

The Origin and Evolution of the Referendum

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Abstract

The procedure of a legislative referendum is met at the Romans. For them, “lex” meant convention. Terminologically, and not only, the institution has its origin in Roman law, where the gerund of the verb referare designated a procedure through which the entire elective, different from the plebs, was directly consulted regarding a precise subject, the adopted decision being therefore legitimate.

Keywords: *referendum, law, Constitution, popular vote, Parliament, electorate.*

1. The origin of the referendum

The procedure of a legislative referendum is met at the Romans. For them, “lex” meant convention. When the convention came between two physical persons, “lex” meant contract, and when it interfered between the magistrate and the people, it meant law, as the form of expression of the right¹. Gaius said that the law is what the people decides, *quod populus romanus iubet atque constituit*.

The magistrate would introduce the bill by an edict. People would debate the magistrate’s proposal during unofficial meetings, and afterwards the magistrate would be called in commissions to pronounce. Citizens could not bring amendments to the law project. If they agreed, they would answer by yes, *uti rogas*, and if they did not, with no, *antiquo*. There was a real legislative referendum on the edge of a legislative initiative emanating from a state authority.

The Roman people would participate in making legislative, electoral or judicial decision, being organized in commissions or distinct gatherings: *comitia curiata*, *comitia centuriata*, *concilium plebis* and *comitia tributa*.

¹ Emil Molcut and Dan Oancea, *Drept roman*, Sansa SRL, Bucharest, 1993, p. 41.

Comitia curiata had an increasing importance at the beginning of the Republic, being developed for the adoption of laws for the senior magistrates, laws through which people delegated the power and promised to obey.

Comitia centuriata was made of land owners.

Concilium plebis was the plebeian assembly that originally adopted decisions bend for the plebeians only. Through the Hortensia law, once the decisions are binding only for citizens, patricians start to participate in the concilium's works, seeking to defend their interests. Therefore, *concilium plebis* turns into *comitia tributa*.

Comitia tributa included all Roman citizens organized on tribes; it becomes a legislative gathering.²

The difference between plebiscite and law is clearly defined by Gaius: "The law is what the people command and decide. The plebiscite is what the plebs decides and command."³ Plebs are different from the people because the term "people" includes all citizens, even patriciens, meanwhile "plebs" includes only the other citizens, without the patriciens. Through the Hortensia law, all people must obey plebiscites, which have been therefore assimilated to the laws.

Hence the tendency to despise the plebiscites, in the modern sense of the word, as it originates in a legislative body without quality. If ,for the Romans, the inferiority resulted from the lower quality of the citizens that formed the plebs, in modern times the inferiority of the plebiscite emanates from the person who manipulates the popular vote, either through his personality, either through more obvious methods of constraint against the people who allow to be manipulated.

In the old diets of the Germanic and Swiss confederations, the confederate states' representatives only stated *ad referendum*, meaning their decisions were confirmed by the Governemnt of their state.⁴

The term "referendum" has its origin in the habits of the ancient confederations. Inside the diets, the communes were represented by trustees. They had to submit *ad referendum* about all the problems for which they were not able to vote. The citizens who had a voting right expressed their vote *ad referendum* to accept or to reject new propositions.⁵

² *Ibidem*, p. 28.

³ Gheorghe Ciulei, *Curs de drept roman*, Faculty of Low from Cluj, 1948, p. 15: «Lex est quod populus iubet atque constituit. Plebiscitum est quod plebis atque constituit.»

⁴ Dan Claudiu Danisor, *Drept constituțional și instituții politice, Curs de bază*, Universitaria, Craiova, 1999, p. 261.

⁵ Catherine Clessis, Didier Claus, Jacques Robert, Patrick Wajzman, *Exercices pratiques – Droit constitutional*, Montchrestien, Paris, 1989, p. 271.

