

# REFERENDUM

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## ABSTRACT

Referendums have been used to settle matters regarding self-determination since the early 19<sup>th</sup> Century and gained prominence when the institution was championed by Woodrow Wilson in the wake of the First World War. The referendum provides a mechanism for resolving territorial disputes through democratic means, the referendum on Scottish independence shows. However, without an agreed legal framework referendums can also exacerbate ethnic conflict as the recent referendums in Ukraine show. What is required is a new doctrine of self-determination referendums in international law.

## INTRODUCTION

A referendum is a vote taken by the whole of a people on a policy issue.

Etymologically the word comes from the Latin *referre* – ‘to refer back’. Grammatically speaking, as a Latin gerund *referendum* has no plural, the plural gerundive *referenda*, meaning ‘things to be referred’, necessarily connotes a plurality of issues, which could be misleading. Accordingly, ‘referendums’ is, grammatically the more correct plural of the word<sup>1</sup>. However, it should be noted that some prefer the term ‘referenda’. For example the Conservative English politician Alan Clark described the word “referendums” as “an exceedingly ugly term”<sup>2</sup>.

The referendum is often – if mistakenly seen as an example of pure direct democracy and is seen as detrimental to representative government. This is somewhat inaccurate. The referendum is more properly regarded as a complement to indirect democracy. The voters do not have the right to initiate legislation (as under citizens’ initiatives, which exist in some American states<sup>3</sup>); they can merely approve or reject proposals put forward by the legislature. The referendum, consequently, is fundamentally a conservative institution. It allows the people – or a legally specified part of them – to veto a proposal or a law already adopted by the legislature.

The idea that the people should have the final say on the most important matters is almost as old as Western civilisation itself. The Roman historian Tacitus observed that, “on matters of minor importance only the chiefs decide; on major matters the whole community decides.”<sup>4</sup>

In the wake of the *Glorious Revolution* (1690), John Locke noted, in *The Second Treatise of Government* written in the same year, that “if a controversie arise betwixt a Prince and some of the people, in a matter where the law is silent, or doubtful, and the thing be of great consequence, I think the proper Umpire in such a case should be the Body of the People.”<sup>5</sup> This has philosophically become the basis of the constitutional justifications for referendums. At this stage the term referendum had not yet been used in Britain. But elsewhere, namely in what was to become present-day Switzerland, the “thirteen-canton Confederacy of 1513 instituted the policy of taking central decisions back to the communes *ad referendum et instrumentum*”<sup>6</sup>. And, in the wake of the War of Independence many American states adopted referendums before their constitutions could be changed, but no referendum was introduced at the federal level.

That the referendum could be used to resolve matters of self-determination was its *raison d'être* in the years immediately after America won its independence and the monarchy was overthrown in France. The doctrine of the sovereignty by the people became the gold-standard among democrats and dictators alike. This was a change from the earlier age of absolutism. In 1791 Cardinal Carlo Rezzonico (the Pope's envoy) complained that, as a result of the referendums on self-determination in Avignon in 1791, “everybody will be able to choose a new master in accordance with one's pleasures”, something he found “absurd.”<sup>7</sup> Now this ‘absurdity’ is considered self-evident, even by those whose commitment to free and fair referendums is less than sincere. As a prominent scholar of referendums wrote in a classic study:

“The French Revolution proclaimed the dogma that we now term self-determination...The mental and logical process was simple. The people *are* the state *and* the nation; the people are sovereign. As such they have the right to decide, as the ultima ratio, by popular vote and simple majority, all matters affecting the state and the nation”<sup>8</sup>.

But referendums on self-determination (of which there have been 87)<sup>9</sup> are only a small subset of the literally thousands of referendums that have taken place worldwide<sup>10</sup>.

