7 Sovereignty referendums: A question of majority?

Or how "majority" actually begs numerous questions

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I. Introduction

Over the years, I have come to use the expression "law of independence" (Bérard and Beaulac, 2017) to refer to the legal reality surrounding issues involved in the becoming (and being) of a state on the international plane. In ontological terms, this field of study would include both public international law[2] and comparative constitutional law.[3] For instance, statehood refers to a set of constituting elements, as codified in the *Montevideo Convention*:[4] defined territory, permanent population, effective government and the capacity to enter into relations with the other states (Brownlie, 2004). These are international law issues; but they concern also constitutional law, as many of these criteria indeed refer to the domestic legal structures of states, for example the organization of governance within a federal framework.[5] Another field is the law of international recognition,[6] with the traditional distinction between the constituting and the declaratory theories[7] as well as the legally hybrid (and quite contested) concept of effectivity in international law.[8] These are downstream-type of issues, as regards states and statehood.

There are many other legal issues that are rather upstream, in a way, to the being of states on the international plane. They pertain to the becoming of states or, as often referred to,[9] the creation of states, although this expression gives the (false) impression that there is a kind of overarching authority responsible for statehood. In any event, here the legal rules gathered under the heading of the

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2 For instance, among the vast international law literature, see Lecucq, 2017; Crawford, 1998.
3 See Palermo, 2019; Choudhry and Howse, 2000.
4 *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 49 Stat 3097, 165 L.N.T.S. 19.
5 See the classic by Wheare, 1963.
6 See Garcia (ed.), 2018. See also, generally, Dugard, 2013, at 35 ff.; Ryngaert and Sobrie, 2011.
7 See Talmon, 2004; and, generally, Verhoeven, 1975.
8 See Seymour, 2007, at 399–400; Mendes, 2019, at 23–24.
9 See Crawford, 2006; Radan, 2007.

"law of independence" are interested in both the substance and the process of becoming states. Indeed, how do international law and constitutional law, separately or together, deal with issues regarding the entitlement to or the possibility of statehood, as well as the processual aspects that bring about the becoming (or creation) of states. To use the terminology familiar to all, this normativity includes the right to self-determination[10] and the law of secession[11] – including doctrines like *uti possidetis juris*[12] – as well as the rules pertaining to sovereignty referendums.[13]

II. What "majority" entails in sovereignty referendums

This chapter examines a specific aspect of the last category of issues, namely the legal question of "majority."[14] Simply put, for the consultation of the population to bring a positive outcome to the initiative, in this case on statehood, what is required in terms of popular support? The short answer that comes to mind, intuitively, is "majority" support, of course.

What I want to demonstrate in this chapter, however, is that the word "majority" (or one may call it a concept, a notion, an idea) is not only problematic to capture what is required for a referendum to pass, but that it actually hides more than it reveals with regard to the process of popular consultation for the purpose of becoming an independent state. At the outset, let me address an epistemological point, a sort of preliminary objection to the very topic, perhaps: considering the question of majority in sovereignty referendums, in and of itself, before (or without) taking into account the right to self-determination and the law of secession, is it not like turning the whole thing on its head, or perhaps "putting the cart before the horse" as the saying goes?

On the contrary, I would submit that the idea of "majority" is so often intertwined with the legal reality of referendums – as well as self-determination and secession – that treating it as a separate object of study will help appreciate the complexity of the related issues and, indeed, allow to name many of the multifaceted elements, some obscure or less obvious, involved in ascertaining popular support for independence. Besides, be it through the prisms of international or constitutional law, scholarship has already defined and otherwise dwelled upon self-determination,[15] its

10 See Mancini, 2012.
11 See Margiotta, 2005; Wellman, 2005; Tancredi, 2001.
12 See Lalonde, 2002.
13 See Radan, 2012.
14 Indeed, "majority" is a legal construct, as Maximilian Steinbeis (2017) explains: "A majority is not something you will find in nature. It is an artifact of law. You need legal rules to determine who counts, and in which way. You need legal safeguards of liberty, equality and diversity of opinion. You also need legal rules to determine what the majority will be able to do, which necessarily implies that the majority gets to told what she is not allowed to do. In short, you need constitutional law."
15 See Buchanan, 1992; Buchanan, 2007.

internal and external dimensions,[16] the concept of secession[17] – which was said to be a word in search of a meaning[18] – even specific issues dealing with sovereignty referendums,[19] like the wording of an intelligible question put to a vote.[20] In a way, instead of attempting yet another definition,[21] bound to have shortcomings and be contested,[22] and given the numerous typologies in the domain already,[23] the objective here is to show that speaking of a "majority" in a narrative on sovereignty referendums actually begs numerous questions relating to popular support.

The method used for my demonstration may seem unorthodox at first blush, as it borrows from linguistics,[24] with a view to giving a meaningful structure in the discussion. In analyzing the English language, linguists distinguish two types of interrogations: (i) yes or no questions and (ii) WH-questions. The last category is also known as content-information questions, which contain interrogative pro-forms, aimed at gathering basic information.[25] These questions are why (reason), how (manner), which (choice), when (time), where (place), who or whom (person), what (object) as well as derivatives such as how much (amount, uncountable) and how many (quantity, countable). This is what I intend to do with "majority": asking these questions in order to show that the word – used within the narratives pertaining to self-determination, secession, referendum – is actually addressing (often concealing) a good number of materials, as well as contentious features of the law of independence.

III. The Canada-Quebec experience with "majority"

This author, of course, has a particular take on the law of independence – it is my hermeneutics, so to speak – because I first studied and conceptualized it in

16 See Cassese, 1995; Barten, 2015.

17 The Supreme Court of Canada in the celebrated *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 83, defined secession thus: "Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one."

18 See Radan, 2016.

19 See Taillon, 2012; Choudhry, 2007.

20 See *infra*, under the sub-heading "The question of HOW MUCH."

21 For many decades now, scholars in many disciplines have attempted to define sovereignty, self-determination, secession, referendums, etc. See, for examples, these two classics: Hannum, 1990; Buchheit, 1978.

22 This idea could be linked to the philosophical theory by Gallie, 1955–1956.

23 For referendums, dating back to Scelle, 1934, at 277 ff., going to contemporary typologies such as the one in six categories of sovereignty referendums by Gary Sussman, 2012. See also Qvortrup, 2014a; Mendez and Germann, 2018.

