

Understanding Referendum

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INTRODUCTION AND LEARNING OUTCOMES

The referendums can have increasing role in the building and maintenance of a constitutional system. One aim of the referendums is to support the weight of popular sovereignty in the decision making process, so the most important decisions can have the opinion of 'the people'.

The most significant recent referendums also have been mentioned, and the three main issues that highlight the difficulties that referendums present for democracy and the rule of law: (a) constitutional status; (b) sovereignty; and (c) how we conceive of the 'constitutional people' or demos.

The advantages and disadvantages of the process both has to be taken into consideration to decide on the application of the referendum.

Learning outcomes

1. Understanding the concept of referendums

2. Understanding the difficulties of referendums

Keywords: referendum, constitutional referendum, constitutive referendum, constitutional status, constitutional people, sovereignty, popular democracy

Estimated time: app. 45 minutes

Recommended Reading

1. Tierney, S., 'Constitutional referendums: A theoretical enquiry', *Modern Law Review*, 72/3 (2009), pp. 360–83.
2. Underwood, W., Bisarya, S. and Zulueta-Fülscher, K., *Interactions between Elections and Constitution-Building Processes in Fragile and Conflict-affected States* (Stockholm: International IDEA, 2018), accessed 3 August 2018.
3. European Commission for Democracy Through Law (Venice Commission), 'Guidelines for Constitutional Referendums at National Level', COE Doc CDL-INF (2001)10, I, 11

1. Introduction

The use of referendums in processes of constitutional formation and change has increased considerably across the world in recent decades. This Discussion Paper lays out the main areas of constitutional practice where referendums have increasingly been used. It then considers the problems that this development poses in terms of how we determine the constitutional status of referendums and how their use has an impact upon our understanding of constitutional sovereignty and the very identity of the constitutional people.

A main point of focus for the paper is how the proliferation of referendums has extended to the process of constitution-making itself, involving some of the most complex and fraught states—for the most part, fragile and conflict-affected states—where the issues identified raise many practical problems.

2. Proliferation

The referendum has become a fixed feature of state- and constitution-building across the globe. Table 1 gives a breakdown of how referendum use has increased in four main areas of constitutional practice since the end of the Cold War.

First, in the founding of new states, the referendum was widely used in the early 1990s, in the respective break-ups of the Soviet Union and Yugoslavia, and it is now the default mechanism for the emergence of most new states, as exemplified by Eritrea (1993), TimorLeste (1999), Montenegro (2006) and South Sudan (2011). Notably, referendums were held on independence in Scotland in September 2014 and, with disputed legality, in Catalonia and Kurdistan (Iraq) in 2017.

Table 1. Four types of referendum after the end of the Cold War

Type of referendum	Examples
Founding of new states	Ukraine (1991), Slovenia (1990), Croatia (1991), Bosnia and Herzegovina (1992), Eritrea (1993), Timor-Leste (1999), Montenegro (2006), South Sudan (2011) Scotland 2014 (a 'No' vote) Catalonia 2017 (a 'Yes' vote, but with disputed legality)
Creation and amendment of new constitutions	New states emerging from the Soviet Union and Yugoslavia Iraq: ratification of the Constitution of 2005 Egypt: referendums to adopt new constitutions in 2013 and 2014
Substate autonomy	Spain referendums: e.g. Basque Country

	(1979), Catalonia (1979), Galicia (1980) United Kingdom referendums: Scotland (1997), Wales (1997 and 2011), Northern Ireland (1998)
European Union: treaty-making processes in respect of accession, dissent or exit	Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland, Czech Republic, Estonia, Latvia (all 2004) Croatia (2012) Greece (2015), Hungary (2016) United Kingdom (2016)

Source: Tierney, S., 'Should the people decide? Referendums in a post sovereign age, the Scottish and Catalan cases', *Netherlands Journal of Legal Philosophy*, 2 (2016), pp. 99–118.

Second, when **creating or amending constitutions** at some point in time referendums were very rarely used (Tierney 2014); however, throughout Central and Eastern Europe, and more recently in Egypt, Iraq and Kenya (new constitutions), and Bolivia, Ireland and Rwanda (constitutional amendments), the referendum has emerged as an instrument both in the founding of new constitutions and as part of future amendment procedures within the text of these constitutions.

