THE NATIONAL RESEARCH INSTITUTE
PAPUA NEW GUINEA

RESEARCH REPORT

INDEPENDENCE REFERENDUMS:
HISTORY, PRACTICE AND OUTCOMES

Matt Qvortrup

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About the Author

Professor Matt Qvortrup is an internationally recognized comparative political scientist and lawyer with a strong presence in the world of practice – in politics, diplomacy and the media.

Currently Professor of Political Science at Coventry University, he was a special advisor to the House of Commons Constitutional Affairs and Public Administration Committee in 2015 and drafted key sections of the regulations pertaining to the 2016 Brexit referendum. Having advised respectively The British Electoral Commission and Elections Canada as a special consultant, he served as part of President Barack Obama's Special Envoy Team for the South Sudan referendum on independence 2008-2011.

He holds a (PhD) from the University of Oxford and a Graduate Diploma in Law from the University of Law (London).

Executive Summary

The referendum to be held before June 2020 on the future status of Bougainville provides both risks and opportunities for Papua New Guinea and Bougainville. While all referendums involve risks, the forthcoming referendum in particular is above all a momentous event, which could potentially provide a template for other countries or regions contemplating independence.

Like the independence referendum in South Sudan (2011), but unlike the referendum in Timor Leste (1999), the forthcoming referendum in Bougainville is a result of a negotiated settlement between leading players from both sides of the political divide. This bodes well. The Bougainville Peace Agreement (BPA) states that: "[t]he choices available in the referendum will include a separate independence for Bougainville" (BPA, paragraph 310). However, for a referendum to produce a credible, legitimate and accepted outcome it is imperative that both the citizens and the authorities clearly understand the nature, process and implications of the referendum; the authorities in particular have to appreciate its potential benefits and shortcomings, and draw lessons from other countries and jurisdictions for its design and implementation.

The objectives of the research study are to provide this critically required understanding of what a referendum is, why are they held, and the context and the nature of the upcoming referendum. The report presents lessons from the experience of these and other referendums in relation to conducting a vote, which not only accurately captures and reflects the wishes and preferences of the people, but which is also accepted by all parties and stakeholders involved, regardless of the result. In short, the report summarizes the factors that are required in order to achieve a peaceful and beneficial outcome.

Ch. 1 Introduction

According to the second pillar of the Bougainville Peace Agreement, the Autonomous Region of Bougainville is guaranteed a referendum on Bougainville's political future to be held among Bougainvilleans. According to Article 312(a) of the Peace Agreement, "constitutional amendments will guarantee that the referendum will be held: no earlier than 10 years and, in any case, no later than 15 years after the election of the first autonomous Bougainville Government". Having passed the 10-year mark, the Governments of Papua New Guinea (PNG) and the Bougainville Peace Agreement have set a target date for the referendum of 19 June 2019.

The referendum is a momentous event. A referendum on independence (or the future governance of a region) is of long-term importance and requires careful preparation. Bougainville is not the only region scheduled to hold a referendum. In 2018, New Caledonia will vote on independence from France and earlier this year controversial referendums were held in Kurdistan and in Catalonia, in respectively Iraq and Spain.

Previously referendums on independence have been held in over 50 cases. Some of these followed a negotiated settlement (like in Bougainville), but in others, referendums were held without an agreement (for example in Estonia in 1991). In some cases, referendums resulted in a peaceful settlement of a long-standing conflict (such as Northern Ireland in 1998). Yet in others, hostilities broke out immediately after the result was declared (such as in Timor Leste).

The aim of this report is to provide an introductory overview of when, how and with what consequences referendums are held. And to provide an overview of how these referendums can—and ought to be—regulated to ensure a legitimate outcome.

Others have written at length about the specific factors pertaining to PNG and Bougainville in general (Regan, 2014) and the referendum in particular (Wallis, 2013; Woodbury, 2015). This report is not aimed at competing with research by experts in the region, rather it is aimed at complementing their insights by drawing on comparative research on independence and sovereignty referendums from the past 160 years in all corners of the world.

The report does not make firm recommendations. It is for the policy-makers to make decisions. However, the report does suggest that a number of lessons could be learned from other referendums on independence around the world. These suggestions are:

- It is possible to go beyond the binary choice of referendums by introducing a two-stage multi-option referendum (as has been done in Canada and New Zealand) but simple multi-option referendums should be avoided;
- It is not generally advisable to have an excessive super-majority requirement, but a minimum turnout requirement (of 50 percent) and a small-qualified-majority requirement of 55 percent of the voters (as in Montenegro in 2006) can under some circumstances be advisable;
- It is advisable that the Electoral Commission has representations by both sides and participation by external experts;
- There should be clear restrictions on government spending, campaign finance and grants for each side to secure a level playing field;
- There needs to be equal access to the media for both sides in a referendum.

While the aim is to provide an understanding of the key lessons and issues for Bougainville the aim is not only to look to previous examples but also to learn from these in order that the forthcoming referendum—irrespective of its outcome—can become a model for holding referendums on independence in other countries and on other continents.

Ch. 2 What are referendums and what are their consequences?

Referendums have been defined as "popular votes on bills before they become law" (Qvortrup 2018 p. 1). This definition may be somewhat too restrictive. Indeed, in some countries, like Italy, voters can demand referendums on already enacted and implemented laws if they can gather signatures of more than 500,000 citizens. But, as a general rule, a referendum is a vote by all the eligible voters and not just by their elected representatives.

A referendum is – strictly speaking – a conservative weapon (with a small 'c', that is). It allows the voters to veto legislation or proposals. Indeed, some scholars have referred to the institution as a 'people's veto'. For example, A.V. Dicey wrote in the introduction to the eight edition of *The Law of the Constitution:*

> "The referendum is sometimes described, and for general purposes well described, as 'the People's Veto'. This name is a good one; it reminds us that the main use of the referendum is to prevent the passing of any important Act, which does not command the sanction of electors. The expression 'veto', reminds us … that the electors … are now … the political sovereign" (Dicey, 1983, p. cix).

This is also the function most referendums perform. To take but one example, Scotland could have become an independent state when the Scottish National Party (SNP) won the 2011 elections. Yet, the SNP accepted that not all who had voted for them were in favour of independence. Hence a referendum was held in order that the Scottish people could 'veto' the proposed secession from the United Kingdom, as indeed they did with a 55–45 majority in 2014. We shall return to such votes on independence, but before doing so it is useful to consider which issues have been put to referendums.

To date—since the French Revolution—there have been over 1,500 nationwide referendums but with an explosive growth after 1970 (Qvortrup, 2018). Referendums have been held on all manner of policy issues from abortion legislation (such as in Portugal and Malta), through pension reforms (Sweden in 1957) to the abolition of the death penalty (the Irish voted for this in 2001). Generally speaking, referendums had a slight tendency to favour conservative causes in countries with relatively few referendums, whereas voters have tended to be more disposed to liberal causes in countries and entities with many referendums. For example, voters in Croatia, where referendums are relatively rare, voted against gay marriage. Conversely, voters in Ireland (where referendums are held in every electoral cycle) voted for this policy. However, while referendums have been held on practically all policy issues, it is difficult to generalise. Some research suggests that politicians become more responsive to voters' demands in countries and entities with provisions for referendums (Matsusaka, 2004, p. 175). But, of course, the main question in a nation with a history of political violence is whether referendums are compatible with peace; whether referendums polarise so much that they are likely to result in civil war. We will look at that in the next section.

Independence referendums and political violence

Many have been sceptical about referendums on ethnic and territorial issues. The constitutional theorist, Vernon Bogdanor, otherwise an enthusiast for direct democracy, boldly concluded a short assessment of referendums on national issues that "referendums cannot be used for this" (Bogdanor 1996, p. 5). And, in a similar fashion, Michael Gallagher, writing about the experience in Europe, concluded that "the referendum is least useful if applied to an issue that runs along the lines of a major cleavage in society" (Gallagher, 1996, p. 246). Yet, referendums are being used to decide ethnic and national issues. Is there a pattern, which suggests when they result in violence and strife? And, on the more positive side, are there things that can be done to make referendums compatible with peaceful resolutions of policy issues?

Votes on independence provide the seal of approval to agreements reached by political elites. But sometimes when a referendum is held *without* prior negotiations between elites, it can be a blunt instrument that does

little but provide a tool for the tyranny of the majority. In such situations the likely response by the minority is to resort to violence, especially if they have powerful external friends and supporters. Evidence suggests that referendums held before a settlement has been reached are often unproductive and at worst dangerous.

A few examples from history might be useful. In 1861, Texas, Virginia and Tennessee voted for independence in referendums. There was a majority in support for independence but a large minority boycotted the votes. The votes merely confirmed and entrenched the positions and led more-or-less directly to the outbreak of the American Civil War.

This example is not unique. In 1973 a vote in Northern Ireland on unification with Ireland exacerbated the conflict and precipitated a conflict that killed more than 3,000 people. Likewise in Croatia and in Bosnia-Hercegovina in the early 1990s, plebiscites on independence did not resolve the problem but exacerbated it—and resulted in war. That a war followed the referendum in the so-called 'Luhansk People's Republic' (in Eastern Ukraine) in 2014 was tragically predictable. The same, it could be added, was true for the Kurdistan referendum in Iraq in September 2017.

All this is not to say that all referendums on independence are ill advised. A case can be made for creating new states through democratic processes. The establishment of Montenegro after a referendum in 2006 shows that it is possible to create new states democratically and without bloodshed. But the important difference here is that the Montenegrin referendum was preceded by a negotiation between the two parties (Montenegro and Serbia) and that it was run in accordance with agreed guidelines. The same was true in the case of Northern Ireland. While the 1973 'border poll' mentioned earlier precipitated 'the troubles', the referendum on the Good Friday Agreement in 1998—which *followed* negotiations—effectively resolved the conflict. Similarly, this spirit of conciliation was the basis of the 2012 Edinburgh Agreement in which the British Government and the devolved administration in Edinburgh (Scotland's Capital) agreed to hold a referendum after intensive negotiations. No two countries are the same.

Historical developments and memories are always unique. Bougainville cannot be directly compared with Scotland. But PNG and the United Kingdom share many constitutional traditions and have similar constitutional architectures. It is encouraging that the Constitution of Papua New Guinea in this respect mirrors the constitutional position in the United Kingdom.

When have referendums been undertaken on questions of independence?

The main aim of this report is to present an understanding of the referendum with a view to Bougainville's forthcoming vote on independence. The forthcoming vote—the first major referendum in PNG—is not unique. A similar vote is planned to New Caledonia at the end of 2018, for example. These two referendums follow a relatively large number of more-or-less controversial referendums on the subject of sovereignty held since 1861. Before talking about independence referendums, it is important to put them into context. Overall, there are three types of referendums:

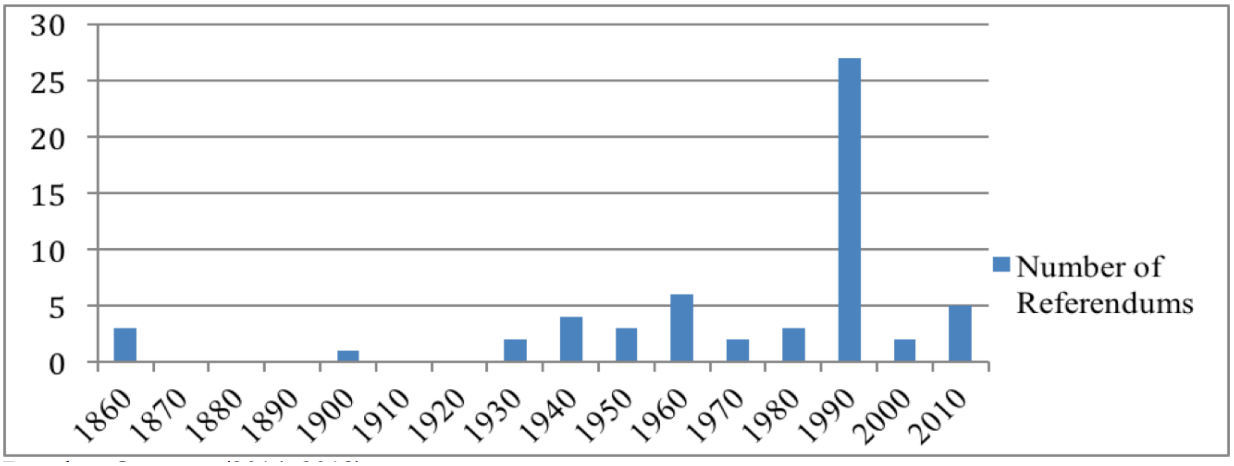
- Ad hoc referendums (questions to solve a perceived political issue – such as David Cameron's decision to hold a referendum on UK membership of the European Union (EU) in 2016);
- Initiatives (votes initiated by a specified number of electors on a) already enacted legislation (as in Switzerland) or b) on new laws (as in Hungary);
- Constitutional referendums (see next paragraph).