24 See, generally, Quirk, Greenbaum, Leech and Svartvik, 1985.

25 See. Elson and Pickett, 1988, at 110 ff. A derivative of WH-questions are WH-movements, developed in theoretical linguistics, mainly by Chomsky, 1977; and also Cheng and Corver, 2006.

the Canada-Quebec context, not only having experienced the two referendums of 1980 and 1995, but also given the teaching of the Supreme Court of Canada in the 1998 *Quebec Secession Reference*.[26] It is interesting to note that a recent book, edited by Giacomo Delledonne and Giuseppe Martinico, highlights the contributions of this case to the study of secession, what were referred to as my country's legacies.[27] Thus I feel less shy (or presumptuous) to have this section recalling the celebrated contributions of our highest court, specifically in regard to the consultation of the population in a sovereignty referendum. The Canadian experience is meant not only to provide us with a factual background to help illustrate my different points, but the 1998 court case also proves useful to situate the role of "majority" within the bigger picture, as far as the processual law of independence is concerned.

The Supreme Court of Canada, in addressing the first issue about the legality of a UDI[28] in domestic law (the other issue was on UDIs in international law[29]), went beyond the black letter law[30] of the constitutional order and identified underlying (and unwritten) principles: federalism, democracy, constitutionalism and the rule of law and respect for minorities.[31] These were the legal justifications behind the statement that the Canadian constitution is not a "straitjacket."[32] Indeed, the Supreme Court audaciously held that

> the *clear* repudiation of the existing constitutional order and the *clear* expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[33]

Notice the decisive (and repetitive) use, already, of the adjective "clear," when referring to the support expected from a successful sovereignty referendum.

For the High Court, therefore, the consequence of such a clear indication of the population's will to secede is to bring the stakeholders (to force them) to sit down at the negotiating table. "The continued existence and operation of the Canadian constitutional order," it is said, "cannot remain indifferent to the *clear* expression of a *clear* majority of Quebecers that they no longer wish to remain in Canada."[34] The trigger of such a duty to negotiate a new constitutional deal is a

26 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. See also Gaudreaut-DesBiens, 1999; Dumberry, 2006; Rocher, 2014.
27 Delledonne and Martinico (eds), 2019. See also. Walters, 1999.
28 Short for "unilateral declaration of independence."
29 See Toope, 1999. See also Tancredi, 2008.
30 See Gaudreault-DesBiens, 2019, at 38–39: "The Supreme Court's departure from a strictly positivist reading of the Canadian constitution allows it to elaborate tools from which to better grasp a potential provincial secession attempt."
31 See Gaudreault-DesBiens, 2006; and, generally, Leclair, 2002.
32 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 150.
33 *Ibid*., para. 88 [emphasis added].
34 *Ibid*., para. 92 [emphasis added].

referendum,[35] in which the Quebec population is asked to vote on a question, the result of which will determine whether or not there is a popular will supporting secession, all of which is justifiable by the underlying principles of the Canadian constitution. "Those principles," the court further explained, "must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a *clear* majority of Quebecers votes on a *clear* question in favour of secession."[36] Note, time and again, the term "clear" is utilized in the reasons for judgment.

For better or worse, in analyzing the 1998 Reference, the focus of the discussion (if not the obsession) has been on what the High Court meant by "clear"[37] What is a clear referendum question? What is a clear majority? To concentrate on the latter, for present purposes, publicists[38] have highlighted that, in using the adjective "clear," the court is neither endorsing (nor rejecting, in fact) the idea of a simple majority (50%+1), nor is it necessarily speaking in terms of a qualified (or super) majority. The main other explicit indication in the reasons for judgment of what is meant by "clear majority" is when the Supreme Court writes this:

> In this context, we refer to a "clear" majority as a *qualitative* evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.[39]

It is noteworthy that the term "qualitative" is used only once by the High Court. Finally, the last passage that is deemed informative is towards the end of the judgment, summing up the reasons: "Democracy," it is said, "means more than simple majority rule." Is this a repudiation by the court of the 50%+1 hurdle for sovereignty referendums? The debate is still on, over 20 years strong!

This being so, by concentrating on what is meant by 'clear', when considering the issue of popular support (requiring a "clear majority"), publicists have in fact overlooked an important part of the equation: what do we mean by "majority"? Put another way, can there be different ramifications of the term "majority," when used to ascertain whether or not there is a will to secede? Here come the WH-questions, to help us navigate to the several elements linked to "majority": indeed, why, how, which, when, where, who or whom, what as well as how much and how many, in utilizing the word "majority."

35 See Haljan, 1999.

36 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 148 [emphasis added].

37 See Biglino Campos, 2016, at 453, who speak of the need for a clear majority to a clear question as something that is now part of the constitutional patrimony in comparative constitutional law.

38 See, for instance, Derriennic, 1998.

39 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 87 [emphasis added].

IV. WH-questions to reveal the many facets of "majority"

These interrogations raise multifaceted features about having a "majority," thus pertaining to the quest for popular support in a sovereignty referendum. Gathered in three sub-sections, each question is considered below, with references to the Canada-Quebec experience, as well as to other relevant contemporary situations in the world.

(i) "Majority": WHY

In asking WHY a "majority" is required in a referendum, one is interested in the motivation, the reason behind the consultation of a population. In the present context, the focus is on sovereignty referendums – not on other types of referendums about internal governance,[40] such as in archetypes Switzerland and Italy[41] – but the question remains as to what popular support is meant in fact to accomplish. In other words, consulting about sovereignty brings up many different scenarios, secession being only one of them. In this first scenario, reaching a "majority" would be linked to the aspiration of becoming "a new state upon territory previously forming part of, or being a colonial entity of, an existing state."[42] The end goal is full-fledged statehood. Conversely, the motivation may be just to confirm the *status quo*, such as in Gibraltar in 2002 and in the Falkland Islands in 2014, having no expectation but to reiterate the actual constitutional arrangements with these territories. Having said that, when the literature suggests that, since the late eighteenth century, there have been more than 300 sovereignty referendums in the world – according to the Center for Research on Direct Democracy,[43] adopting a liberal concept of sovereignty[44] – the WHY has not always been secession or *status quo*. In numerous cases, the political project for which popular support was gauged was to move sovereignty, be it either in a centripetal or a centrifugal direction, with neither (initial) any intention of becoming a new state, nor disappearing from the international plane.