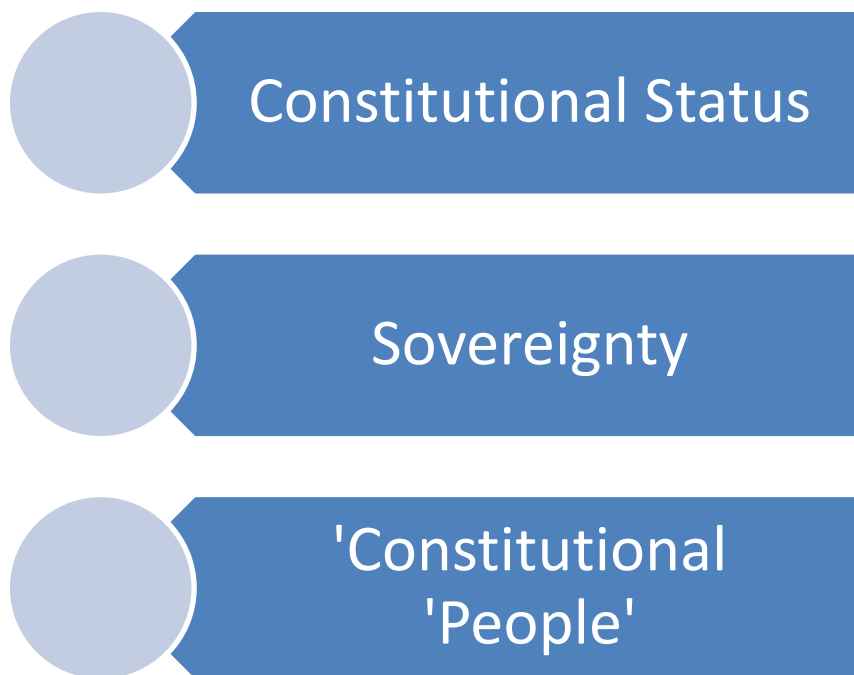
Third, although the referendum is a device deployed by nationalists in attempts to secede from states, it has also been central to the **establishing of complex new models of substate autonomy** (as we have seen in Spain and the United Kingdom in the late 1970s and 1990s respectively), and in ongoing processes of constitutional change (e.g. a referendum on further devolution for Wales in 2011). A related example is the referendum in Canada on the draft Charlottetown Accord in 1992, where distinct referendum processes were held respectively in Quebec and the rest of Canada (Tierney 2016). There is, then, a complex interplay between referendums used to create or extend autonomy to substate territories, and referendums on secession: the failure of the Charlottetown process sparked the process leading to the Quebec independence referendum in 1995.

The fourth and final example is various referendums in **the EU context**. While there has been sporadic use of referendums in the ratification of treaties, we are seeing the referendum emerge now as a default means of endorsing accession to membership itself. We have also seen the referendum emerge in two new contexts—dissent and exit—each of which suggest that direct democracy is now a significant challenge to the integrationist dynamics of the European Union.

3. Issues

The use of the referendum across these various sites of constitution-making highlights the extent to which a referendum is a **very different voting event from an election**, and why the referendum has come to be seen both as highly significant and potentially problematic, particularly in territories beset by conflict or inter-ethnic division. This chapter discusses **three main issues that highlight the difficulties that referendums present for democracy and the rule of law**: (a) constitutional status; (b) sovereignty; and (c) how we conceive of the 'constitutional people' or demos.

1. Difficulties of referendums:



Constitutional versus constitutive referendums

Referendums must always be understood in relation to constitutional authority, that is, referendums do **not occur in a vacuum**. In a sense, there is no such thing as pure, unmediated direct democracy, and referendums are **always relational**: to an existing or emerging constitutional order, and to the elite actors who are institutionalized by an existing constitution or who act in a directional capacity in the creation of a new constitution. But it is still the case that the **subject matter of referendums can vary greatly**. In particular, it is useful to draw a distinction between the general and somewhat loose term 'constitutional referendum' and the more specific term, 'constitutive referendum', which is itself a category of constitutional referendum.

The term **'constitutional referendum'** is a broad category, which we can take to mean any **direct citizen-vote on a matter of constitutional change or constitutional creation**. The Venice Commission of the Council of Europe has defined constitutional referendums as 'popular votes in which the question of partially or totally revising a State's Constitution . . .

is asked' (European Commission for Democracy Through Law 2001). As such, it can be a fairly routine exercise, for example part of the regular constitutional amendment process (as in Australia or Ireland), or it can be a 'constitutive referendum' when constitutional creation is at stake.

We can call the former 'contained constitutional referendums', operating as part of the ordinary constitutional amendment process, either on their own or in a process of joint decision with parliament to change the constitution. This type of constitutional referendum takes place within, and its process and effects are determined by, existing constitutional structures. In this sense, the contained constitutional referendum is entirely internal to, and contained by, the constitution.

'Constitutive referendums' are categorically different from contained constitutional referendums. They are instances of direct democracy deployed to create either new states new constitutions (or both). What makes these so challenging for constitutional theory and practice is that both the source of authority for such constitutions, and the legal effects they have, can be far less clear than is the case with contained constitutional referendums. Occurring as they do at the interface of an old and a new constitutional order, it is possible (or even unavoidable) that referendums be conceived as in some sense transcending the normative authority of the existing order, supplanting and replacing it with a new constitutional order.

