The Legality and Success of Independence Referendums

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Abstract
The paper outlines a legal and political theory of when independence referendums are permissible. Based on existing legal theory it is concluded that referendums are only legal when they are either directly allowed by the constitution or if the part of the country that espouses independence is barred from pursuing this goal through democratic means. It is proposed that Sixth Amendment to the Sir Lankan constitution thereby gives the Tamils in said island a right to hold a referendum. The paper also argues that independence referendums are most likely to be implemented when this in the interest of the three Western Powers on the UN Security council. While there is a statistically significant correlation between the support for independence (the yes-vote) and international recognition, this is much lower than the 100 per cent association between support of the three permanent Western Powers on the Security Council and international recognition. Countries may cite legal, democratic and philosophical principles but the statistical and historical facts suggest that these are of secondary importance when it comes to recognising states after independence referendums.

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Introduction
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, though it should be noted that some international agreement on referendums have not resulted in actual referendums, such as the referendum on the future of Kashmir and Western Sahara. These two latter referendums deserve to be mentioned although – or perhaps because – no referendum has taken place in either of the jurisdictions.

Thus, despite being condemned by the UN Security Council for its illegal annexation of Western Sahara, Morocco has delayed holding a referendum on the future status of annexed area in flagrant 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 that "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 at the time of writing. To date no referendum has been held.

However, when referendums are held, the outcome has been accepted by the international community and by 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 42 independence referendums held since 1980. 36 or 85 per cent were in this category. Only in one

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 in the case of Bosnia, Estonia and the Ukraine) but not in other cases such as in Catalonia, Tartarstan and Somaliland? To answer this, we need to look at the legal aspects pertaining to – what misleadingly – is called the 'right to self-determination' (Dobelle 1996).

The Legal Argument

Legal philosophers may disagree at the theoretical level as to whether the law is the way acts or parliament or legal precedents are interpreted by the courts or whether there is some higher legal principle – or natural law – which overrides 'black letter law'.

Proponents of the latter view – such as Thomas Aquinas (1224-1274), but the doctrine can be traced back to Sophocles' *Antigone* in fifth Century BC - hold that statutes and precedents that are at odds with natural law must give way. That is, "a legal norm fails to be valid if it goes against the human reason, regardless of the fact that it has been adopted by the state" (Thomas Aquinas quoted in Şen 2015: 59). Whatever the philosophical merits of this view, courts and governments do not tend to be persuaded by legal theory or jurisprudence. Thus, while the late legal theorist Neil MacCormick, in the case of the United Kingdom, believed one could answer the question "Is there a constitutional path to Scottish independence?" affirmatively (MacCormick 2000), this is very much a minority view among practicing lawyers. Thus, while one may philosophically disagree with the ethical and moral tenants of legal positivism, this doctrine holds sway in practical politics. Hence, the following is based on a reading of the black letter law pertaining to independence referendums.

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: 417). Those who espouse a similar legal positivist approach will further stress that this is consistent with the jurisprudence if international counts. Thus, in an *obiter dicta* in the Kosovo Case Judge Yusuf, opined,

> 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 (Re Kosovo, 2010: 1410).

This view regarding 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 little often misunderstood) *Re Quebec* (See below)

Thus, the general rule is that referendums have to be held in accordance with existing constitutions (such a provision exists in Art 39(3) of the Ethiopian constitution and was used when Eritrea seceded in 1993. But in few other states provide for this possibility, the exceptions are Art. 74 of the Constitution of Uzbekistan, Art. 4 of the Constitution of Liechtenstein and previously Art. 60 of the Constitution of Serbia-Montenegro.

