

İlker Gökhan Şen

Sovereignty Referendums in International and Constitutional Law

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Preface

This book offers a systematic legal analysis of referendums on sovereignty issues and is based on my Ph.D. dissertation from the University of Zurich, Faculty of Law which was approved on 11 December 2013. The concern for authenticity has led me to prefer a facsimile publication except for certain formal modifications of the text. This is the main reason for the exclusion of certain referendums held in 2014, such as the ones in Crimea, Scotland and Catalonia. Putting aside the challenge of updating, these subsequent developments have, fortunately, reconfirmed my belief from the very beginning of this project that the use of referendums is growing in the resolution of sovereignty conflicts in international and national politics. I hope this book will serve as a useful reference for researchers in international and constitutional law who have a scholarly interest in the subject of sovereignty referendums.

Eskisehir, Turkey

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Abbreviations

CNMI	Commonwealth of Northern Mariana Islands
CNRT	National Council of Timorese Resistance
COFA	Compact of Free Association
CPA	Comprehensive Peace Agreement
CSCE	Conference of Security and Cooperation in Europe
DCP	Derived Constituent Power
DOM	Département d’Outre Mer
ECtHR	European Court of Human Rights
EEC	European Economic Community
ELA	Estado Libre Asociado
EU	European Union
FAS	Freely Associated States
FLNKS	Front de libération nationale kanak et socialiste
FSM	The Federated States of Micronesia
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IGAD	Inter-Governmental Authority on Development
INTERFET	International Force in East Timor
LRSL	Law on the Referendum on State Legal Status
MINURSO	United Nations Mission for a Referendum in Western Sahara
NC	National Council
NCC	National Consultative Council
NCP	National Congress Party
NIA	Northern Ireland Act
NPP	New Progressive Party
OAU	Organization of African Unity
OCF	Original Constituent Power
ODIHR	Office for Democratic Institutions and Human Rights

OSCE	Organization for Security and Co-operation in Europe
PDP	Popular Democratic Party
PIP	Popular Independence Party
POLISARIO	Popular Front for the Liberation of Saguia-el-Hamra and Rio de Oro
PQ	Parti Québécois
RPCR	Rassemblement pour la Calédonie dans la République
SADR	The Saharawi Arab Democratic Republic
SEA	The Single European Act
SPLM/A.	Sudanese People's Liberation Movement/Army
SSRA	Southern Sudan Referendum Act
TOM	Territoire d'Outre Mer
TTPI	Former Trust Territory of the Pacific Islands
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMET	The United Nations Mission in East Timor
UNAMIS	The United Nations Advance Mission in the Sudan
UNIF	Front Bersama Pro-Otonomi Timor-Timor
UNIRED	United Nations Integrated Referendum and Electoral Division
UNISFA	United Nations Interim Security Force for Abyei
UNMIS	United Nations Mission in the Sudan
UNMISS	United Nations Mission in the Republic of South Sudan
UNTAET	United Nations Transitional Administration in East Timor
USA	United States of America
USSR	Union of Soviet Socialist Republics
WWI	World War I
WWII	World War II

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Chapter 1

Introduction

Abstract This book is a product of the belief that there is a convincing justification for a systematic legal analysis of the referendums on sovereignty issues. With more than 300 referendums that have been held since the late eighteenth century, there are now abundant data in international and constitutional law for a comparative analysis on sovereignty referendums, which mostly derive their philosophical foundations from liberal values such as nationalism, democracy, popular and national sovereignty and self-determination. Thus, this first introductory chapter highlights this point of departure and provides a brief summary and plan of the book.

Referendums on sovereignty issues have been a prominent feature of the international political and legal landscape since the late eighteenth century. Up to now, more than 350 referendums have been held on sovereignty since 1791.¹ This number accounts for a considerable portion of the total referendums that have been held in the world so far. Butler and Ranney highlighted this point by observing that referendums on “territorial” issues constitute one of the four groups of subjects that commonly appear in referendums. If one includes some of the constitutional referendums (another group of referendums as reported by Butler and Ranney) that have been associated with these territorial issues, the number of referendums on the subject of sovereignty makes up almost half of all world referendums.² This far-reaching presence of territorial issues in the practice of direct democracy is not a coincidence. It shows that sovereignty referendums have been a widespread element used throughout different historical periods of democratisation, nation building and state creation.

