Referendum

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A. Notion

1 A referendum is defined as a direct vote by the electorate of a country to advise or decide on a specific issue, in contrast to votes for individual candidates to national or local elections. The terms referendum and plebiscite are used interchangeably as they both involve a vote by the whole electorate on a specific issue. However, the term referendum is now preferred as generally used by democracies under democratic conditions. Plebiscites, legitimately used at times to decide on territorial or sovereignty issues, or the adoption of a new constitution, have acquired a negative connotation when used by dictatorial regimes under undemocratic conditions to approve or confirm the appointment of a ruler, or a political regime restricting individual freedoms.

2 The term referendum is used throughout in this text, except for specific plebiscites which took place in past centuries. Referenda are one tool of direct democracy as opposed to representative democracy, a system in which officials are elected in free and periodical elections on the basis of electoral platforms to represent the views of their electorate in decisions to be taken in assemblies (parliaments), but free to advance their own agenda. In most democracies, referenda exist solely as a complement to the representative system of government. The balance between representative and direct democracy is determined by each country’s constitution under national constitutional law.

3 Referenda have been used either as required by the national constitution, or requested by the executive, the legislative or groups of citizens, or by an international organization. They are called to advise or decide on pre-determined issues of major national importance. Historically, they have often been connected with decolonization, and the creation or expansion of the European Union.

4 States have used referenda in application of the principle of self-determination. Internal self-determination as participatory democracy is implemented within the boundaries of an existing State without affecting its territorial integrity (Territorial Integrity and Political Independence).

5 External self-determination is defined as:

   The right to decide on the political status of a people and its place in the international community in relation to other states, including the right to separate [secede] from the existing state of which the group concerned is a part, and to set up a new independent state. (van Walt and Seroo)

A claim to external self-determination raises the issue of its interrelation with the principle of territorial integrity, ‘... one of the most fundamental and well-established principles of international law’ (Musgrave 181). It is based on the principle of non-interference in the internal affairs of States, and by establishing the status quo it serves for the maintenance of stability and peace in the relations between States. The principle of territorial integrity was enshrined in the Covenant of the League of Nations (Art. 10) and in the UN Charter (Art. 2).

6 The principle of self-determination of peoples is one of the fundamental human rights firmly established in international law. The UN Charter refers to the ‘principle ... of self-determination of peoples ...’ (Art. 1 (2)), and the conditional right to self-determination has been affirmed in UN Covenants and Declarations and UN General Assembly resolutions.
However, according to Cassese, ‘strictly speaking, these resolutions are neither opinio iuris nor usus’ (Cassese 69).

7 The international principles of *uti possidetis iuris* (→ *Uti possidetis Doctrine*) and of non-interference in the internal affairs of sovereign States (Intervention, Prohibition of) became well-established principles of general application during decolonization after World War II. In its judgment of 22 December 1986 in the → Frontier Dispute Case (Burkina Faso/Republic of Mali), the ICJ noted that the principles to be applied were the intangibility of frontiers inherited from colonization and the *uti possidetis iuris* principle which accords pre-eminence to legal title over effective possession as a basis for sovereignty. However, in the → Western Sahara (Advisory Opinion) of 16 October 1975 the Court did not find any legal ties of such a nature which would affect the application of UN General Assembly Resolution 1514 (XV) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ of 14 December 1960 in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.

8 The prevailing opinion among international legal scholars is that there is no international legal right to → secession except in the context of decolonization. Cassese (at 90) adds another category, peoples subjected ‘to alien subjugation, domination and exploitation’, as a violation of the principle of equal rights and self-determination of peoples, as well as a denial of fundamental human rights. However, the intent in UN General Assembly Resolution 2625 (XXV) ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations’ of 24 October 1970, seems to apply essentially to ‘bring a speedy end to colonialism’, and not to open the door to other claims.

9 Buchanan (400, 436–7) proposes the ‘remedial right only’ theory; the right to unilateral secession in a justice-based conception of → legitimacy. Among other measures, he recommends international legal recognition of such a right, restricted to cases where secession is a remedy of last resort against a persistent pattern of serious injustices, including large-scale violations of basic human rights. He also recommends international support for the creation and maintenance of intra-State → autonomy regimes, and international recognition of a unilateral right to intra-State autonomy.

