Nationalism, Referendums and Democracy

Voting on Ethnic Issues and Independence

Edited by
Matt Qvortrup

ROUTLEDGE

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Nationalism, Referendums and Democracy

Democracy is above all about majority rule. But which majority should rule if a part of a country wants to secede and become independent? Should the majority of the whole country decide? Or only the majority in the part that seeks to become independent be allowed to vote? Referendums and democracy have often been perceived to be almost incompatible with nationalism and ethnicity. Are they? Are there limits to democracy and the use of referendums? This book looks at these issues through a comprehensive study of the referendums held on ethnic and nationalist issues since the French Revolution. It analyses the pros and cons of referendums and presents a nuanced and up-to date *tour d'horizon* of the academic and scholarly writings on the subject by experts in international law and comparative politics.

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A lawyer and a political scientist, Professor **Matt Qvortrup,** earned his doctorate at University of Oxford. Described by the BBC as 'one of the world's leading experts on referendums', he has advised the US State Department on referendums and constitutions. The winner of the Oxford University Law Prize and the PSA Prize for best paper in 2012, he currently teaches at Cranfield University.

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Introduction: Referendums, Democracy, and Nationalism

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Referendums have often been perceived to be incompatible with nationalism. "Democracies," wrote William Sumner Maine, "are quite paralyzed by the plea of nationality. There is no more effective way of attacking them than by admitting the right of the majority to govern, but denying that the majority so entitled is the particular majority which claims the right."[1] This special issue looks at referendums held on ethnic and nationalist issues from the French Revolution to the 2011 referendum on independence for Southern Sudan.

Secession Referendums and the Motherland: The Case of Scotland

By the time this special issue is published Alex Salmond, first minister of Scotland (a part of the United Kingdom), will have launched a proposal document *Your Scotland – Your Referendum*, in which he proposes to hold a referendum on independence. But even before the launch of the proposal, constitutional issues were raised. One of the issues was whether Scotland would be legally entitled to hold a referendum, which is debated in Peter Radan's article in this issue. The basic argument advanced by Michael Moore, the British cabinet minister responsible for Scotland, was that a referendum would be *ultra vires*, that is, beyond the powers conferred to Scotland by the Scotland Act of 1998. This seems to have been accepted by the media—and it is possible that this argument holds. But, informed debate was in short supply and only a few constitutional lawyers pointed out that the issue of legal efficacy rarely has been of great importance in other referendums on independence.[2]

Indeed, the issue of international law has not been mentioned at all in the Scottish debate except in passing by the First Minister.[3] This is somewhat surprising because it is very pertinent to the issue. International law generally

holds that two conditions must be met for successful secession. First of all, the people of the territory must express a wish to secede. This was recognised by the International Court of Justice (ICJ) in the case concerning East Timor[4] and in the ICJ's Advisory opinion on Western Sahara in which it was held that independence "requires the free and genuine expression of the will of the peoples concerned."[5] To use but two examples, Montenegro did not have to ask Serbia to secede in 2006, nor did Estonia seek the Soviet Union's permission to become independent in 1990 and clearly permission would not have been granted. But this is not sufficient. According to the second principle of international law, countries must also be recognised by the international community. In matters regarding recognition, most countries follow the so-called Estrada Doctrine that was named after the Mexican Foreign Secretary Genaro Estrada in 1930.[6] According to this doctrine, a country should be recognised when it has control over its own territory. Though in some cases, it should be noted, the international community has recognised a state after a referendum and without ascertaining that the state in question controlled the territory (as happened in the case of Croatia[7]).

If Scotland votes for independence (and if the Scottish government is in control of the territory), then the international community will in all likelihood recognise the new state, just like in the cases of former Soviet states in the 1990s.

Of course, it is possible that only a narrow majority will vote for independence. But this need not be fatal. When Malta voted for independence in 1965 only a little more than 50 percent of the population voted to sever ties with Britain, yet Westminster accepted the outcome. Still, there is nothing that prevents Westminster from ratifying a potential vote of Scottish independence.