2. History of popular consultations in Romania

In the Romanian countries, Cristian Ionescu considers that the drafts of Constitution and the 1848 revolutionary programs have constitutional value, as a beginning of fundamental organization for the Romanian people. In this context, the Constitutional Act from Islaz, which includes The Proclamation and The Revolutionary Programme of the Romanian Country from 9 / 12 June 1848 is the first Constitution of the Romanian countries.¹ Under this name it was submitted for the approval of the Islaz Assembly and presented to Mr. Gheorghe Bibescu, who signed it. After the constitutional theory, this meeting was actually the first Constituent Assembly of the Romanian people and the document was approved by the first constitutional referendum held in Romania. The popular vote gave the required legal force for the act to be promulgated by the ruler of the state.

A referendum which the theory calls plebiscite was held in 1866, when, following Ion Bratianu's proposal, a popular vote was organized to name Prince Charles of Hohenzollern as the successor of Mr. Al. I. Cuza, who would accept the throne under the name of Charles I. It was plebiscite because the successful outcome of the election was due to the personality of the politician Ioan C Bratianu and not to the consideration that the German prince might have enjoyed, being virtually unknown across the Romanian countries.

The 1866 Constitution did not foresee the possibility of organizing a referendum, the power belonging to the ruler and to the national representative. The executive power belonged to the ruler. The constitution was influenced by the Belgian Constitution of 1831, its major influence being criticized by Charles I, who, in 1870, wrote: "These people, politically and socially educated mainly abroad and completely forgetting the circumstances of their country, are not interested in anything else than in applying here ideas that were watered there, dressing them in some utopian forms, without investigating whether they fit or not. Thus, the unhappy country, which was always bowed under the yoke of the toughest, passed suddenly and directly from a despotic regime to the most liberal constitution", *Algemeine Ausburger Zeitung*, 27.01.1870.⁶ Although the King characterized it as liberal, the times were not so liberal to allow the direct intervention of the electorate in the city life through referendum.

The 1923 Constitution was a rigid one, which meant it was a constitution that could not be changed by an ordinary law. Although it was a special procedure for this purpose, the revision did not include any popular vote, there was no referendum for the ratification of the review. All the review system included a

⁶ Ion Rusu, *Drept constituțional și instituții politice*, Lumina Lex, Bucharest, 2004, p. 61.

Parliament specially elected for this purpose and the King. People did not intervene in any proceedings of popular vote.

Paul Negulescu states the difference between the rigid and flexible constitutions. “For example, the English Constitution entitles the English Parliament to make, whenever it wants, amends to the Constitution, without carrying out any information other than those required for ordinary laws. From this point of view, there is the adagio that the English Parliament can do whatever it wants, except a boy out of a girl.”⁷

Plebiscite, so labeled by historians and lawyers, was organized in 1938 by King Charles II to vote on the Constitution of 1938. Article 100 of the Constitution provided, however, that whatever the outcome of the plebiscite, it automatically entered into force. The result of the vote showed that voters supported the decisions of the King, obtaining 4,297,581 votes for and 5438 votes against. The last act of entry into force was promulgated through the High Royal Decree no. 1045 of February 27, 1938.⁸

Ioan Muraru and Elena Simina Tănăsescu do not consider the referendum as a foreign body in the Romanian democracy, especially the happy experiment of the ad-hoc gatherings. Thus, it was stipulated in the Constitution of 1948, the consultation decision belonging to the Grand National Assembly and in the 1965 Constitution, according to which the Great National Assembly would decide the consultation of the people by referendum about the measures of particular importance for the country's supreme interests.

The current Constitution includes the national referendum, which belongs to the field of constitutional law, and the local referendum is mentioned in the law no. 215/2001 regarding public local administration, therefore being considered by the authors belonging to the administrative law.

3. The concept of referendum

Paul Negulescu encloses the referendum procedure alongside the popular veto or the popular initiative in the semi-direct democratic government. The author qualifies the referendum as a popular one and he defines it as “a system of constitutional establishment in which an elected law by the Parliament is not perfect unless it is approved by the nation”.⁹ The semi-direct system contains a

⁷ Paul Negulescu, *Curs de drept constituțional roman*, Bucharest, 1928, p. 472.