By convention, there are three types of constitutional referendums:

> "The Constitutional doctrine normally distinguishes between three types of constitutional referendums: on the approval of the constitution, on its revision, and on sovereignty issues (like the foundation of a new state)." (Morel, 2012, p. 504)

While there has been a considerable debate on independence referendums and scholarly writings about them (Qvortrup, 2014), the number of them is comparatively small. Thus out of the 1,500 nationwide referendums only 61 have pertained to independence (of which only three have returned a 'no' vote: (Quebec 1980 and 1995 and Scotland 2014)—though other referendums have failed because they did not satisfy super-majority requirements (such as in Nevis in 1998 and in several referendums in Palau in the 1980s). Historically, the independence referendums have come in waves, a few in the early 1860s, when the US states of Arkansas, Tennessee, Texas and Virginia held referendums on independence following the election of Abraham Lincoln to the US presidency.

Figure 1: Referendums on independence 1860–2017[i]



Based on Qvortrup (2014, 2018)

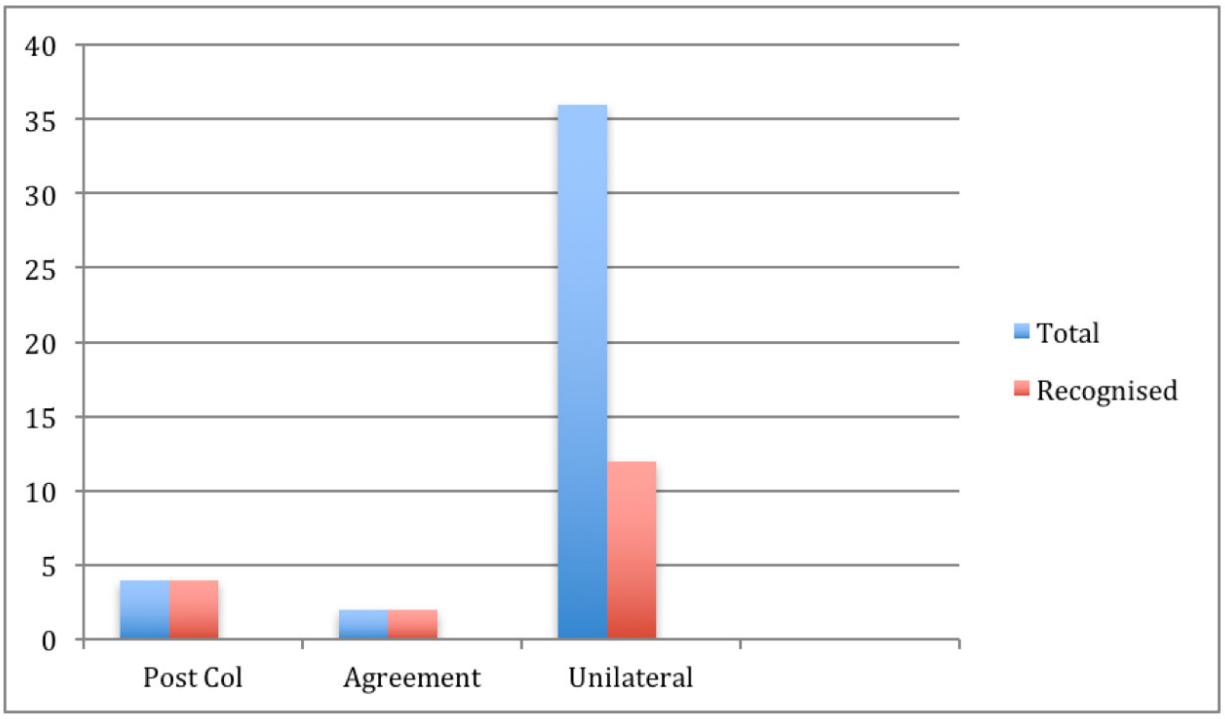
Further subdividing the referendums we can distinguish between three forms (see Sen 2017, p. 213), namely:

1. post-colonial (such as the Philippines in 1935);
2. by agreement (Montenegro and Bougainville);
3. unilateral (Catalonia, Quebec and Estonia).

Not all of these different types of independence referendums have been equally conducive to the establishment of a new independent state. As Figure 2 shows, all the referendums in post-colonial territories (such as the Philippines in 1935, Micronesia in 1983 and most recently in Timor Leste in 1999) have been recognised. The same is true for referendums held following an agreement, such as in the cases of the referendums in Montenegro in 2006 and in South Sudan in 2011. It seems that the international community—which oversees these two types of referendums—have been keen to ensure that their endeavours have not gone to waste. However, it should be noted that some international agreements on referendums have not resulted in actual referendums, such as those on the future of Kashmir and Western Sahara.

Despite being condemned by the United Nations (UN) Security Council for its illegal annexation of Western Sahara, Morocco has delayed holding a referendum on its future status in contravention of international law due to uncertainties over the electorate. Similar delaying tactics have been deployed by India over the disputed territory of Kashmir. The UN Security Council called for a referendum in Resolution 47, which stated: "a plebiscite will be held when it shall be found by the Commission that the cease-fire and truce arrangements set forth in Parts I and II of the Commission's resolution of 13 August 1948". That was 70 years ago. To date no referendum has been held. It is, however, difficult to see how the same delaying tactics could be used in Bougainville, but they cannot be ruled out.

Figure 2: Types of referendums and international recognition



Based on Sen (2017) and Qvortrup (2017)

However, when referendums are held, the outcomes have been accepted by the international community and the parent states. Indeed, even when the result of the referendum was not legally binding (due to the doctrine of parliamentary sovereignty), the outcome of the referendum has been ratified by parliaments. Thus the parliament of Indonesia—after considerable pressure from the international community—recognised the outcome of the 1999 East Timorese independence referendum.

The situation is markedly different for unilateral independence referendums. This type of independence referendum constitutes the majority of the 44 independence referendums held since 1980; 36 (or 85 percent) were in this category. Only in one of twelve cases was the referendum followed by international recognition of the new state.

Why is it that some referendums—even unilateral ones—result in the establishment of a new state (such as Bosnia, Estonia and the Ukraine) but others do not (such as Catalonia, Tatarstan and Somaliland)? To answer this, we need to look at the legal aspects pertaining to what is – misleadingly – called the 'right to self-determination'.

Without going into a deep discussion about overall patterns, it seems that momentous changes in the international system are correlated with referendums on independence. (Though in this respect the Bougainville referendum is something of the odd-one out, as this—just like the South Sudan referendum—was a result of a different dynamic, see Chapter 4.)

In the wake of the Second World War, during the process of decolonisation, several countries broke free from their erstwhile colonial overlords following successful referendums. And, in the period following the collapse of the Soviet Union, there was an explosion in the number of independence referendums.

This pattern might be understandable. Colonial powers that previously were able to prevent independence due to a combination of military and power-political factors were unable to stem the tide of national awakening.

Generally speaking, and with inevitable exceptions, it has become an accepted norm in international relations that erstwhile colonies should be granted independence after referendums (Secretary-General, SG/SM/11568,

GA/COL/3171).

This was not always the case and this change represents a change from earlier epochs, when "the rules governing the intercourse of states [did] neither demand nor recognise the application of the plebiscite in the determination of sovereignty" (Mattern 1921, p. 171). This has changed now. Referendums are now the norm in cases where a defined part of an existing state wishes to become independent.

The recognition that all former colonies and dependent territories should be 'free' was the formal justification for the referendums on independence in, respectively, Eritrea (1993) and Timor Leste (1999)—though not in the referendum in Southern Sudan in 2011 (see Chapter 4). The former areas had been self-governing and were perceived to be (or were argued to be) 'colonies'. Consequently, they were allowed to become independent states. By contrast, 'countries' like South Ossetia, Somaliland and Northern Cyprus were not former colonies or dependent territories, hence they were not granted international recognition—although they held referendums, which were not unfair by international standards (IRI, 2001) (see Chapter 3).

The question is why have these referendums generally taken place? A general, but not universal, condition is that referendums have been allowed at times of momentous international change. When the international order is being changed, as it was after the First and Second World War, and after the fall of the Soviet Union, there is a window of opportunity to create new states. To get the popular approval of the people for this change strengthens the claim to legitimacy.

Allowing referendums on secession, or being forced to accept that a smaller part of a larger empire secedes after a referendum, is not a popular option for the mother country. Accepting that an empire does not have the power, the political influence and the military clout of yesteryear is not a welcome realisation, and may explain why Indonesia resisted a plebiscite in Timor Leste for so long (see Chapter 4).

Very few countries have freely accepted that referendums on independence take place. Though in this PNG, Macedonia and South Sudan (see Chapter 4) were exceptions. Bougainville falls in the same category.

Earlier, territories under American control such as the Philippines (1935), Palau (1983) and Micronesia (1983) were examples of freely accepted referendums on independence (Ranney and Penniman, 1985). But these countries were not part of the American heartland and were legally former colonies or mandate territories. This makes a difference. The USA was one of the first countries to use referendums as a part of the governing process. (Referendums were held before the American revolution.) Yet, the use of the device was not accepted when it threatened the Union itself. Some of the confederate states, above all Texas, actually voted to leave the USA. That request was robustly rejected and the separatist aspirations were dealt with on the various battlefields of the American Civil War.

Generally speaking, and leaving aside the example of a handful of other confederate states, there seems to be a pattern of sorts, namely that referendums on separatism take place in times when an older power no longer has the power to resist separatist movements. And, these conditions generally exist at times when there is a reordering of the balance of power in the international system. Thus, it does not seem to be a coincidence that many referendums on secession or separatism were held in the aftermath of the Second World War or after the collapse of Soviet Communism. The chances of there being an independent Estonia, to mention but one example, is unlikely in the absence of the fall of the Berlin Wall.

However, case studies do not prove a general thesis. We are in danger of extrapolating on the basis of a limited set of data. First, we must compare this example with other cases. To corroborate our hypothesis, we need to compare all the examples of secessions and determine if the ones that involved referendums took place after momentous changes in the international system. Thus 45 of the 56 cases of referendums on independence were held within three years of the end of the First and Second World Wars and within two years of the fall of the Soviet Union. (This is also corroborated by a statistical analysis, see Qvortrup, 2014, p. 59.)

The general 'law' that referendums on separations occur after deep-seated changes in the international system is not universally true. Politics is not generally an exact science. Indeed, the recent referendum in Scotland (2014) is an exception to the rule. Not everything can be explained by a simple hypothesis. But as a general and imperfect rule,

separatist referendums occur after seismic shifts in the tectonic plates of the international systems *if* this is in the interest of the leaders in the separating state and the powerful states in the international system (see Chapter 2).

This explanation applies—to a degree—to the separation of Southern Sudan from Sudan in 2011. Sudan was seen to be close of Osama Bin Laden (the Islamist lived in the country); it was coming under pressure for its treatment of minorities. Given the international pressure from the outside, the Bashir government was forced to make concessions. Allowing a referendum in Southern Sudan (later named South Sudan) was a relatively cheap option. But this external reason cannot be seen in isolation and must be linked to domestic politics. Indeed, Sudan's government's opponents were encouraged to—and had an interest in—seeking a compromise through a referendum. Having fought a bloody and prolonged war with Khartoum, the Sudanese People's Liberation Army (SPLA) accepted a referendum on independence when the parties signed the 2004 Comprehensive Peace Agreement. The parties realised—much like those in Czechoslovakia—that they were unable to defeat the other. A divide-and-rule strategy was not the ideal option for either of the parties, but it was the second-best option. In an ideal world, the SPLA would have liked to rule over the whole of the Sudan, and—for his part—Al Bashir (the leader of the National Congress Party) would have liked to introduce a strict *Sharia* law throughout the country. But this was not a feasible option. Hence the SPLA decided to cut its losses and get independence. Never mind that this left its brethren in the states of Blue Nile and South Kordofan to fend for themselves (see Sen, 2015).

