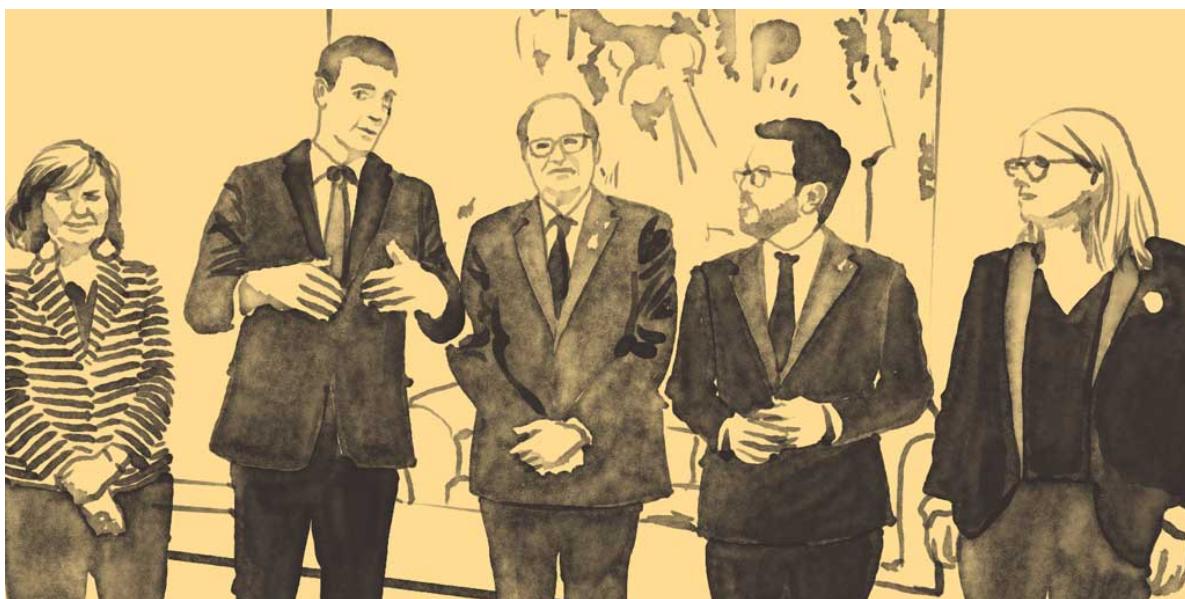


The Good, the Bad and the Ugly: Independence Referendums in Comparative Perspective

Matt Qvortrup



Qvortrup conclou que, "pel que fa a trobar una solució, el referèndum sobre la independència no resulta d'ajuda si no hi ha hagut cap negociació prèvia". Il·lustració:
César Cromit

*Democracies 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*

William Sumner Maine [1]

In 2017 a majority of the voters in Catalonia, the Spanish *comunitat autònoma*, voted overwhelmingly for independence in what supporters called a referendum -but which opponents called an illegal and unconstitutional act. The figures seemed impressive. Over 92 per cent voted for independence and just over seven percent voted *no* to the proposition, "do you want Catalonia to become an independent state in the form of a republic?" [2].

This result was - on the face of it - reminiscent of the 1944 referendum in Iceland and the vote in Norway in 1905 when similar majorities voted for independence from, respectively Denmark and Sweden. With one exception, that is. The turnout in these referendums was considerably higher. In both Iceland and Norway more than 90 percent. In Catalonia, by contrast, only 43 per cent of the voters turned out to cast their ballot [3].

The aim of this chapter is not to give a blow-by-blow account of the Catalan poll, others are much better equipped to do so! Rather the intention is to analyse this vote in the light of more general tendencies in similar referendums in a comparative perspective. The article will point out contrasts and similarities with the over sixty referendums that have been held on independence in the past 160 years.

A Short History of Independence Referendums around the World

Independence Referendums have a long history. In many ways, these were the original referendums. As far back as the 14th century, votes were held in present-day France to escape the domination of the Holy Roman Empire. Thus in 1307, Lyonnais voted for independence in the first instance of what we might call a referendum [4].

And, under similar circumstances, male property-owning citizens in Burgundy voted in 1527 to nullify the *Treaty of Madrid*, according to which the territory would be ceded to Spain. The vote was a tactical masterstroke by the French King Francis I, who -having read Erasmus of Rotterdam- thought that he could undo the accord he had signed when he was in a weaker position [5].