⁸ Cristian Ionescu, *Drept constituțional și instituții politice, Sistemul constituțional românesc*, vol II, Lumina Lex, Bucharest, 2001, p. 65.

⁹ *Ibidem*, p. 285.

delegation offered to the Parliament and the act made by the agent is ratified by the principal, namely the nation.

So, Paul Negulescu is the adept of the civil mandate theory, as a legal status of the parliamentary mandate that he exercises every elected of the nation and the referendum as a ratification procedure of the operations performed by the agent.

Moreover, “what the Parliament votes is just a project that becomes law only by people voting it. The nation cannot make changes, they shall vote only yes or no, to accept or to reject the project.”¹⁰

There have been many criticisms against the referendum system, by the fact that people would be too often called to issue the various legislative works, and the nation’s reaction would eventually have no interest, due to such a process of considerable importance for the collectivity. Another criticism refers to the high costs of organization and the time relatively consequent that it is required, that could be used in a more productive activity.¹¹ Another criticism concerns the referendum as contempt of the Parliament, because its work is subject to the popular vote.

The motivation of such a process derives from the fact that the nation is the one who must decide on issues they are directly interested in and therefore the fact that the mandate comes to examine the work carried out by the agent cannot be a disregard, so that it becomes mandatory for all the citizens.

Ion Deleanu does not give a classic definition of the referendum, but he remembers it in the section relating to the exercise of sovereignty. Thus, he states that “the nation the detentor of the sovereignty, exercises the national sovereignty through its representative bodies and by referendum.”¹² So the referendum is the fundamental rule that ensures the direct participation.

Dan Claudiu Danis says that the popular intervention is generically called referendum, but the semi-direct rule disposes of several forms of intervention: the referendum, the popular veto, the popular initiative and the revocation. Thus, the referendum is “the process by which the nation is related to power.”¹³ The author believes that whenever an act is subject to the popular decision we talk about a popular referendum. The classic model appears as a direct participation of the sovereign will of the electorate to legislate. The delineation is not very accurate and can be also available for the popular veto and even the plebiscite.

¹⁰ *Ibidem*, p. 285.

¹¹ *Ibidem*, p. 293.

¹² Ion Deleanu, *Instituții și proceduri constituționale*, vol II, Servo-Sat, Arad, 1998, p. 213.

¹³ Dan Claudiu Dănișor, *op. cit.*, p. 261.

The author also highlights the undemocratic aspect of the referendum. “The referendum, the direct expression of the sovereign will of the nation, establishes in the politics an absolute weapon”¹⁴. When the control of this weapon is given by the Constitution to a single protagonist of the political game, he becomes excessively strong. He will use the referendum at a moment when he decides to choose alone or almost alone, concerning the theme established in some terms wanted by him. This weapon will legitimize his power, because the distinction between a genuine referendum in which the popular sovereignty is active, and a plebiscite in which it is passive and has to choose between giving up and picking one, is very hard to do. There were leaders who have used this method in a tragic way: Napoleon, Hitler, Franco, and in a way less tragic, the General of Gaulle.

Thus no weapon should be available to any constitutional body, especially not to an executive one. The referendum leads nowhere as a technique of democracy if it can be accomplished in other ways than initiative or the popular veto.

Pierre Pactet defines referendum as being the main technique of the semi-direct democracy and it develops through the consultation of the electorate regarding a problem or a text that will not become perfect and definitive or in case of a positive outcome.¹⁵

In the French constitutional law, referendum means popular voting, it is the procedure through which the electorate is called to express directly regarding a measure that the political power takes or is about to adopt.¹⁶

Ion Rusu believes the referendum is a “political judicial tool efficient for the triumph of democratic principles, with the condition that it is preceded by a large information of the electorate through all means of information”.¹⁷ Out of all the fears expressed by various authors, it emerges that the proper information of the electorate tends to become a component of the referendum that would ensure it not transforming into a plebiscite.