Counterintuitively perhaps for many, this was the situation for Canada-Quebec, where the WHY had nothing to do, at least not explicitly, with obtaining a "majority" for the purpose of statehood. The 1980 referendum was about sovereignty-association, as the question put to the people shows, referring to Quebec acquiring "[t]he exclusive power to make its laws, levy its taxes and establish relations abroad – in other words, sovereignty – and at the same time to maintain with Canada an economic association including a common currency." Precisely, the reason WHY a "majority" was sought in 1980 was to support the mandate for the government, in the words of the actual question again here, "to

40 See Butler and Ranney (eds), 1994; Qvortrup, 2005; Hamon, 2012.
41 See Grisel, 2004; Ryngaert, 1982.
42 Radan, 2016, at 18.
43 A web resource that may be consulted here: http://c2d.ch/.
44 See, generally, Qvortrup, 2014b.

negotiate a new agreement with the rest of Canada." Similarly in 1995, although the question was about Quebec becoming sovereign, the political project was linked to "a formal offer to Canada for a new economic and political partnership." In both 1980 and 1995, the WHY the "majority" was sought had much more to do with backing up a new autonomous arrangement within the parent state (as part of Canada) than with becoming a new state (for Quebec).[45]

The spectrum of centripetal or centrifugal transfers of sovereignty behind the WHY searching for "majority" support is wide. They range from new federative partnerships for sub-state entities seeking more autonomy, on the one end, to new inter/supra/trans-national arrangements pooling attributes of sovereignty, on the other end. Examples of the former category are the two waves of referendums in the UK[46] – in the late 1970s for Scotland and Wales, and again in the late 1990s for Scotland, Wales and Northern Ireland. In all these cases, popular support was tested for devolution of powers to regional parliaments. More recently, in the autumn of 2017, referendums were held in the two Italian regions of Veneto[47] and Lombardy;[48] both cases saw an overwhelming "majority" (Veneto 98.3%; Lombardy 95.3%) supporting the quest for more autonomy, which authorities have not yet acted upon, however.[49]

In highlighting the reasons WHY obtain "majority" support, on the other end of the spectrum, there are numerous illustrations of centrifugal political projects, putting together attributes of sovereignty. No doubt, the European Union is the best illustration, as there were numerous referendums held, at different point in time, within EU member states.[50] Adopting the typology of referendums on European integration suggested by publicists (Mendez, Mendez and Triga, 2014), there would be three categories of them, all of which concerning sovereignty pooling. First, membership referendums, the most basic reason for them being to join the EU, or what was known before as the European Communities. Not all 21 accession referendums were successful though, with the notable case of Norway whose "majority" refused twice over to integrate the union. WHY seeking a "majority" in the EU context may have to do with reforming the union, that is to say, may concern the ratification by member states of amending treaties.

45 This is in spite of what we learned following the 1995 referendum, that the leadership of the nationalist movement, especially then premier Jacques Parizeau, was apparently going to use the "majority" to make, at once, a unilateral declaration of independence. See Hébert and Lapierre, 2014.

46 See Kidd and Petrie, 2016.

47 The question was: "Do you want Veneto to be given further forms and particular conditions of autonomy?"

48 The question was: "Do you want the Lombardy Region, in the framework of national unity, to start the necessary institutional initiatives to ask the State the devolution of subsequent particular forms and conditions of autonomy, with the corresponding resources, in the way and for the purposes provided in Article 116, Paragraph 3 of the Constitution?"

49 See Delledonne and Monti, 2019.

50 See Auer, 2007; Shu, 2008.

This is the second category of EU sovereignty pooling referendums, specifically the following instruments:

- *Single European Act* (1986)
- *Treaty of Maastricht Treaty* (1992)
- *Treaty of Amsterdam* (1997)
- *Treaty of Nice* (2001)
- *Constitutional Treaty of the European Union* (2004)
- *Treaty of Lisbon* (2007)

For each of these reform projects, some EU member states would hold consultations[51] – sometimes having to repeat the process twice to win a "majority" – with some 16 treaty ratification referendums being held from 1986 to 2009.[52]

To be complete, there is a third category of EU referendums, also illustrating the many different reasons WHY a "majority" may need to be ascertained. These are policy referendums, about specific issues, for instance monetary policy, fiscal policy or foreign policy (including the issue of enlargement).

Of course, still in the context of the EU, there is another example that is worth exploring to show WHY popular support may be sought, namely that of Brexit.[53] To put this current affair in a broader perspective, it would fall within the first category (above) of EU referendums, concerning membership in the union.[54] This time, it is not to join the EU, but the opposite – to withdraw from the EU. Interestingly, before Brexit was decided by a (slim) "majority" of the UK population in June 2016, there had been two instances of withdrawal referendums. The first one was also in the UK, in 1975, to decide whether to stay in the Common Market (or European Community), entered into two years prior; it was rejected by a "majority" of over two-thirds. Another withdrawal referendum took place in Greenland (a former Danish territory), in 1982, and this time proved to be successful, as a relatively thin "majority" of 53% of the voters decided in favour of leaving the union. Now, Brexit is the third experience in EU withdrawal referendums, although the first one conducted under Article 50 of the *Treaty of the European Union*, adopted via the *Treaty of Lisbon* in 2007,[55] provided for the possibility of withdrawal or renegotiation of EU membership status.[56] Although the actual vote on Brexit was often said to be a shot in the dark (or a blank cheque),[57] as the ultimate outcome was to be determined some two years down

51 On the reasons behind decisions by member states to hold EU referendums, see Closa, 2007.
52 See also, generally, Closa, 2013.
53 See, generally, Fitzgerald and Lein (eds), 2018.
54 See Hillon, 2015.
55 See Tatham, 2012.
56 **See Łazowski, 2017b.**
57 See Clarke, Goodwin and Whiteley, 2017, at 175 ff.; and, generally, Fabbrini (ed.), 2017.

the road – with a negotiated UK–EU accord, a hard or a no-deal Brexit[58] – the reason WHY a "majority" of the UK voted (52–48%) in favour of it was nevertheless known: to put an end to the current (and regular) form of membership of the EU.[59]

(ii) 'Majority': HOW, WHICH, WHEN, WHERE and WHO or WHOM

The question HOW is interested in the manner in which support of the population is ascertained in relation to a political project involving sovereignty. Although it may just be about the process, this interrogation makes it explicit that a referendum is not the only possible procedure. Another option would be to have a vote in parliament, instead of[60] or along with[61] (*ex ante* and/or *a posteriori*) a referendum. HOW relates also to whether the verdict of the "majority" in a referendum is merely advisory or indeed binding.[62] As well, HOW is concerned with a possible pre-referendum agreement to provide a framework through which the existence of a "majority" will be determined, as in the Scotland–UK case with the *Edinburgh Agreement*.[63] Finally, HOW includes a role for courts to help with referendum processes of testing "majority,"[64] which was the situation not only in Canada-Quebec, but in many other jurisdictions, like in Sri Lanka[65]; and again recently, on many occasions, in the Spain-Catalonia.[66]

