

# The Referendum in Different Political and Constitutional Systems

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## Abstract

*The referendum in different political and constitutional systems as in Europe, representative regimes start to beneficiate of institutions of direct democracy, noticing an existing plebiscitary utilisation: Germany, Italy and France. The referendum at the popular initiative is used as common procedure. As considerations we can say that the referendum represents a rapprochement means of the political decision to the electorate or to the latest holder of the sovereignty attribute – the people.*

**Keywords:** *referendum, Constitution, constitutional systems, democracy, the people, the electorate, popular will, political class, the object of referendum, constitutional council, political practice.*

In order to describe the federal system of United States of America, Hugues Portelli uses the concept of direct democracy considered to be the main feature that distinguishes the federal states of the federal position. As explanation of the appearance of this type of democracy, the author mention that is a reaction developed at the end of the XIX century regarding the corruption of the state legislations.<sup>1</sup> The legislative referendum is practiced in 37 American federal states. In 21 states, the constitutional laws and the amendments can be introduced by a popular petition signed by a variable percentage of electors and can be the subject of the popular vote, without Parliament being informed. 15 states allow even to

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<sup>1</sup> Hugues Portelli, *Droit constitutionnel*, Dalloz, Paris, 1999, p. 41: ...s'est developpee a la fin du XIX siecle en reaction a la corruption des legislatures d' Etat...

dismiss the elected by the voters, recall, but the procedure is less applied, because of the short term of the mandate.

Dan Claudiu Dănișor describes the semi-direct democracy techniques in United States of America. Thus, these are found only in federal states. These elements entered under the influence of Switzerland between 1898 and 1918. The revocation has a special status and requires risks for promoters: if they lead to the confirmation of the mandate of the person for which the referendum was made in ordered to be revoked, they will assume the costs of the organization of the popular deliberation.<sup>2</sup>

Also, in Europe, representative regimes start to beneficiate of institutions of direct democracy, noticing an existing plebiscitary utilisation: Germany, Italy and France.

The referendum at the popular initiative is used as common procedure. The author explains that a constitutional referendum is met only in Switzerland, as legislative. Italy organizes abrogative referendum. From its insertion in 1970, it had a continuous success. Over 40 referendums were organized, and half of them were positive. Some votes concerned normative acts from constitutional filed: modification of the electoral law for the Senate...<sup>3</sup>

The referendum can have different juridical nature. Constitutionally, it is obligatory for modification of the Constitution in Austria, Denmark, Spain and Ireland. For a partial modification, it is organized in Germany, Austria, France, Spain and Italy. The referendum is also used for sovereignty delegation in Denmark, in community problems. The referendum can have consultative role, even if it is not provided by the Constitution: Norway, regarding the adherence at the European Union, in Belgium, on monarchy, in Greece on monarchy and Constitution. Great Britain used the referendum at national level for the adherence at European Union, in order to be approved London status and peace in North Ireland.

The referendum can be organized at parliamentary initiative, in Denmark and Ireland, and by executive in Greece and Portugal.

The author considers that the use of referendum in a fully spectrum and having almost a systematic feature, it is translated in the representative system to be controlled directly by citizens.

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<sup>2</sup> Dan Claudiu Dănișor, *Drept constituțional și instituții politice, Curs de bază*, University, Craiova, 1999, p. 265

<sup>3</sup> Hugues Portelli, *op. cit.*

In Eastern and Central Europe, the democracies provide such procedures: constitutionally, the referendum is provided in Baltic States and Slovenia; can be organized for matters of national interest by the chief state in Poland, Croatia, Slovakia, Russia, Ukraine, Byelorussia, and by the Parliament in Hungary, Slovenia, Bulgaria and Moldavia. Slovakia, Lithuania, Slovenia, Ukraine and Macedonia provide a referendum at the popular initiative.

In France, political class was always reluctant at introduction of procedures for direct expression of popular will. Thus, the constitutional laws from 1875 totally excluded the recourse at referendum. Despite many proposals for organizing popular deliberations and despite the example of other countries after the First World War, the Constitution from Weimer, the Constitution of Austria and Czechoslovakia, the 3<sup>rd</sup> Republic closed the door of semi-direct democracy principles<sup>4</sup>.

Only after the special politic situation from 1945 General de Gaulle dare to enforce organizing a referendum in order to decide the elaboration of a new Constitution and in order to ratify this, organizing 3 referendums during 1945-1946. Being approved by referendum, the Constitution from 1946 committed the use of referendum only for its modification, being a constituent referendum.

Today, the use of referendum is reserved to the chef state and has a limited object. The absolute champion of using the procedures is Charles de Gaulle. He appealed to 5 referendums: 1958 - constituent referendum, 1961 - Algerian referendum and 1962, 1969 - constituent referendum. But his successors appealed to this procedures three times: 1972, Georges Pompidou for expanding the European Communities, and Francois Mitterrand for the agreements with New Caledonia in 1988 and the treatment of European Union in 1992. This year, the referendum organized for the approbation of the Constitution failed.