The referendum or the plebiscite represents the direct vote of an entire electorate about approving or rejecting a proposition.¹⁸ This way, a Constitution, a

¹⁴ *Ibidem*, p. 268.

¹⁵ Pierre Pactet, *Institutions politiques, Droit constitutionnel*, Masson, Paris, 1985, p. 92: «la consultation des électeurs sur une question ou sur un texte qui ne deviendra alors parfait et définitif qu'en cas de réponse positive.»

¹⁶ Catherine Clessis, Didier Claus, Jacques Robert, and Patrick Wajzman, *Exercices pratiques – Droit constitutionnel*, Montchrestien, Paris, p. 271.

¹⁷ Ion Rusu, *Drept constituțional și instituții politice*, Lumina Lex, Bucharest, 2004, p. 49.

¹⁸ www.wikipedia.org: “A *referendum* (plural: «referendums» or «referenda» [N.B. *referenda* imply a plurality of issues.] or *plebiscite* (from Latin *plebiscite*, originally a decree of the

revision of the Constitution, a law, a revocation or a mere political governmental matter can be adopted.

The authors of the mentioned site consider that the terms of referendum and plebiscite are similar, but in practice they use the term plebiscite in the context of voting major problems of a state, such as sovereignty. But plebiscite also designates the procedure through which a dictator or an autocrat organizes popular voting that cannot be free and democratic. The term referendum is used especially for the common, usual adaptations in a democracy.

The Irish Republic has used both referendum and plebiscite to adopt its Constitution. The conclusion expressed in the end would be that we can use the referendum for a democratic state and plebiscite for the states where there is a personality cult.¹⁹

Referendums are still very rarely used in practice, being also a controversial matter. It usually only exists complementary to a representative legislative authority.

The defenders of the referendum consider that the decision should be taken away from the elites and voted directly by the people. Direct democracy would be preferable and the referendum must prevail over a decision of the Parliament. Another argument is the popular sovereignty that must be exerted by its detentor in fundamental matters of the state.

4. Criticism of the referendum

Critics believe that representative democracy is superior to the direct one. Representative democracy is a system in which the elected apply independent judgments, they are only mere delegates automatically tied to the voting machineries. Furthermore, it is said that the referendum is used by the politicians as a method of escaping from the responsibility of taking a controversial decision. Most fundamental changes would not have been possible if they had not been submitted to popular vote, because the people are reticent to changes: the abolition of slavery, universal vote, because the electorate is driven by feelings and interests rather than by deliberate conclusions. They can be influenced by strong personalities or proper propaganda. Such instruments might lead to the “tyranny of the majority” and the erosion of minorities or individual rights.

Concilium Plebis) *Is a direct vote* in which an entire electorate is asked to either accept or reject a particular proposal.”

¹⁹ *Ibidem*. “Here too, «plebiscite» will be mainly used for un-democratic states where we are likely to find a cult of personality, and «referendum» for democratic states.”

This opposition to the referendum has its origin in its successful use by Hitler or Mussolini, who have used plebiscite to limit their power. For this reason, after World War II, Germany has not provided or organized a referendum at federal level.

To conclude, the British politician Chris Patten is quoted, who has talked about the possibility of organizing a referendum in Great Britain regarding the U.E. Constitution in an interview for BBC in 2004:

“I believe that referendums are horrible... they were Mussolini and Hitler’s favorite tools in spreading the plebiscitary democracy. They underestimate the Parliament (Westminster). What they do realize, as I’ve seen during the last elections, is the fact that if you have a referendum about a matter, politicians, during the entire campaign, will say that they do not discuss and they must not discuss about it, this is referendum. The result is that at the last elections euro was highly debated. I believe referendum is fundamentally anti-democratic in our system and I do not want to deal with it. To make a long story short, governors only take it into consideration when they are weak.”²⁰

Another possibility of manipulation would be submitting to popular vote the same question several times until it passes, due to the elective’s fatigue. Repeating a referendum for the same matter has become phenomenal, never-en-dum.²¹

The definition offered by the Explanatory Dictionary of the Romanian Language describes the referendum as a direct consultation of the citizens, called to pronounce themselves, through vote, about a law project of high importance to the state or about matters of general interest.²²

The definition does not cover the entire range of types of referendum because the authors have decided to give a descriptive definition, in our right existing constitutional referendum, more commonly met and that cannot be ignored in defining this type of popular consultation.