This referendum was not, as we have noted, held after a seismic shift in the international system *a la* the break-down of communism. The case of the Sudan is certainly an anomaly. But so too were other examples such as Norway (1905), Quebec (1980 and 1995) and Timor Leste (1999).

These examples show that separation referendums can be held at times other than after changes in the international system. These votes did not take place at a time when the established international order had entered or finished a period of seismic shifts. To be sure, it could be argued that the referendum in Southern Sudan—though indirectly—was a result of changes in the international system. The Bashir regime's links to Al Qaeda meant that the USA forced the government to abandon its previous alliances and the regime was forced to adopt a more positive stance to efforts to end the decade-long conflict with the (predominately Christian) SPLA. And in a similar fashion, it could be argued that the declining strategic importance of Indonesia—which had prompted the USA to tolerate the Suharto regime's human rights violations in and annexation of Timor Leste—had gone, and this change (which was a result of the end of the Cold War) gave the secessionists in Timor Leste the opportunity to demand a referendum. We shall return to both of these cases in Chapter 4).

Another question, to which we now turn, is whether the referendum—is conducive to a peaceful settlement.

Ch. 3 How are the results of referendums determined and implemented?

That a referendum is held does not mean that the result is implemented. Sometimes referendums on independence are akin to a symbolic act that seeks to break a deadlock and force the other side to the negotiating table. (This was arguably the rationale behind the Iraqi Kurdistan government's decision to hold a referendum on independence in September 2017.) Thus, in many cases referendums have been held and have had little effect (a case in point being the recent independence vote in Catalonia on 1 October 2017). Before looking at the consequences of independence referendums, it is necessary to look at their legal and political aspects. Only after we have looked at these issues can we begin to analyse why and when referendums lead to independence.

Legal perspectives: referendums and the rule of law

Historically, the question of the legality of self-determination through referendums has, as the British politician Philip Goodhart noted, "almost invariably followed national lines" (Goodhart, 1971, p. 107). And, he went on, the support for this "right" was almost always coloured by political self-interest masquerading as high principle. The French had been in favour of referendums on self-determination when they had votes in the wake of successful military conquests, but after the defeat to Prussia in 1871 the French changed their minds. Goodhart wrote:

> "For almost 25 years after the Franco-Prussian War [1870–1871] the leading French international lawyers, Montluc, Ott, Cabouat, Renan and Audinet steadily argued that natural right and international usage had established the doctrine of self-determination. Meanwhile the German lawyers Hotzendorf, Geffker, Stoerk and Francis Liever argued variously that plebiscites were wrong; that they subjected the minority to the rule of simple majority without protection" (Goodhart, 1971, p. 111).

Expedience—or opportunism—it would seem, led to a change of heart. Perhaps very little has changed. One of the most persistent and controversial questions on national self-determination and the referendums is who is allowed to initiate a vote on independence.

Yet for all the justified cynicism, legal issues often constrain the political logic and force actors to take decisions that may not be in their political interest. Scotland is a case in point. In 2011 the SNP won the election to the Scottish Parliament on a manifesto commitment to hold a referendum on independence (Tierney, 2012, p. 147). But although the SNP won a majority of the vote, the party was—as a leading constitutional lawyer noted—"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" (Tierney, 2012, p. 147). It was in realisation of this that the Scottish government entered into negotiations with London with a view to holding a referendum on independence (see the Scotland Section in Chapter Four).

It is a key part of constitutional politics that the judiciary polices the boundaries of competencies allocated to different actors. In the context of referendums on national self-determination, this has led to several rulings on the constitutionality—or otherwise—of decisions by secessionist governments or sub-units to hold votes on independence.

In 2017, the referendum for the establishment of an independent state in Catalonia was struck down by the Spanish Constitutional Court[1].

However, this example is not unique. Indeed, in the USA, the Alaska Supreme Court ruled in 2006 that a

[1] See: www.rtve.es/contenidos/documentos/constitucional_sentencia_referendum.pdf, accessed 23 October 2017.

referendum on whether Alaska could seek a legal path to independence was *ultra vires*, and could not be held (Kohlhaas v Alaska, 2006). In reaching this decision, the judges cited the earlier—and much celebrated—case of *White v Texas* from 1869, in which the US Supreme Court held that a unilateral secession would be illegal under US Constitutional Law (Radan, 2012 p. 187). These cases are, as we shall see, not unique. So, what does the law say, and does it matter?

In the 1990s, the American political scientist Stephen Krasner wrote a book titled *Sovereignty.* Most telling about it was the subtitle, 'organised hypocrisy' (Krasner, 1999). Analysing international relations from a largely *realist* perspective, the scholar broadly concluded that, all things considered, arguments dressed up in idealistic rhetoric were manifestations of power politics. References to laudable principles tended to fall down when tested against the 'national interest'.

Is this legally the case? The black letter law of the 'right' to self-determination referendums is, in a sense, very simple. In the words of James Crawford, "there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory" (Crawford, 2006, p. 417). Those who espouse this view will further stress that this is consistent with the jurisprudence of the international counts. Thus in an *obiter dicta* in the Kosovo case, Judge Yusuf held:

> "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" (Yusuf, 2010, p. 1,410).

This view of the legality of independence referendums is near identical to the doctrine followed by domestic courts. In the Canadian case of Bertrand v Québec, it was held *per* Justice Robert Lessage that a referendum on a unilateral declaration would be "manifestly illegal". This is still the legal position notwithstanding the reasoning in the much cited (and rarely misunderstood) Re Quebec (see below).

Thus, the general rule is that referendums have to be held in one of two ways. Either in accordance with existing constitutions (such a provision exists in article 39(3) of the Ethiopian constitution but in few other states). 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 Timor Leste 1999, South Sudan 2011, Scotland 2014 and the forthcoming Bougainville 2020 (Radan, 2012).

To take a recent example, following this logic, it would seem that the referendums in both Catalonia and Kurdistan were both illegal and unconstitutional. None of the regions could expect to be recognised as this would be against the principle known as *ex injuria jus non orbitur*—or, in other words, legal rights cannot derive of an illegal situation (Shaw, 2008, p. 469). As the declaration of independence was formally illegal, the countries could not expect legal recognition. Indeed, that was also the case when Rhodesia (now Zimbabwe) declared independence after a referendum in 1964. The result of the (illegal) plebiscite was declared void and Rhodesia was not recognised by the international community (Shaw, 2008, p. 469).

Based on this reasoning, the Soviet leader Mikhail Gorbachev was well within his right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the spring of 1991 were illegal and that he was the guarantor of *Pravovoe gosudarstvo*—the equivalent of the rule of law in Soviet jurisprudence[2].

As neither the Iraqi nor the Spanish constitutions do not allow for independence referendums, the two held in these two entities were, *ipso facto*, unconstitutional.

Yet matters are not that simple. Yes, all other things being equal a country only has a right if it follows the rules. However, when a region is part of an undemocratic constitutional order matters are a bit more complex. Antonio Cassese has argued:

> "When the central authorities of a sovereign State persistently refuse to grant participatory rights to a

[2] Of course, some would say, previously, under the so-called 'Stalin Constitution 1936', individual Soviet states did indeed have the right to self-determination referendums under Article 48. But this provision had been dropped in the Khrushchev Constitution of 1956. Consequently, the Baltic republics were in breach.

> 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" (Cassese, 1995, p. 119–120).

As Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. Again the comparison with the Soviet Union is illustrative. Notwithstanding Gorbachev's reforms, the United Socialist Soviet Republics (USSR) was not a democratic regime, which consequently provided the Baltic States with a justification for holding referendums. But, given that Spain is a democratic state, this rule hardly covers Catalonia. While the Spanish government arguably acted in a way that appeared grossly disproportionate, the legal argument remains the same. Catalonia is not currently part of a non-democratic state. Based on the situation, as it stands now, the referendum was from a purely legal perspective extra constitutional. In a legal system under the rule of law, the powers of state institutions have to be enumerated in law.

The basic principle of what in different languages is known as, among other things, *L'état du Droit* or the *Rule of Law* is that citizens can do anything unless it is expressly prohibited. Public bodies or 'emanations of the state'—as the technical term is—can only do things that are expressly allowed. Thus, public bodies cannot *legally speaking* take actions that are not prescribed in enabling legislation. To pass legislation outside the boundaries of the constitution or enabling legislation is the very definition of being *ultra vire—shof* acting illegally.

But does the law have to be that inflexible? Not necessarily. In Canada, the two referendums held in Quebec in, respectively, 1980 and 1995, were not strictly speaking within the powers granted to the provinces by the Canadian Constitution (Sen, 2015). Technically speaking, the referendums were *ultra vires* or extra constitutional. Yet, the Canadian judges, realising that legality ultimately rests on a modicum of legitimacy followed a more pragmatic logic. In the celebrated case, Re Quebec, the Court was asked the question, "Under the *Constitution* of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?"

The Court 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" (*Re Secession of Quebec,* 1998, p. 385).

In other words, a result in favour of secession would require the rest of Canada to negotiate with Quebec. Needless to say, this ruling does not apply in Spain. But the Canadian example suggests that other countries' courts have shown a flexibility and appreciation of nuances that is conducive to compromises.

These examples would seem to suggest that the international law pertaining to independence referendums is clear and simple. Alas, this is very far from being the case. (For a more general discussion see Sen, 2015, p. 77ff.)

While governments may confidently cite principles, the practice of independence referendums seemingly owes more to national interest than to adherence to principles of jurisprudence. For example, the states of Western Europe readily recognised the secessions of several former Yugoslav republics in the early 1990s—although these new states did not adhere to the aforementioned legal principles. And yet, in other cases, international recognition has been less forthcoming even if the countries have seemingly followed the established norms.

No state has to date recognised the outcome of Nagorno-Karabakh's referendum in 1991, although Azerbaijan is very far from being a democratic state (the country has a Freedom House Score of 7—the same as North Korea) and despite the greater freedoms for the citizens/inhabitants of the break-away republic. Similarly, no state recognised the referendum in Somaliland although this enclave is considerably more democratic, peaceful and respecting of the rule of law than Somalia, which at the time of the referendum was an archetypal failed state. For all the legal arguments, acceptance of referendum results is ultimately a political rather than a legal decision. In other words, are all these arguments just examples of the aforementioned 'organised hypocrisy'?

Or, are states actually recognised if they follow the rules of the game? Or, it is simply a matter of power politics?

Political perspectives: referendums and realpolitik

Lawyers are interested in what is—or is not—legal and in accordance with more-or-less rigid rules. Political scientists, by contrast, are interested in what actually happens. Are there, from a political science or international relations point of view, causes and tendencies associated with recognition of independence referendum results? Or, are independence referendums simply recognised when the rules are followed?

Alternatively, do we now live in a democratic age in which the gold standard of legitimacy is popular support? And, if the answer is yes, do independence referendums tend to be recognised when secession is supported by a large majority of the new *demos* on a large turnout? Or is it all down to power politics? There is statistical evidence for the latter, though, once again, matters are a bit more complex and nuanced.

Since 1973 there have 33 successful referendums on independence[3]. Of these 15 have resulted in the establishment of a new state (see Qvortrup, 2014 for a further discussion). What are the factors associated with establishing these new states? Factors associated with recognition are generally legal ones, such as the seceding entity was part of a non-democratic state? Were there provisions for secession in the constitution. But are there also more political ones, for example a high turnout and a massive yes-vote? One particular factor regarding the acceptance of an independence referendum is whether the new state has the support of the international community—or, more specifically, the three 'democratic' permanent members of the UN Security Council.

