only when the government chooses to initiate a referendum on a given subject. This can lead to accusations that the referendum is a political tool for the government, rather than a voice of the people.

In other countries, the circumstances in which a referendum can be held are clearly prescribed in the constitution or relevant legislation. Ireland, Switzerland, Uruguay, Taiwan and Australia are examples. Referendums may be held in relation to specifically defined subjects or situations: certain subjects and situations may also be specifically excluded from being the subject of a referendum.

Subjects and situations in which a referendum may be held

The legislation designing the framework for the referendum should specify which, if any, topics will be subject to the referendum mechanism. In Ireland and Australia, for example, constitutional change is automatically put to a referendum vote, because the constitution cannot be amended without an affirmative referendum vote. In others, issues such as international treaties or supranational organisations are legally required to be the subject of a referendum.

The subjects on which referendums are held broadly varies in different parts of the world. In most of Europe and in Australia, referendums are generally held in relation to issues of major political or constitutional significance (e.g., European integration), and referendums on more day to day policy issues are rarer. In contrast, in Latin America and the United States, referendums are more commonly held in relation to internal political issues. Referendums have been held in Latin America on subjects as diverse as: the constitutional system; constitutional reform; political amnesty; and the privatisation of state industries.

Referendums may also be held in certain specified circumstances. In a presidential system, the referendum may be a useful tool if there is deadlock between the President and Congress; allowing the people a vote in a referendum may provide a less controversial way of resolving the dispute.

In other countries, such as Italy, Uruguay and Switzerland, referendums are held if signatures are collected from enough voters

to force a vote on a particular issue. This procedure may be used in relation to existing or recently passed legislation, in which case it effectively allows voters the opportunity to veto a piece of legislation they do not agree with.

Exclusions

Certain subjects may be constitutionally or legally excluded from being the subject of a referendum. In Uruguay, the referendum cannot be used in relation to laws concerning fiscal policy or laws applicable to the executive power (e.g. pension laws for civil servants). In countries where there has been a recent political transition, certain sensitive subjects might also be excluded from the referendum mechanism. In Colombia, for example, the issue of amnesty (as well as the issue of taxation) is excluded from being the subject of referendums.

When preparing referendum laws, it is important that, if restrictions on the use of the referendum are to be imposed, policy makers drafting the law should be able to justify the basis for the exclusions.

Is a simple majority enough?

It is important that the design process gives due consideration to the threshold of support and/or participation that is required for a referendum to pass. One option is that achieving a simple majority of the voters who turn out to vote is enough for a referendum to pass. Alternatives include imposing minimum participation thresholds or requirements for double or super majorities.

Participation thresholds

Imposing a participation threshold requires means that the outcome of a referendum is only valid if there is a minimum specified turnout. Therefore, if a referendum is required to achieve a turnout of 40% in order for the outcome to be valid, but only achieves turnout of 33%, the result of the referendum is not implemented, and it will not be binding either way.

An argument in favour of participation thresholds is that they prevent a small minority of voters from imposing their will on the democratic process. If, for example, a referendum achieves a 52% yes vote on a turnout of 50%, this means that around only a quarter of voters have actually registered their support for the referendum; yet in the

absence of a turnout quorum, the views of this quarter will determine the outcome of the referendum. Imposing a turnout requirement of, say 75%, of the electorate would ensure that a yes vote achieve the support of at least a third of registered voters.

However, opponents of participation thresholds argue that they are inherently unfair, in that they effectively categorise abstention as a no vote. In addition, imposing such imposing thresholds is only workable if the register of voters is accurate and up to date. Using a participation threshold in a country where the register is inaccurate would mean that the participation threshold is wrong relative to the number of voters who actually exist. If, for example, a country's electoral register includes the names of 10 million people, 5% of whom are 'missing' voters who do not actually exist, and a participation threshold of 40% is in place, it will be harder to achieve the 4m votes required, since there are only actually 9.5m voters.

The use of the referendum in Colombia is subject to a participation threshold of 25%. Fifteen questions concerning government spending and wages and measures to reduce corruption were put to voters in October 2003. However, all fifteen measures were defeated because none achieved the level of turnout required for the referendum to be valid. Some experts have suggested this is because many of the people on the Colombian electoral register are either no longer alive, or are migrants who have left the country and are no longer resident to vote.

Extra majority requirements

Another possibility, whether combined with a turnout quorum or not, is to impose extra majority requirements for a referendum to pass. Instead of a referendum passing if a simply majority vote yes, extra majority requirements might impose additional requirements for a majority to be achieved in a certain proportion of regions, or requirements for a majority of a certain percentage of turnout.

In Australia, for example, not only must a referendum achieve an overall majority, it must also achieve a majority in at least four of the six Australian states.