B. Typology

10 A first distinction is made by defining the authority for a referendum. There are two types of referenda: the mandatory or obligatory referendum; and the optional or facultative referendum. They may be binding or non-binding. Another distinction may be made by the object of the referendum.

1. The Mandatory or Obligatory Referendum

11 At the national level, a mandatory or obligatory referendum is a vote by the electorate required and called under the authority of the constitution requiring that a referendum be held in specific circumstances—or under the authority of a general authorizing statute (such as Arts 11 and 89 French Constitution)—or pursuant to a statute authorizing a single referendum on a specific subject, by legislative approval.

12 The consequences of a mandatory referendum are usually binding for the executive or the legislative. In many countries, proposed amendments to the constitution must be
affirmed by a referendum. In presidential systems a referendum may be required to resolve a dispute between the president and the legislature.

13 At the international level, an international organization such as the League of Nations or the United Nations may request or authorize a referendum in order to allow the population of a territory or country to decide whether to join another country, or become independent, or to approve a constitution.

2. The Optional or Facultative Referendum

14 An optional or facultative referendum calls for a vote of the electorate by a formal demand, which may emanate from the executive, from a number of parliamentarians, from a set number of citizens, or from some other defined agent. Its consequences may or may not be binding. A government may decide to initiate a referendum on a major political issue, possibly as a result of public pressure to hold one, and/or because it is divided over the issue. Optional referenda initiated by governments have been held frequently in Europe over European Union participation, although, in some countries, such referenda have been mandatory because they involve an amendment to the country’s constitution. Although optional referenda may not be legally binding, governments would find it politically difficult to ignore the outcome.

3. Object of Referenda

15 A referendum may be called to approve a new constitution, to approve a revision to the existing constitution, to approve an international treaty, to assert a territory’s accession to independence by secession from an existing State or through a process of decolonization, or to approve integration of a State into an existing State. Their object may be a sensitive political issue, such as accession to the European Union, the degree of autonomy of regions within a State, environmental questions, taxation issues, or a sensitive social/moral issue, such as the legality of divorce, contraception, or abortion.

16 Another object of a referendum may be to abrogate or amend a law. These are held when citizens force a vote on a new law, or part of a new law, passed by the legislature, usually by collecting a set number of signatures in support of a vote. In some countries abrogative referenda can be used in relation to existing legislation. If the law is defeated in the referendum, it may have to be repealed or amended.

C. Historical Developments

1. Direct Democracy and Early Referenda

17 Direct democracy was first experimented with in the Athenian democracy that existed in some parts of ancient Greece, and which began in the city state of Athens circa 508 BC, with restrictive participation (male citizens excluding slaves) in a small population. With similar restrictions, Roman democracy followed, circa 449 BC, including citizen formulation and passage of law, and citizen veto of legislature-approved law. Modern-era citizen lawmaking began in the towns of Switzerland in the 13th century. In 1847, Switzerland added the ‘statute referendum’ to their national constitution.

18 A few plebiscites took place during the early stages of the French Revolution as a way to conciliate annexations with the doctrine of renunciation to territorial conquests: Comtat-Venaissin and Avignon in 1791; and Savoy, Mulhouse, Hainaut, and the Rhineland in 1792.
However, plebiscites were set aside by France in 1795 and the → Vienna Congress (1815) did not concern itself with self-determination and the consultation of populations.

19 With the development of the principle of nationalities, Italian unification (1860–1870) was carried out in the name of the will of the people and by plebiscites via popular votes by manhood suffrage with no literacy qualification. In France, the → annexation of Savoy and county of Nice, in accordance with the Treaty of Turin of 24 March 1860, was approved by two plebiscites in April 1860. The transfer of the Swedish island of Saint Barthelemew to France was sanctioned by a plebiscite in 1877, as well as the separation of Norway from Sweden in 1905. The electoral qualifications in Norway in 1905 allowed all male citizens over the age of 25 to vote, if not disqualified through indictment for crime or bankruptcy. Women were not given the vote until 1907 in Norway. However, annexations without consultation in the 19th century were more numerous than plebiscites and involved large territories (Rousseau 267–8).