While political theorists from John Locke through to Hugo Grotius were in principle in favour of letting people decide whether they wanted to be ruled by one King or another [6], it was not until the 18th century that this form of consultation began to resemble what we today would consider to be a democratic method of voting.

Modern democracy took a quantum leap forward with the American Revolution. All free men were entitled to vote, and it was recognised that the right to govern should not be limited to a small elite group. Perhaps not surprisingly, this had impact on the use of direct democracy.

The first referendum in America was held in 1788 in Rhode Island, when voters were consulted on whether they wanted to give up their independence and join the newly minted United States. As it happened, they voted 'no', but -in what some will find to be an interesting parallel- there were eventually forced to join the Federation [7].

These early experiences were continued in France, though here with a clearer ideological commitment to the sovereignty of the people as originally developed by Rousseau.

The "French revolution proclaimed as the fundamental principle of all government the

principle of popular sovereignty" [8]. As we saw earlier, even Napoleon was an enthusiastic user of (tightly controlled) referendums. Though these were not free and fair. However, as we have seen, the referendum as a means of determining sovereignty fell into disuse after Waterloo, and it only began to be used again in the years after 1848, when there were several votes in Italy and France. For example, Nice voted in a sovereignty referendum to join France, and the process of Italian reunification was codified by popular votes, though it was sometimes difficult to determine the fairness of these.

The first referendums on independence were held in the Confederate states in America in the early 1860s. At this stage the referendum was already a deep-seated part of political life in the United States. By the mid 1850s it had become commonplace to consult the citizens in major issues of constitutional importance. It was natural; therefore, that Texas, Virginia and Tennessee submitted the decision to secede from the Union to the voters in 1860. What is perhaps interesting is that the support for secession was not unanimous. In Tennessee, for example, 104.019 voted for secession while 47.238 voted against, and in Texas the figures were 34.794 for and 11.235 against. We do not have figures for Virginia. These were not endorsements of epic proportions. The less than unanimous support perhaps suggested the Dixie voters did not support the nuclear option favoured by the confederate elites [9].

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After the American Civil War referendums on independence were almost forgotten. To be sure, there were debates about plebiscites to resolve the border dispute between Denmark and Germany, but these came to naught.

It took a full 45 years before the next referendum on independence was held. In this case a vote on whether Norway should secede from Sweden (more than 99 per cent supported the proposition) in a referendum in 1905. In the Norwegian case the referendum was the brainchild of Norwegian Prime Minister Christian Michelsen, who wrong-footed the Swedish Unionist elite by calling a surprise referendum after the Swedish king had refused to appoint a government that had a majority in the *Stortinget* (the Norwegian legislature) [10].

But although the principle of self-determination of the people was much espoused in the wake of the First World War -especially by US President Woodrow Wilson who had campaigned for the use of more referendums in America while he was governor of New Jersey [11]-, no referendums were held on independence for the newly established countries (e.g. Czechoslovakia or Yugoslavia) or the secession of states from established ones (e.g. Hungary and Finland). To be sure, there were several referendums on the drawing of borders in Europe, e.g. in Schleswig and in Tyrol in 1920. But referendums on

outright independence were not held, and the leading scholars of international law were generally sceptical of them. L.F.L Oppenheim, arguably the most prominent international legal mind at the time concluded, "it is doubtful whether the law of nations will ever make it a condition of every cession that it must be ratified by a plebiscite" [12].

In the period between the two World Wars, only two referendums were held. One in 1933, on whether Western Australia should secede from Australia, another in 1935, on whether the Philippines should become independent from the United States. In the former, a majority voted for independence, but as the *National Party*, which campaigned for secession, lost the election held on the same day, nothing came of it.

In the latter case, a successful referendum was held on a new independence constitution after the Philippine Congress had rejected the US Congress' *Hare-Hawes-Cutting Act*, which granted independence for the erstwhile overseas dependency. However, it was not after the Second World War that referendums began to be used consistently. This happened when areas seceded from their parent states. Of the over 60 referendums on independence since 1860, 54 have been held after 1944. But the vast majority of these -41 in total- were held after 1990. As shown in Table 1 there were only 13 independence referendums in the four decades after the Second World War.

