

Foreword

In his message to Congress on 11 February 1918, US President Woodrow Wilson demanded “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, even the great game, now forever discredited, of the balance of power; ...”. Every territorial question had to be decided “in the interest and for the benefit of the populations concerned”. He thus already postulated the consent of the population to a territorial cession.

Already in the peace treaties of Rijswijk of 30 October 1697 and of Utrecht of 30 October 1697, the inhabitants of the territories to be ceded had to decide within a certain period of time to maintain the previous loyalty relations and, if they decided otherwise, could emigrate taking their property with them. Plebiscites were also held in Avignon and Venaissin in 1791, in Savoy in 1792 and Nice in 1793 to decide on the further status of the territories. Furthermore, as a result of the Franco-Sardinian Treaty of Turin of 24 March 1860, a vote was held in Savoy and Nice on whether the territories should fall to France. In the Versailles and Saint Germain Peace Treaties, the cession of six German and Austrian border territories respectively, namely Northern Schleswig, the Prussian territories of Allenstein and Marienwerder, Upper Silesia, Burgenland, Carinthia and Saar, was made conditional on the holding of plebiscites. In addition, the Versailles Peace Treaty provided for a “consultation populaire” to confirm the cession of Eupen and Malmedy. Another plebiscite not provided for in the peace treaties was held in Ödenburg. After the Second World War, referendums were held in the French-Italian border areas of Tenda and Briga and in the Saar region. However, it should be noted here – much more information on this can be found in this volume – that many of these referendums took place in a legally questionable form. Moreover, it should not be overlooked that in most cases of a change of territory the population was not consulted; one thinks of the allocation of the German Eastern territories, where originally German people lived, to Poland and the Soviet Union in the Two Plus Four Treaty, the dissolution of the South African homelands and the allocation of the Bay of Whales to Namibia. These examples can be qualified as disregard for the right of self-determination of peoples. Whether there is an obligation under customary international law to regularly subject territorial changes to a referendum by the affected population is a matter of debate among scholars. If a state could dispose of a territory without taking into account the will of the population, the right of self-determination of a people would in any case become a farce. Moreover, any annexation to another state made by the people on the basis of the right of self-determination could easily be reversed in an international treaty between the governments.

James Crawford argues that the right of self-determination applies to territories that are established and recognised as separate political entities. He cites as examples federal states, mandated territories, non-self-governing territories and those that have a clear political-geographical demarcation and whose inhabitants are arbitrarily excluded from state participation. The referenda in Macedonia, Montenegro, Bosnia-Herzegovina, South Ossetia, Crimea, Eritrea, Canada, Puerto Rico were less about the exercise of the right of self-determination of a people or an ethnic group than about transfers of territory. Especially the referendums held in Eastern Europe, Africa and Central America on the occasion of territorial changes could make it appear justifiable to assume an exercise, even if only a population that does not qualify as a people or ethnic group is assigned to another state.

The “European Commission for Democracy through Law”, also known as the “Venice Commission”, is taking a closer look at a mandatory referendum in the future. It was founded on 10 March 1990 by the Committee of Ministers of the Council of Europe and consists of 62 full members. It is an independent consultative body of the Council of Europe. In 2002, the Commission published a Code of Conduct on Elections and in 2007 the Code of Good Practice on Referendums. However, the guidelines on holding referendums are merely recommendations, as the Venice Commission only has an advisory function.

This volume of the Study Group on Politics and International Law is devoted to referendums on territorial affiliation, with special reference to the referendums after the First World War. *Peter Hilpold* deals generally with the territorial referendum in international law. *Jørgen Kühl* is dedicated to border demarcations and minorities. There is a review of the numerous border referendums after the First World War, which are then dealt with in detail below. *Holger Kremser* deals with the referendum in Schleswig after the First World War in 1920, *Barbara Kämpfert* with the referendum in East and West Prussia in 1920, *Karsten Eichner* with the referendum in 1921 and the partition of Upper Silesia, and *Dennis Traudt* with the referendums in the Saar in 1935 and 1955. The following comments are devoted to Austria. *Wilhelm Brauneder* deals with the Anschluss referendum in the province of Salzburg in 1921, *Gunda Barth-Scalmani* with the referendums in Tyrol on the Anschluss to the German Reich, *Günther Rautz* with the reorganisation of Europe with special reference to the referendum in Carinthia in 1920 and *Richard Lein* with the Burgenland question 1919–1924, a bilateral as well as international problem case of the European Union. Finally, referendums outside the German-speaking area are discussed. *Gian Luca Fruci* deals with plebiscitary practices in the old Italian states before unification, *Carolin Gornig* is dedicated to the referendums in Crimea and eastern Ukraine in 2014, and *Stefan Oeter* to the vote in West Papua in 1969 as an example of a distorted image of a territorial referendum.

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