2. Post-World War I Peace Treaties Plebiscites

20 In a speech to the US Congress on 11 February 1918, President Woodrow Wilson asserted the doctrine of self-determination:

National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril ... Second, that peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game (Wambaugh [1920] 11).

21 However, the → peace treaties after World War I were far from applying these lofty principles, except in High Silesia and the Saar, and other relatively minor cases. Only one plebiscite (in Klagenfurt) was contained in the Treaty of Saint-Germain between the Allies and Austria. The Sopron plebiscite was decided by the Venice Protocol of 13 October 1921. These plebiscites (1920–1921) were monitored by international or interallied commissions. The Saar plebiscite was carried out by the League of Nations in 1935.

(a) The Åland Islands Case

22 In July 1920, the Council of the League of Nations appointed an → International Commission of Jurists (ICJ) to give an Advisory Opinion over a dispute between Finland and Sweden over the → Åland Islands, which provided for a legal discussion of self-determination. Finland had objected to international legal jurisdiction, arguing that disposition over the territory was a matter of internal Finnish jurisdiction. Sweden sought international legal recognition of its own sovereignty over the islands, arguing that the Ålanders had shown their desire to be united with Sweden through their political and military struggles. The Commission considered that the concept of self-determination could not be considered as an established part of positive international law.

23 For the Jurists, the ‘essential basis’ of law was sovereignty, at least in normal circumstances. However, in the absence of a stable sovereign the legal situation becomes ‘obscure and uncertain’. This equivocal situation is one of a ‘transition’ from fact to law, from a ‘de facto situation to a normal situation de jure ... [u]nder such circumstances, the principle of the self-determination of peoples may be called into play’ (Berman 72–76).
While the Commission clearly upheld the Finnish position on its sovereignty, it opined that the Åland Islands dispute fell within the jurisdiction of the League of Nations. After the adoption of the Commission’s report (League of Nations, 1920), the Council of the League of Nations appointed a Commission of Rapporteurs to recommend a programme of action. Their report, issued in April 1921, recommended that the Åland Islands remain under the sovereignty of Finland, but that this country be obliged to increase the guarantees granted to the Islands by the Autonomy Law of 7 May 1920 (League of Nations, 1921).

Both Finland and Sweden accepted the League’s decision. Concerning the relationship between the principle of self-determination and that of the protection of minorities, the Commission of Jurists found that they had both a common ground and a common object (‘to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics’). However, whenever ‘geographical, economic or other similar considerations’ prevented resort to self-determination, ‘a solution in the nature of a compromise lay in the protection of minorities’. Both the Commission of Jurists and the Commission of Rapporteurs considered that there might be cases where minority protection might not be regarded as sufficient; for instance, ‘when the State at issue manifestly abused its authority to the detriment of the minority, by oppressing or persecuting its members, or else proved to be utterly powerless to implement the safeguards protecting the minority’. On this issue, the Commission of Rapporteurs stated that ‘when confronted with the cases at issue, one ought exceptionally to admit the right of “separation” of the minority from the State’ (Cassese 30–1).

(b) The Saar Plebiscite

After World War I, the Saar was placed under the government of an international commission of five members from 1919 to 1935. On 4 June 1934, the Council of the League approved the proposals of the Aloisi’s Committee which defined the modalities of the plebiscite. A Plebiscite Commission and a Supreme Plebiscite Tribunal were created. An international force, 3,300 strong, was authorized by the Council in December 1934.

The plebiscite took place on 13 January 1935: 90% of the electorate voted for reunion with Germany. By decision of the Council, the Saar was united with Germany on 1 March 1935. While the plebiscite itself was an operational success for the League of Nations, its expected outcome had no pacifying effect on Hitler’s plans for conquest and war (Wambaugh [1940] 317, 321).

3. The United Nations: The Principles of Self-Determination

‘Self-determination’ is formally inscribed in the UN Charter. Art. 1 (2) includes as one of the purposes of the UN, ‘To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples …’ The Declaration on the Granting of Independence to Colonial Countries and Peoples affirmed, in part, that immediate political freedom was a basic right for all peoples regardless of their stage of political, economic, social, or educational development: colonialism should therefore be brought to a speedy and unconditional end, and independence attained in accordance with the ‘freely expressed will and desire’ of their peoples. Resolution 1541 (XV) principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Art. 73 (e) of the Charter of 15 December 1960, set a requirement that free association of colonial territories with an independent State or their integration with an independent State should be the result of a free and voluntary choice by...
the peoples of the territory concerned. Another option was their emergence as a sovereign independent State.