In the analysis that follows we have measured some of the factors that statistically could be conducive for when states are recognised using simple Pearson Correlations. Without going into technical detail, this analysis measures the strength of association between different factors. A score of R = 1 indicated a perfect positive correlation, a score of -1 a perfect negative correlation and a score of 0 no association. Conventionally a score between 0.2–0.3 indicates a small correlation, a score of between 0.3–0.5 a modest correlation and a score of over 0.5 indicates a strong correlation.

The dependent variable is whether the state was recognised and took up a seat in the UN. The independent variables are the official yes-vote, the turnout, the Freedom House score of the country from which the entity sought to secede and lastly a dummy variable for whether there was support for secession among the five permanent members of the Security Council (in practice the USA, Britain and France).

Table 1: Correlation coefficients: recognition and political determinants

Freedom House score	R: -0.23 (significance 0.18)
UN Security Council Dummy	R: 1.00 (sig 0.00)
Turnout	R: -0.28 (sig 0.12)
Yes-Vote	R: 0.44 (sig 0.05)
N: 33	

The different variables have different levels of success. It is plain to see that the level of democracy in the parent state is of no importance whatsoever. Although the legal theory dictates that countries ought to be given a right to secede if they are part of a dictatorial state, there is little indication that this is the case. The level of democratisation is measured by the Freedom House score for political rights. As this is a negative measure from 1 (Free) to 7 (Not Free), a score of R of -.23 indicates that a country is more likely to become independent if the parent state is democratic, thus a result that runs counter to the legal doctrine. While this correlation is not statistically significant at the minimal 0.1 level of significance, the tendency is nevertheless clear.

[3] This analysis is based on the referendums held since the breakdown of the Soviet Union. Before that date there had been relatively few independence referendums (only a handful in each decade). The first independence referendums were held in the US confederate states Texas, Virginia, Tennessee and Arkansas, where narrow majorities voted for independence in 1861. Other independence referendums include Norway (1905), Iceland (1944) and Malta (1964). For a discussion of these referendums see Qvortrup (2014) and Sen (2015).

There is a tendency that low turnout is likely to lead to recognition; the higher the turnout, the smaller the chances for secession. While this correlation is not statistically significant it is relatively close to the 0.1 threshold.

The statistically significant factor is the yes-vote. A high yes-vote is—all other things being equal—correlated with recognition of the state (R:0.44. Statistically significant at the 0.05 level). While high support for independence does not guarantee secession, it is a strong factor—perhaps an indication that a Clarity Act like the Canadian one is a good idea.

However, the by-far-strongest factor is support by the three Western powers on the UN Security Council. There is a 100 percent correlation between getting the support of these countries and becoming a recognised independent country.

Winning the support of the people is important but to be certain of independence you need friends in high places. Secession is not just won in referendums; it is also won by successful lobbying in Paris, Washington and London.

Ch. 4 Regulation of referendums

How referendums have been organised in democracies

As we saw earlier (Chapter 1), referendums began to be used in earnest after the First World War. Inspired by earlier experiences and prompted by American President Woodrow Wilson's call to make the world 'safe for democracy', a number of referendums (then often called plebiscites) were held in disputed territories such as Schleswig (in present-day Northern Germany, Allenstein (now north-east Poland), Upper Silesia (North of the Czech-Polish border) and Sopron (now a city in Hungary on the Austrian border). All these—not little-known—areas had divided populations that had experienced armed conflict over ethnic and national issues.

In all the areas, referendums helped to resolve deep-seated conflict. Thus the Germans never sought to reclaim Northern Schleswig after the Danes had voted for union with Denmark in 1920. Conversely, the Germans made claims on areas where no referendums had been held—or allowed by the Paris Peace Conference. One of the main reasons for the successes of the referendums held at the end of the First World War was acknowledged to lie in their organisation and administration.

As "a defective plebiscite [referendum] delivers a defective title to sovereignty" (Farley quoted in Sen 2015, p. 211), it is necessary to get an understanding of how different democracies regulate referendums. The following analysis is based on the regulations in European states only[4] , and is not representative for all countries around the world. Hence the analysis is mainly illustrative and is aimed at providing an insight into how countries that have recently used referendums regulate campaign spending issues and provide a media balance—or not, as the case may be. In addition, there are the important questions of whether there should be a special-majority requirement and if there should be one or more questions.

Multi-option referendums

Multi-option referendums have often been discussed in relation to referendums on ethnic and national issues and polls on independence as well as on other issues. There have been relatively high-profile referendums with several options in Sweden, for example in 1955 when three pension systems were put to a vote and in 1980, when the future of nuclear energy was decided in a three-option referendum. Also in the New Zealand referendums on a change of the electoral system. But multi-option referendums have also been discussed in relation to the referendum on independence or 'devolution max' (independence but with the same currency and foreign policy) in Scotland.

There are a handful of referendums that are particularly interesting in this connection; the referendums in Newfoundland in 1948, in Guam in 1982 and in Puerto Rico in 1964, 1993, 1998, 2012 and 2017.

Puerto Rico is particularly interesting. In all these referendums the voters were offered more than one choice; independence, become a state within the USA, or status quo ('Commonwealth'). In all cases, Table 2 shows the voters opted for status quo – or in 1998 for 'none of the above'.

[4] The focus on European countries is due to access to data. As the analysis is based on legal texts, which inevitably are written in local languages, the author has not been able to verify translations of non-European rules and regulations.

Table 2: Multi-option referendums in Puerto Rico

Option	1967	1993	1998	2012	2017
Commonwealth	60.4	48.6	0.1		1.22
Free Association			0.3	33.3	
US Statehood	39.0	46.3	46.5	61.1	97.18
Independence	0.6	4.4	2.5	5.6	1.50
None of the above			50.3		
Turnout	60.4	74.0	71.0	72.0	22.2%

Source: Comisión Estatal de Elecciones de Puerto Rico, 2012

In 2012, in a referendum held at the same time as the US Presidential election, 61 percent of the voters voted for statehood and for becoming the 51st state, and this preference was also reported in the 2017 referendum, albeit on a very low turnout. However, it remains to be seen when—or, indeed if, the US Senate will ratify the result. The problem with these referendums is that they worked like a first-past-the-post system, under which it is possible to win without securing a majority of the votes. To establish a new nation, it is reasonable you have the support of a majority. As this is not guaranteed in a multi-option referendum it is, arguably, ill-suited for such questions. However, there is a different way in which referendums can be held that go beyond the strict binary choice between yes and no.

In New Zealand in 1992 and 1993, two referendums were held on the proposals for new electoral systems proposed by a Royal Commission. The first was held on whether to change the electoral system and, on the same day, the voters were asked which of four different electoral systems they preferred. A large majority of 85 percent supported a change of the electoral system. On the second question, close to 70 percent opted for the mixed-member electoral system. The following year, another referendum was held, pitting the most favoured option against the existing electoral system in a run-off. In the latter referendum a narrow majority voted for the mixed-member system (McRobie, 1994). Thus the New Zealand experience suggests there are ways of overcoming the dichotomous choices that often oversimplify referendums.

Newfoundland, in Canada, is another area where multi-option referendums with a run-off have been held. Given that the issue pertained to the same question as in the forthcoming Bougainville referendum, it is instructive to take a closer look at the experience there.

In 1948 Newfoundland was a dominion in the United Kingdom. The question was whether the territory should maintain its status (commission government), become a part of Canada (confederation) or become an independent country (responsible government). A first referendum was held on 3 June 1948. After an acrimonious campaign, the clear winner was responsible government with 69,400 votes (44.6 percent). Maintaining the status quo dropped out (receiving a mere 14.3 percent). Confederation received 64,066 votes, 41.1 percent of the total.

A second referendum was set for 22 July. The confederates, that is, those in favour of becoming a Canadian province, realised that they could prevail only if they managed to shift votes from those who favoured the status quo. To win these additional votes, the confederates adopted two new tactics. Firstly, they emphasised the role played by the Roman Catholic Church, which had been strongly against confederation in the first referendum. Thus, in early July the 'Loyal Orange Association' (a hard-line Protestant organisation) issued a circular letter to all members. It cited the role played by the Roman Catholic Church, condemned "such efforts at sectional domination", and warned Orangemen of the dangers of Catholic influence. Secondly, to win votes from those who had voted for the status quo, the Confederalists also targeted unionist voters, and presented the confederal option as a 'British Union'. The tactic paid off, 78,323 votes (52.3 percent), voted to become a Canadian province, and 71,334 votes (47.7 percent), voted for independence. Newfoundland became a Canadian province, and the divisive campaign was soon forgotten.

Multi-option referendums are rare – but not unheard of. Whether they are a good idea is debatable, but the fact that the very bitter campaign in Newfoundland in 1948 was quickly forgotten probably suggests that they

are not as bad as they may seem at first. With a run-off among the most popular options in the first round, the variety offered by a multi-option might be a good means of overcoming the dichotomous nature of referendums.

Special-majority requirements

Sometimes a majority is not enough. Sometimes a specific turnout is required, and sometimes a special majority (which may also be called a qualified majority or a super majority). The terminology is not clear and concise but the principle is the same. Some issues are so momentous that more than merely a majority of those voting is required.

This is widely recognised in the scholarly literature. In a classic study, the British referendum expert David Butler noted, "Basic changes in territorial boundaries or sovereignty will be respected more readily when it has been incontrovertibly demonstrated that they command a majority of the voting population" (Butler, 1981, p. 76). If a referendum scrapes through on a low turnout it is likely that the result will be challenged. This view is reflected in the more recent scholarly literature, "If the approval rate of a referendum is too low, it ought to be discredited. A nearly simple majority does not provide sufficient legitimacy" (He, 2002, p. 77). Hence, "an enhanced majority is important in securing the legitimacy of a referendum when aimed at resolving sovereignty conflict" (Sen, 2015, p. 233). And, yet, despite this, "a quorum – either of participation or approval – is not a universal rule" (Sen, 2015, p. 233).

There are pros and cons of imposing super-majority requirements. On the one hand, they can be seen as a way of preventing a particular outcome and as a means of obstructionism. This was arguably the case in the Soviet Union when Gorbachev insisted, "a two-thirds majority should be required for secession in Latvia". This requirement was, arguably, "unreasonable because the Russian population accounted for 34 percent of the Latvians at the time" (He, 2002, p. 77).

However, at other times, a super-majority requirement has prevented radical change from happening. In the small Caribbean federation of St Kitts and Nevis, a referendum was held in 1998. Nevis wanted to secede from the union and held a perfectly legal referendum to that effect; 62 percent of those voting supported secession. However, the constitution requires, according to Article 113(2b), that the Bill for secession is "approved in a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum". Once the referendum was over, support for independence seems to have all but withered away and the issue does not appear to be debated in Nevis.

In yet other cases, provisions for super majorities have made changes cumbersome and work to hinder changes that the majority of the voters support. This was arguably the case in Palau. Here, the voters rejected independence in a referendum in 1983 (Ranney and Penniman, 1985). Subsequent to the vote, the island state's constitution stipulated that certain constitutional changes required the majority of 75 percent of the voters—including independence (Article 13(6)). While public opinion gradually moved towards independence, it proved difficult to get a majority for this. Indeed, five referendums were held in 1984, 1986 (twice), 1987 and 1990, which returned majorities of over 60 percent, yet fell short of the 75 percent mark. Finally, after a change of the law, a referendum was held without a super-majority requirement in 1993. In this referendum, a simple 50 percent plus one was required. Over 60 percent supported independence. Palau is now an independent member of the UN.

St Kitts and Nevis and Palau are small states that have received relatively little attention. The same cannot be said for Canada. In this very large country, there has been a heated debate about super-majority requirements. Yet, Canada is, as we shall see shortly, not a particularly good illustration of the pros and cons of super-majorities.

It is common (but inaccurate) to cite the Canadian Clarity Act as a precedent for super-majority requirements. As the example is often mentioned, it is instructive to give a brief description of this model. After the 50.58 percent to 49.42 percent result in Quebec in 1995 (Nadeau et al, 1999), the House of Commons in Canada sought to establish that a future referendum was not won by a narrow margin. The Act, however, stops short of recommending a specific majority. According to the Act:

> "The House of Commons shall consider "whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province ceases to be part of Canada. Factors for House of Commons to take into account include (2) (a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant"[5]

These conditions are arguably somewhat subjective and open to interpretation, and it is by no means certain what a 'clear majority' means in practice.