Key issues relating to the administration of a referendum

A number of issues arise in regard to the politics, administration and logistics of holding a referendum.

Combination of polls

When a referendum is held, it must be decided whether or not it is to be combined with another poll (e.g., an ordinary general election), or whether the referendum is to be held separately. It is sometimes argued that combining polls can increase the risk that voters will confuse separate issues (e.g., the performance of the incumbent government can be confused with the issue on which the referendum is being held). However, from an administrative point of view, it may be more cost effective to hold a referendum at the same time as an election

The referendum question

One of the most important issues is the drafting of the referendum question. Research by experts has shown that the way the question is phrased can have significant implications for how people vote. Therefore, those campaigning for and against the referendum will have an interest in how the question is worded, since even a slight change to the question might affect how voters cast their votes at the referendum.

Different organisations could have responsibility for determining the referendum question. The Electoral Management Body (EMB) might be a sensible option if it is perceived to be neutral in the referendum debate; its first responsibility would be to ensure that the referendum question is intelligible to voters, rather than to try to encourage voters to vote a particular way. Alternatively, the government might assume responsibility for drafting the referendum question. However, if the government supports a specific outcome to the referendum, it may try to deliberately phrase the question so as to encourage people to vote a certain way. Even if it does not attempt to do so, opponents of the government's position might *perceive* that it is deliberately trying to load the question, which could undermine the legitimacy of the referendum.

One solution to this potential problem is to allow the government to draft the question, but provide for an independent organisation, for example the EMB or Referendum Commission, to provide a neutral oversight of the question drafting process. In the UK the government is responsible for drafting referendum questions, but the independent Electoral Commission is required to publicly comment on the intelligibility of the questions. The Commission has made public a set of criteria by which it will do so, see. Although the government is not required to take note of the Commission's views, it would be

politically difficult for it to disregard the Commission's comments if they were very critical.

To view the UK Electoral Commission's guidelines on referendum questions, click on

<http://www.electoralcommission.org.uk/templates/search/document.cfm/8644>

A further alternative might be to try to seek agreement on the question between the main referendum campaigners. This might be extremely difficult (if not impossible) and potentially time consuming.

However the question is drafted and regardless of who it is drafted by, it is important that the *process* for designing the question is clear, and is adhered to. Confusion over the responsibility and process for designing the referendum will undermine acceptance and legitimacy of the referendum question and whole referendum process.

The referendum campaign

There are several different models of regulating referendum campaigns. Some countries choose not to impose any controls at all, preferring to leave the campaign and campaigners unregulated. In other countries, financial and other controls are imposed on any individual or organisation which wishes to participate in the campaign.

Consideration of how, if at all, to regulate the campaign is important because providing a framework for open debate is crucial to the conduct of a free and fair campaign and referendum. However, the interpretation of what a fair campaign is differs. Does a 'fair' campaign mean an equal campaign, in which both sides have equal resources to spend to promote their case? Is a fair campaign one in which each side of the campaign has a minimum equal level of funding but is also able to fund-raise and spend private contributions? Or does a fair campaign mean leaving campaigners unchecked to spend any money made available to them, as dictated by the level of support for each side of the campaign?

Registration of campaigners

In some countries, such as Canada, organisations and individuals that wish to campaign for or against a certain outcome at the referendum are required to register their intention to do so. This is to ensure that campaigners comply with controls imposed to ensure a fair

referendum campaign. When designing a framework for regulating the campaign, policy makers will need to decide whether or not to make registration of campaigners a feature of the framework.

Financial controls on campaigners

Whether or not campaigners are required to register, certain controls may be imposed on any individual or organisation campaigning for an outcome at the referendum. One such control may be to require any campaign advertisements and material to bear the name and address of the organisation that published it, in order to ensure that the public are aware of whom campaign material is published by. This control applies in Australia and the UK.

Many countries impose financial controls on campaigners; either limiting the amount of money that can be spent on campaigning, or restricting the level or sources of private contributions that can be accepted for the purpose of the referendum campaign; in addition, disclosure of expenditure and contributions may be required after the referendum. In Canada, for example, the amount that registered referendum committees can spend is limited, and financial contributions can only be accepted from Canadian sources. In the UK, disclosure of both expenditure and contributions is mandatory after the referendum. In Colombia, expenditure controls apply and campaign accounts must be published after the poll.

In contrast, at the Swedish referendum in 2003 on whether to join the Euro, there were no controls restricting the amount of money that could be spent by campaign groups. In the US, campaign expenditure controls have frequently been ruled unconstitutional by the courts, on the basis that they are a restriction on freedom of speech. Therefore although some polls at federal and state level are subject to contribution and/or disclosure controls, some referendums are held at state level without any financial controls being imposed.