For its part, WHICH highlights that the word "majority" may bring up (and might hide) issues relating to the options given to the population in the course of a sovereignty referendum. More often than not, the logic is binary: you vote "yes" or "no" to a question, that is that.[67] Sometimes the question put in a referendum gives two separate options, "a" or "b," but in explicit terms, such as in the

58 See Gadbin-George, Ringeisen-Biardeaud (eds), 2018.
59 **See Łazowski,** 2017a.
60 An example is the split of Czechoslovakia. See Luers, 1990.
61 An example is Ethiopia. See Bihonegn, 2015.
62 See Taillon, 2007. In Canada, based on the constitutional principle of parliamentary supremacy – from the Anglo-Saxon common law tradition of public law (confirmed in the legal challenge to Brexit case by the UK Supreme Court: see *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5) – government cannot abdicate its responsibility to legislate; hence referendums cannot be binding, but just advisory: see *Re Initiative and Referendum* Act [1919] A.C. 935 (Privy Council). Having said that, as it was recently suggested, "almost no difference exists in practice between consultative and legally binding referendums, since all consultative referendums have been considered as politically binding"; see Palermo, 2019, at 273.
63 *Agreement between the UK Government and the Scottish Government on a referendum on independence for Scotland* (2012). See MacIver, 2019.
64 See Morel, 2012, at 514 ff.
65 See Welikala, 2019.
66 See, in general, Xavier Cuadras Morató (ed.), *Catalonia: A New Independent State in Europe? – A Debate on Secession Within the European Union* (Abingdon: Routledge, 2016).
67 See Morel, 2018, at 160 ff.

2014 Crimean referendum: does the "majority" want to join a country (Russia) or remain in the current one (Ukraine)?[68] Now, WHICH implies too that there may be more than two options in a sovereignty referendum, with a possible outcome of winning with much less than 50%+1; actually 33.34% would suffice in a three-option case. This was indeed a scenario during the 2014 Scottish referendum – which in the end did not materialize – where it was considered to have a third option on the ballot, namely to obtain new devolution powers (Devo-Max) for the region.[69] In the several bills proposed for a sovereignty referendum in Puerto Rico, there were attempts too to move away from a binary (or dichotomous) choice by offering three options.[70] The question WHICH thus highlights how, sometimes, a "majority" may entail a much weaker popular support than one would think, intuitively.

WHEN is interested not so much in the timing of a referendum (early or during a negotiation; on mere propositions or on a new deal), but in the actual point in time, the occasion of the verification of popular support.[71] Put another way, should the required "majority" be determined once and that is all? Or, rather, could there be other times to test it again, at the end of the negotiation on a new political status, for instance? This was the case for the 1980 Quebec referendum,[72] where the very question referred to the need for a second consultation: "[…] any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum […]." In the situation where the "majority" says no in a sovereignty referendum, WHEN is also about the possible repeat of the consultation, what was coined in the Canada-Quebec context as the idea of "neverendum."[73] After the 2014 referendum in Scotland, rejected by quite a large "majority" (55–45%), the SNP leadership was on the record saying no new vote on independence for a while, a position that changed 180 degrees given that Brexit passed in spite of a strong Scottish "majority" against.[74] It is noteworthy that referendums in member states of the European Union, in recent history, have been repeated on many occa-

68 See the report by the European Commission for Democracy through Law (Venice Commission), entitled *Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution Is Compatible with Constitutional Principles"*, 21 March 2014, CDL-AD(2014)002.

69 See Mullen, 2016.

70 They were as follows: (1) Independence: Puerto Rico should become fully independent from the United States. (2) Sovereignty in association with the United States: Puerto Rico and the United States should form a political association between sovereign nations that will not be subject to the Territorial Clause of the United States Constitution. (3) Puerto Rico should be admitted as a State of the Union. See Gökhan Şen, 2015, at 263.

71 The whole process of having a referendum to test "majority" support would be flawed, some say, as it artificially freezes in time the will of the population; see Cohen, Grunberg and Manin, 2017.

72 See Lecours, 2018.

73 See Freed, 2017.

74 See McKenna, 2018.

sions in order to obtain popular support for different packages of reforms,[75] the most notorious cases out of the Republic of Ireland.[76] The question of WHEN a "majority" is ascertained, therefore, is crucial – the goal is to catch it once, some say like in a "lobster trap."[77]

Brexit also provides a vivid example of the question of WHERE the "majority" is assessed by means of a referendum.[78] Across the UK, the option to leave the European Union got the support of 52%, while the option to remain got 48%. However, the regional breakdown shows supports of 38–62% in Scotland, 44–56% in Northern Ireland; in Wales, the percentages were the same as countrywide. WHERE also raises the issue of whether a sovereignty referendum – e.g. on the secession of a region – should be assessing the support of the population of the whole parent state or whether the "majority" will is only concerned with the territory at stake.[79] This would be the situation in Spain, where Madrid says that the secession of Catalonia must be decided by the whole country, while of course Barcelona claims that the only "majority" that matters is that of the region alone.[80] From a Canada-Quebec perspective, in part because of the two-founding nations theory (different from the Spanish one-nation approach), the proposition of a countrywide referendum to decide on the secession of a province is borderline absurd and, in any case, does not correspond to the 1980 and 1995 experiences of testing "majority" support in a referendum. Having said that, the question of WHERE highlights another feature inherent to a referendum "majority," which may be put in terms of *uti possedetis*: indeed, can the various popular supports, region by region, justify a reconsideration of territorial borders of a secessionist region?[81] Let us recall, in that regard, an *obiter dictum* by the Supreme Court of Canada in the *Quebec Secession Reference* case: "Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."[82]

The ramifications of "majority" raised by WHO or WHOM – the latter being more grammatically correct – are interested in one simple thing: among those connected to the territory at stake, who gets the right to vote and decide the question put in a referendum? It really boils down to eligibility, a basic issue

75 See Özlem Atikcan, 2018.

76 Both the *Treaty of Nice* (2001, 2002) and the *Treaty of Lisbon* (2008, 2009) were submitted to the Irish population twice before it was approved by a "majority."

