Reflections on referendums

International IDEA Discussion Paper 5/2018

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Stephen Tierney

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International IDEA
Strömsborg
SE–103 34 Stockholm
Sweden
Telephone: +46 8 698 37 00
Email: info@idea.int
Website: ‹http://www.idea.int›

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Summary

- The use of referendums in processes of constitutional formation and change has increased considerably across the world in recent decades.
- This proliferation means that referendums have occurred in some of the most fragile and conflict-affected states, where there are many issues surrounding democracy and stability.
- This Discussion Paper identifies four main areas of constitutional practice that attract referendums.
- The use of the referendum has come to be seen as both highly significant and potentially problematic, particularly in territories beset by conflict or inter-ethnic division.
- The paper 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.
- 'Constitutive referendums' are categorically different from 'contained constitutional referendums'. The former are instances of direct democracy deployed to create either new states or new constitutions (or both).
- The concept of sovereignty becomes more complex when we tie it 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. 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.
- A constitutive referendum can help to overcome the 'demos 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.
- But we are left with two considerable difficulties: defining 'the people' and the amenability of the constitutive referendum to accommodate societal pluralism.
- These are issues that need to be confronted if the referendum is to be a viable device in constitution-building within complex and divided societies.

- What is needed 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.

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), Timor-Leste (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 Catalonian 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.

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 or

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 constitution-making 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 constitution-building (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.

4. Problems with constitutive referendums in divided societies

The significance of referendums also leads us to the potential risks associated with them. The remainder of this paper will focus on two of these risks: defining 'the people', and the amenability of the constitutive referendum to accommodating societal pluralism.

If 'the people' is a key element in the formation of the constitution, there are extensive debates about how to constitute the people who will make this decision. By using a referendum to create the constitution and hence to create a constitutional people, this is already a 'demos-forming' move—it is declaring, in a sense, who the people are before the constitution is made.

This happens because any referendum brings with it two types of boundary creation. One is territorial: stakeholders are deciding on the space where the referendum should be held. This can involve deep disagreement over the physical boundaries of the polity, as we saw in Bosnia and Herzegovina in 1992. It can also lead to questions about the involvement of related territories or states. In Northern Ireland in 1998, there was the implicit question as to whether 'the people' in Northern Ireland could alone decide the territory's future. In the end, there were two referendums—one in Northern Ireland, the other in the Republic of Ireland, the latter concerning the Republic's constitutional claims to the territory.

Second, what might be called a 'franchise boundary' is created. In holding a referendum, it is necessary to decide who can vote, what majority is required and if the decision is binding and upon whom. To take just one of these issues, who is entitled to vote can raise a particular set of problems of its own. Two questions surrounding the eligibility of voters have created controversy: are there, or should there be, people among those resident within the territory not entitled to vote? We saw these issues emerge in the post-Soviet period in the Baltic states where there were attempts to remove the franchise from 'Russian' residents. Another issue is the use of thresholds. The referendum on statehood in Montenegro in 2006 promised to be deeply contentious, given how small the population was, and the likelihood of a very close result. A threshold of 55 per cent was set, and, although it was only narrowly achieved, the result was sufficient to constitute a clear majority in the eyes of most observers.

It can also be a major issue in the decolonization process; for example, in New Caledonia, where plans remain in place to hold a referendum, but where there is discussion about how long an individual ought to have been resident to be entitled to the franchise, in order that indigenous residents are not overwhelmed by the voting power of more recent incomers. Another question is whether there are people resident beyond the territory to whom, nonetheless, the extension of the franchise is warranted? This emerged as an issue in the

Montenegro referendum of 2006, in relation to the many people who had left the republic since the 1990s.

In these questions, we see how the very definition of the demos can become deeply ideological, involving not only territorial space but also constructed identity-markers, such as legally defined residence, citizenship, nationality and ethnicity. The way in which the franchise issue is dealt with in the design of a referendum reveals much about the type of nationalist ideology that prevails within a particular state or territory; for example, particular rules of inclusion or exclusion reveal whether the vision of the nation that prevails is more or less 'civic' or 'ethnic' in orientation.

These issues also arise, of course, in elections surrounding a new constitution, but they can be more pronounced in a referendum that purports to be an act of direct constitutional authorship by a nascent people.

This leads to a second problem—pluralism. Given that the constitutive referendum has the potential salience it does, in terms of legitimizing constitutional authority, conditioning constitutional sovereignty and potentially shaping the very identity of the constitutional people, we should, of course, also be aware of the potential problems that can attend it when the very issue of peoplehood is deeply contested.