29 The right to self-determination was also affirmed in the → International Covenant on Economic, Social and Cultural Rights (1966) and of the → International Covenant on Civil and Political Rights (1966) (common Art. 1), in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Res 2625 [XXV] [24 October 1970]), in the Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 35/118 [11 December 1980]), and in the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (UNGA Res 50/6 [9 November 1995]). These Declarations affirm that this right should not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

30 ‘The legal regulation of the self-determination of colonial peoples was authoritatively stated by the ICJ, first in its Advisory Opinion on Namibia of 1971, and then in the Advisory Opinion on Western Sahara of 1975’ (Cassese 88–9; → South West Africa/Namibia [Advisory Opinions and Judgments]). The latter Advisory Opinion affirmed:

The above provisions, in particular paragraph 2 [defining self-determination], thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned (at para. 55)

and

[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination, or on the conviction that a consultation was totally unnecessary, in view of special circumstances. (at para. 59)

31 The right to self-determination is recognized in other international legal documents, such as the Final Act of Conference on Security and Co-operation in Europe (Part VIII), which also includes a reference to the territorial integrity of States.

4. United Nations Supervision or Observation of Referenda

32 Self-determination has been widely used under UN auspices or with UN support to initiate, support, or complete the decolonization process, through the monitoring of electoral processes, plebiscites, and referenda. The UN supervised or observed a number of plebiscites and referenda in trust and → non-self-governing territories between 1956 and 1991: Togoland; British Cameroon; Western Samoa; Ruanda-Urundi; Equatorial Guinea; Niue; the Gilbert and Ellis Islands; the Mariana Islands, French Somaliland; the Trust Territory of the Pacific Islands; the Marshall Islands; Palau; and the Federated States of Micronesia.
Namibia, then called South West Africa, was placed under a mandate of the League of Nations given to South Africa in 1920. After World War II, South Africa refused to place the territory under the → United Nations Trusteeship System. In an Advisory Opinion of 11 July 1950, the International Court of Justice held that the dissolution of the League of Nations and its supervisory machinery had not entailed the lapse of the mandate, that South Africa was under an obligation to give an account of its administration to the UN, and that it had no competence to modify the international status of the territory unilaterally (at 128). In October 1966, the UN General Assembly revoked South Africa’s mandate and declared the territory to be under the direct responsibility of the UN (UNGA Res 2145 [XXI]). In another Advisory Opinion of 21 June 1971, the International Court of Justice opined that, the continued presence of South Africa in Namibia being illegal, South Africa was under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory. UN Member States were under an obligation to recognize the illegality of South Africa’s presence in Namibia.

On 30 January 1976, the Security Council adopted Resolution 385 which decided, in part, that free elections would be held under UN supervision for Namibia as one political entity. Elections took place in November 1989, the Constituent Assembly convened on 21 November, and a democratic Constitution was adopted on 9 February 1990. Namibia became independent on 21 March 1990.

Eritrea was part of Ethiopia, a federal State that had existed since 1952. Following the overthrow of Mengistu Haile Mariam in Ethiopia and the military liberation of Eritrea by the Eritrea People’s Liberation Front, Ethiopia’s National Charter accepted the right of the Eritrean people to self-determination. The UN General Assembly authorized the Secretary-General to establish a UN Observer Mission to Verify the Referendum in Eritrea (UNGA Res 47/114 [16 December 1992]). The referendum, held on 23–25 April 1993, resulted in a 99.81% vote for independence, which was declared on 24 May 1993. Eritrea was admitted to membership in the United Nations by General Assembly Resolution 47/230 of 28 May 1993.

A UN-organized referendum to decide whether East Timor would secede from Indonesia took place in August 1999. The overwhelming vote of the population for independence ended 25 years of Indonesian occupation (Security Council Resolutions 1246 of 11 June 1999 and 1272 of 25 October 1999).