If financial, contribution or disclosure thresholds are to be imposed, consideration must be given to the levels at which these should be set. If similar controls are imposed for routine elections, these might provide a useful comparative. A further important aspect to consider is the practicality of the controls: how will they be implemented and monitored?

Provision of public assistance

To ensure a minimum level of campaigning for each outcome to the referendum, many countries provide grants and other assistance to selected campaign organisations. Depending on the number of campaign organisations that exist, it is unlikely (although not impossible) that all campaign groups will receive public assistance to run their campaigns. Countries can choose to recognise and provide assistance to a single umbrella campaign group campaigning for each outcome (such as Australia and the UK), or otherwise select organisations on the basis of being representative of the outcome for which they are campaigning.

Public assistance might be provided in different forms. In some countries, cash grants are provided. This might be in the form of an equal level of funding made available to all sides of the campaign. In the US, the fact that opposing campaign groups often have access to significantly different levels of resources has led to debate about how public assistance might most usefully be allocated. One proposed solution is to ensure that the one side of the campaign never spends more than a fixed proportion of total campaign spending, by providing subsidies to the poorer campaign the more the better-resourced campaign spends. Other proposals to remedy the problem – if, indeed, it is perceived as one – include providing forms of non-cash assistance.

Non-cash assistance might include the provision of free radio and television broadcast time, freepost facilities or free use public meeting rooms. In Colombia, the media are required to give broadcast time to the yes, no and abstention campaigns. Alternatively, the state may offer incentives to firms that assist campaigners, e.g. by providing tax-breaks to media outlets that allow campaigners to print or broadcast their arguments.

If public assistance is to be provided to campaign groups, the terms on which it is provided must be clearly defined. These terms include:

- who is eligible to public assistance;
- how much public assistance is available;
- what conditions must be met in order for public assistance to be provided;
- whether public assistance can be withdrawn.

Voter education

Whilst referendum campaigners may provide useful information to voters, it is important to consider the need for a source of unbiased

and non-partisan information. An important role of information is to facilitate debate and discussion about the referendum proposal, thereby providing voters with as much assistance as possible in reaching their voting decisions. However, many voters may be more inclined to trust arguments presented by organisations which are not campaigning for a certain outcome.

There are different approaches to the provision of non-partisan information. In many US states, the state government is responsible for publishing an information pamphlet, which many voters cite as their prime source of information in reaching a decision on how to vote. The pamphlet usually contains an article from yes and no campaigners, but crucially also contains an independent analysis of the proposition by the government. In other countries, the government's information department might run information campaigns, such as distributing leaflets or running broadcasts.

In Ireland, the independent Referendum Commission is responsible for running an information campaign that explains the subject of the referendum and sets out arguments for and against the referendum proposal. The Commission is required to disseminate this information as widely as possible, and promote and facilitate debate at the referendum. At the 1999 Australian referendum on the monarchy, the government established an experts group to direct a neutral public education campaign, giving the group a substantial budget in order to fund its operations.

If the government does agree to fund a non-partisan information campaign, there are various different mediums through which the campaign could be run. In many countries, an information booklet is delivered to every household or registered voter. In others, television and radio broadcasts might be used. In terms of encouraging people to vote, billboard and poster adverts can be used to convey shorter messages to the public.

Role of the government

An issue related to both the regulation of the campaign and voter education is the role of the government in the campaign. If the government supports a certain outcome to the referendum and is permitted to campaign for it, the considerable resources available to it may mean that the campaign is weighted disproportionately in favour of the outcome that the government supports. It may be difficult to legislate on or regulate the activities of the government to prevent them from campaigning, although in Ireland, the government

is prevented from campaigning by a judicial decision, and in Australia, referendum legislation strictly limits the money that the government can spend on campaigning for the yes or no side to the cost of funding public information campaigns and official campaign organisations. When framing the legislation, it is important that consideration is given as to the role of the government in the campaign.

Even if the government does not actively campaign for an outcome, it may still wish to provide information about the issue (see the voter education section above). At the UK referendum on EU membership in 1975, in addition to the yes and no campaigners sending a leaflet to every household free of charge, the government also distributed a leaflet setting out its views. A government might also choose to run a government broadcast, which raises the issue of whether opposition parties should also be able to run broadcasts.

Role of the media

A further important issue in the campaign is the role of the media. Controls imposed to seek to ensure an even-handed campaign might be undermined if the media is heavily in favour of one outcome rather than another. Similarly, if the media is state-controlled, it may be the case that the media simply follows the government line on the issue. However, in a country with a free and fair media, it may be politically difficult to implement controls to regulate the reporting of the press during the campaign period. If possible, it may be that an independent regulator could be appointed, or a self-regulatory system introduced to ensure accurate and fair reporting of the referendum issue in the press.