77 This was a most incredible image once used by a revered secessionist leader of the Parti Québécois, Jacques Parizeau, who suggested that obtaining a majority in a referendum on Quebec independence would be like catching a lobster in a trap, i.e. once you get it, there is no way out. See Beaulac, 2016.

78 Comparing Brexit and the Canada-Quebec experiences, including on this aspect of referendums, see Fitzgerald, 2018.

79 See Basta, 2017.

80 See Sanjaume-Calvet, 2018.

81 See Ratner, 1996.

82 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 96.

in democratic theory.[83] WHO concerns the requirements of citizenship and, in some instances, residence period in a territory – or at least not out of the jurisdiction – to be able to exercise the right to vote and thus be tallied in assessing a "majority."[84] The Brexit vote in June 2016 illustrates such requirements: the *Referendum Act 2015* restricted eligibility to citizens of the UK (no citizens of the EU residing in the UK) and even excluded those residing abroad for more than 15 years.[85] WHOM concerns also the age eligibility to vote and thus be counted towards a referendum "majority," which is generally 18 years old, the age of majority; for Brexit, it was 18 years. Of course, it may be brought down, which increases the pool of people consulted; such as in the case of the *Scottish Independence Referendum (Franchise) Act 2013*, which allowed persons aged 16 and up to vote.

(iii) "Majority": WHAT, HOW MUCH and HOW MANY

The last group of WH-questions will address several questions highly relevant to sovereignty referendums, from participation quorums and minimum vote requirements, to qualitative and quantitative popular supports, as well as the different possible numeric results, be it simple or qualified (a.k.a. super) majorities. All of those ramifications of the word "majority" will be illustrated with the help of the Canada-Quebec example which, accordingly, requires to be given some details. For the purposes of the discussion below, and although some of the figures are approximate, let us say that the whole population of Canada is 36 million people and that the province of Quebec is 8 million. In an election or a referendum, let us say there are 28 million and 6 million, respectively in Canada and in Quebec, who are citizens of 18 years of age or older, who are thus eligible to vote. We have already determined, pursuant to the question WHERE, that for the sake of assessing a "majority" in a sovereignty referendum on secession, the consensus in Canada-Quebec is to use the province only. Therefore, for the discussion that follows, the important initial number is 6 million, the number of eligible voters in Quebec.

a. The question of WHAT

The question WHAT is interested in the object of verification, the idea being that it is possible to explicate and actually impose conditions on the reference group in the context of a sovereignty referendum. Put another way, the word

83 See Oklopcic, 2012.

84 See Gökhan Şen, 2018, at 214 ff., identified four categories of voters: (i) resident natives, (ii) non-resident natives, (iii) non-native residents, and (iv) non-native non-residents.

85 See Shaw, 2017. Interestingly, a recent court case in Canada saw the Supreme Court strike down as unconstitutional the provision of the election legislation denying the right to vote in a federal election to Canadian citizens residing abroad for five consecutive years or more. See *Frank v. Canada (Attorney General)*, 2019 SCC 1, 11 January 2019.

"majority" ought to be seen as, potentially, involving minimum characteristics or requirements, all in the name of defining properly the object that popular support is meant to ascertain. Essentially, the features we are talking about here are quorums, which can be in relation to the turnout or with the approval. The former type are quorums of voters' participation which impose minimum turnouts in the sovereignty referendum, short of which, popular support will not be deemed demonstrated, no matter what is the final result of cast votes. The other type are quorums of registered voters' approval which require the support as determined not by a percentage of cast votes, but by a set portion of the whole electorate. Briefly, on each of them.

MINIMUM TURNOUTS

For quorums of participation, WHAT a "majority" is about in a referendum (the object of verification) requires to meet a preliminary condition. The process of assessing popular support must be true to its spirit and, therefore, be representative of the will of the population. By asking that, minimally, a good proportion of those eligible to vote do so in the referendum, the "majority" is validated as better reflecting what the population wants. Having said that, it was pointed out that, "while it can prevent the adoption of an ultra-minority measure, the quorum of participation is far from allowing it to reach the majority of the registered voters."[86] To take Quebec as an example, putting the minimum turnout at 50% means that a winning (simple) majority of cast votes would be 1.5 million plus one, out of a 6 million electorate. Although certainly better than nothing, a feature to define the object of "majority" allowing for a meagre 25%+1 of the registered voters to be sufficient support, theoretically, for one's sovereignty project is light, to say the least, if not complaisant. It can hardly be said to meet the objective of being truly representative of the will of the population, of WHAT a "majority" should be about in a referendum.

Often the minimum turnout threshold is set at 50% of the registered voters, such as in the 2006 sovereignty referendum in Montenegro.[87] The Venice Commission, in a study entitled "Referendums in Europe,"[88] identified the practice of a minimum turnout of 50% in referendums in a bunch of European countries: Bulgaria, Croatia, Italy, Latvia, Lithuania, Macedonia, Malta and Russia. Some make this threshold a condition for the referendum to be binding and not just advisory, like in Poland and Portugal. The Venice Commission notes that the minimum turnout may be set much lower, which is the case with Azerbaijan where the threshold is at 25% only; thus, if combined with a (simple) majority of cast votes, an extremely small 12.5%+1 of the population would be sufficient for a

86 Morel, 2018, at 152.

87 See Bérard and Beaulac, 2017, at 94.

88 European Commission for Democracy through Law (Venice Commission), *Referendums in Europe – An Analysis of the Legal Rules in European States*, 2 November 2005, CDL-AD(2005)034, at para. 112.

referendum to pass. WHAT is required in terms of the popular support in the latter case, in theory at least, would be ridiculously low. Indeed, the word "majority" generally brings up in people's mind a much high percentage of approval, intuitively.