A UN proposal for the reunification of Cyprus (the ‘Annan Plan’) was rejected in a referendum held on 24 April 2004. The Plan was approved by the Turkish Cypriot Community and rejected by the Greek Cypriot Community, thus making it null and void.

On 27 June 1990, the Security Council adopted Resolution 658 endorsing a proposal for a ceasefire between Morocco and the Frente Polisario, and the holding of a referendum under UN auspices to enable the people of Western Sahara to choose between independence and integration with Morocco. No progress has been made since to implement this resolution.

For Cassese (68 n 2), ‘the crucial importance of the UN for the development of the international law of self-determination is obvious and is linked to the fact that this principle could not emerge and take shape without UN action and scrutiny’.
5. Other Independence Referenda

40 Other independence referenda were held in Africa and Asia-Pacific. For instance, Guinea obtained its independence by voting against the ‘empire wide’ vote conducted by France in 1958 in an attempt to maintain continued control of its colonies. The Evian Accords, signed by France and the Minister of Foreign Affairs of the Provisional government of the Algerian Republic on 18 March 1962, granted independence to Algeria. They were approved by 91% of the votes in France in a referendum held in April 1962, and by 92% of the votes in Algeria in July 1962.

41 Independence has also been obtained by secession from an established State, as shown in the cases of Eritrea and East Timor. A referendum was carried out on 21 May 2006 on the independence of the Republic of Montenegro from the State Union of Serbia and Montenegro: 55% affirmative votes were required to validate the results; positive votes amounted to 55.5%. The referendum satisfied the requirements of the Constitutional Charter of Serbia and Montenegro (Art. 60). The Montenegrin Parliament made a formal Declaration of Independence on 3 June 2006. Serbia, the European Union, and other countries expressed their intentions to respect the results.

42 In a few cases, proposed referenda for or against independence were rejected, or have not yet been held. India has rejected the plebiscite proposed by the Security Council in 1948 for → Kashmir (UNSC Res 47 [1948] [21 April 1948]), while Pakistan’s position is that Kashmir’s residents should have the right of self-determination.

43 A first referendum was held in 1980 in the Quebec province of Canada, asking voters whether Quebec should acquire sovereignty while maintaining economic association with Canada. This was defeated by a 59.56% majority. A second referendum held in 1995 to pursue Quebec’s independence was rejected by a small majority of 50.58%. In a judgment of 20 August 1998, Reference re Secession of Quebec, the Supreme Court of Canada held, in part, that international law contains neither a right of unilateral secession nor the explicit denial of this right. A right to external self-determination would arise in only the most extreme of cases and, even then, under carefully defined circumstances. This was not the case for Quebec.

44 A Comprehensive Peace Agreement was signed in Kenya on 9 January 2005 between → Sudan and Sudan’s People Liberation Army (‘SPLA), representing South Sudan. Under this Agreement, the electorate in South Sudan decided by referendum in January 2011 to form a separate sovereign nation, South Sudan. Its independence from the Republic of Sudan was granted on 9 July 2011 and it joined the United Nations on 14 July 2011.

45 Several referenda have been held in → Gibraltar, albeit not for or against independence. The sovereignty of Gibraltar has long been an object of contention between Spain and the UK. In a 1967 referendum, the Gibraltarians voted almost unanimously to voluntarily retain their link with Britain, and not to pass under Spanish sovereignty. A compromise proposal by both Spain and the UK that both countries should share sovereignty was rejected in a 2002 referendum by a 98.97% majority. A referendum on the Gibraltar Constitution Order 2006 was approved by the Gibraltar electorate on 30 November 2006 by a majority of 60.40% in favour. The British government gave a guarantee that the status of the territory would never be changed against the ‘freely and democratically expressed wishes’ of the people of Gibraltar (Constantine 404).
D. Applicable Rules

46 Existing electoral law provides for basic principles and procedures including the political equality of voters, the compilation of voter registers, and the establishment and manning of polling stations. Free voting without coercion or intimidation of the voters and secret ballot must be guaranteed and enforced. Polling and tabulation of the votes must be controlled by independent officers, representatives of the parties or groups in competition, independent national and international observers, and media reporters (Beigbeder 29; Garber 3, 13).