Table 1. Secession Referendums 1944 - 1980

Parent Country	Seceding Country	Year	Turnout	Yes Vote
Denmark	Iceland	1944	98%	99%
China	Mongolia	1945	98%	64%
Denmark	Faroe Islands	1946	50%	64%
United Kingdom	Newfoundland	1948	52%	88%
France	Cambodia	1955	100%	-
France	Guinea	1958	97%	95%
New Zealand	Western Samoa	1961	86%	77%
West Ind Fed	Jamaica	1961	46%	60%
France	Algeria	1962	99%	75%
Malaysia	Singapore	1962	71%	90%
United Kingdom	Malta	1964	50%	80%
United States	Micronesia	1975	52%	59%
Canada	Quebec	1980	85%	41%

Source: www.c2d.ch (accessed 2 October 2020)

One would perhaps have suspected that these referendums would have pertained to

decolonisation; that the independence movements would have sought popular approval of their newly gained or espoused freedom. This was not the case. The elites who fought for and won independence were not, in most cases, willing to risk the political victories gained in negotiations or wars by submitting declarations of independence to an unpredictable electorate. Indeed, the only colonies to submit the declarations of independence to referendum were Cambodia, Western Samoa and Guinea. In the first two cases, the votes were held at the instigation of the parent states, which wanted to show that there was popular support for abandoning the territories.

The Guinean referendum was somewhat different. Held on the same day as eleven other referendums in other French colonies, on whether to take part in the newly established *Communauté française*, established by Charles de Gaulle, the Guineans, led by the independence leader Ahmed Sékou Touré, defied Paris and voted to become independent [13]. 95 per cent voted in support of independence. France retaliated by withdrawing all aid. However, within two years Mali, Niger, Upper Volta (now Burkina Faso), Côte d'Ivoire, Chad, The Central African Republic, The Republic of Congo and Gabon became independent states.

All territories that had returned huge majorities for maintaining links with France in the referendum in 1958 but none of the new states submitted the decision to become independent to the voters. It was almost as if referendums on independence were anathema to the independence movements.

Generally, the reasons for holding referendums in the aftermath of the Second World War were varied. In the case of Mongolia, the vote was held for geopolitical reasons at the instigation of Stalin; the vote in Algeria was held after a lengthy war of independence and negotiations. Overall it would be difficult to find a general pattern of when referendums were held after the Second World War.

In the 1970s there was only one referendum on independence: the decision of the Trust Territory of the Pacific Islands to become independent from the USA under the name of the Federated States of Micronesia in 1975. In the 1980s there was a similar paucity of plebiscites. The only one in the latter decade being the 1980 vote in the Francophone Canadian province of Quebec, in which 59 per cent, on a 85 per cent turnout, rejected the secessionist *Parti Québécois*'s proposal for 'sovereignty association' -a veiled description of independence-.

In many cases, the referendum was a kind of symbolic national manifestation of a newly found freedom. By voting in an independence referendum, often almost unanimously, the new state made the plebiscite a symbolic representation of the nation itself

It was only after the fall of Communism in 1989 and after the collapse of the Soviet Union

in 1991 that the floodgates of independence referendums opened. Again, the reasons seem to have been varied. But, in many cases, referendums were held because the international community -especially the major European powers- insisted upon referendums in order to recognise the new states. Especially the *Badinter Commission* -set up by the European Communities (soon to become the EU)- stressed that referendums were a *conditio sine qua non* for recognizing new states. There is historical and anecdotal evidence to suggest that it was this requirement that prompted a large number of successor-states to hold referendums especially in the Former Yugoslavia [14].

But the referendum was also in many cases a kind of symbolic national manifestation of a newly found freedom. By voting, often almost unanimously, in an independence referendum, the new state made the plebiscite a symbolic representation of the nation itself: a mirror image of the *demos* and the *ethnos* merged into one indivisible unity. Ernest Renan's often cited remark that a "nation is a daily plebiscite" is perhaps an accurate description of these referendums [15].

But as this author has argued at length elsewhere, the referendums were also held for more prosaic reasons, namely when a new elite was under threat from external and internal powers and wanted to prove that it had popular support and the requisite legitimacy to govern [16].

Not all of the states, of course were recognized, and not all of the referendums were conducted in accordance with the internally recognized standards of free and fair voting. In addition to referendums in former Soviet and Yugoslav entities, a proliferation of plebiscites were held in sub-national territories such as, e.g. in Abkhazia in Georgia and Krajina in Bosnia, where minorities sought to win approval for independence from recently declared independent states -and did so with military support from, respectively, Russia and Serbia. None of these sub-national referendums -while the majorities were large- resulted in the establishment of new states recognised by the international community.