Since the constitutive referendum becomes a vehicle through which 'the people' can speak and determine their constitutional future, how can these processes accommodate deep and fraught issues of pluralism? In many of the situations addressed in the December workshop, the very notion of who constitutes 'the people' is deeply contested. One danger is that the referendum can essentialize the demos, positing the existence of 'the people' when that very term is in fact the deep source of the conflict. This was a pronounced problem, for example, in the referendum in Bosnia and Herzegovina in 1992 and was clearly a major factor in the Iraq referendum.

Can, therefore, the constitutive referendum be adapted to deep multinational pluralism? Is, what we might call, a 'consociational referendum' feasible? To this end, it is possible in fact to require more than one majority in a referendum in order to determine and validate the outcome. Voters would vote as a particular group and the outcome of the referendum would require there to be a majority from each group, or some super-majority of groups, to pass. In a sense, and unofficially, the Belfast Agreement in 1998 is seen as a success in no small part due to winning majority support in both communities; the Bosnian referendum was a disaster because the Bosnian Serbs chose to boycott the process. One question is whether this would have been a possible approach in Iraq, although the situation there was so fraught and complex, the organizational dimension would have been very difficult, and the prospects of arriving at pluralized assent by no means clear.

A significant question of course remains—namely, the nature and status of the 'created demos'. In many ways, the referendum is difficult precisely because there is no agreement on 'peoplehood', and the referendum can itself exacerbate these problems. The real work that must go on in parallel is that of constitutional design, which works towards polity-building that is in the end inclusive and pluralistic, creating institutional guarantees and protections that reflect the state's social complexity. Only in this way will a referendum on a new state or new constitution come to be seen as legitimate across the polity in the long run.

Another possible solution is sequencing. It might be possible to use the referendum as an endorsement of an agreement which is not tied up with issues of demos-creation and sovereignty. If there is a peace deal and you get agreement across communities you can then have the referendum as a validatory exercise. Essentially, this is an elite-led approach. The elites of the rival communities, and other state or international actors, arrive at a deal, which they then sell to their respective constituents. Can we talk about the voters in such a referendum as 'a public', setting to one side the thicker and more contested term 'people'? The identity and constitutional future of the territory remains contested but people are

willing to vote for a more contingent settlement. The referendum on the Belfast Agreement is perhaps an example of this. Another is the South Africa referendum in 1992. This was a referendum among white voters only. It was deployed by F. W. de Klerk, essentially as a way of giving him a mandate to conclude negotiations towards the ending of apartheid. That aside, the failure of the referendum in Colombia shows how the people can play a rejectionist role in relation to a deal carefully crafted by elites.

In such difficult situations, it is clear that we ought not to be too ambitious for referendums and what they can achieve. In the end, it may just be that a polity is being created that will depend upon a deeply attenuated approach to peoplehood and one that, in fact, requires the whole issue to be held in abeyance. Even the minimal requirement of constituting a voting public may be a deeply troubled one, and one not amenable to a general plenary voting event. The experience of Iraq bears this out. In short, in some situations the referendum is more of a threat than an aid to constitution-making. It does seem, however, that the referendum has become almost an automatic step in the move towards statehood for any people, and as such, even when the circumstances are extremely challenging for an exercise in direct democracy, the referendum may well be unavoidable.

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.

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About the author

Professor Stephen Tierney is Vice Dean of the Edinburgh Law School and Professor of Constitutional Theory, as well as the Advisor to the Constitution Committee of the House of Lords. He is also a co-editor of the UK Constitutional Law Blog. He was a British Academy/Leverhulme Senior Research Fellow (2008–09) and an Economic and Social Research Council Senior Research Fellow (2013–14); the former to pursue the project 'Let the People Decide: Referendums in a Post-Sovereign Age', the latter to study the democratic credentials of the Scottish independence referendum. He is the author of *Constitutional Law and National Pluralism* (Oxford University Press 2004) and *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012). He has edited a further five books. He served as independent adviser to the Scottish Government on the technical aspects of the independence referendum for six months in 2012, and in January 2013 was appointed constitutional adviser to the Scottish Parliament's Referendum (Scotland) Bill Committee. Professor Tierney teaches and researches at the interfaces between public law, international law and constitutional theory.

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The use of referendums in processes of constitutional formation and change has increased considerably across the world in recent decades. This proliferation means that referendums have occurred in some of the most fragile and conflict-affected states, where there are many issues surrounding democracy and stability.

This Discussion Paper is based on a presentation by the author at the fourth Edinburgh Dialogue on post-conflict constitution-building, held in Edinburgh, United Kingdom, on 4–5 December 2017.

It argues that the use of the referendum has come to be seen as both highly significant and potentially problematic, particularly in territories beset by conflict or inter-ethnic division.

International IDEA
Strömsborg
SE–103 34 Stockholm
Sweden
Telephone: +46 8 698 37 00
Email: info@idea.int
Website: ‹http://www.idea.int›