Nationalism, democracy, popular and national sovereignty and self-determination had been the founding concepts in the formation of nation states. These values

¹ According to the data retrieved from the Center for Research on Direct Democracy: www.c2d.ch. This number may vary depending on the inclusiveness of the working definition of sovereignty referendums. For instance, Laponce noted an approximate number of 190 sovereignty referendums (Laponce 2010, p. XII); according to Sussman, this number is around 240 (Sussman, G. When the demos shapes the polis – The use of referendums in settling sovereignty issues. <http://www.iandrinstitute.org/Studies.htm>. Retrieved 5 May 2007).

² Butler and Ranney (1994), p. 2.

appeared during the same course of events, and it should be noted that they overlap and/or support each other in meaning and content. At the beginning of the twentieth century, nationalism and democracy were generally perceived as synonymous concepts in the West. This may be sensed in Renan's allegory³ defining the nation as "a daily plebiscite". The nation state was considered as the political expression of the will of the people. The association of these two doctrines was provided by the fact that they were both directed against multinational monarchies as a common enemy. As to the principle of national self-determination, the right of the people to form an independent state or to choose which state to belong to appeared as the product of revolutionary theories asserting that the people had a fundamental right to make a constitution and choose its own government.

This study deals with the sovereignty referendums that have been used within the process of nation building and state creation and where the Renanian metaphorical "daily plebiscite" of self-constitution of a nation has become a reality.

The first question in this respect may be this: what is sovereignty? This and other concepts such as national and popular sovereignty, democracy and self-determination should be clarified before starting a study of referendums that involve sovereignty in its various aspects. The concept of sovereignty may be considered in political and legal terms. Politics may be further considered in the descriptive and normative sense of political legitimacy. In the former sense, it involves the conceptual explanation of acquisition and consolidation of a political power in a polity, whereas in the latter it explores the question of how political power should be acquired and what its limits are. In legal terms, sovereignty is tied to independence of states according to international law and to state competence to make and execute laws in terms of constitutional law.

The point of departure for understanding the concept of sovereignty and the relevant referendums is the historical process of birth of the modern nation state. The emergence of the nation state in the nineteenth century created a set of values that made profound changes in the nature of the relationship between territories, peoples and their rulers. Although the origins of the modern nation state can be traced back to the sixteenth century, which is regarded as the breakdown of the medieval era, its theoretical underpinnings grew in prestige in the domestic and foreign policies of the Western world with the advent of American independence and the French Revolution—the latter also being the stage upon which the preliminary experiences of sovereignty referendums occurred. The fundamental guiding principles like popular sovereignty, democracy and self-determination of the French Revolution were decisive in the renouncement of the war of conquest by France and the pledge by the new regime that the consent of the people concerned would be secured before any territorial alteration could be made. This era being the first historical stage of sovereignty referendums, four subsequent and different historical periods may then be discerned, encompassing an increasing momentum

³Renan, E. What is a nation. <http://ig.cs.tu-berlin.de/oldstatic/w2001/eu1/dokumente/Basistexte/Renan1882EN-Nation.pdf>. Retrieved 10 November 2012.

of state creation and constitution making in which sovereignty referendums were held in greater numbers.

These five different eras of sovereignty referendums are described in the third chapter. The first two historical stages included the referendums that were held following the French Revolution, and in the second half of the nineteenth century particularly concerned, the creation of Italy. The third and fourth periods of territorial reconfiguration and state creation following the two successive World Wars and relevant referendums are also mentioned in this context. The fifth group of referendums was held during the process of post-communist state creation and democratisation at the end of the twentieth century.