A better example of a super majority, albeit a small one, was used in 2006 in Montenegro (a referendum that has become the gold standard of best practice); the law stipulated that independence be approved if supported by 55 percent of those eligible to vote. (The total turnout of the referendum was 86.5 percent. 55.5 percent voted in favour and 44.5 were against breaking the state union with Serbia (Krause, 2012)).

In most other referendums (such as Timor Leste in 1999, Malta in 1955, the referendums on independence for former Soviet states in 1990 and the referendums in Yugoslavia in the 1990s) there were no special-majority requirements. Special majorities and turnout requirements were used in Scotland in 1979, in a referendum on whether to introduce a Scottish Parliament with powers over devolved powers. The outcome was a rejection of the proposal for self-government, although a majority had voted in favour. The result exacerbated antagonisms.

Some people have expressed concern that the turnout might be low, and that consequently, voters on a low turnout may vote for secession. One author has summed up the reason for this concern as follows:

> "The legitimacy of referendums derives from the assumption that their results express the will of the majority of the people. But, the lower the participation level, the greater the possibility of distortion (in which the percentage voting yes varies considerably from the percentage that would have resulted if all citizens had voted). In these instances of high voter apathy, a mobilised interest may be well poised to take advantage of the situation. Trooping to the polls in massive numbers while most of the electorate stays at home, an activated minority can defeat a position held by the majority of the citizens. The result is what I term a 'false majority' (in which the final verdict of the proposal had all citizens voted, would have been different)" (Kobach 1993, p. 138–139).

Generally speaking, referendums on independence are characterised by very high turnout rates—typically higher than general elections and certainly much higher than referendums on more mundane issues such as taxation and social issues. For example, in Quebec in 1995, the turnout was in excess of 95 percent. The same was—according to international observers—the case in Eritrea in 1993.

To ensure that 'false majorities' do not occur, it could be stipulated that a minimum of 50 percent of the eligible voters participate in vote. Such a system operates in several countries, including Poland, Italy and Lithuania. An inquiry carried out by the Venice Commission (an advisory body of the Council of Europe) provided information on 33 of its 48 member states. 12 of these, have legal provisions setting a minimum threshold of participation of 50 percent of registered voters (the only exception is Azerbaijan that requires the participation of 25 percent of the registered voters). According to the report:

> "A quorum of participation of the majority of the electorate is required in the following states: Bulgaria, Croatia, Italy, Malta, Lithuania, Russia and The Former Yugoslav Republic of Macedonia. In Latvia, the quorum is half the voters who participated in the last election of Parliament and in Azerbaijan; it is only 25% of the registered voters. In Poland and Portugal, if the turnout is not more than 50%, the referendum is *de facto* consultative and non-binding (in Portugal, the quorum is calculated on the basis of the citizens registered at the census)."

It is difficult to make a strong case for either of the above models. Efforts must be made to ensure that the electorate is as wide and as inclusive as possible. Hence, a case can be made for the view that a close result threatens the legitimacy of the outcome. Yet, specific requirements are unlikely to increase the legitimacy of the

[5] Clarity Act, 2000, c. 26 [Assented 29 June 2000] 2(1).

result.

It might be stipulated that the turnout should be above 50 percent lest a controversial policy be enacted against the knowledge and wills of the voters. Whether this situation—which has occurred in Switzerland—is likely to be a problem in Bougainville where the turnout-rate is perhaps unlikely to get above 75 percent is an open question.

Special-majority requirements (such as qualified-majority requirements and registered voters' requirements) are used comparatively frequently.

Table 3: Constitutional and legal provisions for special-majority requirements in Europe

Azerbaijan (Article 139.1 of the election code)
Bulgaria (electoral legislation)
Croatia (Article 87.4)
Denmark (Article88 Constitutional Changes)
Italy (legislative regulation, abrogative referendum)
Latvia (Article 79; it applies to constitutional revision)
Malta (Article 20.1 of the Referenda Act)
Portugal (Article 115.11)
Poland (binding if 50% of electors participate, Article 125.3; 50% majority – no threshold – required for constitutional reform article 235.6)
Slovakia (Article 98.1)
Slovenia (Article 170.2)
The Former Yugoslav Republic of Macedonia (Article 73.2).[6]

Campaign spending

Campaign spending is a controversial issue that addresses different yet interrelated concerns. Campaign spending pertains to the amount of money spent in each campaign and the possible disparity between the amounts the two sides are willing and able to spend, and, allied to this, the provisions for public-funded campaigns to ensure fairness. However, campaign spending also concerns the government's ability to use taxpayers' money to forward a particular point of view. Each of these issues will be analysed in turn. The danger that one side could win the referendum by outspending the other side – and through this pay for advertising on billboards, on television and on social media – is often noticed.

Given the research that suggests that money—at least to a certain degree—can influence the result of a referendum (Stratmann, 2006), it is somewhat interesting that only relatively few countries have introduced restrictions on campaign spending.

Of the member states of the Council of Europe only Britain, Spain and Portugal have placed limits on campaign spending. The United Kingdom is the country with the most extensive regime of spending limits. In each referendum campaign, the Electoral Commission designates two umbrella organisations to represent each of the sides. Each of these is allowed to spend a maximum of £5 million. In addition, political parties are allowed to spend up to £0.5 million depending on their vote-share in the previous general election (Section 20 of the Act).

[6] **Source:** Le référendum en Europe—Analyse des règles juridiques des Etats européens—Rapport adopté par le Conseil des élections démocratiques lors de sa 14e réunion (Venise, 20 octobre 2005) et la Commission de Venise lors de sa 64e session plénière (Venise, 21-22 octobre 2005) and own updates.

In Portugal the Lei No 56/98 *Financiamento des partidos e das campanhas eleitorales* includes provisions for limits on campaign contributions. The same is true in Spain, where there are limits on campaign contributions set at €6,000 (Zellweger and Serdült, 2006, p. 82).

While the referendums in Spain and Portugal have been relatively uncontroversial, the limits on campaign spending did not seem to have been discussed at great length during the respective campaigns.

During the very controversial and high-profile British referendums on, respectively, Scottish Independence 2014 and Leaving the EU ('Brexit') in 2016, the charge could not be made that one side was richer than the other and merely won because of deeper pockets and more financial resources.

This was in sharp contrast to the 1975 referendum (also on leaving the European Economic Community – the precursor of the EU). In this campaign, the government's ability to out-spend the 'leave' side by a factor of 10:1 was identified as a major source of inequality and a possible factor in securing a yes for remaining in the European Communities (Butler and Kitzinger, 1976, p. 86).

Public grants for campaigning

While limits on campaign spending are relatively rare, it is relatively common to provide public funds for each of the sides in referendum campaigns. Thus, Armenia, Denmark, Liechtenstein, Macedonia, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the United Kingdom provide funding for the opposing side at the taxpayer's expense. It is noteworthy that most of the established Western European democracies acknowledge the need to provide the different sides with resources to conduct an effective referendum campaign. In Portugal, funds extend to groups with more than 5,000 members (Alves et al, 2009). In the Netherlands, voters can now initiate referendums provided they can gather a specified number of signatures (300,000):

> "The Referendum Law institutionalises a commission whose task it is to foster the debate about the law put before the voters. The commission informs the voters about the law and pays subsidies of up to 2 million euros to parties and organisations taking part in the referendum debate. A commission of this kind already existed during the EU Constitution Referendum 2005, and it published a list of all entities that got subsidies for their activities during the debate. The Referendum Law contains no provisions about the behaviour of the government during the campaign" (Holsteyn, 2017).

Such laws seem to have had a positive effect and have—based on anecdotal evidence—removed opportunities to claim that the government enjoys an unfair advantage. Yet, it should be noted that a number of established Western democracies do *not* provide funding for campaigns (namely, Austria, Ireland and Italy). There were concerns about the fairness of the 1994 referendum on EU membership in Austria (Pelinka and Greiderer, 1996), and similarly some concerns were raised in Ireland in 2009 when massive and one-sided campaign spending created an unequal playing field, which arguably helped the Irish government win the second referendum on the Lisbon Treaty (FitzGibbon, 2009).

Limits on government spending

Much depends on how these rules are enforced and on the ability to use the loopholes in the legislation. Thus, the British Government distributed a leaflet outlining the economic benefits of EU membership just two days before the official campaign started. The estimated cost of distributing the leaflet was £10 million. However, while this unquestionably provided the government with an opportunity to get its message across it is an open question how many read the leaflet, and it is conceivable that the adverse publicity associated with the mail-shot might have backfired (Qvortrup, 2018, forthcoming). There are other examples of similar perceived abuse of taxpayer's money to promote a particular point of view in a referendum campaign. Thus in Hungary, the legislation provides amble opportunities for promoting the government's position at the taxpayer's expense (Komaromi, 2014).

However, it should be noted that these advantages notwithstanding Prime Minister Orban did not succeed in winning popular approval for a government referendum aimed at limiting immigration (Pállinger, 2017). In

other countries, the courts have even positively endorsed the right of the government to spend taxpayers' money. For example in Austria, the Constitutional Court in 1994 rejected the plaitiff's claim and accepted that the government spends tax-payers money in referendums campaigns Limits on the amount spent by the government are present in 12 of the 33 cases.

In some countries, rules are derived from litigation (for example in Ireland) (see also the much-cited Patricia McKenna v An Taoiseach ruling from 1995) but in other countries, rules limiting the government's spending are set out in primary legislation.

In McKenna, the Irish Supreme Court held, that "the Government is not entitled to expend public monies for the purpose of promoting a campaign for a particular outcome to a proposed referendum to amend the terms of the Constitution. I would allow the appeal".

In most other countries, limits on government spending are contained in primary legislation. For example in Latvia the 'Law on National Referendums, Initiation of Laws and European Citizens' Initiative', states, in Article 33(1):

> "During campaigning before a national referendum, campaigning on initiation of a law or campaigning on initiation of recalling of the Saeima, it shall be forbidden to display and disseminate campaign materials at public spaces of institutions and capital companies if more than 50% of their capital shares (stocks) are held by the state or derived public persons."

Similarly, in Italy, the law 'Provisions for equal access to media during election and referendum campaigns and for political communication'[7], provides Article 9:

> "From the date of the convocation of the electoral committees and until the closing of the voting operations, it is forbidden to all public administrations to carry out communication activities except those made impersonal and necessary for the effective performance of their functions."

These restrictions on campaigning should be—and are in practice—distinguished from information campaigns. There is a fine line between objective information and political advertising, and in several countries complaints and even litigation have followed from attempts to restrict the use of taxpayers' money.

While relatively rare, such provisions remove a potential complaint that the referendum was unfair and one-sided. However, the implementation of the rules has often led to protracted battles and complaints by opponents. For example, in the United Kingdom, the Public Administration and Constitutional Affairs Committee in the House of Commons (chaired by leading Brexiteer MP Bernard Jenkin) complained that the government was effectively undermining the referendum by making statements pertaining to EU issues during the campaign[8].

Likewise in Poland, government is obliged to "provide 'information' which should be objective", and "it cannot conduct 'campaign', however in practice "providing information" is often suggestive" (such as a very pro-European campaign before accession referendum in 2003) (Rytel-Warzocha, 2017).

Fair media balance

Referendum campaigns are often won by those who set the agenda, or in the parlance of social science theory by the ones who are able to frame the argument. Thus:

> "Politicians attempt to mobilise voters behind their policies by encouraging them to think along particular lines, emphasising certain features of these policies. These frames organise everyday reality by providing meaning to events and [by] promoting particular definitions and interpretations of political issues. The influences these frames have on the voter is the framing effect" (Atikcan, 2015, p. 18)."

Given the role the electronic media have for framing the debate, it is not surprising that 17 of the 33 countries

[7] The Italian name of the law is Legge 22 Febbraio 2000, n. 28 *Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica.*

[8] The author of this report was an expert consultant to this committee during the 20152016 Parliament.

have introduced or operate regulations aimed at ensuring a balance in the media. For example, in Spain, the law 'On the regulation of different modalities of referendums'[9] grants all parliamentary parties free access to public media during the referendum campaign.