While most referendums were held in former Communist countries, a few polls were held in Western democracies. In 1995 the voters in Quebec again rejected independence, this time by a whisker, and so did voters in Puerto Rico in a multi-option referendum in 1993. And in 1998, the voters in Nevis, failed to meet the required threshold of 66 per cent necessary to secede from the Federation of St Kitts and Nevis.

Perhaps interestingly, the only unsuccessful referendums on independence have been held in countries with established democratic traditions, prompting a scholar (and later politician to conclude that "secessions are...difficult in established democracies" [17].

Table 2. Secession Referendums 1991 – 2020

Parent Country	Seceding Country	Year	Turnout	Yes	Vote
USSR	Lithuania	1991	91%	84%	
USSR	Estonia	1991	77%	83%	
USSR	Latvia	1991	74%	88%	
USSR	Georgia	1991	98%	90%	
USSR	Ukraine	1991	70%	85%	
Georgia	South Ossetia	1991	98%	90%	
Georgia	Abkhazia	1991	99%	58%	
Yugoslavia	Croatia	1991	98%	83%	
Croatia	Serbs	1991	98%	83%	
Yugoslavia	Macedonia	1991	70%	75%	
USSR	Armenia	1991	95%	90%	
Bosnia	Serbs	1991	90%	-	
Serbia	Sandjak	1991	96%	67%	
Serbia	Kosovo	1991	99%	87%	
USSR	Turkmenistan	1991	94%	97%	
USSR	Karabagh	1991	NC	NC	
USSR	Uzbekistan	1991	98%	94%	
Macedonia	Albanians	1991	99%	93%	
Moldova	Transnistria	1991	100%	NC	
Yugoslavia	Bosnia	1992	99%	64%	
Yugoslavia	Montenegro	1992	96%	44%	
Georgia	South Ossetia	1992	NC	NC	
Bosnia	Krajina	1992	99%	64%	
Ethiopia	Eritrea	1993	99%	98%	
Bosnia	Serbs	1993	96%	92%	
United States	Puerto Rico	1993	48%	73%	
United States	Palau	1993	64%	68%	
Georgia	Abkhazia	1995	96%	52%	
Quebec	Cris	1995	95%	75%	
Canada	Quebec	1995	49%	94%	
St Kitts and Nevis	Nevis	1998	57%	61%	
United States	Puerto Rico	1998	50%	71%	
Indonesia	East Timor	1999	78%	94%	
Somalia	Somaliland	2001	-	97%	
New Zealand	Tokelau	2006	-	95%	
Yugoslavia	Montenegro	2006	55%	86%	
South Sudan	South Sudan	2011	97%	98%	
United Kingdom	Scotland	2014	83%	44%	

Iraq	Kurdistan	2017	72%	92%
Spain	Catalonia	2017	43%	92%
France	New Caledonia	2018	81%	43%
Papua New Guinea	Bougainville	2019	87%	98%
France	New Caledonia	2020	85%	46%

Source: www.c2d.ch (accessed 2 november 2020)

During this period, the referendums can in different forms and not all followed legal procedures -or none. Some referendums were held under legally agreed rules, such as the ones in Scotland (2014), New Caledonia (2018) and Bougainville (2019), others like the vote in Kurdistan and Catalonia (both 2017) were legally speaking *ultra vires*, not held in accordance with established and codified legal principles.

But, in many cases -Catalonia, New Caledonia and Scotland among them- the vote took place in a political culture that was shaped by the precedents of previous referendums. Thus, as we shall see shortly, Catalonia has a track-record of referendums on territorial matters which makes the province unique. What was new in 2017 was that the vote was about outright independence, something which never previously had been a stated goal for the Catalans.

The Legal Position: The Referendum in International and Constitutional Law

One of the purposes of the United Nations, according to Article One of the UN Charter is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of the peoples”. This would seem to grant the right of nations to secede. That is not, as we shall see shortly, how the international courts have interpreted this statement.

As a consequence, independence referendums are not a solid part of international law, let alone constitutional jurisprudence. To be sure, there is general agreement that, “the crucial requirement for self-determination plebiscites or referenda is the political will or consent of the countries concerned, their conviction that populations should not be treated as mere chattels and pawns in the game, but that their free vote should be the basis for territorial and sovereignty allocations” [18]. But, getting the peoples in question to the polls -in other words to organise a referendum- is not straightforward. For starters, you cannot simply hold a vote on self-determination.