The significant presence of sovereignty referendums in history explains why so many authors have something to say on this subject, especially political scientists, philosophers and lawyers. The following sections in the third chapter aim to survey the relevant literature offering a brief but holistic account from differing perspectives. The main purpose of this research is to study sovereignty referendums from a legal perspective. Therefore, following a synopsis on the sociological, philosophical and moral or—in other words—meta-juridical aspects, Part I concludes with the main outline of our legal perspective on which we shall build Part II.

In the second part, the legal appraisal of sovereignty referendums will be considered from aspects of international and constitutional laws, as sovereignty and self-determination have both international and domestic dimensions. That may be considered in material and formal perspectives. The material dimension refers to the content or the subject matter of the vote concerned, and the formal dimension indicates its legal basis. In international law, the question of state creation may be observed as the central theme included within the subject matter of any sovereignty referendum. From a formal perspective, the legal status of referendums in international treaties and international customary law will be assessed in the light of historical experiences from the earliest to the most recent periods. The presence of sovereignty referendums in contemporary international law is not a random practice arising from some political expediency. Rather, its legal status in international treaties and international customary law has been gradually and determinedly consolidating itself until the present day.

In constitutional law too, sovereignty referendums have both formal and material aspects. In its material context, the concept of sovereignty is central theme to constitutions and constitution making. In other words, if we refer to the final authority to make and execute laws in a polity when we use the term sovereignty, then the sovereignty becomes the basic condition that should be secured before any constitution may be made. Formally, the question of the legal status of sovereignty referendums may be considered within the larger framework of constitutional change, boiling down to two questions: (1) the legal evaluation of constitution-making activity (constituent power) in a state and (2) the overall picture of sovereignty referendums in comparative constitutional law.

Having dealt with these two questions, we will go on to tackle in-depth cases: France, the United Kingdom, Canada (Quebec), and the United States of America. France has a rigid and written constitution, and it is the home of the doctrine of territorial inviolability. Yet it is also the historical inventor of sovereignty

referendums and their relevant underlying principles in Europe. This puts France in a distinctive position. While being the creator of sovereignty referendums, France shows a strong tendency to control the questions of decolonisation—and the referendums held for this purpose—in the limits of its constitutional system. The approval of its 1958 Constitution led to the decision of colonies whether or not to remain as part of France. Further decolonisation issues and relevant procedures also involved referendums in Algeria, Mayotte and New Caledonia. The description of these cases and ensuing debates offer substantial insights as to the political impact and legal appraisal of these referendums in terms of constitutional law in a written constitution.

The case of the UK, in contrast to France and to other cases having written constitutions, is relevant to the discussions of the role of the sovereignty referendums in the context of an unwritten constitution, where the difference between constitution and politics is considerably blurred. Referendums in the UK may be considered as forming a constitutional convention and challenging seriously the principle of parliamentary sovereignty.

Canada and the US offer useful insights to assess the legal value of referendums in a common law context, albeit within a written constitution. Particularly, the secession opinion of the Canadian Supreme Court regarding Quebec explicitly refers to the unwritten rules of the Canadian Constitution regarding the legal value of the referendums. In a similar manner, the US rhetoric of consent of the governed has been the overriding theme in constitutional politics. The referendums and surrounding debates both in the realms of politics and judiciary of the overseas territories will be studied, Puerto Rico being the most recent case.

Chapter 7 is dedicated to a comparative study of common legal problems of sovereignty referendums. The first section deals with fair and impartial referendum administration. From this perspective, the administration of a referendum includes every action required to secure a legitimate referendum. These actions might include census; preparation of electors list through the registration of the voters; guaranteeing of freedom of speech, freedom of assembly and right to vote; counting of votes; declaration of results; resolution of legal disputes; and the daily administration of the referendum area during a fixed period before and after the referendum.

Another common legal issue of the sovereignty referendums is the problem of the quorum, whether there is a need to require an enhanced majority for the final result. According to a first view, enhanced majority may impair the credibility of a referendum since it enables minorities to block the democratic decision process. According to the contrary view, a fairly set level of enhanced majority secures the protection of minorities against the tyranny of the majority.