In several countries, such as Austria, the United Kingdom and Norway, these requirements are covered not by primary legislation but in regulations governing the public broadcasters. In the latter country, for example, "NRK was obliged to provide balance between the two sides in the 1994 referendum", something that "worked tolerably well" (Bjørklund, 2017).

In the United Kingdom the BBC's 'Due Impartially Guidelines' stated:

"Due impartiality is not necessarily achieved by the application of a simple mathematical formula or a stopwatch, but the objective – in a referendum with two alternatives – must be to achieve a proper balance between the two sides. This will be irrespective of indications of relative levels of support. However, referendums are seldom fought purely on the basis of just two opposing standpoints – on each side, where there is a range of views or perspectives that should be reflected appropriately during the campaign."

To achieve this, the BBC went to great lengths to ensure that:

> "Content producers … ensure that our use of certain phrases or words, in a particular context, does not inadvertently convey a meaning which may be construed as favouring one side or the other. Where such terms are used, there should be clear attribution …"[10]

Notwithstanding these exceptional efforts to ensure a balanced coverage, the BBC was subsequently criticised for failing to provide robust questioning of the different sides during the campaign, thus proving that ensuring impartiality can be very difficult during a referendum campaign.

FORI: Overall levels of referendum fairness

Adding these tendencies together, it is possible to construct a Fairness of Referendum Index (FORI). Giving each country a score for each type of regulations they have introduced, and adding these numbers together, the FORI reveals that the United Kingdom (FORI score 4) has the highest level of referendum fairness, followed closely by Switzerland, Spain and Portugal (each with a FORI score of 3).

Meanwhile, Hungary, Slovakia and Luxembourg are some of the countries with the lowest scores. The more prominent a role the referendum plays in public life the more it is regulated. As suspected, therefore, there is a moderate tendency that countries with more referendums have higher levels of regulation[11]. However, there are several outliers that suggest that there are other factors. Thus Slovenia and Slovakia, with both double-digit numbers of referendums, do not have any such regulations.

There is, also, a slight tendency that countries in Western Europe have a higher level of referendum fairness, thus there is a statistically significant correlation between being a former communist country and having a low FORI score.[12]

[9] The Spanish name of this law is *Ley Orgánica 2/1980, de 18 de enero, sobre regulación de las distintas modalidades de referendum.*

[10] See: www.bbc.co.uk/editorialguidelines/guidelines/appendix8/due-impartiality, accessed 15 October 2017.

[11] There is a correlation of R=.29, but only statistically significant at p<.08.

[12] R=-.32, significant at p<.05%.

Table 4: FORI scores for Council of Europe countries (referendums since 1990 in brackets)

Britain	4 (9)
Switzerland	3 (252)
Spain	3 (1)
Portugal	3 (3)
Albania	2 (4)
Armenia	2 (4)
Cyprus	2 (1)
Denmark	2 (7)
Estonia	2 (4)
Ireland	2 (25)
Italy	2 (58)
Liechtenstein	2 (17)
Macedonia	2 (2)
Moldova	2 (2)
Netherlands	2 (2)
Norway	2 (1)
Poland	2 (2)
Sweden	2 (2)
Austria	2 (2)
Finland	1(1)
Azerbaijan	1(6)
France	1(3)
Latvia	1(7)
Lithuania	1(20)
Romania	1(5)
San Marino	1(16)
Hungary	0(8)
Iceland	0(4)
Luxembourg	0(4)
Slovenia	0(21)
Greece	0(1)
Slovakia	0(16)
Czech Republic	0(1)
Bulgaria	0(2)
Russia	0(6)
Ukraine	0(3)

Ch. 5 Case studies of recent independence referendums

So far this report has focused on more general aspects of referendums in different jurisdictions but with an emphasis on those in economically developed countries. The reason for this is relatively simple; most referendums have been held in countries with high levels of economic development.

However, in recent years referendums have been used frequently in developing countries. Like in the case of Bougainville these referendums have often pertained to matters of sovereignty and independence. Three referendums in particular are relevant: the votes in Timor Leste, South Sudan and Macedonia.

In this chapter, each will be analysed in turn. We will also look at the case of Scotland by way of contrast with a recent referendum on independence in a Western country and briefly at the cases of Cyprus and New Caledonia.

Timor Leste

The case of Timor Leste (East Timor) is particularly interesting to readers in PNG and Bougainville due to its geographical proximity. Moreover, the example is also pertinent to the forthcoming referendum due to the similar constitutional architectures of the rules under which it will be held. In particular, it is of interest that the Timor Lester vote—like the one planned in Bougainville—envisages a choice between further autonomy or independence.

However, the referendum in Timor Leste also points to some concerns and shortcomings, which need to be avoided at all costs. To avoid these, it is useful to take a closer look at the Timor Leste referendum: its background, implementation and violent aftermath.

A former colony of Portugal, Timor Leste was occupied and annexed by Indonesia in 1975 when it was granted independence by its erstwhile colonial power. While the annexation was widely condemned internationally, including by the UN Security Council (see Security Council Resolution 384, 22 December 1975) there was little appetite for sanctions against the Indonesian government, a key US ally.

Following the resignation of President Muhammad Suharto in 1998, his successor Jusuf Habibie proposed a new status for Timor Leste to end the impasse. In May 1999 the 'New York Agreement' between Portugal and Indonesia authorised the UN Secretary-General to organise and implement a "popular consultation" on whether Timor Leste wanted independence or status of special autonomy within Indonesia. The New York Agreement also included details of the date of the vote and led to the establishment of the UN Mission in Timor Leste (UNAMET), which was tasked with organising the referendum. UNAMET compiled voter lists and made preparations for voting in Timor Leste and in countries with a large number of East Timorese. UNAMET was given full powers over the implementation of the referendum, a public information campaign. This followed the pattern established in the 1993 referendum in Eritrea.

In the run-up to the referendum it soon became clear that UNAMET was ill suited to withstand the disruption caused by Indonesian-backed militias, which sought to halt the process through intimidations and violence. During the process of voter registration, the UN Secretary-General stated that he was "to ascertain based on the objective evaluation of the UN Mission, that the necessary security situation exists for the peaceful implementation of the consultation process" (UN Secretary-General, 1999). Despite these threats more than 450,000 voters registered and in August 1999 —with a three-week delay—78 percent of the voters rejected autonomy and opted for independence on an impressive 98 percent turnout.

Violence broke out immediately after the referendum result was announced. Pro-independence villages were

raided and their populations were displaced. Although the Indonesian government officially recognised the outcome, it was undisputed that the militias had the tacit support of the Jakarta government. To stop the violence, the UN Security Council dispatched the International Force in East Timor (INTERFET) under the command of Australia, which was tasked with restoring peace and to protect UNAMET.

Roughly a month after the referendum, Indonesia formally recognised the result of the referendum and, a week later, on 25 October, the UN Security Council established the UN Transitional Administration in East Timor (UNTAET), which was "endowed with overall responsibility for the administration of Timor Leste and empowered to exercise all legislative and executive authority, including the administration of justice" (UN Security Council Resolution 1,272). UNTAET oversaw the election of a Constituent Constitutional Assembly and the process of establishing government departments. It was also in charge of all aspects of public administration until the UN General Assembly formally admitted Timor Leste as a member (UN General Assembly Resolution of 27 September 2002).

The referendum experience in Timor Leste provides both lessons and warnings for subsequent referendums. Overall the process was too short for developing any credible alternative to independence. The actions of Jakarta-backed militias meant that any proposals for autonomy were stillborn and unattractive to the inhabitants of Timor Leste.

Further, UNAMET was given insufficient time to carry out the preparations for the referendum and there should have been better and more credible levels of referendum security. Some of these concerns would have been met if UNAMET had been given a credible police force (as was the case with the plebiscites held immediately after the First World War).

Under the circumstances, the UN was unable to prevent the violence and the displacement of East Timorese. However, after the referendum UNTAET did an exceptional job in transforming Timor Leste into a functioning state with a public sector and administrative structures.

Montenegro

The referendum in the former Yugoslav republic of Montenegro is an example that, in several ways, provides a template for how to conduct a democratic, legal and legitimate referendum on independence. Again, a bit of background is essential.

In the early 1990s, the Yugoslav Republics' declared their intention to become independent. In pursuit of this goal Croatia, Macedonia and Slovenia held referendums on independence. All these were won by a relatively clear margin. Bosnia-Hercegovina also declared independence. The European Economic Community (the precursor of the EU) recognised the former three countries' declarations of independence. Yet the 'Badinter Arbitration Commission', which represented the European Community, did not formally recognise the latter as "the will of the peoples of Bosnia and Herzegovina" had not been established in a referendum (Badinter Commission quoted in Raic 2002, p. 292). In other words, the European countries seemingly made independence dependent upon the positive endorsement by a majority in a popular vote. In response, the government of Bosnia-Herzegovina organised a referendum, which was boycotted by the Serbian minority, who constituted of roughly 36 percent of the population. In the referendum on 1 March 1992, 99 percent of voters voted for independence on a 63 percent turnout.

While it would be tantamount to committing the 'ecological fallacy' to conclude that the non-voters were all Serbs, evidence suggested that this particular minority was broadly identical to those who abstained (Radan, 2000, p. 50). While we should be careful not to simplify complex causal relationships and dynamics, it is generally accepted that the vote precipitated the Bosnian War (Slack and Doyon, 2001). The war resulted in ethnic cleansing, genocide and the death of over 150,000 people (Burg and Shoup, 2015, p. 169). In the light of these atrocities it was understandable that the international community was concerned about another referendum in the former Yugoslavia. While Montenegro had voted for union with Serbia in a referendum in 1992, the prospect of another secession referendum was not greeted with enthusiasm. President Milo Đukanović—a one-

time ally of the controversial Serbian president Slobodan Milošević—had (perhaps opportunistically) turned on his former friends and now advocated for independence for Montenegro.

To avoid a repetition of the events in the early 1990s, the EU, through the office of the High Representative for Common and Security Policy, mediated between the parties.

While the situation in Montenegro may seem very different from those in PNG and Bougainville, there are some interesting similarities. The most important is that the country's constitution explicitly provided for an interim period after which the future relationship could be decided by referendum. Thus according to the Belgrade Agreement 2002, negotiated with the EU as a mediator:

> "Upon the expiry of a three-year period the member state shall have the right to initiate the procedure for a change of the status quo, i.e. the withdrawal from the State of Union of Serbia and Montenegro. A decision to withdraw … shall be made after a referendum has been held. The Law on Referendum shall be passed by a member state, taking into account recognised democratic standards" (Article 60).

At the instigation of the EU, the last sentence was changed to "internationally recognised democratic standards". The amendment also required the member states to "cooperate with the European Union on respecting international democratic standards" (Venice Commission, 2007, Para 3). Following this, the Montenegrins informed Serbia and the EU that they intended to invoke Article 60 and hold a referendum on independence. Shortly thereafter, the parties began negotiating the law regulating the referendum with the EU as a mediator. Through the mediation it was agreed a super majority of 55 percent was required for independence to take effect. These regulations were contained in the Law on the Referendum on State Legal Status. This also provided that the referendum should be administered by a referendum commission with "equal representation of both parties participating in the referendum" and an independent chairman casting the deciding vote in case of a tie (Article 10). This provision gave the commission legitimacy and powers to enforce rules on campaign spending and media balance, and gave the final result a level of legitimacy rarely seen in independence referendums. No one challenged the result when it was declared; on 21 May 2006: 55.5 percent of the voters in Montenegro voted for independence on an 86.4 percent turnout (OSCE/ODIHR, 2006).

South Sudan

The referendum in South Sudan from 9 to 15 January 2011 shares a number of similarities with the forthcoming referendum in Bougainville. Not only was the referendum a result of a negotiated settlement after a prolonged civil war, the vote also envisaged a choice between further autonomy and complete independence. Furthermore, like in the case of Bougainville, the settlement was initially the result of third-party mediation. For these reasons it is illustrative to consider the detailed implementation of the South Sudan referendum[13].