Quorums, especially participatory ones, have been viewed as flawed however, the main reason being that it deems abstentions to be tantamount to no votes. This assertion is questionable, it is argued, because there may be a series of different reasons why voters abstain, ranging from a conscious decision to boycott the vote to contingencies like being stuck in traffic at the voting end. The next step, even more problematic, is to imagine that a camp in a referendum would actually promote abstention, with a view to preventing the results to prevail, that is to say, by hoping that the threshold of participation fails. This is a strategy that proved to be quite successful in Italy, as "most popular initiatives since the 1990s [were] invalidated because of a quorum not being met."[89] Here is how the Venice Commission illustrated the shortcomings of minimum turnout requirements:

> if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority.[90]

Having said that, the downside of quorums of participation is mitigated, or even perhaps cancelled out, in the context of sovereignty referendums, the main distinguishing fact being what is at stake, namely a fundamental change in political status. This is also based on the premise that the yes-side has *a priori* advantages, in a way, having set in motion the process of consultation and enjoying the lead on the debate and the actual question posed. Conversely, the no-side is forced to react, not having asked for a sovereignty referendum; the same could be said about the population on the territory, whose will (generally latent) is instrumentalized, like it or not. In this context, it might not be unreasonable to even out the playing field by having the no-side benefit, so to speak, from the abstention of the electorate because of a quorum of participation.

It is submitted that the question of WHAT is the "majority" about in a sovereignty referendum would, accordingly, be improved in terms of representativeness of popular support with minimum turnout requirements. Bottom line, the critique of these quorums should be given little weight because, as one author puts it, "the situation is different when it comes to existential issues such as secession and statehood."[91] Interestingly, it was the view expressed by the Venice Commission, it seems, in the case of Montenegro.[92] Noting that a participation quorum was a condition, among other precedents, in Slovenia's and Macedonia's

89 Morel, 2018, at 153.

90 European Commission for Democracy through Law (Venice Commission), *Code of Code Practice in Referendum*, 20 January 2009, CDL-AD(2007)008rev, para. 51.

91 Palermo, 2019, at 276.

92 See Cazala, 2006.

sovereignty referendums, it wrote the following: "Regarding international practice, a minimum turnout of 50% of the registered voters seems appropriate for a referendum on the change of state status."[93] WHAT the "majority" demonstrates, in such circumstances, is improved (slightly) as being more representative, for sure.

APPROVAL QUORUMS

Minimum thresholds may relate to the actual approval by a specific proportion of the whole electorate. The question WHAT is a "majority" focusing here not on the cast votes but rather on the percentage of votes within the reference group of the registered voters. To give an example: Slovenia, for its December 1990 referendum on sovereignty, where the required majority was set at 50%+1, calculated not on the basis of the number of votes in the ballot boxes but rather in proportion to the electorate as a whole. To use Quebec as an illustration, it would be like requiring that, out of the group of 6 million registered voters, the "majority" be at least 3 million plus one, i.e. 50%+1 of all people entitled to vote in the province. In previous writing, I have used the expression "absolute majority" to refer to this situation: a support in a referendum representing more than half of the population eligible to vote.[94]

In its opinion on the Montenegro referendum, the Venice Commission looked at not only the possibility of qualified majority – which we will examine below – but also this type of quorum. It was put as "a rule requiring that there must, in addition to simple majority of those voting, also be a specified number of Yes votes (e.g. 35%, 40%, 45%, 50%) of the total national electorate."[95] The European experience at large, where votes are taken on constitutional reforms for instance, shows several countries where the results are calculated based on specific proportions of the whole electorate: Albania, Armenia, Denmark, Hungary, Latvia. Interestingly, the Venice Commission acknowledged that a "majority" ought to be more stringent via an approval quorum when the consultation is on sovereignty issues.[96] The constitution of Macedonia, for example, calls for a majority of all registered voters if a referendum is held on the association or dissolution of a union or community with other states. For union or even secession in Slovakia, the constitutional requirement is also 50%+1 calculated on the basis of the whole electorate body. A vote in Lithuania on constitutional reforms that would affect

93 European Commission for Democracy through Law (Venice Commission), *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 10 December 2005, CDL-AD(2005)041, para. 26.

94 Lussier, 2013.

95 European Commission for Democracy through Law (Venice Commission), *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 10 December 2005, CDL-AD(2005)041, para. 27 [emphasis in original].

96 *Ibid*., para. 33.

the fundamentals of the country (the independent democratic republic character of the state) must gather a support of 75% of the electorate as a whole.[97] That last hurdle is incredible, I am tempted to say, and goes a long way towards assuring that WHAT a "majority" is about in a sovereignty referendum will leave little (or no) doubt as to popular will.

When compared with the first type of requirements, minimum turnouts, quorums of approval are considered less problematic. Be it at 50% or (or even better) less of the electorate body, such a scenario would not allow a boycott on voting promoted by the no-side to have an impact on the result; so long as the yes-side gathers the number set in the approval quorum, calculated on the fixed reference group that is the electorate, there will be a "majority" support.[98] Of course, the closer to 50%+1 of the registered voters you get as a quorum, the stronger is the claim that it is a proper and full representation of popular will, that could indeed be called "absolute majority." A sort of compromise, that takes the best of both worlds, so to speak, can be a combination of minimum turnout and approval quorum requirements. This is the case in Lithuania, for a category of referendums that are mandatory, where the quorum of participation is 50% and the quorum of approval is set at 33.33% of registered voters.[99] The question WHAT in this last scenario – although not quite as much as that of absolute majority – brings out how quorum requirements may be excellent tools to boost support representativeness in a sovereignty referendum.

b. The question of HOW MUCH

Before addressing the key question of HOW MANY votes are actually required in a referendum (next), it is most useful to put the issue of popular support in terms of HOW MUCH. Indeed, one of the most interesting insights from the Supreme Court of Canada's decision in the *Quebec Secession Reference* case, seen above, was the distinction between the formal numeric aspect of popular support (the actual percentage, which was never set at any particular number), on the one hand, and what was referred to as the "qualitative evaluation"[100] of what is a "majority" support within the population, on the other hand. Right after, in the same paragraph of the reasons for judgment, the High Court adds this: "The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."[101]

97 See European Commission for Democracy through Law (Venice Commission), *Referendums in Europe – An Analysis of the Legal Rules in European States*, 2 November 2005, CDL-AD(2005)034, at para. 114.

98 See Morel, 2018, at 153.

99 See European Commission for Democracy through Law (Venice Commission), *Referendums in Europe – An Analysis of the Legal Rules in European States*, 2 November 2005, CDL-AD(2005)034, at para. 115.

100 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 87.

101 *Ibid*.