Equally important is the question as to who should be entitled to vote. This problem lies at the heart of almost all of sovereignty referendums creating an abundant amount of data in comparative constitutional law and international law. Indeed, the question of voter qualification involves the need for two equally legitimate principles of democracy and self-determination, the principle of universal suffrage and securing the genuine wish of the populations concerned. This question will be assessed within the framework of cases, most particularly those of Western Sahara, Puerto Rico, South Sudan and New Caledonia.

Additionally, in this chapter the question of the designation of the voting units will be tackled. Finally, the last section of the chapter handles the issue of formulation of the ballot question, which is of crucial importance in ensuring a legitimate and credible referendum. It has three aspects. Firstly, the wording should be clear and free of ambiguity to allow the voters to cast informed votes. Secondly, the voters should not be forced to vote for more than one option, which may be dissimilarly put in the one ballot question—this is the single subject rule. Finally as a third issue, the ballot should not be prepared in a way that supports the maintenance of the *status quo*.

By exploring in detail a diversity of ideas, cases contexts and issues, the global aim of this study is to achieve a better empirical and legal understanding of the sovereignty referendums, in international and national politics and law. This research therefore aims to provide the students, researchers and all other readers who may be interested in the subject with a comprehensive survey of the sovereignty referendums, as they have developed both in modern political-legal theory and actual practice of modern international law.

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Part I
Theorising the Sovereignty Referendums

Chapter 2

Introduction to the Theory of Sovereignty Referendums

Abstract There is a growing literature on the topic of referendums and sovereignty, which can be classified according to numerous overlapping dimensions, such as constitutional law, international law, political science and political philosophy. Furthermore, this literature is becoming increasingly sophisticated in terms of the methods it employs and the potential for interdisciplinarity. This chapter is an introductory note on the basic concepts, theoretical framework and methodology used. A more detailed account of the theoretical aspects, methodology and discussions of philosophical views and empirical observations will appear in the subsequent chapters. It starts with the assertion that sovereignty referendums have been principal elements in the territorial reconciliations at different points in history. Furthermore, the chapter gives a definition of the concept of sovereignty referendum and reviews different terms such as “plebiscite” and “self-determination referendums”, which are used to mean the same concept. The remaining of this chapter briefly reviews the seminal literature, which concludes that the topic of sovereignty referendums may be the subject of several disciplines, most particularly, of politics and law.

In this part, we aim to explore the various concepts that appear in the laws and politics of sovereignty referendums. The many different stages of sovereignty referendums have occurred during the major transformations and realignments of the world map. In these processes, the pivotal issue has been the legitimacy of the acquisition or the possession of territories by various states. In other words, the common concept in these periods of state formation has been the challenges that have occurred against the legitimacy of territorial adjustment or preservation. Different actors, in times of great change, have attempted to overcome this challenge by means of referendums. The concept of legitimacy as its central theme has interacted with the notions of sovereignty, self-determination, nationalism and democracy within the law and rhetoric of sovereignty referendums. By considering these notions, Part I aims to study the basic concepts and their theoretical underpinnings, which we shall refer to in the following chapters.

The common theoretical underpinning of all sovereignty referendums is their legitimating power: allowing the people to express their consent in the process of

determination of a political unit. According to Auer's definition, sovereignty referendums are popular consultations pertaining to territorial modifications, the independence of states, the self-determination of a decentralised community or adhesion of a state to a supranational organisation.¹ There are also other differing terms used to define the concept of "sovereignty referendums",² namely, "self-determination referendums"³ and, more commonly, "plebiscite".⁴

The term plebiscite is a Latin expression, created by the unification of two separate words: *pleb* and *scitum*. The former refers to the social strata having political rights in the Roman civilisation, whereas the latter means decree. Plebiscite therefore means the decree approved by the plebs.⁵