Although referendums are institutionally conservative as a matter of logic, they have generally been successful; the voters have been more likely to vote ‘yes’ than to vote ‘no’. Thus the average yes-vote in all nationwide referendums held to date (excluding Switzerland) is 53 percent; a relatively close margin. However, there are regional variations. In Africa – no doubt reflecting the presence of many autocratic regimes – the average yes-percentage is 82, the same as in Asia. In Latin America the yes-side on average wins 70 percent. In Oceania, by contrast the average yes-vote is 46 percent. The figure for Europe the figure is 61 percent<sup>11</sup>.

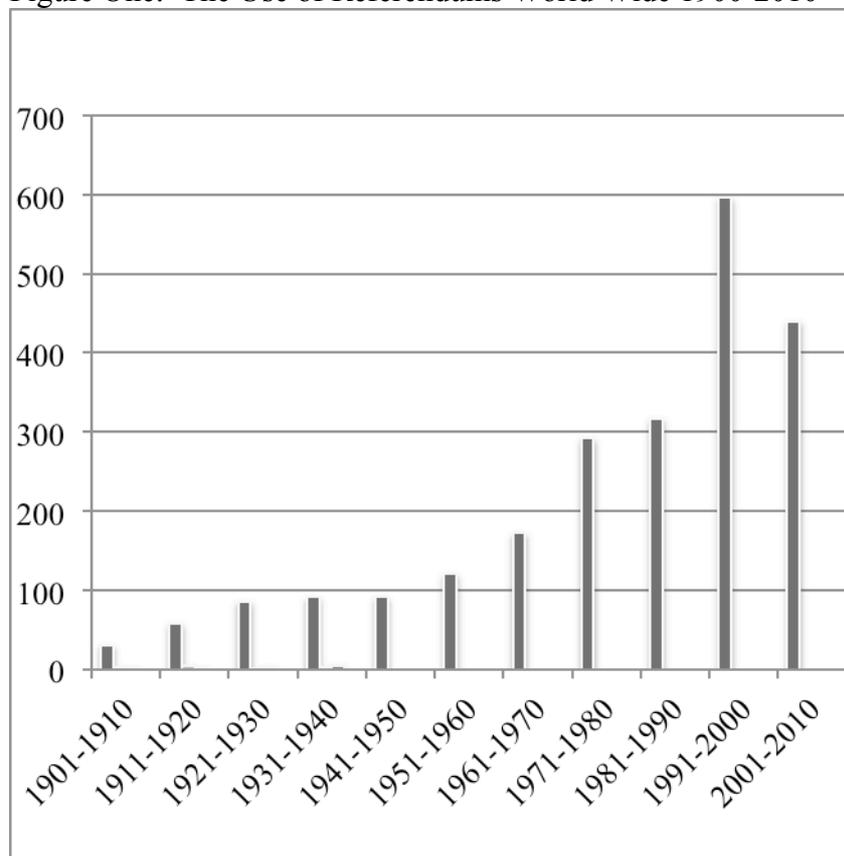
Referendums have become more frequently used, though the growth has not been linear. As Figure One shows there has been a steady growth of referendums until the high water-mark in the 1990, when a number of independence and constitutional referendums were held in the former communist countries. After that the average number of referendums dropped, though to a higher level than before the 1990s.

There were 596 nationwide referendums (including Switzerland ) in the 1990s, the following decade the number had fallen to 440. Despite this drop the number of referendums is still higher than the 317 referendums held in the 1980<sup>12</sup>.

However, these aggregate data cover a wide range of sub-trends, which point in different directions. In some countries referendums have become more frequent, especially due to the intervention of the courts (Ireland is a good example) but in others the number of referendums have fallen after governments have suffered notorious defeats at the polls (e.g. in Australia and France), which have made them weary of submitting issues to the voters.

Worldwide there are, as one would expect, different practices and tendencies. In Africa, Latin America and the Former Soviet Union referendums have predominately served as vehicles for increasing support for strong presidents. Such votes are sometimes called plebiscites (See article on Plebiscites) For example in Belarus, President, Alexander Lukashenko, has on several occasions won overwhelming support in dubious referendums to boost his own powers. Similarly, in Latin America President Evo Morales of Bolivia, to take but one example, has used referendums to consolidate his powers at the expense of opposition parties.