This is all very familiar—constitutions emerge and need a new source of authority. The 'bootstrapping issue' (from where does a new constitution derive its authority) is always there, whether a referendum is used or not. But it is also clear that the referendum takes on a totemic significance that sets it apart from other routes towards a new constitutional order. Perhaps the key to understanding the attractiveness of the referendum in constitutionmaking processes is that the referendum offers a unique source of legitimacy, which can act as a bridge from the old to the new order.

The authority of democratic constitutions hinges upon legitimacy. In modern democratic theory this has been symbolized by the idea of 'the people'. But it is also accepted, going back to the Federalist Papers debates surrounding the Philadelphia process in the founding of the United States Constitution, that this idea of popular authorship of a constitution is highly attenuated. 'The people' do not really emerge directly as constitution-making actors. Insofar as they do, they are represented by elites.

This is where the constitutive referendum takes on particular salience. It can be presented as the transformation of the foundational popular act from one of symbolism to constitutional reality. Is it, in fact, the case that the referendum is a way in which the symbolism of popular constitutional authorship can be replaced by its actuality? This is certainly the sense of many embracing the referendum in these foundational moments. In this way, the referendum can

play a key role not only in the process by which the new order derives its foundational authority but also in vesting it with the direct popular legitimacy that has come to be seen as the badge of validity for modern democratic constitutionalism.

It is in this context that the constitutive referendum takes on great significance. It is, therefore, perhaps no surprise that, in a number of the countries—Iraq and Egypt, for example—discussed during the fourth Edinburgh Dialogue on post-conflict constitutionbuilding (see Underwood, Bisarya and Zulueta-Fülscher 2018), there is so much focus on the referendum as the defining event in the emergence of the new constitution. In attempts to bring legitimacy to the process, the direct political act of ‘the people’ was seen as a validating step like no other.

Sovereignty and the constitutive referendum

This conception of the popular role in the legitimization of a new constitution also informs how we might think about sovereignty. In the modern era there has been a tendency for sovereignty to be viewed as simply a matter of command: sovereignty is ultimate power, the power to order or control, and the issue for constitutionalists is simply to find its locus: where is sovereignty located institutionally within a constitutional order? And who within a constitutional system has the last word?

In fact, when we consider the key role played by popular legitimization in giving a constitution its foundational authority—or sovereignty—this account is insufficient. Just as constitutions derive their legal authority from the initial political legitimization given by ‘the people’, we must also understand foundational sovereignty and the authorization it gives to lived constitutional practice in relation to popular will.

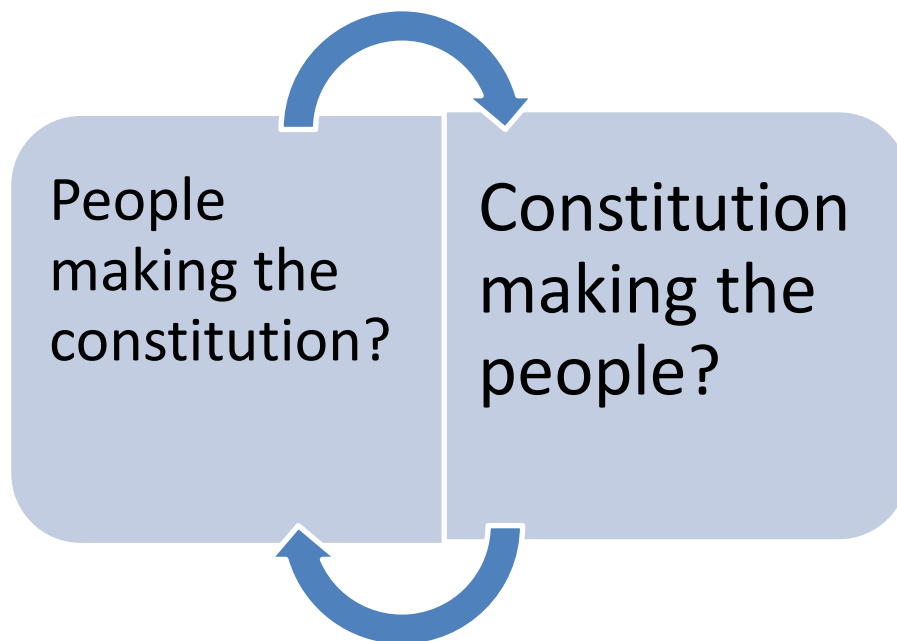
In other words, the concept of sovereignty becomes a more complex concept when we tie it, as we must, to legitimacy. When we see popular endorsement emerge as the source of the constitution’s legitimacy, it is clear that sovereignty is tied inextricably to popular consent. And so, when people vote in a referendum on the founding of a new constitution, these people are in a sense the ‘constituent subjects’ of the constitution. They help to form not only the governmental structure of a community but also its juridical and political identity (Tierney 2009). The link between the people and constitutional sovereignty is both foundational and ongoing—sustaining the everyday authority of the constitution. Again, this is another reason why a referendum can be so important when a constitution is being made. The popular role gives it foundational legitimacy, but it also helps this to be a lasting legitimacy: the people within the constitutional order can always refer back to the referendum as an act by their forebears, and in this sense their allegiance to the constitution may well be bolstered. We see this, for example, in relation to the Northern Ireland referendum in 1998. Both sides agreed to participate in this. Exit polls show that a majority

of each community voted in favour. This has helped to support the agreement at times when the institutions themselves have failed.