Gawenda discerns four separate connotations of the word plebiscite. In the first, there are the plebiscites of Roman law signifying, as mentioned in the preceding paragraph, the practices of direct democracy during the Roman era. Second, there are the plebiscites taking place within the domestic politics of states. These encompass all the different sorts of referendums that are held, either according to the constitution or legislation of a state or ad hoc by the governments without any prior legal base. Gawenda coins the term "social plebiscite" (*plébiscite social*), as a third type of plebiscite, indicating questionnaires held by the private research institutions. Fourth, as to the "plebiscite of international law" (plebiscite in its strictest sense), the term is used as a synonym for sovereignty referendums.⁶ The use of the term plebiscite, both in literature and in legal documents, evokes a considerable amount of ambivalence. The "plebiscite" therefore is one of the most problematic and controversial concepts in the terminology of both law and political science. This inconsistency mainly stems from the fact that diverse authors in literature attribute various meanings to the term. For certain authors, plebiscite and referendum are synonymous words and may be used interchangeably.⁷ Others tend to use the expression to connote votes not taken in a free way or under unfair political conditions. They refer to farcical referendums where dictators or other sorts of despotic regimes use the device to legitimise their authoritarian policies. Under these conditions, the democratic principles such as free campaigning or the secrecy and open tabulation of the vote are not observed. Among these diverse authors, for instance, Uleri says, "Plebiscite could...denote any kind of popular vote...where there is no real possibility to compete in a free and fair way".⁸

¹ Auer (2007a), p. 262; Auer (2007b), p. 58.

² Auer (1997), p. 28; Laponce (2010); LeDuc (2003), pp. 101–124.

³ Dobelle (1996); European Commission For Democracy Through Law. "Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning The Organization of Referendums With Applicable International Standards". Opinion No: 343/2005, Council of Europe, Strasbourg, 19 December 2005. Para. 33.

⁴ Wambaugh (1920, 1933), Farley (1986) and Gawenda (1946).

⁵ Berger (2004), p. 63; Barnhart (1995), p. 576; Ernout and Meille (1967), p. 514.

⁶ Gawenda (1946), pp. 13–14.

⁷ Eule (1990), p. 1587; Bogdanor (1981), p. 143.

⁸ Uleri (1996), p. 4.

Accordingly, for Zoller, a plebiscite is a degenerate form of referendum.⁹ The reasons for such a negative connotation may be found from examining the historical experiences of referendums. Indeed, many dictators have had recourse to use a distorted form of referendum, such as Napoleon in France, Hitler in Germany and Mussolini in Italy.¹⁰ Also, there are other scholars who differentiate between referendums and plebiscites, the former referring to votes held on policies or issues, the latter involving votes on political leaders, i.e., a sort of vote of confidence given by the people. Dezsó also made such a distinction, discerning democratic and anti-democratic plebiscites where De Gaulle's use of the referendum in France was an example of democratic plebiscites.¹¹ Thus, in this case, the plebiscites do not necessarily have to be undemocratic but may still have "a slightly negative connotation".¹²

This short survey of literature shows us that the term plebiscite has many diverse connotations in diverse contexts and resources and thus is prone to ambiguity. Indeed, "There are many different systems of classification that categorise the types of referendums, indeed as many as there are authors".¹³ Adding to this plethora of typology another ambivalent term like "plebiscite" will not serve in any way to a greater conceptual understanding of the referendums that are examined in this study. Taking this into account, and to avoid confusion, we opt to endorse the term "sovereignty referendums" for the purpose of this study rather than the term "plebiscite", unless it appears in a direct quotation from legal documents or literature.

An initial observation about the state of literature regarding sovereignty referendums may be that the study of referendums on sovereignty issues is not the sole preserve of a single discipline. The dominant approaches are law and political science, to which one could add political philosophy. Even within the two dominant fields there are disciplinary divisions, which roughly boil down to whether the focus is on domestic versus international aspects. This is because the concept of a sovereignty referendum naturally implies, both internal and external, i.e., the national and international aspects of sovereignty. In law it tends to break down into constitutional law approaches¹⁴ on the one hand and international law approaches on the other.¹⁵ The political science approach seeks to answer the question of whether the referendum device is a preferable option in the resolution of sovereignty issues. This is in fact associated with a broader question of the

⁹ Zoller (1999), p. 365.

¹⁰ Uleri (1996), p. 4; Dezsó (2001), p. 264.