Indeed, in 1933, the Imperial parliament ignored a vote for independence in a referendum in Western Australia, and in 1946, the Danish government did the same when the Faroe Islands voted for independence in a referendum in the same year. But these are the exceptions. Out of the more than 40 democratically credible secession or independence referendums that have been held since 1791, only these two have not led to independence. So legal matters aside, referendum results tend to be respected in democratic countries. And when they are not accepted, as in Bosnia, Kroatia, Estonia, Latvia, and Lithuania, the country secedes anyway. So unless London wants to follow the Soviet Union in 1990, it cannot politically block Scottish independence. The only ones who can do so are the Scottish voters and the Scottish administration. Thus is the doctrine of self-determination, which has been recognised as a fundamental principle of international politics and law since it was established by US President Woodrow Wilson after the First World War.

But would a country have a case for independence under domestic law? Again, the Scottish example may be pertinent. Though as Peter Radan shows

in "Secessionist Referenda in International and Domestic Law" in this issue, there are other examples.

When the Scottish Parliament was established the *Scotland Act 1998* stipulated a number of areas that would be reserve powers of London, and other areas that would fall under the jurisdiction of the Scottish parliament at Holyrood.

In the run up to the Scottish government's announcement that they would hold a referendum on independence, the British Coalition government argued that the Scottish government was not allowed to hold a referendum under Section 30 of the Scotland Act.[8]

The validity of this legal argument is still to be determined, but already there are indications that this argument is unlikely to prevail. The assumption that the Supreme Court (previously the House of Lords) could declare a secession referendum illegal or void is perhaps debatable in the UK. In the only case to have dealt with the limits of power of the Scottish Parliament to date, *AXA v. The Lord Advocate* in 2011, the Supreme Court refused to declare an Act of the Scottish Parliament void, and held that it, "the judgment of [an] elected body as to what is in the public interest." In its decision the Supreme Court noted:

> [Parliament does not] legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law. There is ... no suggestion in the present case that the Scottish Parliament has acted in such a manner.[9]

In other words, it seems the Supreme Court accepted that the Scottish Parliament, having a democratic mandate, had the right to legislate, even if they went beyond the narrowly defined powers in the Scotland Act. Or so the argument runs. The implications of this ruling seem to be that the Supreme Court washed its hands of any involvement with the legal issue of Scottish independence. It is debatable whether or not this is the case. Some might argue that it is necessary to go back and look at the intentions of Parliament when they passed the Scotland Act in 1998. Back then, the Secretary of State for Scotland, Donald Dewar, was unequivocal that a referendum was a reserved matter, i.e. that a future Scottish Parliament could not call a referendum on independence without the consent of London:

> It is clear that constitutional change-the political bones of the parliamentary system and any alteration to that system-is a reserved matter. That would obviously include any change or any preparations for change. ... If one assumes that that is a way of changing the constitution, no, it is not in the power of the Scottish Parliament to change the constitutional

> arrangements . . . A referendum that purported to pave the way for something that was *ultra vires* is itself *ultra vires*.[10]

But Scotland is not the sole example of this *problematique*. Another example is Quebec.

In Canada, the Supreme Court reached the opposite conclusion, and concluded in a reference[11] that Quebec would not have the right to secede by referendum. The law of secession and referendums is a complex subject, which is why it fascinates political scientists.

One of the problems in this subject is that—as we shall see below—many legal arguments are advanced to support political viewpoints. Another example that has surfaced in the debate about Scottish independence is the issue of whether to hold two referendums rather than one. When the Scots began to talk about independence, some (such as the aforementioned Scottish Secretary Michael Moore) suggested that in fact two referendums were needed; one in the part of the country that sought to secede and a second in the rest of the country. Again, this was presented as a legal fact, but evidence of precedent was weak and difficult to find.

