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The Referendum in the Portuguese Constitutional Experience

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Introduction

The referendum is not part of the Portuguese political tradition. Indeed, the first proposal for the direct consultation of electors did not occur until the beginning of 1870s, almost half a century after the approval of the first Portuguese Constitution in 1822. This suggestion was not adopted, and the first referendum in Portugal was not held until the beginning of the 20th century.

After the 1910 Republican Revolution, it became possible to hold local referendums. Indeed, some even took place, albeit under very limited terms. However, somewhat ironically, the first national plebiscite was organised in 1933 by the dictatorship, *Estado Novo* (New State), which was established after the military coup of 1926. This plebiscite was held to legitimise a Constitutional text drawn up under the direction of Salazar himself. The text, which supported the authoritarian regime, applied with revisions until the regime's final downfall in 1974. The plebiscite of 1933 was the first experience of a national referendum in Portugal and, given its non-democratic character, it tainted the image and notion of the referendum (in the eyes of Portuguese democrats in particular) for years to come.

In the early 1960s, when the regime engaged in colonial wars against the liberation movements of Angola, Guinea-Bissau and Mozambique, some sectors suggested an appeal to the referendum as a potential means of resolving problems that had no military solution. For some, the referendum would be a road to self-determination. For others, it would legitimise colonisation. However, neither the Portuguese regime nor the liberation movements were interested in that kind of solution. The regime insisted on the war, even though no end was in sight, and both the Portuguese opposition and the liberation movements believed that the liberation of the colonial territories was only a matter of time.

After the 1974 Democratic Revolution, the idea of a referendum resurfaced regarding two central issues of Portuguese political life: decolonisation and the Constitution. Some sectors opposing the recognition of the independence of former Portuguese colonies claimed that referendums could aim at, and allow for, federative solutions as an alternative to independence. However, these suggestions were ephemeral, since the way to independence had already proved itself to be irreversible. Furthermore, such a solution was unacceptable to the liberation movements, and was not supported by either the revolutionary military or

democratic forces in Portugal. Curiously, many years later, the former Portuguese colony of East Timor arrived at independence through a referendum, achieving its liberation not from Portuguese colonial rule, but from Indonesian occupation that lasted between 1975 and 2001.

Within Portugal itself, the referendum flag was brandished by the opponents of the 1976 Constitution, who tried to use a plebiscitary means to promote a change in the Constitutional order. The defeat of this attempt in the 1980 presidential election created the conditions for a peaceful acceptance of the referendum as a complementary device of representative democracy. Thus, the successive Constitutional revisions allowed for three different types of referendums to take place: the local referendum in 1982, the national referendum in 1989 and finally the referendum in the autonomous regions in 1997.

From 1990 onwards, the question was not whether referendums were possible, but the circumstances under which they should be held. Three main issues mobilised support for referendums: the ratification of the European Union treaties by Portugal; the decriminalisation of abortion; and the creation of administrative regions. Since the approval of the Maastricht Treaty in 1992, demands for European treaties to be ratified by referendums have been a constant feature of Portuguese political life. However, no referendum has ever been held in this context. On the other hand, the decriminalisation of abortion was considered by referendums in 1998 and 2007, and the creation of administrative regions was also submitted to a referendum in 1998.

Therefore, if it is true that the referendum in Portugal does not enjoy a strong tradition, it is also true that several political and Constitutional controversies have involved debates about whether or not to hold a referendum. As such, the circumstances in which national and local referendums are held make useful case studies, the relevance of which we shall try to demonstrate in this work. After approaching the theoretical basis of the referendum and its expression in political thought and practice, we shall develop in detail the theme of the referendum in Portuguese policy. The starting point will be the advent of liberal Constitutionalism with the 1820 revolution.

Firstly, we shall draw on the historical evolution of the Portuguese Constitutional experience, focussing on the referendum proposals introduced in each period, even those that did not formally materialise. This evolution has three distinct parts: Monarchic Constitutionalism (1820-1910); the First Republic (1910-1926); and the

dictatorship of the New State (1926-1974), during which the Constitutional plebiscite of 1933 took place.

The debates surrounding the potential use of referendums to resolve colonial issues, and to facilitate or stall the decolonisation process, will be considered in detail. To begin with, these will be analysed through a close discussion of the hypothetical referendums regarding the Portuguese colonial statutes that were proposed by some voices in the early 1960s. After that, reference will be made to the attempts to avoid the decolonisation process by drawing on a referendum. This section will focus on how this was implemented by each of the former colonies on their road to independence. The case of East Timor deserves a special reference, because it was militarily occupied by Indonesia in 1975, a few days after its declaration of independence, eventually winning back its independence precisely by means of a referendum held in 1999 under the aegis of the United Nations.