¹¹ Dezsó (2001), p. 265.

¹² Suksi (1993), p. 11.

¹³ Dezsó (2001), p. 264.

¹⁴ Auer (1996) and Beaud (1994, 1997).

¹⁵ Beigbeder (1994), Farley (1986), Wambaugh (1920, 1933), Sureda (1973) and Rudrakumaran (1989).

impact of referendums in the polities where they are used. This question may be dealt with by a focus either on domestic politics¹⁶ or on international relations.¹⁷

Likewise, we may discern three approaches to referendums: explanatory, normative and legal. The explanatory (or descriptive) approach to any social phenomenon often deals with the causes and consequences of any social process or event that takes place in diverse contexts. In the context of sovereignty referendums, one may consider the description of referendums from a historical perspective, and additionally several works may be cited in an attempt to answer questions such as the timing, the reasons, the role of the political parties, voter behaviour and, most importantly, the impact of these referendums in the course of the various resolutions of sovereignty issues for which they are held.¹⁸ From a normative viewpoint, the question concerns the moral duty to hold referendums whenever a change of sovereignty is in question. Finally, from a legal perspective, referendums may be studied in the light of a variety of legal resources, namely, court decisions, constitutions and international legal documents.¹⁹

With respect to the legal aspects of sovereignty referendums, Wambaugh's two successive treatises stand as seminal examples.²⁰ Evidently, these works from the interwar period are outdated, and they are open to criticism that they were no more than the historical records of the referendums lacking a thorough legal analysis. However, by raising some of the basic issues and compiling the historical material, the two works have served a community of scholars working on the topic since. Other examples of mapping the field can be identified, such as Gawenda's legal analysis of the referendums held until WWII²¹ or Sureda, who directly addressed the sovereignty referendums held in the post-war decolonisation process and offers a detailed legal analysis of the referendums held in British Togoland and Cameroons, Gibraltar and Somali.²² More recently, Farley reformulated some of the basic legal issues as set out by Wambaugh in a more systematic manner, with a more precise language and with reference to some of the more recent referendums.²³ One of the most recent and up-to-date legal surveys from an international law perspective has been provided by Beigbeder, whose work remains a reference point on the role of UN involvement.²⁴ In addition to these works, we could also mention some of the articles that deal with particular issues of sovereignty referendums such as customary international law²⁵ and questions concerning the eligibility of voters and

¹⁶ Bogdanor (1981, 1994), Ginty (2003), Goodhart (1981), Morel (2007) and LeDuc (2003).

¹⁷ Rourke et al. (1992).

¹⁸ Balsom (1996), Bogdanor (1981, 1994), Brady and Kaplan (1994), Butler and Ranney (1994a), Gallagher (1996), Goodhart (1981), Rourke et al. (1992) and Uleri (1996).

¹⁹ Pavkovic and Radan (2007), p. 171.

²⁰ Wambaugh (1920, 1933).

²¹ Gawenda (1946).

²² Sureda (1973).

²³ Farley (1986).

²⁴ Beigbeder (1994).

²⁵ Rudrakumaran (1989).

the wording of the question.²⁶ In addition to these studies, certain number of works may be mentioned that focus on sovereignty referendums in a specific country. For instance, Dobelle and Amiel have both focused on the legal regime underpinning French-related decolonisation referendums.²⁷

These works, as outlined above, being the first point of departure, this thesis is devoted to a study of sovereignty referendums from a legal perspective. On the other hand, the relationship between the explanatory and normative theories with legal theory remains to be answered before deciding on the methodology. To this end, one may refer to Luhmann's system theory, according to which politics and law are considered as two different social systems. According to this conception, social systems are like living organisms, in the sense that they produce and reproduce the components that constitute the system itself. These systems operate as if they are related to each other yet remaining reciprocally distinct. In this process, each system treats the other systems as their environments. Every system (as the environment) sends communications and demands to the other systems. These systems are "autopoietic": they are "cognitively open", i.e., they allow transfer of information and thus may adapt to demands from the environment. However, they are also closed, that is, this adaptation may only be realised if, and only if, the system translates the new information in its own terms. This is made by the bipolar-binary code specific to each system, which is "legal/illegal" in law. In politics, it may be defined as "holding/non-holding of the political authority" from a sociological perspective, or it may be "good/evil" or "justified/non-justified", from a moral one.²⁸ Also, each system sends communication to the other systems by means of their binary codes.