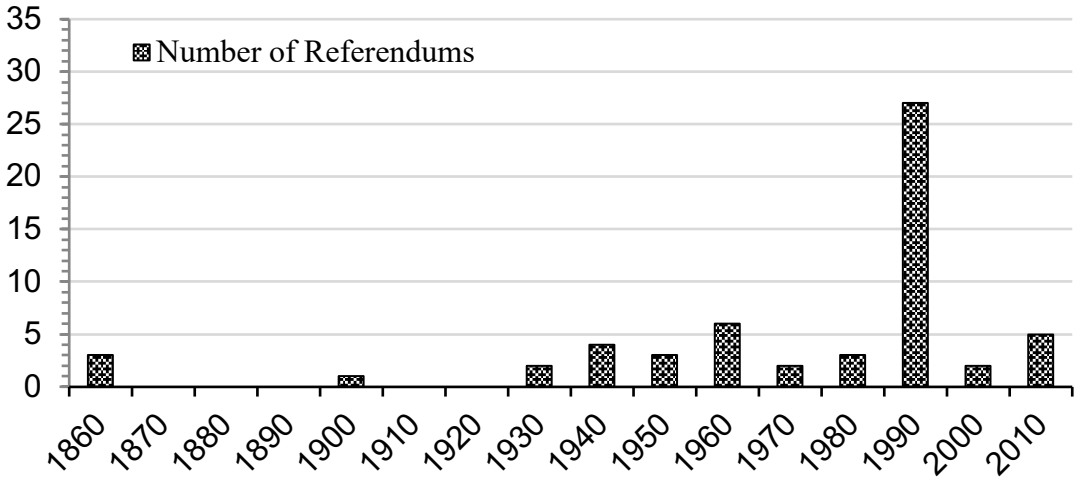
Another legal avenue to secession is after an agreement between the area that seeks secession and the larger state of which it is part (this is what happened in the very different cases of East Timor 1999, South Sudan, 2011, Scotland 2014, and a fortiori Bougainville 2020 (Radan 2012: 14).

Following this logic, it would seem that the referendums in both Catalonia and Kurdistan, to take two recent examples, were both illegal and unconstitutional.

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. 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 Art 48. But this provision had been dropped in Khrushchev Constitution of 1956. Consequently, the Baltic republics were in breach in the early 1990s. (Though some claim their annexation by the Soviet Union in 1939 was illegal and hence their declaration of independence was merely a statement of a reassertion of sovereignty)

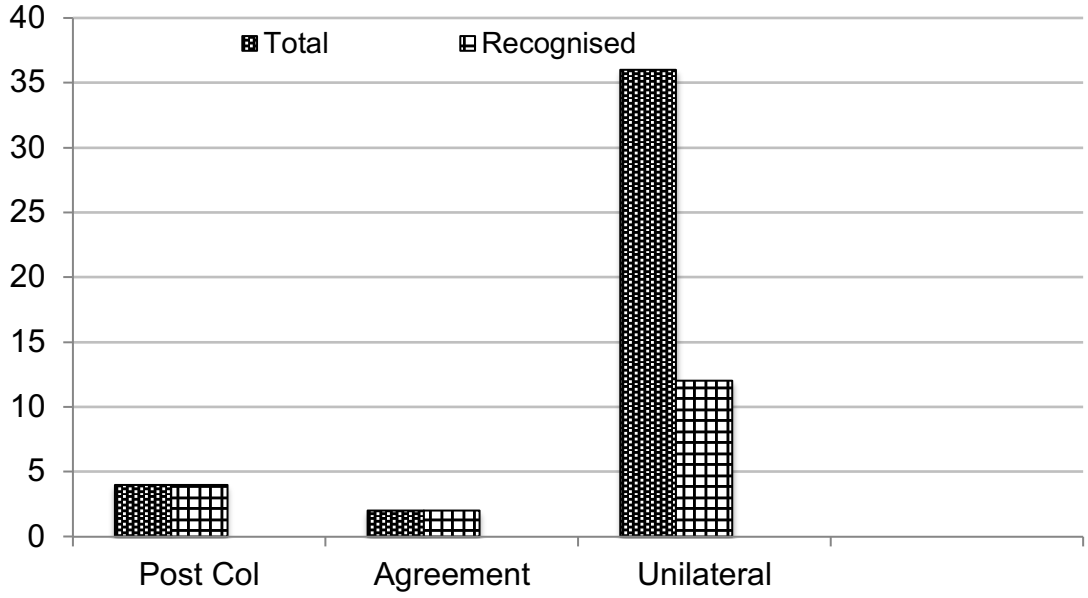
But let's go back to the Catalan and Kurdish cases. As, respectively, the Iraqi and the Spanish constitutions do not allow for independence referendums, the two referendums held in these two

Figure 1: Referendums on Independence 1860-2017[i]



Based on Qvortrup (2014) (2017). Note: This Figure does not include the four multi-option referendums in Puerto Rico (1968, 1993, 1998 and 2012), which formally included 'independence' as one of the options. However, the table includes the two-round multi-option referendum in Newfoundland in 1948 as independence was one of the choices in the run-off. The independence options lost to 'statehood' and the former British territory became a Canadian Province. (See Qvortrup 2014: 69)

Figure 2: Types of Referendums and International Recognition



Based on Şen (2017) and Qvortrup (2017)

entities referendum were, it would seem, *ipso facto*, unconstitutional.