²⁰ www.wikipedia.org, “I think referendums are awful ... they were the favourite form of plebiscitary democracy of Mussolini and Hitler. They undermine Westminster. [parliament]. What they ensure, as we saw in the last election campaign say oh we’re not going to talk about that, we don’t need to talk about that, that’s referendum. So during the last election campaign the euro was hardly debated. I think referendums are fundamentally anti-democratic in our system and I wouldn’t have anything to do with them. On the whole, governments only concede them when governments are weak.” (BBC, 2004)

²¹ “Never –en-dum”.

²² Romanian Academy, *Dicționarul Explicativ al Limbii Române*, Univers Enciclopedic Publishing House, Bucharest, 1998, p. 906.

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Ioana Muraru and Elena Simina Tănăsescu define referendum as a “procedure of democratic consultation of the people”²³. The consultation can be initiated by the state authorities or even by the nation itself, can have a purely informative purpose, for a clearer information about the public will, or a decisional propose, which imposes to the authorities that have initiated it.

Another delimitation of the concept, based on the fact that, most often, the people appear as a referee for extremely important problems or extremely general as they might be, describes the procedure as being “by excellence a way of directly exerting the state power.”²⁴

Terminologically, and not only, the institution has its origin in Roman law, where the gerund of the verb *referare* designated a procedure through which the entire elective, different from the plebs, was directly consulted regarding a precise subject, the adopted decision being therefore legitimate. Also in Antiquity, the referendum was appreciated as an excellent tool of the direct democracy, in which the electors expressed their opinion and adopted a decision directly, without any intermediate.

The concept of participative democracy cannot be considered perfection, having panacea value for all states and all government forms. In this regard, the authors quote: “The project regarding Recommendation no. 1704(2005) of the Parliament gathering referring to referendum: towards the establishment of good practices in Europe.”²⁵

This rapport was written by the Council of Europe to remove any feeling of obligation of the states in their regulatory systems specific instruments of representative democracy. This rapport was prepared based on the contribution of teachers Francois Luchaire, Andorra, Peter Van-Dijk, Olanda and Giorgio Maliverni, Switzerland. They point out that the recommendation values the intentions of the Venice Commission towards ensuring a real democracy, but the formulations are partial and they draw the attention to the advantages the referendum presents, without mentioning side effects and without referring to the positions of different states about the referendum. They say there should also be place for the ideas that emphasize the fact that the referendum, especially if it has a constraining character, can seriously limit the Parliament’s competence. It could also have unsuspected effects on the responsibility of the representative authorities, without necessarily and systematically leading to strengthening the

²³ Ioan Muraru and Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. II, C.H. Beck, Bucharest, 2006, p. 132.

²⁴ *Ibidem*, p. 134.

²⁵ www.venice.coe.int cited by Ioan Muraru and Elena Simina Tănăsescu, p. 138.

democracy in those states. Abuses being always available, they could determine the strengthening of the executive in disadvantage of the legislative, either indirectly, by circumventing the legislative by the executive by editing legal standards or by using the referendum to enhance the legitimacy of the executive, creating the so-called “plebiscitary derive”.²⁶

There is also a legal definition of the referendum offered by Law no. 3 in 2000, regarding the organization and the deployment of the referendum. Thus, “the national referendum constitutes the form and method of direct consultation and expression of sovereign will of the Romanian people regarding: revision of the Constitution, dismissal of the President of Romania, problems of national interest.”²⁷ The local referendum is also reminded, regarding problems of special interest for that certain administrative-territorial division.

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