The aim here is not to question the motives of the UK government but to add empirical meat to the bone. In only two cases have there been referendums in the "mother country," namely in 1916, when voters in Denmark approved the sale of the Virgin Islands to the US; and in 1961, when French president Charles de Gaulle organised concurrent referendums on Evian Accords in both France and Algeria. But these referendums do not create much of a precedent. The Danish vote belongs to the colonial era, and General de Gaulle's referendum was not required by constitutional law (for anoraks it was held under Article 12, not under Article 89 of the French Constitution), and was a result of internal political pressure, not the consequence of a legal requirement.

One of the arguments for two Scottish referendums is that independence would have unforeseen consequences for the rest of the union, hence the rest of the UK is entitled to have a say. This justification for a referendum was first introduced by the prominent lawyer (and fanatical unionist) A.V. Dicey in an article in *Contemporary Review* in 1890.[12] Back then it sank without much of a trace. Despite Dicey's standing as a lawyer, his idea has not had any impact on international law. For example, Jamaica's secession from the Caribbean Federation after a referendum in 1961 was not put to a vote in the other states—and did not raise a chorus of international protests. Indeed, since the early 1990s, it has become a generally accepted practice in international law that only the seceding country votes. This was the case in the United Nations-sponsored referendum in Eritrea in 1993 and in the referendum in Southern Sudan in 2011. Furthermore, since the European Union-sponsored secession referendum in Montenegro in 2006, an international practice has been built up that only one referendum is required. Of course, London can

choose to ignore the result of a referendum—like it did unsuccessfully after a referendum in South Rhodesia in 1964—but to do so would be a breach of current practice.

Secession Referendums Around the World

As the foregoing example from Scotland shows, referendums have played an important role in attempts to resolve ethnic conflicts for centuries. But it is fair to say that scholars of ethnic and national conflict have had reservations about these plebiscites. In this special issue, experts from law, international relations, and political science analyse the various aspects of submitting national and ethnic issues to referendums

But, it is fair to say, that scholars of ethnic and national conflict have had reservations about these plebiscites. In this special issue, experts from law, international relations, and political science analyze the various aspects of submitting national and ethnic issues to plebiscites.

Not all the articles reach the same conclusions. Nor are they intended to. This is not a special issue aimed at converting the readers to more or fewer referendums on ethnic and national issues. There are pros and cons of referendums—and it is important that both sides of the argument are presented. However, in the literature it has mainly been the negative voices that have been heard.

Michael Gallagher, concluded that "the referendum is least useful if applied to an issue that runs along the lines of a major cleavage in society."[13] He was not alone. Yet, he was not as dismissive of referendums as Roger Mac Ginty (one of the authors in this volume), who noted that "the principle problem with referendums in situations of profound ethnic conflict is that they are zero-sum, creating winners and losers. Simple majoritarian devices do little to help manage the complexity of conflict. Instead they validate the position of one side and reject that of another. Often, they do little other than delimit and quantify division."[14] This interpretation may have been correct in the case of the 1973 Border Poll in Northern Ireland, and, indeed, in the case of many of the referendums held in the Former Yugoslavia in the 1990s—as noted by Zoran Oklopcic in this volume.

Yet, other examples seem to suggest the very opposite. In her much cited classic *Plebiscites since the World War*, Sarah Wamburgh noted that the referendum in Schleswig (between Denmark and Germany) "was so fair and excellently administered that the Schleswig question, which caused three wars in the 19th Century and rent of councils of Europe for some seventy years, has ceased to exist."[15] This conclusion is shared by Jean Laponce in his article in this special issue. Further, prominent political scientists have argued—or suggested—that in ethnically divided societies "the potential of calling the referendum . . . is a strong stimulus for the majority to be heedful of minority views."[16]

In "Secessionist Referenda in International and Domestic Law," Peter Radan looks at plebiscites in international law and finds that "the legal requirement for [holding] a referendum is limited to cases involving agreements between relevant parties to hold [one]." In the subsequent article, "Independence Referendums and Democratic Theory in Quebec and Montenegro," Zoran Oklopcic tackles the questions that arise from the invocation of "the people" in independence referendums in a contextualized way by examining the constitutional experience of two independence referendums: Quebec's unsuccessful independence referendum in 1995 and Montenegro's successful one in 2006. Oklopcic concludes that "the tension in democratic theory ought to . . . contribute to reducing the vehemence of nationalist politics that surround attempts to achieve political independence."