Figure One: The Use of Referendums World Wide 1900-2010



Source : Qvortrup (Editor) *Referendums Around the World 2014*, p. 247

But in Western Europe, North America and Australia the referendum has tended to perform the function of a constitutional safeguard, which has effectively barred governments from enacting institutional changes at faster pace than favoured by the electors. Referendums on issues ranging from planning laws in Denmark (in 1963) through several referendums on European integration (in the 1990s) to the referendum on electoral reform in Britain (2011) have thwarted cherished ideas and many a politician's pet-project. This is not only true in Western Europe. In Canada, the Charlottetown Agreement on a new constitution was rejected by the voters in 1992 and in Australia, less than 25 percent of all referendums have been passed. These are examples of how referendums may limit elected politicians room for manoeuvring.

Do referendums lead to 'bad' government? Apocalyptic titles such as "Democracy Derailed," "Dangerous Democracy," and "Democratic Delusions," have been published by concerned commentators especially in America. But the evidence from the country that has used the referendum most frequently, namely Switzerland does not suggest that frequent referendums has directly negative policy consequences, let alone have led to populism. Indeed, in 2012 the Swiss voters rejected a measure that would have given them longer paid holidays<sup>13</sup>.

"The use of referendums around the world has proliferated remarkably in the past 30 years."<sup>14</sup> Whether this growth continues is an open question, but many still entertain the hope that the referendum is, or may be, an education in the application of men's understandings to the weightiest of political concerns – namely the passing of laws. This is absolutely unobtainable by voters who are trained to think that their role or duty as citizens consists in supporting the conservative or radical party, and that their blind acceptance of every proposed enactment which happens to form part of the party platform<sup>15</sup>.

The year 2014, *The Washington Post* observed, became the year of the referendum<sup>16</sup>. But it did so in different ways.

In Crimea, a hastily organised referendum of dubious legality was held in March to give a seal of legitimacy to the Russian annexation of the area. The authorities in Crimea – and the Kremlin - claimed that Art. 138 of the Ukrainian Constitution entitled them to hold a referendum. The article provides that "The competence of the Autonomous Republic of Crimea comprises organising and conducting local referendums". However, and perhaps more importantly, the Ukrainian Constitution also states – in Art. 73 - that "issues of altering the territory of Ukraine are resolved exclusively by an all-Ukrainian referendum". It is difficult to see how the referendum held on the 16<sup>th</sup> of March 2014 could be compatible with Article 73. The referendum, so it was reported, returned an overwhelming yes vote, though the vote was not verified by impartial international monitors<sup>17</sup>. The referendum in Crimea – and still more the votes held a couple of months later in the eastern Ukrainian areas of Donetsk and Luhansk are examples of the consequences of not holding referendum under an agreed framework. Such referendums, as suggested in a recent book by this author, rarely resolve the issues<sup>18</sup>.

By contrast, the referendum in Scotland on the 18<sup>th</sup> of September 2014 is constitutionally and politically a totally different referendum. The result of an agreement reached by the Westminster coalition-government and the regional government in Edinburgh in 2012, both sides agreed to abide by the result and reached a consensus on the legal avenue. That the debate in Scotland showed an astonishing interest in public issues, evidenced by town-hall meetings around the country, was perhaps another example of Benjamin Barber's observation that democracy is best taught by practicing it<sup>19</sup>. So-called 'ordinary voters' suddenly began to discuss complex issues such as currency unions, the necessity, or otherwise of an elected second chamber. The referendum in Scotland, unlike the votes, in Ukraine, showed that the referendum – in the words of Stephen Tierney, "can be a successful constitutional instrument [which can] protect a deliberative environment within which citizen participation can be fostered"<sup>20</sup>. But it is overall imperative that the process is firmly rooted in agreed legal principles. In any democratic country that claims to be a *Rechtsstaat* it is acknowledged that decisions by public authorities must be based on established laws. This is called the principle of legality. To demand this is not merely western bias, indeed the notion of *Pravovoe gusudarsto* (roughly translated as 'the rule of law') is cornerstone of Russian and Ukrainian jurisprudence. Provid-

ed that referendums are consistent with this principle they are a good – indeed, the best - way to resolve issues pertaining to self-determination.