In this way, we need to conceive of the constitutive referendum in terms of the vital role of the people in 'constituting' a polity and hence as being themselves the source of sovereignty within the constitutional order, not only in its political dimension but also in its role as source of legal authority.

Referendums and the 'constitutional people'

This leads to a third issue: the relationship between the constitutive referendum and the way in which we define 'the people'. Just as the birth of a constitution leaves constitutionalists somewhat perplexed at how a new constitutional order can supplant an old, so too is there a debate about how the constitution changes the status of its authors, transforming them from constituents or subjects into citizens. The notion of citizen makes no sense until there is a constitution: it is the constitution that defines what it means to be a citizen, but at the same time the original people are the founding source of legitimacy of the constitution. We are left with a conundrum: do people make the constitution or does the constitution make the people?



A constitutive referendum can help to overcome this problem, replacing an abstract problem with a real solution. The issue in play here is that of identity, and how a constitutive referendum can play a role in helping to frame the civic identity of the polity.

It is often discussed how a constitution can have nation- or polity-shaping potential, giving articulation to the revised civic identity of the people under the new constitution and

helping to develop that identity through patterns of affiliation with or loyalty to the constitution. But, if this is indeed the case, then the **foundational moment can be crucial**. One of the things that brings people together in a sense of shared citizenship of a polity is a reference point back to the framers of a constitution, and so on. But this association can be **highly abstract**. It is also an association that calls on the people to feel represented by what may have been a small founding elite. The constitutive referendum can act as a referent that is neither elite nor representative. The people today can relate back to the founding moment and see themselves—or at least a previous generation of themselves—in that moment, as direct constitutional authors. This would seem to have the potential to be a much more compelling formative story, **capable of building popular identity with**, and loyalty to, the polity in a unique way.

In short, the constitution is **demos-shaping**, but how much more salient is this process when the direct act of the people is the key instrumental move in forming that polity? Constitutive referendums must therefore also be understood for the polity-building or nation-building potential that they have. When referendums are used to make or re-create constitutions, they can themselves take on a **vital nation-building role**. In some sense, through the direct engagement of the people in constituting the polity, referendums themselves become a **key device in shaping the very identity of that polity and the political identities of the citizens**. Again, when we look at the experience of referendums in Egypt and Iraq, when an attempt to build deep popular affiliation with the constitution was very much present, it is perhaps no surprise that the referendum was turned to. This is also the story of states, such as Croatia, Eritrea, Montenegro, Slovenia, South Sudan, Timor-Leste and Ukraine, emerging from multinational polities, seeking to assert their own demotic distinctiveness.

(...)

5. Conclusions

The referendum is proliferating and is being used for the highest-level constitutional decisions, often in very fraught environments. One issue that is crucial is **process**. There is a need for more focus upon how referendums are framed and upon international standards in relation to the decision to hold a referendum, the framing of the issue, the setting of the question, oversight roles, spending rules, information to voters etc. There is a **renewed interest in the possibility of making referendums truly deliberative**, engaging the public meaningfully in decision-making. This dimension is also crucial if referendums are truly to be exercises in 'popular' democracy.

But process itself will not surmount the considerable difficulties that attend referendums, particularly in troubled settings. What is first required in territories such as Bougainville, where a referendum on independence is planned, is a full articulation of what a referendum does and the crucial role it can play in legitimizing a constitution, underpinning its

sovereignty and helping to frame constitutional identity. It is also crucial to understand that a referendum posits the idea of 'the people' speaking and determining; if the idea of 'the people' is deeply contested, the referendum may in fact exacerbate existing tensions. In appreciating how high the stakes are when referendums are used, it may then be easier to make an informed decision as to whether it is, in fact, wise to use a referendum and, if so, how to ensure that it is conducted in an open, democratic and deliberative way, and that its implications for the deep pluralism of the polity are fully understood.

Questions for Self-Check

What is the concept of referendum?
What is the constitutional referendum?
What is the constitutive referendum?
What is the meaning of the phrase 'constitutional people'?
What is the concept of popular democracy?
Why is sovereignty important related to referendums?

Home Assignment

Choose a referendum from the past 3 years, and examine in detail the precedents, the results and the consequences of the referendum.



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