This theme is continued in Sung Yong Lee and Roger Mac Ginty's article "Context and Postconflict Referendums," in which the authors empirically argue that "referendums may have a limited ability to bring about reconciliation"; although some "well-timed referendums have advanced peace processes at critical moments, these are exceptions."

The question of the usefulness of referendums is also analyzed in "Phantom Referendums in Phantom States: Meaningless Farce or a Bridge to Reality?" by Dahlia Scheindlin. However, unlike Lee and Mac Ginty, Scheindlin reaches an more favorable conclusion, namely that "in situations of profound uncertainty about national and political identity, legitimacy, and leadership, referendums are more likely when the authorities can guarantee—or orchestrate—an indisputable majority in the desired direction." This conclusion is also reached in Erol Kaymak's article "If At First You Don't Succeed, Try, Try Again: (Re)Designing Referenda to Ratify a Peace Treaty in Cyprus."

In the next article, Jean Laponce analyzes the timely issue of linguistic cleavages in his article "Language and Sovereignty Referendums: The Convergence Effect," in which he tests the "hypothesis that sovereignty referendums tend to bring closer together the boundaries of states and language" and finds support for his proposition in an article that finds that referendums have many benefits that are not found in purely representative institutions.

Lastly, in "The History of Ethno-National Referendums 1791–2011," Matt Qvortrup presents an overview of the more than 200 referendums held on ethnic and national issues since the time of Napoleon. He presents the outline of a typology, and shows that referendums have tended to be held in times of upheaval and usually as an opportunistic tool rather than as an idealistic mechanism of democratic principle.

Stalin—in a quotation that is likely to be apocryphal—is often credited with the statement "what matters is not who votes, counts the votes." The essays in this special issue have not been quite as negative as the Soviet dictator's conclusion, but nor have they—as a whole—given the ethno-national referendums a clean bill of proverbial democratic health. Much depends on

the context, the spirit, and the political climate of the referendum. Referendums are not political panaceas, but nor are they as dangerous as some people have occasionally suggested.

So, while we may not have found a final conclusion, it is hoped that this collection of articles have at the very least shown the reader that nationalism and democracy are difficult to reconcile.

NOTES

1. Sir Henry Sumner Maine, *Popular Government* (Indianapolis: Liberty Fund, 1897), 88.
2. See Aidan O'Neill "We Need to Talk About the Referendum," *The Guardian* 8 Nov. 2011 http://www.guardian.co.uk/law/2011/nov/08/uk-supreme-court-scottish-independence (accessed 6 Feb. 2012).
3. Alex Salmond, on, "The Andrew Marr Show," BBC 1, 29 Feb. 2012.
4. Portugal v. Australia, International Court of Justice, 30 June 1995, ICJ Reports, 90-106.
5. Advisory Opinion, International Court of Justice, 16 October 1975, ICJ Report 12-68, 55.
6. Alina Kaczorowska, *Public International Law* (London,UK: Routledge, 2008), 83).
7. See Antonio Cassese (2005) *International Law* (Oxford, UK: Oxford University Press, 2005), 74.
8. S.30 Scotland Act, 1998.
9. *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents)* (Scotland), UKSC 46 [2011], 153.
10. Donald Dewar in House of Commons Debate, 12 May 1998, Column 257.
11. Reference re Secession of Quebec, [1998] 2 S.C.R. 21.
12. See Matt Qvortrup, *A Comparative Study of Referendums* (Manchester, UK: Manchester University Press, 2005), chap. 2.
13. Michael Gallagher, "Conclusion," in Michael Gallagher and Pier Vincenzo Uleri, eds., *The Referendum Experience in Europe* (Houndsmill: Macmillan, 1996), 246.
14. Roger Mac Ginty, "Constitutional Referendums and Ethnonational Conflict: The Case of Northern Ireland," *Nationalism and Ethnic Politics* 9(2): 3 (2003).
15. Sarah Wamburgh, *Plebiscites since the War* (Washington, DC: Carnegie Endowment for International Peace, 1933), 98.
16. Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), 231.