Like in Bougainville and PNG, most of the period since Sudan became independent was characterised by more-or-less intense armed conflict. Since 1956, when Sudan gained its independence, the predominately Muslim north fought the predominately Christian south. In addition to the religious differences, the war was also fought over access to natural resources above all oil (Deng, 2011). After 1983, the war was fought between the Khartoum Government and the South Sudan Liberation Movement/Army (SPLM/A). The neighbouring countries sought to mediate in the conflict and began this process under the aegis of the Intergovernmental Authority of Development (IGAD) in 1993[14], and were supported in their efforts by the UN special mission UNMISS[15]. However, these efforts yielded few results. The breakthrough only came after pressure from the international community and through mediation by the USA (assisted by the United Kingdom and Norway). In 2005, the parties signed the Comprehensive Peace Agreement, which envisaged a transition phase of six-and-a-half years at the end of which an internationally monitored referendum would be held. It was agreed that the voters would be presented with a choice of either unity—with extensive mechanisms of power sharing—or

[13] As an envoy of the US State Department, the author of this report was part of the mediation team that negotiated the referendum agreement. The contents of this report is based on open sources.

[14] IGAD had representation from countries in the region including Djibouti, Eritrea, Ethiopia, Kenya, Somalia and Uganda.

[15] UN Advance Mission in the Sudan.

independence for South Sudan (Comprehensive Peace Agreement. Chapter 1, Machacos Protocol, Article 2.5).

Shortly thereafter the National Legislature in Khartoum and its counterpart in South Sudan adopted the Interim National Constitution of the Republic of Sudan, which – like the Constitution of the Independent State of Papua New Guinea (Article 338)- contained provisions for a "referendum on self-determination" (Article 222). Pursuant of the interim constitution, the Sudan National Assembly passed the Southern Sudan Referendum Act 2009, to provide a "basic legal framework of conducting the Southern Sudan referendum" (quoted in Sen, 2015, p. 106). The issues regulated by the Act were as follows:

- Legal requirements for being included on the register in Southern Sudan and other locations;
- Who is eligible to vote;
- Conditions under which the referendum may be delayed or postponed, and actions to be taken to reschedule;
- Corrupt and illegal practices and offences;
- Appointment of an independent media committee to launch a media campaign to educate Sudanese people in general and Southern Sudanese in particular;
- The referendum question;
- The approval level by which the referendum will be binding;
- The process for the counting of votes and declaring results (UNMISS, 2010).

This list provides interesting aspects that also pertain to the forthcoming referendum in Bougainville. Indeed, as, according to some estimates, "over 60,000 Bougainvilleans were living in internally-displaced person's camps, and with thousands more fleeing to the neighbouring Solomon Islands" Woodbury, 2015, p. 6) finding mechanisms for how to register voters who for different reasons find themselves outside the jurisdiction is a challenge. Its many well-documented shortcomings notwithstanding (Sen, 2015, p. 106), the South Sudan Referendum provides an example of how it was possible to successfully register voters.

Registering voters is a subject that has received scarce attention. Yet, questions over registration and the entitlement to vote has on several occasions led to the indefinite postponement of referendums on national self-determination and independence. Thus, disagreement over who constitutes the electorate is the reason that India's occupation of Kashmir was never resolved by a referendum as required by the UN Security Council Resolution 47 of 1948. And disagreements over displaced persons are the main obstacles that have allowed Morocco to postpone the referendum on the future of Western Sahara in contravention of UN Security Council Resolution 690 (1991).

That this was not repeated in South Sudan was due to international pressure but also to specific and detailed rules for postponement and for international support in verifying voters living abroad. Article 25 of the Southern Sudan Referendum Act was clear and very specific:

> "The Referendum Act established eligibility to vote in the Southern Sudan referendum for three categories of people: those born to at least one parent from a Southern Sudanese indigenous community who was residing in Southern Sudan on or before Jan. 1, 1956; those whose ancestry was traceable to one of the ethnic communities in Southern Sudan but without at least one parent residing in Southern Sudan on or before Jan. 1, 1956; and permanent residents who (or whose parents or grand-parents) had resided in Southern Sudan since Jan. 1, 1956. The first category of eligible voters could vote in Northern Sudan, Southern Sudan or overseas locations. The second and third category of voter could only vote in Southern Sudan (Carter Centre, 2011, p. 12)."

With the help of the international community, 3,755,512 voters were registered in South Sudan, 116,857 in North Sudan and 60,219 in the diaspora (Sen, 2015, p. 107).

Like in the case of Bougainville, the Comprehensive Peace Agreement contained the option of increased

autonomy and mechanisms of power sharing. Without commenting on the prospects for such an option in the case of the present situation under the Constitution of the Independent State of Papua New Guinea, it was clear in the case of Southern Sudan (now South Sudan) that this option was never seriously entertained. The scares of decades of war, and the declining trust that followed from these hostilities, meant that the South Sudanese were never seriously interested in continuing to be part of the Republic of the Sudan. While the international community provided expert assistance on how to draft a possible constitution under which South Sudan could enjoy virtually all the trappings of statehood short of de facto legal independence, the SPLM/A showed little interest in this option[16].

The referendum in South Sudan was initially deemed satisfactory. According to a UN Report, "The panel found that the referendum reflected the free will of the people of Southern Sudan and that the process as a whole was free, fair and credible" (UN Security Council, 2011, Para 5). With a yes-vote of 98 percent and a somewhat incredible turnout of 97 percent, the Carter Centre reported "an overwhelming turnout of voters, who cast their ballots in an atmosphere of enthusiasm and solemn determination to participate in a historic referendum process" (Carter Centre, 2011, p. 29). However, the same observers also, "noted instances of intimidation by the SPLA of different groups along the North-South border region in the run-up to the referendum, which contravened international legal obligations to ensure individuals personal security" (Carter Centre, 2011, p. 29).

The levels of violence after the referendum cannot be attributed to the conduct of the vote. The vote for independence and the SPLM/A's struggle against the government in Khartoum meant that very different ethnic and tribal groups – most notably the Nuer and the Dinka – united against a common enemy. After the referendum, the uneasy truce between these groups disappeared and civil war broke out. South Sudan – the world's newest state – is also one of its most violent ones. Independence has not brought about peace. Indeed, Human Rights Watch found that the levels of violence were as high as during the war between Khartoum and the SPLM/A[17] in the 1990s. However, this is due to unique factors and cannot be attributed to the referendum or the conduct of it.

Excursus: Referendum without an agreement: Cyprus 2004

In the cases of Sudan, Timor Leste and Montenegro, there was an agreement between the parties as well as international support from the international community. But what if there is no agreement between the parties and the international community imposes a solution on a population and submits this to a referendum? In 2004, after negotiations over the future of Cyprus, UN Secretary-General Kofi Annan submitted a proposal for Cypriot Reunification to the voters on the island. Having been divided since Turkish invasion in 1974, the leaders of the two communities had failed to agree to a power-sharing solution during prolonged negotiations in the early months of 2004. After a meeting of the leaders in Lucerne Switzerland, which yielded no agreement, Annan used his discretionary powers to submit an agreement to the voters in two separate referendums. While the Annan Plan was supported by Turkey and by Mehmet Ali Talat (the Prime Minister of the unrecognised Turkish Republic of Northern Cyprus), it was opposed by Greek-Cypriot President Tassos Papadopoulos and by his opposite number, President Rauf Denktaş. The lack of elite support in the Greek-speaking part of the island proved fatal. Despite considerable international support for a yes-vote, 75 percent of the Greek Cypriots rejected the agreement. Despite receiving the support of 65 percent of the voters in the Turkish Republic of Northern Cyprus, the Annan Plan was null and void (Loizides, 2014). International support is not sufficient to win a referendum. Indeed, the leaders in both parts of the island were able to present the plan as an example of untimely foreign interference.

Scotland

It is evident that Scotland shares very few similarities with Bougainville and that the United Kingdom in almost every respect is very different from PNG. However, as Scotland voted in a referendum (and that a majority of Scots voted 'no' to becoming an independent country by a 55–45 percent margin), makes it imperative to touch

[16] This impression is based on the author's involvement in the negotiations between the two parties from June to October 2009.
[17] See: www.hrw.org/world-report/2017/country-chapters/south-sudan, accessed 19 October 2017.

on this referendum on independence.

The Scottish Referendum on 18 September 2014 was arguably the most important poll in British history; it concerned the very existence of the nation. The referendum had been a manifesto commitment when the SNP surprisingly won an outright majority in the Scottish Parliament in the election in 2011. (They were elected on the same day as the Alternative Vote referendum.) Some of the unionist parties argued—with some justification—that a referendum was what lawyers call ultra vires; basically the Scottish government, its popular mandate notwithstanding, did not have a legal right to hold a referendum.

Most voters in Scotland would have preferred what was known as 'devo-max', more powers to the Scottish parliament—somewhat akin to what some people are suggesting in the case of Bougainville. But this was not on offer in 2014 in Scotland.

In October 2012, David Cameron and the Scottish First Minister Alex Salmon signed the Edinburgh Agreement. This agreement allowed the Scots to hold a vote in September 2014. At this stage the opinion polls were still massively in favour of the status quo ante. Only about 30 per cent of the Scottish voters were in favour of independence. From a political point of view, Cameron's acceptance of the SNP-administration's demand seemed low risk and gave him an air of magnanimity.

Throughout 2013 and in the early part of 2014 the polls began to narrow, though still with a clear majority in favour of a no-vote. In February 2013, the yes-vote stood at 32 percent according to YouGov. It remained relatively static until the last month of the campaign when it rose to 40 percent and sensationally, on 10 September, with only eight days to go, an ICM poll showed the yes-side had nudged ahead with 49–42 percent lead. In the last week of the campaign, following the intervention of Gordon Brown, the no-side regained the lead.

Table 5: Selected opinion polls: Scottish Independence: 2014

Date	Yes	No	Don't know
25 February	38	55	7
12 May	34	46	20
6 August	37	50	13
2 September	47	45	8
10 September	49	42	9
16 September	45	49	6

Sources: Angus Reid, YouGov, ComRes, ICM

The British Government predominately relied on economic arguments to convince the Scots. In early spring 2014, the British Government issued a number of statements intended to show the consequences of independence. Chancellor of the Exchequer George Osborne suggested—backed up by his opposite number Shadow Chancellor Ed Balls – that Scotland would not be allowed to use the Pound in the event of a yes-vote. And later the British Government issued calculations that purported to show that the costs of setting up a new administration would cost £1.5 billion (or one percent of GDP).

While the Unionists won the referendum, it is questionable if this was due to 'project fear'. Indeed, instead of stopping the slow move towards 'yes' the government interventions arguably had the effects of spurring on the debate. Even the tabloids were full of discussions about policy issues and at town hall meetings around the country 'ordinary' voters were discussing the referendum and its implications. And, worryingly for the government, the pro-independence side was gradually gaining support—though from a low base.

The discussions seemed to favour the yes-side. With one week to go the Prime Minister intervened and promised that in the event of a no-vote far more powers would be transferred to Scotland. Former Prime Minister Gordon Brown in a speech reinforced this message on 8 September, in which he effectively promised devo-max before St Andrew's Day. Brown's intervention stemmed the tide and the no-campaign regained its lead and went on to win by a 10-percent margin.

In the aftermath of the referendum it was universally acknowledged that the campaign had been tough but fair. More importantly still, the high turnout proved that politics can fire people up. Unlike the 2011 referendum, the 2014 referendum led to a more engaged public as evidenced by the highest turnout in British referendum history and well above the paltry 65 percent who voted in the general election 2010. The Scottish referendum was a model to be emulated in other countries. Not least because the two sides had sufficient time to present their case to the voters.

Excursus: New Caledonia 1987, 1988, 1998 and 2018

New Caledonia, a part of France in the Pacific (with a so-called c*ollectivité sui generis status*[18]), has held a series of referendums on independence and self-determination issues. In 1987, a majority voted against independence in a referendum that did not have foreign observers and was boycotted by separatists. The referendum led to political violence, which precipitated negotiations between *ront de Libération Nationale Kanak et Socialiste* (FLNKS) and loyalists in *Rassemblement pour la Calédonie* (RPCR). These negotiations resulted in the Matignon Accords, which granted a large degree of home rule. This was ratified in a referendum.