Yet matters are not that simple. Admittedly, 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 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: 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 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 (to wit Police violence and arrest of democratically elected politicians), 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 Catalan referendum in 2017 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 *D'état du Droit* is that citizens can do anything unless it is expressly prohibited. Public bodies or 'emanations of the state' an only do things that are expressly allowed. Thus, the latter 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 vires*.

However, the situation is different in Tamil Eelam. Following the sixth amendment to the Sri Lankan Constitution the inhabitants of said region arguably have a right to a referendum on independence. The amendment states (157A), "(1) No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka". As this effectively bars a particular point of view from the democratic process, it follows that a referendum is legal under the doctrine of lack of democratic recourse.

But does the law have to be that inflexible? Could the Catalan process be legal? To answer this question we can look at the case of Canada. 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 (Şen 2015).

Technically speaking, the referendums were *ultra vires.* 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: 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 Şen 2015: 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. To wit, 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 arch-typical 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 what IR scholar Stephen Krasner (1999) with an apt phrase called 'organised hypocrisy'? Or, are states actually recognised if they follow the rules of the game? Or, it is simply a matter of power politics?

When are Referendums on Independence Recognised?

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 and the causes effecting this.

Are there from a political science– or international relations – point of view causes and tendencies associated with recognition of 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 in the affirmative, 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?

Politicians who are sure of the backing of the people often point to the legitimizing effects of referendums. This, indeed, has been characteristic of independence referendums since the earliest days. Camillo Benso di Cavour (1810-1861), the Italian statesman, who was the responsible for the politics of Italian unification. Was this an early example of this? Before the referendum in Tuscana and Emilia in 1860, he wrote,

> I await with anxiety the result of the count, which is taking place in Central Italy. If, as I hope, this last proof is decisive (*questa ultima prova)*, we have written a marvellous page in the history of Italy. Even should Prussia and Russia contest the legal value of universal suffrage, they cannot place in doubt (*non potranno mettere in dubbio*) the immense importance of the event today brought to pass. Dukes, archdukes and grand-dukes will be buried forever beneath the heap of votes deposited in urns of voting places of Tuscany and Emilia (Cavour 1883, 211).

At the time – over 150 years ago – democratic legitimacy seemingly had a legitimizing effect. And this effect was even stronger a couple of generations later when the American political scientist Sarah Wambaugh observed, "There was not one of the great powers, not even Austria or Russia, which did not participate in those years [1848-1870] in some form of appeal to national self-determination to settle Europe's numerous territorial questions" (Wambaugh 1933: xxxiii).

In the light of the latter it would seem reasonable and plausible that outcomes of referendums on independence would have an even stronger legitimizing force in an age where 'democracy' – to use a term from analytical philosophy - is an illocutionary speech-act, a term that demands unconditional observance. Yet, recent votes – such as the one in Kurdistan in 2017 – it seems that independence referendums, despite this near universal acceptance of the rhetoric of democracy, only tend to lead to independence and recognition when this is in the national interest of major powers. Whether it is one or the other – or more likely a combination of the two – is an empirical question.

The hypothesis in the following is that power politics is the more important factor and that this can be demonstrated statistically.

Statistical Analysis

Since the 1980s there have been 44 referendums which have resulted independence. This analysis is based on the referendums held since the break-down 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), Jamaica (1961) Algeria (1962) and Malta (1964). For a discussion of these referendums see Qvortrup (2014) and Şen (2015). Of these 16 (or 36 per cent) have resulted in the establishment of a new state. What are the factors associated with the establishment of these new states? Factors associated with recognition are the legal one 'the seceding entity was part of a non—democratic state. But there are also more political ones, e.g. a high turnout and a massive yes-vote. And then, there is the factor, which I think is the most important one – 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 below we have measured some of the factors that statistically could be conducive for when states are recognised using what is known as a multiple logistic regression analysis. Without going into technical detail, this analysis measures the strength of the different given factors behind a phenomenon.

The dependent variable is whether the state was recognised and took up a seat in the UN.