The main aim in this study is to analyse the role of referendums in Portuguese democracy between 1974 and 2011. The first issue under analysis will be the Constitutional referendum, including the proposals which aimed **a)** at approving a provisional Constitution by referendum (1974), **b)** at submitting the approval of the Constitution to a referendum after its passing in the Constituent Assembly (1976), **c)** at changing the Constitution by referendum (1980), and **d)** at enshrining the referendum as a normal procedure of Constitutional revision.

Afterwards, the experience of local referendums, which the Constitution has permitted since 1982, will be discussed. All local referendum proposals will be discussed, including those that were formally considered, and the four local referendums that were actually held. Reference will also be made to the Constitutional and legal provision that allowed for the holding of referendums in the autonomous regions of the Azores and Madeira, which has not had any practical consequence until now.

Particular attention will be paid to national referendums. Reference will be made to their inclusion in the 1989 Constitutional revision and the law of 1991. After this first phase, there will also be reference to the unsuccessful draft referendums presented in advance of the 1997 Constitutional revision, and the passing of the referendum law of 1998, which preceded the first national referendums of the democratic period. This section will conclude with a synthesis of the subsequent legal evolution, with reference to every draft referendum that were presented.

A detailed analysis will consider each of the three main questions underlying the debate on the referendum in Portugal during the last decades: the referendum on the decriminalisation of abortion; the referendum on the creation of administrative regions in the Portuguese mainland; and the referendum on the participation of Portugal in the European integration process. Each of these themes will be treated in a specific section. Finally, a global account of the experience of the referendum during the Portuguese democracy will be presented and some conclusions will be drawn on the future of referendum in Portugal.

The present work will focus on referendum proposals actually made, regardless of their formal requirements. However, particular attention will be paid to the draft referendums formally introduced in the Portuguese Parliament in each historic period. As Portugal's central legislative body, the Parliament has unavoidably been the centre stage for political debate. It bears a special responsibility in the discussion and voting on all decisions about whether or not referendums should be held. Therefore, a significant part of the present research is based on the systematic survey and study of the parliamentary debates on referendums in general and each draft referendum in particular. The activities of the Portuguese Parliament in relation to referendums are, in fact, the main focus of the present work.

This is the first global study of the referendum in Portugal. At the beginning of the 1990s, some works were published following the Constitutional and legal sanctioning of national referendums. They analysed the referendum as an institution, and the terms of its application at the national level. However, the first national referendum occurred only in 1998, and few articles in scientific journals were published on the results of this referendum, or other national referendums held since then. In fact, there are no scientific works on the referendum in Portugal, tracing the historical evolution of that institution from the beginning of the 19th century until now. Thus, the parliamentary debates of the 19th century on referendums are presented here for the first time, alongside the first analysis of local referendums during the First Portuguese Republic (1910-1926).

This is also the first work referring specifically to the role of the referendum in the Portuguese decolonisation process, before and after the 1974 Revolution. Regarding the democratic regime, this is also the first work to contemplate all the parliamentary debates and proposals on the referendum in Portugal, and the only comprehensive academic analysis of all the local and national referendums ever held in the country. In these

circumstances, this thesis seeks to fill a significant gap in legal and political theory, and in philosophy studies in Portugal.

Which leads me to a few words on the reasons for the submission of this work in the Netherlands and at Leiden University in particular. Despite their significant Constitutional differences, Portugal and The Netherlands have curiously close positions regarding referendums. The referendary institution is recognised in both Constitutional orders, at local and national levels, but in both cases, the use of referendums has been very scarce.¹ There have been some experiences at a local level, on relatively unimportant questions, and a few experiences at a national level with controversial results, in regard to both participation and political consequences. Besides, the result of the Dutch referendum on the European Constitutional Treaty was one of the decisive reasons to avoid a similar referendum in Portugal, and also to avoid a referendum on the Lisbon Treaty in both States.

The search for a scientific vision of the referendum in the present work, avoiding Portuguese political controversies, seems to indicate The Netherlands as a European State well chosen for that purpose. In addition, submission at Leiden University is a real privilege, given the great prestige of this ancient institution and its reputation for quality, which is acknowledged around the world. The precious support of Professor Grahame Lock in Leiden, and Professor João Bettencourt da Câmara as co-supervisor in Lisbon, guarantee that this research meets the most exacting academic and scientific standards.

¹ On the referendum in Dutch Constitutional experience before the referendum on the European Constitutional Treaty, see Holsteyn (1996).