The Accord made provisions for a 10-year transition period with the possibility of a referendum on independence in 1998. However, before the period expired another agreement was reached with the French government. According to the Nouméa Accord, New Caledonia was given a system of power sharing, which was in some ways akin to that established in Northern Ireland in the same year. The Accord gave New Caledonia powers over all policy areas excluding justice, defence and foreign affairs. The agreement, a UN study suggested, sought a "middle course between the respective political aspirations of RPCR and FLNKS and avoided the need for a divisive referendum on independence" (UN General Assembly, 2011, Para 16). Yet, while the divisive issue of a referendum was avoided in 1998, the accord arguably kicked the referendum can down the road and stipulated that a vote on independence should be held between 2013 and 2018. A vote is planned for November 2018.

[18] Constitution of France 1958, Articles 76 and 77

Ch. 6 Conclusion and how to make the Bougainville referendum a model for other countries

The forthcoming referendum on the future status of Bougainville (whether independence, more autonomy or something different) provides both dangers and opportunities. If done with care and skill, the forthcoming vote provides not only a prospect for replacing deep-seated conflicts and animosities with a new relationship based on mutual respect and in due course trust between the parties. A well-conducted referendum can be a vehicle for a new beginning—as was arguably the case in Malta, Northern Ireland and even after the unsuccessful independence referendum in Scotland in 2014.

Yet, more often than not, referendums (especially those pertaining to independence) exacerbate conflict and create further strife and antagonism. And on many occasions referendums have precipitated violent conflict (the examples of Bosnia-Herzegovina and Timor Leste in the 1990s and more recently the vote in Kurdistan in 2017 come to mind). In the words of one (very critical) observer, "the principal problem with referendums in situations of profound ethnic conflict is that they are zero-sum, creating winners and losers … They validate the position of one side and reject that of the other" (MacGinty, 2003, p. 3)

After the recent examples some have turned against the referendum and have advised against it under all circumstances. These concerns are nothing new and they are unlikely to halt the use of referendums as a mechanism for deciding political issues. The following observation, written almost a century ago, still rings true:

> "As long as we have democracy, the plebiscite [or referendum] is here to stay. It is not that democracy considers the plebiscite (referendum) a perfect tool; on the contrary it appears at present to be extremely critical of it. There is, however, no perfect method of establishing national boundaries … Therefore it seems that we shall keep the plebiscite [the referendum] as a tool in the workshop of political science … Democracy cannot, however be served by faulty plebiscites [referendums]. If we are to keep the tool we must learn how to use it. Therefore we must study those [referendums] already held so that we may discover our errors as well as perfect our technique" (Wambaugh, 1933, p. ix).

Needless to say, there have been many examples of referendums since then, and new issues have emerged. While the number of referendums was low in the early part of the 19th century, this began to change in the 1970s. Since then there has been an explosive growth in the number of referendums in general, as well as an increase in the number of referendums on independence.

Overall these different types of referendums follow different logics and are the result of different factors. While referendums in domestic politics are often—but not exclusively—the result of political parties seeking to attract increasingly volatile voters, referendums on independence have tended to be held in periods following momentous changes in the international system. Thus there were many referendums after the First World War, during the period of decolonisation and especially in the aftermath of the downfall of the Soviet Union.

One of the problems with independence referendums is their legality—or lack thereof. Most referendums on independence—even if they have been successful (that is, yielded a yes-vote) end up in political nothingness. The key determining factor of whether a state becomes independent is not whether a large majority has voted for secession (though that is statistically important too) but whether the would-be state is recognised by the international community (especially the three Western powers on the UN Security Council).

Bougainville is in this respect different from certain other cases. Under the current Constitution of Papua New Guinea the future status of the former is to be determined by a referendum. This is relatively unique. Very few states allow for referendums on independence (Britain, Ethiopia and previously Serbia-Montenegro are or were some of the earlier examples). This provision for a rule-based means of solving territorial conflict makes PNG a model to be emulated in countries like Spain and Iraq, where the lack of similar provisions recently created constitutional crises and in the case of the latter, an armed conflict in Kurdistan.

It is presently difficult to say what question will be put to the voters. While autonomy and independence are the options most often discussed, there is nothing to suggest that a third or even a fourth option may not be included. One of the frequently mentioned objections to referendums is that they are blunt instruments that reduce politics to an artificial binary choice.

One way of resolving this problem could be through multi-option referendums. Such referendums—it would seem—provide voters with a wider array of choices. Moreover, the voters in PNG are already familiar with multi-option voting as the country operates under the alternative vote system, which allows the electors to rank candidates. This familiarity with multi-option voting does not, however, imply that this scheme is desirable. Multi-option referendums, which have frequently been used in Puerto Rico (as well as in Sweden), have some unfortunate consequences, which detract from their usefulness. Like the first-past-the-post electoral system, the multi-option referendum is generally a mechanism for finding the largest minority. That this criticism has also been raised against alternative vote, which is often more disproportionate than the simple first-past-the-post.

Like in candidate elections in countries with majoritarian electoral systems, multi-option referendums often result in neither of the options winning a majority (though in once case, in Puerto Rico, the option 'none of the above' won over 50 percent of votes). Given that multi-option referendums generally fail to produce what political scientists call a 'Condorcet winner' (one that would beat other options in pair-wise contests), some have argued against the use of multi-option referendums. To do so, however, is unwarranted.

It is possible to use a variation of the multi-option referendum, namely the two-round system. Thus, in New Zealand in 1992, voters were given a choice of several electoral systems. When none of the options received the support of 50 percent of the voters, there was a run-off between the status quo (first-past-the-post) and the most popular option (the mixed-members system). In the subsequent run-off the latter prevailed. This two-round system was also used to determine the future of the Canadian Province Newfoundland in the late 1940s. Here too different options were eliminated in the first round and a winner was found in a second round of voting (see Chapter 3). This option could be considered for Bougainville.

However, it could be argued that independence is such a momentous event that it would require a special majority. Special-majority requirements were not required in the independence referendum in Timor Leste or Scotland. But different types of special-majority requirement were used in, respectively, Montenegro (where a majority of 55 percent was required) and South Sudan (where turnout had to be above 60 percent for the result to be valid).

In most cases, independence referendums are won with a clear majority. It is questionable, therefore, if a special-majority requirement makes much of a difference. However, by introducing a special-majority requirement there is a danger that the result will be seen as illegitimate by a majority that has voted for statehood. Such an outcome can have political consequences and is unlikely to legitimise the outcome.

It is granted that a result on a low turnout will also be regarded as illegitimate (such as the low level of legitimacy in the Bosnia-Herzegovina referendum which was due to the low turnout). To avoid this, it would be stipulated that the turnout should be over a specific threshold for the result to stand. Provisions for a turnout-threshold exist in several European states including Slovakia, Slovenia, Italy, Hungary and under certain circumstances Denmark. Such provisions ensure that drastic changes only come into effect if supported by a vote that attracts a high turnout.

To ensure that a referendum is free and fair requires more than an effective administrative system. Referendums

need to be regulated to provide a level playing field. In some referendums, governments have been able to wage an expensive and one-sided campaign using taxpayer's money, and in other cases, referendums have been won by those who have the ability and the inclination to spend vast sums of money. Yet, despite this, many referendums have remained unregulated. The result of this is that the legitimacy and the acceptance of the result suffers. In Chapter 3 we outlined how different European countries have regulated the referendum and we concluded that only the United Kingdom has introduced an effective and thorough system of referendum regulation (with limits on campaign spending, limits on government spending and grants for the two camps).

The forthcoming referendum in Bougainville provides PNG with an opportunity to perfect these systems of referendum regulation by taking the best from the European examples and by learning the lessons from some of the most recent referendums on independence.

In addition to placing limits on campaign and government spending, the Bougainville referendum should implement a system that ensures equal air-time for the two sides as well as it provides financial assistance for the two sides. In doing so, the referendum result will have more legitimacy and the template used could be an inspiration for other countries that contemplate referendums on independence.

Joseph Stalin once, reportedly, observed that "it doesn't matter who votes. What matters is who count the votes". While the quote may be apocryphal, the insight is real. Electoral officials do not solely determine referendums but in an environment based on mistrust it is not uncommon to find rigged results. The legitimacy of a referendum often depends on the perceived impartiality of the administrators. It was because the UN—in different guises—organised, planned and implemented the referendums in Eritrea (1993) and Timor Leste (1999) that the results were regarded as fair, just and legitimate by the international community. And it was because the EU and the UN oversaw and were directly involved in the referendums in, respectively, South Sudan and Montenegro that the results of these referendums went unchallenged. To make the forthcoming referendum in Bougainville an international exemplar, lessons from these referendums could—and should—be learned.

So, material provisions are not enough. But what exactly is needed? In a rapport evaluating the experiences with referendums written as far back as 1933, a list of requirements was produced. This list still serves as a model of how such votes ought to be conducted if the outcome is to result in a resolution of the underlying problems. The conditions still merit being cited in full and still provide an ideal checklist against which referendums on post-conflict territories should be organised:

1. The Plebiscite [referendum] must be held under the agreement of the parties;
2. The area must be neutralised and the agreement must clearly provide this;
3. On the signing of the agreement the area must be put at once under international control;
4. All troops of both parties must be evacuated at once;
5. A Plebiscite commission of unquestioned neutrals, acceptable to both states [or parties] must be set up;
6. The commission must be supported by a police force of its own however small;
7. The commission must have complete power over the administration of the area, itself taking the place of the highest officials;
8. It must have sufficient personnel to exercise this power effectively;
9. It must have this power for a sufficient time in advance of the vote to establish confidence that a change of sovereignty is possible;
10. It must remove the local officials and replace them with its own appointees allowed by both parties;
11. It must set up an effective organisation for supervision of all officials, using local administrative divisions as the bases;

12. It must immediately reorganise the judicial system, cutting off local courts from the higher courts outside the area;
13. It must set up a plebiscite tribunal to have exclusive jurisdiction over all plebiscite offences;
14. The regulation for registration and voting must allow sufficient time for all processes of registration;
15. They must provide adequate tests of identity for the applicants for registration;
16. They must provide adequate penalties (Wambaugh, 1933, p. 506).

Needless to say, this checklist does not cover all cases and cannot be directly applied to all present-day referendums on sovereignty, but some of the recommendations still have currency. Especially that the members of the referendum commission are "neutrals, acceptable to both states" (as indeed was the case in 2006 in Montenegro) and that there must be "sufficient time for all processes of registration" and "adequate penalties" for breach of referendum rules.

However, the list provided by Wambaugh is also deficient in a number of ways. While it accurately identified the machinery required for conducting a fair referendum, the earlier lists are silent on issues such as media balance, government spending in favour of a particular result, equal campaign spending and provision for public support for different campaigns to ensure fairness.

Bougainville can—and should—be setting the new standard for how to conduct referendums. Introducing campaign finance limitations, limits on government spending, a balance in the media as well as having an impartial referendum administration would make the forthcoming referendum an exercise in how to reach a democratic decision on a monumental issue.

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Appendix A

Successful independence referendums 1985–2017: year, yes-vote, turnout and recognition status (States that were not recognised are in *red*)

Parent Country	Seceding Entity	Year	Turnout %	Yes-Vote%
USA	Micronesia		64	77
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	Sandžak	1991	96	67
Serbia	Kosovo	1991	99	87
USSR	Turkmenistan	1991	94	97
USSR	Uzbekistan	1991	98	94
Macedonia	Albanians	1991	99	93
Moldova	Transnistia	1991	97	78
Azerbaijan	Nagorno-Karabakh	1991	80	99
Russia	Tatarstan	1992	82	67
Yugoslavia	Bosnia	1992	99	64
Georgia	South Ossetia	1992	NA	NA
Bosnia	Krajina	1992	99	64
USA	Palau	1993	64	68
Ethiopia	Eritrea	1993	99	98
Bosnia	Serbs	1993	96	92
Indonesia	Timor Leste	1999	78	94
Somalia	Somaliland	2001	99	97
Yugoslavia	Montenegro	2006	55	86
Sudan	South Sudan	2011	97	98
Ukraine	Donetsk Oblast	2014	32	89
Iraq	Kurdistan	2017	99	72
Spain	Catalonia	2017	43	90

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