47 However, there are other requirements specific to referenda, distinct from elections. A key one is the wording of the question, in most cases a ‘yes’ or ‘no’ vote on a substantial issue. A straightforward issue such as whether to adhere to the EU or not, or declare independence, is likely to be understood by most voters, and the vote will likely be clear. The negative vote on the proposed Constitution for the EU in France and in the Netherlands in 2005 was probably due, in part, to the complexity and length of the Treaty (which was rarely read), the contradictory interpretation given to the Treaty by those who promoted the ‘yes’ or ‘no’ vote, and the probable influence on voters’ opinions of the government and its actions.

48 The legislature and/or government should define the requirements for a consultative opinion or decision in the referendum: simple majority or a higher proportion of those voting, with or without a set proportion of the whole electorate (minimum turnout).

49 Another issue is to define the recognized groups in order to fairly apply financial subsidies and media access, if political parties do not clearly represent opposite groups, but are split in several factions, to ensure fair play between the two sides, it may be necessary to create ‘umbrella arrangements’, as initiated by the UK referendum of 1975.

50 Other issues are: 1. the extent of government subsidies to the political parties or groups, and whether there should be public disclosure of contributions and expenditures, and limitations to the contributions; 2. media access. Judicial review should be allowed to control the organization and conduct of referenda, as well as the results of the vote.

E. Special Cases

1. Direct Democracy: Switzerland

51 Switzerland is a small European country—41,290 sq km, with a population of approximately 7.3 million. The origins of direct democracy in Switzerland can be traced back to the middle ages: archaic forms (assemblies of the electorate discussing and deciding political issues) have been practiced in parts of the country since the founding of the Old Swiss Confederacy in 1291. The Federal Constitution of 1848 was approved by a majority of 15.5 cantons, then revised in 1874, and again in 1999. Switzerland is a confederation of 23 cantons. Governments, administrations, parliaments, and courts are organized on three political levels: federal; cantonal; and communal, with frequent referenda at those three levels.

52 The mandatory constitutional referendum was introduced by the 1848 Constitution, requiring that any revision of the Constitution proposed by the Parliament and the Federal Council must be submitted to the people and the cantons for a vote. This applies also to the entry into organizations for collective security (NATO or the UN), or into supranational communities (the EU), and to federal statutes declared urgent which have no constitutional basis and whose validity exceeds one year (Art. 140 constitution). On 3 March 2002, the Swiss People and the cantons voted in favour of joining the UN (54.6% of the population and 12 cantons). Switzerland was admitted as a UN member on 18 July 2002. A popular
initiative for the total or partial revision of the Constitution, submitted by 100,000 citizens entitled to vote, is submitted to popular vote of the people and the cantons, as well as the question as to whether a total revision of the Constitution should be carried out if both Chambers disagree (Arts 138, 139, 140).

53 The optional referendum allows the People to veto decisions taken by the Federal Parliament: 50,000 citizens or eight cantons may demand a popular vote. It can be used for federal statutes and decrees and international treaties. All cantons provide for constitutional and legislative initiatives:

Primarily through federalism and democracy, Switzerland managed to create and preserve institutions that respected the given diversity while also unifying the Swiss population ... the political elites must always bear in mind that almost any decision can be revoked by a popular referendum, thus making the prevention of referendum the main aim of Swiss politics. (Fleiner and others 19, 21)

2. Parliamentary Democracy: the United Kingdom

54 As a representative democracy, where all legislative powers are vested in Parliament, there was no support, originally, in the UK for the use of referenda, considered as an abdication of the responsibility of Parliament and of the government. However, AV Dicey wrote as early as 1894: ‘I think that I would have preferred real Parliamentary government as it existed up to 1868. But I have not the remotest doubt that under the present condition of things sham Parliamentary government means a very vicious form of government by party, and from this I believe the referendum may partially save us’ (Bogdanor 2). ‘Until the 1970s, the referendum had been widely dismissed as unconstitutional. But, by the end of the century, it could be argued that it had become an accepted part of the British constitution’ (Bogdanor 697).