The historical experience of sovereignty referendums may be observed according to this pattern. In politics, referendums may be associated with the success/failure of (1) the resolution of a sovereignty conflict, (2) the acquisition of political power, or (3) secession or state creation. In political philosophy (morality), the doctrinal accounts such as the consent of the governed and social contract theories may be read by reference to the justified/non-justified title to sovereignty. Needless to say, in law, referendums may be found in the procedural patterns, which determine the legality or illegality of the possession of a territory. Referendums are the key components in each of these systems, and all these systems communicate and make demands as regards the right to a piece of territory.

Following this outline, in the following chapters we will first determine the location of sovereignty referendums within the environments of politics. Then we will go on to draw the framework of this study from a legal point of view. Finally, we will offer a typology by considering the legal and political elements that have surrounded sovereignty referendums throughout history.

²⁶ Héraud (1983).

²⁷ Dobelle (1996) and Amiel (1976).

²⁸ Michailakis (1995), pp. 325–332.

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Chapter 3

Sovereignty Referendums in the System of Politics

Abstract This chapter begins with a description of the historical background of sovereignty referendums. The significant presence of sovereignty referendums in the history of the modern state explains why so many authors have something to say on this subject, especially political scientists, philosophers and lawyers. The following sections in this chapter aim to survey the relevant literature, offering a brief but holistic account from different perspectives to offer a synopsis of the sociological, philosophical and moral or—in other words—meta-juridical aspects of the sovereignty referendums.

3.1 Occurrence of Sovereignty Referendums in a Historical Context

3.1.1 *Historical Overview: Practices Since the French Revolution*

The germ of the idea and practice of consulting the inhabitants of a territory may be dated back to medieval times. Gonsollin notes that the first genuine popular consultation was held in Geneva.¹ In 1420 when the Duchy of Savoy decided to annex Geneva, the inhabitants of the city reacted by holding a referendum, after which the annexation was rejected unanimously. The significance of this referendum was that it was conducted by universal male suffrage, which was very progressive for the era.² Another experience may be observed, when in 1552 the cities of Metz, Toul and Verdun decided to stay as a part of France.³

We may further trace the initial and rudimentary practices of popular consultations regarding the foundation of a community, from the early seventeenth century, when the American Ancestors (the Pilgrim Fathers) founded their early colonies.

¹ Gonsollin (1921), p. 31.

² Farley (1986), p. 29.

³ Rourke et al. (1992), p. 31.

From the first colony (New Plymouth) henceforth, colonies were founded by means of the “plantation covenants”: compacts signed by the entirety of the adult and male population. In the beginning, these communities were purely religion based. The plantation covenants were used to found new church congregations of puritans who had emigrated from Britain. However, it did not take long for this religion-based conception of formation of a political unit to evolve into a prototype for the democratic foundation of a political community. In this way, the “Fundamental Orders of Connecticut” was a document prepared for the foundation of Connecticut. It was created by the people who had withdrawn from Massachusetts and is noted as the first written constitution in history to be ratified directly by the people.⁴

Despite these preliminary experiences, the French Revolution is still considered as the starting point for sovereignty referendums. The theory underlying the popular consultation about its political status had been formed during the French Revolution. The guiding principles of the French Revolution such as popular sovereignty, democracy and self-determination urged France to renounce the war of conquest and the employment of force against the liberty of the people as the main framework of its foreign policy.⁵

From this point on, sovereignty referendums may be examined in five main periods.⁶ The first period begins with the French Revolution, where resolving territorial problems through referendum as both principle and procedure first appeared. The union of Avignon, the Comtat Venaissin, Savoy and Nice with France were realised through referendums. When representatives of the Papal States Avignon and the Comtat Venaissin submitted their will for unification with France, the French Assembly compelled the representatives of these states to consult the people in the given areas. It was only after these popular consultations that the French Assembly decided to annex the aforementioned provinces.