This, semantically, is what should be understood by "clear majority," the opposite of "ambiguity"; the popular will "must be free of ambiguity," which speaks to both referendum question and the numeric results. Together, one presumes, is what the court meant by a "qualitative evaluation" of the "majority" – a "clear" "majority" – in a sovereignty referendum.[102]

Let me suggest that asking HOW MUCH is required of the "majority" is a way of assessing the support of the population that involves, as part and parcel of the debate, the referendum question. The qualitative evaluation of the "majority," therefore, is not solely numerical (referring to a percentage value), but also interested in the formulation of the actual question to be decided by means of a consultation. The question of the question, so to speak, has caused much ink to flow in the last 20 years, prompted in large part by the Canadian Supreme Court decision.[103] One also recalls that it was said in the most explicit terms that the particulars of what constitutes an intelligible question, among other things, will not be judicially determined, "not to usurp the prerogatives of the political forces that operate within that [constitutional] framework,"[104] identified by the court. Indeed, "it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken"[105]; in other words, do not come back to us for judicial review, as to HOW MUCH a "majority" should be determined by means of an intelligible referendum question.[106]

It is in this context that, in 2000, the federal parliament in Canada adopted the so-called *Clarity Act*,[107] with a view *inter alia* to assuming the responsibility

102 Similarly, see Oklopcic, 2019, at 218, who writes that "the 'clarity' of a referendum majority may be seen as an evidence of three separate aspects of popular support: (1) its sufficient *magnitude*; (2) its sufficient *intensity*; and (3) its sufficient *constancy*" [emphasis in original].

103 See Rocher and Lecours, 2018; Rosůlek, 2016; Yale and Durand, 2011.

104 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 153.

105 *Ibid*. For another example where the evaluation of the majority support for a change in political status by means of a sovereignty referendum is left, explicitly, to the appreciation of political actors, see the Annex 1 of the *Belfast (Good Friday) Agreement* in Northern Ireland, struck in 1998.

106 Interestingly, the two recent experiences in sovereignty referendums in the United Kingdom – Scottish independence in 2014 and Brexit in 2016 – saw the evaluation of the question formulation given to an administrative body. See Electoral Commission (U.K.), *Referendum on Independence for Scotland Advice of the Electoral Commission on the Proposed Referendum Question* (2013); and Electoral Commission (U.K.), *Referendum on Membership of the European Union – Assessment of the Electoral Commission on the Proposed Referendum Question* (2015). See also Timothy William Waters, "For Freedom Alone: Secession After the Scottish Referendum" (2016) 44 *Nationalities Papers* 124.

107 *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000. In a tit-for-that reaction to the federal statutory initiative the Quebec legislature adopted *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, C.Q.L.R. c. E-20.2, often referred to as Bill 99. The latter statute was challenged in court as constitutionally invalid, due to the alleged incompatibility with the decision of

to decide if, from the country's political perspective, the qualitative evaluation of the popular support is possible.[108] As the preamble of the *Act* states, "the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority." Section 1(3) of the *Act* provides for the following: "In considering the clarity of a referendum question, the House of Commons shall consider whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state." In section 1(4), there are factors that would undermine the intelligibility of the question, essentially two scenarios:

(a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
(b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.

In its "Code of Good Practice on Referendums," adopted in 2009, the Venice Commission provides guidance as to the formulation of a question put in a sovereignty referendum. Using terminology that is reminiscent of the Supreme Court of Canada's, it suggests the following:

> The clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question must not be misleading; it must not suggest an answer, particularly by mentioning the presumed consequences of approving or rejecting the proposal; voters must be able to answer the questions asked solely by yes, no or a blank vote; and it must not ask an open question necessitating a more detailed answer.[109]

It also recommends that the question be explicit as to the impact of the referendum, for instance if it is to be binding or advisory, final or part of negotiation

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the Supreme Court in the *Quebec Secession Reference*. Using a technique of interpretation known as "reading down," the Superior Court of Quebec was able to construe the provisions of Bill 99 at stake as just establishing (and explicating) a framework for secession, not as a justification for a unilateral declaration of independence. See *Henderson v. Quebec (Procureur général)*, 2018 QCCS 1586, 19 April 2018; this judgment is under appeal before the Quebec Court of Appeal.

108 One must understand that in both previous referendums in Quebec, the provincial authorities drafted the question without any participation or input whatsoever from the Feds. See Gaudreault-DesBiens, 2019, at 44.

109 European Commission for Democracy through Law (Venice Commission), *Code of Code Practice in Referendum*, 20 January 2009, CDL-AD(2007)008rev, para. 15.

process. All of this shows that asking HOW MUCH is the "majority" to mean in terms of popular support is intrinsically linked to how intelligible the referendum question is; the Canadian Supreme Court called this feature the "qualitative evaluation" of what is a clear will to secede by the population.

c. The question of HOW MANY

Ironically in a sense, compared to many other features examined above, HOW MANY votes in the ballot boxes are required to succeed in a sovereignty referendum is (relatively) straightforward. It is indeed a quantitative question, which basically refers to the numeric dimension of the results following the holding of a consultation. The expression most often used for the purposes of crunching referendum numbers is simple "majority" – i.e. 50%+1 of the cast votes – which would correspond to the default position to decide, by means of a consultation, a binary question put to a popular vote. But to be crystal clear, this way of calculating a "majority" has a built-in assumption, a sort of implied feature: the reference group is not the registered voters, but the actual ones, those who expressed their right to vote. Here, HOW MANY is not interested in HOW MUCH, as the standpoint is that turnout does not matter, nor in fact broader issues about levels of participation or, importantly, the representativeness of the results.

Let us take a few examples to illustrate this numeric dimension, the first one from Canada-Quebec.[110] As suggested above, the electorate in the province being 6 million, the calculation of simple "majority" of cast vote needs first to adjust this number to take into account the turnout. Drawing from our last real experience with referendums, in 1995,[111] it is reasonable to set the participation at 90%. This means that the reference group is 5.4 million, with which to calculate the simple "majority" of 50%+1; the magic number is 2.7 million plus 1 then. Assessing the situation accountant-like, this outcome would not be too bad in terms of popular support and representativeness of the will of the population given that 2.7 million of cast votes represent 45% backing of the electorate and the favour of 33.75% of the entire population of Quebec (set at 8 million; see above). These numbers are not in the neighbourhood of absolute "majority," however.

Another recent example shows how using simple "majority" to ascertain the will of the population in a sovereignty referendum may prove much more problematic. This illustration draws from the latest experience in Spain-Catalonia,[112] specifically the vote on the region's independence taken in October 2017. Of course, there are many elements of context that are crucial to properly understand the circumstances of this sovereignty referendum;[113] but my analysis here is purely numerical: HOW MANY votes in the 2017 referendum?