Table 1: Logistic Regression: Determinants of Recognition of Successful Independence Referendums

Variables	Model 1
Security Council Dummy	4.258***
	(1.778)
Freedom House Score	-.298
	(.742)
Turnout	.100
	(.90)
Yes-Vote	.055
	(.065)
Negotiation/Constitutional Provision	1.054
	(2.35)
Constant	-15.134
	(9.709)
R;Squared: 0.72 (Nagelkerte):0.52	N: 38
*: p< .1, **: p< .05, *** p< .01	

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 a support for secession among the five permanent members of the Security Council (in practice the USA, Britain and France).

As the Table 1 shows Security Council Support from the three permanent Western powers is the key determining factor (statistically significant at $p<0.01$). All the other variables were not statistically significant.

Whether the country part of a democracy or not (i.e. if the vote was held under the rules prescribed by the legal norms) is statistically speaking irrelevant. While the direction of the statistical correlation is negative as expected (a high Freedom House score indicated less democracy), the level of margin of error – is several times above the conventionally accepted levels.

Likewise, whether the turnout was high or low did not matter one jut when it came to recognizing states. Some countries with low turnout became independent, e.g. Bosnia, others did not, e.g. Tartarstan. Whether the support (the yes-vote) was high or low was equally academic. Indeed, the yes-vote in Somaliland (1999) and Krajina (1992) both had very high yes-votes and both countries remain unrecognized.

Conclusion

Not all independence referendums are equal. There are three basic forms; referendums in postcolonial states (e.g. The Philippines in 1935), referendums following an agreement (Eritrea 1993) and Unilaterally Declared Independence Referendums (e.g. the Baltic Republics in the early 1990s). Whereas *all* the referendums in the two first categories were recognized by the international community and duly led to the establishment of new states the same is not true for Unilaterally Declared Independence Referendums. Less than half of the latter were recognized. What determine this low success-rate?

The answer is that he factors, which determine to success – or otherwise – of an independence referendum are not whether the entity is part of a non-democratic regime (as legal theory would have us believe), nor the turnout and the yes-vote (as democratic norms would suggest), but above all if secession is supported by (and in the interest of) Britain, France or the USA.

To put it crudely, it was not in the interest of these democratic countries to recognize Kurdistan,

Tartarstan, South Ossetia –or Catalonia. The great democratic powers' arguments for not doing so might be legalistic or even philosophical but the statistical evidence suggest that these factors rarely are adhered to in practice; ultimately, what matters is the elusive and yet very real 'national interest'. Recognizing new states and their 'right' to hold referendums on independence is statistically and empirically unrelated to high theory and owes a lot to power politics and *Realpolitik*. This is not a comfortable conclusion in an age of democracy, nor is it one that may appeal to those who espouse theories of natural rights in the sphere of democracy. But as political scientists we are bound to describe the world as it is not as we would like it to be. Only a 'realistic' appreciation of the existing practices will enable us to challenge these – if we so wish. But overall it is imperative that we acknowledge how difficult it is not just to hold a referendum on independence but also to ensure that the result is implemented.

One is tempted to cite Neil Sedaka and say, 'Breaking up is hard to do'. The lesson for those who espouse statehood and independence, and those who contemplate holding independence referendums, is this; make sure you have strong international backers before you initiate the vote. With the benefit of hindsight, Jacques Parizeau made the right decision to visit to Paris in 1995 to win support for independence. But, of course, he didn't manage to convince enough of his compatriots of the merits of – what he would have called – a *Québec libre*. Breaking up *is* hard to do.

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Re Secession of Quebec (1998) 161 DLR (4th) 385.

Texas v White 74 US 700 (1868)

Appendix A: Successful Independence Referendums 1980-2017

Parent	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	Abkhasia	1991	99	58
Yugoslavia	Croatia	1991	98	83
Croatia	Serbs	1991	98	83
Yugoslavia	Macedonia	1991	70	75
USSR	Armenia	1991	95	90
Bosnia	Serbs	1991	90	-
Serbia	Sandjak	1991	96	67
Serbia	Kosovo	1991	99	87
USSR	Turkmenistan	1991	94	97
USSR	Uzbekistan	1991	98	94
Macedonia	Albanians	1991	99	93
Moldova	Transnistie	1991	97	78
Azerbaijan	Nagorno-Karabakh	1991	80	99
Russia	Tartarstan	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
Georgia	Abkhasia	1995	96	52
Indonesia	East Timor	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