To take the example of Scotland, although the SNP won a majority of the vote in the election to the Scottish Parliament in 2011, the party was “clearly aware that it would be democratically perverse, as well as politically and legally impossible, to try to override the legal legitimacy of the [Scotland] Act [1998] by way of an extra-constitutional referendum” [19]. This situation is not so different from the situation in Catalonia where the regionalist

party *Convergència i Unió* and its allies won an election to the *Parlament de Catalunya* on a similar pledge in November 2012 -or even did so in more recent elections.

Hence, the situation in Catalonia mirrors patterns elsewhere. But in one sense it was unique for the exceptionally prominent role played by the courts. To be sure, in other countries too, legal arguments were prominent -not least in Canada (see below). But the recourse to the courts was exceptional. How does this aspect compare and was the Madrid government correct in following this path?

In an *obiter dicta* in a case about the legality or otherwise of Kosovo's secession from Yugoslavia, the International Court of Justice (ICJ), opined that "a radically or ethnically distinct group within a state, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral self-determination simply because it wishes to create its own separate state" [20]. For an entity to hold a referendum on independence they must follow the established rules. The general rule is that referendums have to be held in accordance with existing constitutions (like the provision, which exists in Art 39(3) of the Ethiopian constitution) or following an agreement between the area that seeks secession and the larger state of which it is part (this is what happened in the very different cases of Scotland, 2014 and South Sudan, 2011).

Following this logic, it was illegal for Catalonia to hold a referendum. Admittedly, the Catalans might have claimed that they were allowed the right to hold a referendum because other avenues were closed. As the legal scholar Antonio Cassese has put it:

- When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure...a group may secede -thus exercising the most radical form of external self-determination- once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail [21].

In the Catalan case, as we have seen, Puigdemont was not willing to negotiate a constitutional change. His offer of negotiation was solely about an independence referendum [22]. Hence, given that Spain is a democratic state (it scores One on Freedom House, for example), the rule summed up by Cassese hardly covered Catalonia. Was the referendum in the Spanish *Autonomia* consequently illegal? The answer is in the affirmative.

Independence referendums are not a solid part of international law, let alone constitutional jurisprudence. Legally, the Rajoy government was within its constitutional right to follow the course it chose, but its reaction also exacerbated the situation and it was

not conducive to solving the issue

While the reaction of Madrid was heavy handed (and a public relations disaster), it took place within the confines of a democratic state. Legally, the Rajoy government was within its constitutional right to follow the course it chose. But it also exacerbated the situation and -speaking as an outsider- it was not conducive to solving the issue. The Madrid government was inflexible. A bit of forbearance could have solved the conflict. The Royal Canadian Supreme Court's judgement in the famous *Re Quebec* case could serve as an inspiration.

The Canadian Court famously held that while the "secession of Quebec from Canada cannot be accomplished...unilaterally", a referendum itself was not unconstitutional but a mechanism of gauging the will of the francophone province. Consequently, a referendum, provided it resulted in a "clear majority", "would confer legitimacy on the efforts of the Quebec government" [23]. In other words, a result in favour of secession would require the rest of Canada to negotiate with the Francophone province. Needless to say, this ruling does not apply in Catalonia, however the Canadian example suggests that other countries' courts have shown flexibility and appreciation of nuances that is conducive to compromises.

Conclusion: how not to use a referendum

Referendums are about politics as well as about law. Winning a plebiscite does not give a territory the right to establish an independent state. And, for that matter, winning a majority in an election is not sufficient to give a government an entitlement to hold a referendum. But such reasoning can become stale and legalistic, especially when it is being pursued inflexibly and with political motives, as was arguably the case when Mariano Rajoy used force to prevent the referendum and employed the law in pursuit of his goals, which (so it seems) above all was to strengthen his political party. On the other side, there was a similar lack of flexibility. Confrontation suited both sides politically. The Spanish word *crispación* -translated as an atmosphere of extreme tension and agitation- is often used to describe a situation of adversarial no-compromise politics [24]. It seems particularly apt in the context of Catalonia.

But, as far as finding a solution, the referendum on independence is not conducive to this if there have been no prior negotiations. One is tempted to quote the closing remarks in George Orwell's Homage to Catalonia, "in such circumstances there can be no argument; the necessary minimum of agreement cannot be reached" [25].

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