Matt Qvortrup has been described by the BBC as "the world's leading expert on referendums." He received his doctorate from the University of Oxford and is the author of *A Comparative Study of Referendums* (2005) and *From Bullets to Ballots* (2012). During 2009 he was an envoy for the British Foreign and Commonwealth Office in the Sudan where he helped draw up the rules for the independence referendum in South Sudan.

Secessionist Referenda in International and Domestic Law

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This article assesses the extent to which there is a legal requirement to hold referenda in the context of secessionist claims. If the right to secession is underpinned by the right of peoples to self-determination, ascertaining the will of the relevant people is of undoubted importance in securing political legitimacy. However, the legal requirement for a referendum is limited to cases involving agreements between relevant parties to hold a referendum and to cases where a state's constitutional law mandates a referendum as part of the secession process.

INTRODUCTION

The right of peoples to self-determination is usually cited as the justification for secession. Declarations of independence, which are the usual means of initiating the process of secession, generally base their claims for independence on the right of peoples to self-determination. For example, the independence declarations of Slovenia and Croatia, which triggered the secessionist wars of the early 1990s in the former Yugoslavia, both justified secession on the basis of the right to self-determination.[1] In many cases, the holding of a referendum of secession is what is proffered as a legitimate expression of the right to self-determination. Although such referenda are of undoubted significance in terms of assessing the political legitimacy of any secessionist claim, the issue to be addressed in this article is the place of such referenda from the perspectives of relevant international law and the domestic law of a state that is subjected to a secessionist demand.[2] This article will not address issues relating to the very important procedural aspects of such referenda.[3]

However, before that issue can be addressed, the meaning of secession needs to be clarified, as there can be no understanding of the relevance of referenda on secession from a legal perspective without first determining what types of state creation fall within the definition of secession.

THE MEANING OF SECESSION

The definition of secession is contested. At one end of the spectrum of definitions is that of James Crawford who, in his seminal work, *The Creation of States in International Law*, defines secession as "the creation of a State by the use or threat of force without the consent of the former sovereign."[4] The elements of the use of force and lack of consent limit cases of secession to what is more often referred to as *unilateral* secession. Indeed, in his book, Crawford often uses the expression "unilateral secession" when discussing what he has previously defined as cases of secession.[5] On the basis of his definition of secession, Crawford argues that, at the time of writing his book, the international recognition of Bangladesh's independence from Pakistan[6] constituted the only case of secession outside the context of decolonization since 1945.[7] By way of contrast, the present author has argued for a broader definition of secession and defined it as "the creation of a new state upon territory previously forming part of, or being a colonial entity of, an existing state."[8] This definition of secession extends secession beyond unilateral secession. It includes the creation of new states out of existing states by consent of the existing state. Examples here include Eritrea and Southern Sudan. It also includes new states resulting from the dissolution of an existing state.[9] Examples here include most of the states emerging from the dissolution of the Union of Soviet Socialist Republics, Yugoslavia, and Czechoslovakia. For Crawford, state creation of the type that occurred in these former states did not amount to secession; although he concedes that most of them were initiated by demands for secession.[10]

INTERNATIONAL LAW AND REFERENDA ON SECESSION

The role of referenda on secession in international law is very much dependent upon secession being legally regulated by international law. In this respect, the existence of any legal right of secession in international law is a matter of dispute. The essence of the debate on this question is whether the guarantee of the territorial integrity of states set out in Article 2(4) of the Charter of the United Nations is absolute. It has been argued that the right of peoples to self-determination establishes a limited right of secession and thus makes the territorial integrity of states conditional upon states complying with their obligations in relation to the right of peoples to self-determination.