55 Since 1973, referenda have been held mainly on national or regional constitutional issues: the Border poll (→ Northern Ireland) (1973); UK participation in the European Economic Community (1975); Welsh Devolution (1979, 1997); Scottish Devolution (1979, 1997); the Good Friday Peace Agreement (Northern Ireland, 1998); and the Alternative Vote voting system (United Kingdom, 2011). The Reform of London government (1998) concerned a local issue. The EU → Lisbon Treaty was approved by Parliament and ratified in July 2008. British ministers said that a referendum was not needed as the Treaty had no constitutional implications.

56 Referenda have been used when deemed necessary to legitimize a political decision, when a political party saw a political advantage in its use, or as means to prevent political parties from showing their divisions over an issue. The sovereignty of Parliament is maintained: Parliament authorizes the holding of a referendum and referenda are not legally binding, although government and Parliament could not ignore the popular vote on political grounds.

57 The Political Parties, Elections and Referendums Act 2000 established the Electoral Commission whose functions include, in part, the administration of referenda and reporting on them.

3. Referenda related to the European Union

58 The Treaty of Rome, signed on 25 March 1957, established the European Economic Community (‘EEC’). The six founding members—Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands—ratified the Treaty by parliamentary procedure, without referenda. However, referenda were later initiated by a few Member States to approve the accession of new States, or for countries to join or not join the EEC.
(or the European Union), or for Member States to approve or not approve new treaties: the Single European Act (1986); the Treaty on European Union (1992); the Treaty of Amsterdam (1997); and the Treaty of Nice (2001).

59 For most countries, these referenda were optional, approvals could have been obtained by parliamentary procedure. Their purpose was political; in order to ensure a large popular support for joining the Union, for accepting new members, or for the approval of new Treaties. The Irish Constitution, however, required a referendum to approve amendments to it required by the adhesion to the EEC and later Treaties.

60 The Treaty establishing a Constitution for Europe was adopted by the Heads of State and Government at the Brussels European Council on 17 and 18 June 2004. The Constitution would not take effect until it had been ratified by all 25 Member States. However, France and the Netherlands rejected the Treaty by referenda held respectively on 29 May and 1 June 2005.

61 The European Council, which met in Lisbon on 18 and 19 October 2007 approved the new reform treaty called the ‘Lisbon Treaty’, which replaced the draft Treaty establishing a Constitution for Europe. The 27 Member States of the EU have ratified the Lisbon Treaty which entered into force on 1 December 2009.

62 The Treaty of Lisbon amends the EU’s two core treaties, the Treaty on European Union (‘Maastricht Treaty’) and the Treaty establishing the European Community (‘Rome Treaty’). The latter is renamed the Treaty on the Functioning of the European Union. In addition, several Protocols and Declarations are attached to the Treaty.

F. Assessment

63 Referenda are a useful, and at times essential, tool of democracy. The most frequently used democratic system is representative: voters choose their representatives, whose majority set up and support a government. In principle, these institutions allow the discussion of issues and the careful assessment of decisions and laws. The elected representatives should give careful weight not only to the views of their own electorate, but also to the interests of minorities.

64 However, for important issues such as independence of the territory or country, its constitution, or a decision to join or not join international organizations, it may be important, or even essential, to consult the whole electorate. A referendum gives the people’s legitimacy to decisions which may lead a country in a specific direction for years or decades, with direct consequences for the citizenry.

65 Referenda may serve to complement representative democracy, a mechanism to improve the system as a check on governments and parliamentary assemblies as provided by a State’s constitutional law. The prospect that a referendum may be held on specific issues would entice elected representatives to govern with due regard to the concerns of the ‘sovereign’ people. Referenda may be a recourse against the arrogance or corruption of political leaders and against overly partial decisions by elitist leaders.

66 There are limits to the use of referenda. They should be reserved for important issues, and not held too frequently. Most issues should be settled and decided upon by governments and parliaments. Direct democracy and frequent referenda can only be
practised in such small countries as Switzerland. The conditions under which referenda should be held have been reviewed in Section D.

67 In conclusion, while the referendum is not a solution to all political problems, its use is advisable on major and/or divisive issues as a means to enhance democracy by giving a voice to the people: political decisions are then made openly and are clearly legitimate.

Select Bibliography

C Rousseau *Droit international public* (Sirey Paris 1953).

Select Documents

Frontier Dispute (Burkina Faso/Republic of Mali) [1986] ICJ Rep 554.
Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.