

BREXIT AND REFERENDA. SOME LESSONS TO TAKE INTO ACCOUNT

Joaquín Tornos Mas
Tenured Professor of Administrative Law
Universitat de Barcelona

The outcome of the referendum called for citizens of the United Kingdom to decide whether or not they wanted to continue to be a part of the European Union has resulted in a narrow but clear majority in favour of Brexit.

This has led to a lot of comments on the consequences of a favourable vote for Brexit, its implications for the UK and the European Union, the reasons for the vote, the reactions of the voters themselves following the result, and many other issues of interest. But beyond all of that, now that a referendum of this importance has been held, it seems appropriate to think over the institution of the referendum and some of the guarantees that, from our point of view, should be taken into account when using this form of direct democracy.

As an actual practice of direct democracy representing the people of a State, the referendum has always had supporters and detractors. For some it is the ultimate expression of democracy by appealing directly to the people, for others it can be an instrument in the hands of political elites to get the results they want to wash their hands of complex decisions. And some also note that it usually involves the danger of having to choose between two competing solutions without allowing intermediate options. On this point we refer to the book by Professor Tierney, S. *Constitutional referendums: the theory and practice of republican deliberation*, Oxford University Press, Oxford, 2012, and the Report of the House of Lords Select Committee on the Constitution, 12th Report of Session 2009/2010 Referendum in the UK.

Let us admit that resorting to a referendum can be a useful option when issues that directly affect the Constitution need to be resolved, such as belonging to or leaving the European Union. But then the referendum should take place within a framework previously established with the highest level of standards where some rules of procedure and content were set. It was not so in the case of Brexit, and therefore now it poses some not-so-minor problems.

What majority is required for the result of the referendum to be binding or for it to be addressed one way or another by political parties? The Supreme Court of Canada referred to a "clear majority", but this concept should be clarified before holding a referendum. It seems that in the case of referenda addressing constitutional issues the majority should be reinforced. A reinforced majority can be established requiring a minimum number of votes, a minimum level of participation, a minimum of participation and a minimum number of votes at the same time, or also a minimum number of votes and/or participation level in the various territories that make up the State where the referendum is held. Perhaps the most democratic criterion is to use the

rule of 51% on the electoral roll. It should be noted that for approval of the Scotland Act 1978, a limited devolution, 40% of votes in favour was required, calculated from the electorate roll. The vote resulted in a majority in favour of the devolution, but it did not achieve the 40% required, so it was not approved. If the devolution required 40% of the electorate, the exit from the EU should have required at least 51% of electorate in the United Kingdom expressing their desire to leave.

None of these conditions were established. 72.2% of the census voted, about 33 million people on a census of 45 million, which means that the vote in favour of Brexit did not reach 51% of the electorate. However, the UK has to leave the EU.

The divided national identity existing in the UK was not taken into account either when predicting the effectiveness of the referendum. The result was that in England 75.2% voted for Brexit, while in Scotland it was 38% and in Northern Ireland 44.2%. Thus, the most populous country imposes its will on other territories on an issue of such importance as it is the membership of the Union. The consequence is that Scotland now threatens with a new independence referendum to return to Europe as an independent state, and Northern Ireland (Catholics voted overwhelmingly in favour of Remain) may reopen old conflicts over reunification with the Republic of Ireland.

Another important issue in the regulation of constitutional referenda is to establish a rule that prohibits holding a referendum on the same matter until 10, 15 or 20 years have passed. David Cameron did not address this issue, and the day following the referendum some started to petition for a new referendum on the same question. In principle this initiative should not have much political weight, but any controversy would have been avoided if a rule had been established before the referendum.

Finally, the referendum on leaving the EU has also highlighted the problems of referenda consultations of this nature on issues of enormous complexity in which a concrete proposal is not subject to the decision of the people after a broad participatory debate (for example the ratification of a constitutional reform), but rather a question is posed on two major political options whose response may be dominated by legitimate identity or circumstantial feelings but do not take into account all the consequences of the decision. Had it been submitted to a referendum, a Brexit pact between the UK and the European Union with clear identification of all the consequences that this entails, the result might have been different. In fact, it seems that many voters are questioning their vote, and perhaps, many who abstained would choose to vote now.

Should these issues not have been taken into account? Should they not be considered when other referenda of similar nature arise?