The explanations for these falls are: on one hand, the political wastage of so many uses during 1958-1969 and the risks that Charles de Gaulle assumed: in 1969, the referendum was the opportunity to stake his mandate testing his people and won, but he had to resign in 1969. His followers did not want to take such a risk and refused to stake the mandate in referendums, explaining the fact of their wick success on political stage.<sup>5</sup>

The second reason is also the difficulty establishing the object of the referendum, having a limited sphere. If general de Gaulle did not hesitate using it

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<sup>4</sup> Catherine Clessis, Didier Claus, Jacques Robert, Patrick Wajzman, *Exercices pratiques-Droit constitutionnel, Montchrestien*, Paris, 1989, p. 273

<sup>5</sup> Hugues Portelli, *op. cit.*, p. 170. Le referendum n'a guere utilize depuis le depart du general de Gaulle, le president refusant de s'engager politiquement en cas de recours...

for the modifications of constitutional disposals, his followers have not the necessary status, were very scrupulous choosing theme of popular debates. Expanding the domain of social and economic issues from 1995, it allows a re-launching of this procedure, but still remains a contradiction: popular initiative that could give a new breath remains forbidden; the presidential initiative, because it is no longer included in a responsibility agreement, does not allow consolidating the legitimacy.

The author draws the conclusion that after General de Gaulle, France beneficiates of a representative traditional regime.

His plebiscitary character of referendum lead to losing its initial significance: the citizens are no longer the elements in a precise issue agreeing or refusing. It is a method where the chief of state takes the responsibility ahead of the people.<sup>6</sup>

In France two different types of referendums can be organized: a constituent one for the modification of the Constitution and that need the initial intervention of the government and the Parliament and a legislative one.

For first type of referendum, the government or the two chambers notice the president upon the organizing procedure, and the president can decide if it favorable or not. The French Parliament did never used its initiative power and seemed quite difficult that will do it, taking into consideration that the parliamentarians do not want to replace the representative democracy into a direct one.

The Government practiced only once the initiative, in 1988, through the referendum project regarding New Caledonia. In all other situations, the president himself took the decision, and the government proposal was *a posteriori* in order to legitimate the procedure. By the modification from 1995, if the proposal is from government part, it will be exposed before each chamber by a declaration and debates, but without voting.

The constitutional council is obligatory consulted by the government on all measures that must be voted.

The object of referendum is a limited one: organizing public powers, ratification of the treats and the reforms regarding the economic and social politic.

If the constitutional council supervises the organizing and the function of the referendum, as in electoral election, it is not competent to decide regarding the referendum law, because this is the direct expression of people sovereignty. After the announcement of the result, the president of the Republic must promulgate the

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<sup>6</sup> Catherine Clessis et.al., *op. cit.*, p. 275.

referendum law. This is integrated in positive law and can be repealed by ordinary law by the parliament, with the reserve that the modification cannot touch the right or the liberties with constitutional value.<sup>7</sup>

Dan Claudiu Dănișor analyzes the case of Switzerland. The author calls Switzerland “the election countries”, mentioning that the modalities of direct intervention of people form “the political rights” or “the popular rights”.

The issue of the popular intervention can be regarded at two levels, federal and cantonal. Federally, the referendum is obligatory for the constitutional reviews, optional for laws and optional or obligatory for some international treaties, depending on their specific. It is specific the fact that all forms of referendum are characterized by the result imperative.

Cantonal, the referendum is obligatory regarding the constitutional. The legislative referendum is optional in Roman Switzerland and obligatory in German Switzerland. The cantonal budget is eluded from the referendum procedure. The popular revocation can supervise only the cantonal Meeting and in its whole, without being an individual revocation. Actually, it is a dissolving of the Ensemble on referendum way provided by a number of electors, 12.000 in Bern. Although the federal Constitution ignores the procedure, it was issued once in 1919, when the federal ensemble stopped its mandate after a constitutional law on popular initiative.

As a short balance, from 1948 to 1983 took place 123 popular voting regarding constitutional drafts, and regarding the legislative referendum, 1874 until in 1983 only 93 were popular voted.<sup>8</sup>

In Austria the referendum is obligatory for the modification of the Constitution. Such a draft must be adopted by both chambers of Parliament and then asked by referendum. If a majority voted, in every state, this is presented for the royal agreement, in the name of the Queen by the general Governor. From 75 referendums organized in 1901, only 8 were approved by electors, Austria being the most restrictive country from the advanced world on referendum field. Because of referendum specific in constitution, that un-constituant, are denominated as plebiscites.

The referendum represents a rapprochement means of the political decision to the electorate or to the latest holder of the sovereignty attribute – the people. At the same time, it is a procedure by which the political power understands to

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<sup>7</sup> Hugues Portelli, *op. cit.*, p. 204.