## NOTES

<sup>1</sup> <http://www.oxforddictionaries.com/definition/english/referendum?q=referendums> (Accessed 16<sup>th</sup> May 2014)

<sup>2</sup> Hansard: House of Commons Debates 3 June 1998: Col. 282

<sup>3</sup> Matsusaka, J. (2004), *For the Many or the Few: The Initiative, Public Policy and American Democracy*, University of Chicago Press, Chicago.

<sup>4</sup> Tacitus, P.C. (1970) *The Agricola and Germania*, Penguin, London, p.110

<sup>5</sup> Locke, J.. (1988) *Two Treatises on Government*, Cambridge: Cambridge University Press, 42

<sup>6</sup> Kobach, K.W. (1992) *The Referendum: Direct Democracy in Switzerland*: Aldershot, Dartmouth, p.18

<sup>7</sup> Freudenthal, F. (1891) *Die Volksabstimmung bei Gebietsabtretungen und Eroberungen. Eine Studie aus dem Völkerrecht*, Erlangen: Th. Blaesing, pp.3-4

<sup>8</sup> Mattern, J. (1921), *The Employment of the Plebiscite in the Determination of Sovereignty*, Baltimore, Johns Hopkins University Press, 77

<sup>9</sup> See Qvortrup, M. (2014) *Referendums and Ethnic Conflict*. Philadelphia, University of Pennsylvania Press

<sup>10</sup> For an overview see Qvortrup, M. (2014) 'Introduction' in M. Qvortrup (Editor) *Referendums Around the World. The Continued Growth of Direct Democracy*. London: Palgrave Macmillan

<sup>11</sup> Qvortrup, M. (2014) 'Conclusion' in Matt Qvortrup (Editor) *Referendums Around the World. The Continued Growth of Direct Democracy*, London, Palgrave Macmillan, 246.

<sup>12</sup> The figures for the other decades is as follows: 1911-1920: 58; 1921-1930: 86; 1931-1940: 91; 1941-1950: 91; 1951-1960: 121; 1961-1970: 172 (Source: C2D- University of Geneva)

<sup>13</sup> Der Spiegel, Volksabstimmung: Schweizer lehnen längeren Urlaub ab', <http://www.spiegel.de/wirtschaft/soziales/volksabstimmung-schweizer-lehnen-laengeren-urlaub-ab-a-820637.html> (Accessed 16th May 2014)

<sup>14</sup> Tierney, S.(2012) *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford: Oxford University Press

<sup>15</sup> Dicey, A.V. (1890) 'Ought the Referendum to be Introduced into England?' *Contemporary Review*, Vol.57, p.508

<sup>16</sup> <http://www.washingtonpost.com/blogs/worldviews/wp/2014/09/10/2014-the-year-referendums-reshaped-the-world/>

<sup>17</sup> [http://blog.foreignpolicy.com/posts/2014/03/16/think\\_crimea\\_s\\_referendum\\_looks\\_dirty\\_you\\_should\\_have\\_seen\\_the\\_anschluss\\_plebiscite](http://blog.foreignpolicy.com/posts/2014/03/16/think_crimea_s_referendum_looks_dirty_you_should_have_seen_the_anschluss_plebiscite)

<sup>18</sup> M. Qvortrup (2014) *Referendums and Ethnic Conflict*, Philadelphia, University of Pennsylvania Press. In a simple twist of fate the book was published the very day the referendum in Crimea took place!

<sup>19</sup> Quoted in M. Qvortrup (2007) *Supply-Side Politics*, London, CPS, p.22

<sup>20</sup> Tierney, Stephen (2012) *Constitutional Referendums: The Theory and practice of Republican Deliberation*, Oxford, Oxford University Press, p. 285