110 See Langlois, 2018, at 65 ff.; and, generally, Gervais, Kirkey and Rudy (eds.), 2016.

111 The actual turnout in 1995 was in the low 90s%, in fact at 93.5%.

112 For a full historical context, as well as details about the 2014 referendum on Catalonia's independence, see Bérard and Beaulac, 2017, at 110 ff.

113 See López-Basaguren and Escajedo San-Epifanio (eds.), 2019.

Rounding up slightly the figures, the population of Catalonia is about 7.4 million people; the electorate body is roughly 5.3 million registered voters. Although there is no consensus on the exact number, the participation in the consultation was approximately 43%. This means that the reference group to calculate the results on the basis of a simple "majority" is about 2.28 million. In the end, the total yes-votes in the ballot boxes was a bit over 2 million, making it a "majority" shy of 90% of cast votes, quite an impressive support at first sight. However, when these figures are put in light of the electorate as a whole, 2 out of 5.3 million registered voters bring down the support at 37.7%; if the reference group is the population of Catalonia (7.4 million), then the number becomes a meagre 27%, barely more than a quarter of the people of that region. Thus, the question of HOW MANY is required to establish popular support, based on simple "majority," may bring in numbers that are pretty weak indeed as to the people's will to secede.

In numeric terms, a simple "majority" of cast votes is generally distinguished (or opposed) to a qualified "majority," what is also known as a super "majority." All of these standards are agnostic of the actual levels of participation in sovereignty referendums; the reference group remains generally the citizens, aged 18 years and above, that actually exercised their rights to vote. In its opinion on Montenegro in 2005, the Venice Commission wrote the following: "The required majority makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate."[114] Although the default standard would be simple "majority,"[115] it was acknowledged that this 50%+1 rule may be set aside in some cases and replaced by a qualified (or super) majority. It referred to, indeed, "a rule requiring a *qualified majority of those voting* (that could be e.g. 55%, 60% or 65%)."[116]

Actually, the referendum statute for the sovereignty referendum in Montenegro required such a qualified majority,[117] set out at 55%+1 of the cast votes (and a minimum turnout of 50%).[118] The population is about 620,000 and approximately 485,000 were registered voters in the 2006 referendum. In the end, the turnout was about 86.5% (thus no problem with this requirement) and the 230,711 yes-votes means that the qualified hurdle was met, at 55.5%, indeed a

114 European Commission for Democracy through Law (Venice Commission), *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 10 December 2005, CDL-AD(2005)041, para. 29.

115 See also, in the context of Spain-Catalonia, the opinion of the Consell Assessor per a la Transició Nacional, *The Consultation on the Political Future of Catalonia*, 1st Report, Generalitat de Catalunya, Barcelona (2013), at 184.

116 *Ibid.* [emphasis in the original].

117 See Beaulac, 2016.

118 See *Law on the Referendum on State-Legal status of the Republic of Montenegro* (adopted on 1 March 2006), at art. 6: "The decision in favour of independence shall be considered as valid, if 55% of the valid votes are cast for the option 'yes', provided that the majority of the total number of registered voters have voted on the referendum."

very thin margin of 0.5%. It is interesting to see whether, with these numbers, there was an absolute majority in the Montenegro referendum, the reference group being the whole electorate. The answer is no: 47.6% of the registered voters (i.e. 230,711/485,000) voted in favour of independence. When put in terms of the country population, the proportion in support goes down to 37.2% (i.e. 230,711/620000), a little more than one-third. Again here, the question HOW MANY, even when considering the scenario of a qualified "majority," is very useful to have the full picture of the support in a sovereignty referendum, including how representative it is of the people's will.

This is mathematical, only. The question of HOW MANY votes are required for a consultation to pass, as simplistic as it may seem, must absolutely be apprehended in a comprehensive manner. The standard of a simple "majority" of cast votes is one option, sure, but it may certainly not be the best way to reduce the risk that a small proportion of the population highjacks the process. In theory, with no turnout or approval thresholds, a very tiny percentage of people can be enough to operate a transfer of sovereignty.[119] So long as the 50%+1 rule is satisfied, even if there was a general boycott that brought down the level of participation to very low, the referendum will be successful. Calculating the yes-votes against other reference groups, like the electorate body and the population as a whole, provides much-needed perspectives, those that feed into the "clarity" rhetoric often at the centre of the debate.[120] In any event, when all ramifications are considered (cast votes, electorate, population), pure numeric analysis contributes, along with other features, to having a true picture of the support and representativeness in a sovereignty referendum. When speaking of a "majority," HOW MANY votes does one actually need goes to the core of the will of the population, undoubtedly, but it is but one of the many facets that are at stake.[121]

V. Conclusion

What this chapter attempted to do is to show the numerous elements that the word "majority," used in the context of sovereignty referendums, dissimulates or hides within narratives addressing issues of the law of independence. Put another way, when an author or a political actor suggests that there is a consensus on the international standard with respect to what is required in terms of popular support to bring about the secession of a territory, for instance, and that "majority" actually sums it all up… well, he or she is not telling the whole story. To say that the whole question boils down to having a simple majority of 50%+1 to win a sovereignty referendum is misleading, borderline dishonest. The ascertainment of the support of a population is a multifaceted endeavour, as shown above,

119 See Morel, 2018, at 152, who speaks of not allowing the view of an "ultra-minority" to prevail.

120 See Rocher, 2018.

121 See Morel, 2018, at 152: "In practice, the combination of high participation and large victory is necessary to achieve a truly majority result."

involving a number of features that must be addressed head-on, in explicit terms. This is not simple, but more importantly, it is not simplistic.

The demonstration above relied on the WH-questions, borrowed from linguistics, with a view to showing the many content-information pertaining to the word "majority" used in referendum narratives. Thus why (reason), how (manner), which (choice), when (time), where (place), who or whom (person), what (object) as well as derivatives of how much (amount, uncountable) and how many (quantity, countable), in connection with the idea of "majority," were examined. All of these interrogations – in addition to providing a structure for the chapter – are evidence that, instead of having this word beg numerous questions at the centre of referendum processes,[122] "majority" can and should be utilized to highlight and address the many facets of determining the people's will, the numeric standard of 50%+1 being but one of them, the easiest perhaps.

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122 Indeed, on many issues concerning the law of independence, it is common to come across "mantra-like incantations" as part of the typical narratives used by some authors and political actors, which are in fact concealing more than revealing relevant features of the problems at stake. See Gaudreault-DesBiens, 2019, at 60.

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