<sup>8</sup> Dan Claudiu Dănișor, *op. cit.*, p. 264.

reconfirm, from time to time, the vision justness over certain essential issues of the public life, making the nation participate to this. From this double perspective, we have shown in our project that the referendum could be both a real democratic instrument, part of the free political debate and also one with a plebiscitary, manipulating use for the authorities.

In analysing the Romanian referendum theme, the important matter is the supereminence of the executive power and its temptation to access the people's opinion to ratify its own political decision. As noted on several occasions, the Romanian tradition is defined by the constant use of the plebiscite: the elections result is predictable, as predictable as the state authorities' mobilisation to convince, from the administrative point of view, the citizens who participate to elections. The effect is the civic awareness anesthetisation and the strengthening of the government prestige and of the head of the state. The main invoked argument is the national interest. The limitation of the political freedom is therefore made in the name of noble ideals.

In this range of vernacular plebiscites, there are the initiatives of authoritarian/dictatorial regimes, governed by charismatic personalities. From Alexandru Ioan Cuza to Carol the 2<sup>nd</sup> and Marshal Ion Antonescu, the fiction of the national support played a key part in the constitutional and political vision. The finality of the gesture in this respect was atransparent: the neutralisation of the representative meetings and a direct dialogue with the nation, by the appeal to plebiscite. The Caesarism can not be imagined without a periodic confirmation of the decisions taken by the government.

The plebiscite tradition cannot be reduced to the Romania of authoritarian regimes. The practice of referendum after the 90's is an obviously plebiscitary one. Nation is seen not as a credible dialogue partner, but as an inert institutional actor, whose autonomous will could be credibly simulated. The relationship between the referendum fiction and the political practice after the communist period can be seen in case of the two votes for the fundamental law: in 1991, as in 2003, it was a lack of debate within a free society.

Both votes were predictable in their configuration, not least because of the central and local administration involvement in the institutional manipulation. The last effect of this tactic can be seen in the actual moment of the Romanian politics scene: the appeal to the nation is seen as a tactic used by the state chief in order to get a blank cheque from the electors and as a weapon in the fight with the executive, whenever he cannot control it sufficiently.

Placing the referendum institution in a compared context shows the potential risk of using a semi-direct democracy instrument. In the former Soviet space or in the African one, the referendum dominated by the executive power led, in all cases, to the validation of the decisions already made and to the weakness of certain democracies already fragile. The appeal to the fragmented nation and politically inert can lead to expanding the number of mandates assigned to the state chief or to modifying the fundamental law, according to the “suggestions” made by the state chief. The crisis of the state can be therefore worsened by the practice of non-free referendums.

Romania cannot be actually analysed according to the terms previously mentioned. Without being a democracy fully consolidated, it does not have the traits of a transparent, authoritarian democracy. Compared to other state chiefs from countries with a semi-presidential regime, the Romanian president has limited attributions assigned. The impossibility to dissolve the parliament or the restraint to revoke the government chief are two arguments in this respect. “The Presidential temper” cannot fundamentally change the data of the existing juridical equilibrium.

The 1991 fundamental law, revised in 2003, expressly states the occasions in which a referendum is convoked and has compelling effects for the state institutions: it is the case of the relegation of the state chief and revision of the Constitution itself. Only in these circumstances mentioned in a limited way, the referendum can lead, immediately to the modification of the institutional realities. Even here, the convocation is preceded by an act of assembly, by voting the relegation initiative and the debate of the Constitution revision law within the Parliament.

Besides the defined constitutional status situations, the Constitution refers to the assumption in which the state chief may, after the Parliament agrees, convoke the nation in order to express its opinion on subjects of national interest. Even in the new constitutional context, the nature of the consultations that the president may ask, does not change: referenda initiated under Article 90 of the Fundamental Law stay only advisory. According to them, one cannot proceed to the change of the constitutional regime and he cannot even impose anticipatory elections. The people’s vote aims to show a particular political orientation. The nation can never substitute the legislator. The difference between the autochthonous regime and that of the fifth French Republic is given, among others, by the impossibility of the state chief to push the approval of a draft law on the way of the referendum vote. If we can speak, in the Romanian case, about an effect of the people’s decision

within the assemblies' relationship (House and Senate), then this can be localised in the area of pressure, the Parliament can be subject to. The location against the people's belief can be a credible argument of the president in dealing with the prime-minister and with the parliament majority. The risk of blockage is obvious: if the state chief has the referendum weapon, the assemblies can start the procedure of relegation or can start the prosecution for high treason in case of the serious breach of the fundamental law. The perspectives of the unilateral appeal to referendum could be dramatic, on a medium and long term.

One of the lessons of this latter constitutional controversy deals with the necessity to reconsider the referendum itself. The start of a national referendum convoked even by the electors, according to the Italian model of the people's veto for the recall of a law, would be the sign of extending the civic action framework. Finally, however, the cultivation of a critical conscience at the level of an entire nation remains the only authentic obstacle in front of the authoritarian hypothetical drift in which the referendum can be perverted – from a democratic instrument, into a means to destroy democracy.

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