The second period of referendums started with the process of the unification of Italy in the nineteenth century. The process of unification of Italy through referendums started in 1848, with a referendum in Lombardy to join the Kingdom of Sardinia and was completed in 1870 with the adhesion of Rome.⁷ Also in this period, the return of the Saint-Barthélemy Islands from Sweden to France (1877) and the independence of Norway from Sweden (1905) were realised by means of a referendum. In this period, one should note that not every country was eager to use referendum in its territorial settling. The United States is a striking example of that

⁴ Auer (1996), p. 85.

⁵ Wambaugh (1920), p. 5; Farley (1986), p. 30.

⁶ Laponce (2001), pp. 38–40.

⁷ In the Lombardy referendum, the voters were asked whether to realise the immediate union with Sardinia. The result was almost unanimously in favour of the immediate union. After the first referendum in Lombardy, similar votes followed in Venetia, Parma and Modena for joining the Sardinian Kingdom. These regions were then incorporated into the Kingdom of Sardinia through the laws enacted by the Sardinian Parliament. Then referendums were held in Tuscany and Emilia Sicily, Naples, Umbria and Marches (Wambaugh 1920, pp. 14 and 61–65).

point. No referendum was held during the acquisition of Florida (1819), California (1848), Texas and New Mexico.⁸

After the First World War, a new third phase of sovereignty referendums began. Inspired by the Wilsonian principle of self-determination, referendums were provided by the Paris Peace Treaties for ending the war with Germany and Austria (Treaty of Versailles and Treaty of St. Germain). In this period, referendums were held in Schleswig, Allenstein and Marienwerder, Upper Silesia and Sopron. There were also “attempted plebiscites” that could not be held due to the lack of agreement between the parties on the basic terms and conditions of the referendum. These areas include Teschen, Spisz and Orava (Poland and Czechoslovakia), Vilnius (Poland and Lithuania), Tacna and Arica (Peru and Chile). Also, the transfer of some other regions, as may be seen in the case of Alsace-Lorraine, did not follow a referendum.⁹

The fourth wave of referendums comprises those held during the decolonisation process after the Second World War. By 1945, more than 750 million people were subject to a foreign power. Africa, the Middle East and Asia were all territories of colonialist European countries. The most significant consequence of the Second World War was the emergence of independent states outside Europe in large numbers.

Soon after its establishment, the United Nations took an active role in reshaping the political map of the world. The colonial territories of the defeated countries (Italy, Germany and Japan) were put under the Trusteeship System of the United Nations. The Trust Territories would be administered by the USA, the UK or France on behalf of the UN. The United Nations Trusteeship Council was established in order to check the compliance of the administering authorities with the rules and principles of the trusteeship system as set out in the UN Charter. The trusteeship was different from the mandate system of the League of Nations in that it was defined as an explicit transitional period to independence.¹⁰

In light of the foregoing, it may be observed that virtually all of the post-Second World War referendums were related to the independence of territories under colonial rule. In this era, the right to self-determination of the people gained its utmost prestige, especially within the UN and in parallel with the decolonisation process. Several sovereignty referendums were held, under the UN’s auspices in Africa, Asia, the Pacific Islands and Latin America. In this period, metropolitan states also applied referendums in the process of ceding their colonies. In these cases, certain referendums were based on the internal legal order of the country concerned. France is a model example of this category, where Algeria (1961–1962), for instance, gained its independence by means of referendums organised by France.

It should be noted that European Referendums, which have been held since 1970s, differ from those of the decolonisation processes. By European Referendum,

⁸ Dobelle (1996), pp. 41–60.

⁹ Regarding Alsace Lorraine, it was argued by the French government that given the continuous protests of the population since the region had been occupied by Germany, there was no need for a referendum (Beigbeder 1994, pp. 80 and 81; Wambaugh 1933, p. 17).

¹⁰ Farley (1986), p. 37.