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The Referendum in the Portuguese Constitutional Experience

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Part I

The Referendum in Practice and Theory

1. The Origins

The word 'referendum' originates in the Latin expression *ad referendum*, which was used in diplomatic affairs to name an agreement concluded by a deputy under reserve of ratification. Initially, the referendum was primarily an act of control: an instrument through which the people, as represented, could ratify the acts of the assembly as representative. In this sense, the referendum appears as something related to the imperative mandate (Vega, 1985, p. 113) and its development is linked to the exercise of direct democracy (Duarte, 1987, p. 199).

Some authors find the distant ancestors of the referendum in Ancient Greece and Rome. The Spanish author José Luís López González (2005, p.12) refers to Athenian democracy, after the Cleisthenes reforms (508 BC) as the classic example of direct democracy, having the *ekklesia* (popular assembly) as the main structure of government. The first demonstrations of direct democracy came from the political organisation of the Greek city-States, where the citizens gathered to decide on the most important matters of the city. This model of decision-making was obviously impossible in communities of significant size and, as Gonzalez observes, one should not excessively idealise the classic formulas of direct participation. Important social sectors, including slaves, women, foreigners and citizens with less economic power, were excluded from the decision-making processes.

Other distant origins of the referendum were probably the deliberative practices of the plebs during the Roman Republic. The plebiscite, or plebs, decree was the method used to approve certain types of laws binding only to plebeians (González, 2005, p.12). The Portuguese author Jorge Miranda (1996a, pp. 232-233) refers to the *plebiscitum* as a type of *leges rogatae*, decisions made at diets that, after 287 BC (*Lex Hortensia de plebiscitis*), became binding for all. The Middle Ages also had some methods of direct democracy in the Swiss cantons, where the free men gathered in *Landsgemeinde* to discuss and decide on the main problems of their communities (Duarte, 1987, p. 200).

Though Swiss cantons made decisions by referendum two hundred years earlier, the word referendum, in its current meaning, appeared in English only in the 1880s, to denote the idea of putting issues

directly to the electorate (Butler & Ranney, 1978, p. 4). This was defined by Jorge Miranda (1996a, p. 231) as the popular vote which used individual and direct citizens' suffrage to reach a political or administrative decision, as well as an indication to the government or administrative bodies, or even for other constitutionally or legally established ends.

Since its inception, direct democracy has struggled with the question of how to link citizens to political decision-making procedures. This led to the appearance of institutions like the referendum. It was through popular consultation that the referendum tried to conciliate the exercise of power by representation and its direct exercise by the people (Duarte, 1987, p. 200). However, according to David Butler & Austin Ranney (1978, p. 5), there is little benefit in going back to the distant origins of referendums in the assemblies of Greek city-States and the *plebiscitum* in Rome, or even in the cantons of 15th century Switzerland, or in France, which legitimised its annexation of Metz by a vote in 1552. The first examples of modern referendums are found in the popular votes by which, starting in 1778, some American States adopted and altered their Constitutions. Other early examples include the efforts of *Girondins*, and subsequently Napoleon Bonaparte, to demonstrate support for successive annexations and key Constitutional revisions.

2. Direct and Representative Democracy in the United States

Some commentators believe that, in 1778, the commonwealth of Massachusetts became the first polity in history to use the Constitutional referendum (Ranney, 1978, pp. 68-69). In 1777 the legislature drew up a Constitution, which was delivered to all town meetings, and stipulated that this Constitution would take effect only if it were approved by two-thirds of the voters. The draft was defeated, and only in 1780 was a new proposal accepted. In 1779, the Constitution of New Hampshire was also rejected in a referendum, and was only approved in 1783. But, of course, what interests us here is the resort to the referendum rather than its particular outcomes.

In the following years, other Constitutional referendums were held in the United States: Rhode Island in 1788, Maine in 1816, Mississippi in 1817, Connecticut in 1818, and Alabama in 1819. Therefore, referendums have been used for the approval of Constitutional amendments in most States since their very inception as States of the Union. Presently, 49 of the 50 States may use it, Delaware being the only exception (Ranney, 1978, p. 69). The Constitutional referendum was the

first device of semi-direct democracy established in the federated States, and the only one until the end of the 19th century, when other instruments of direct democracy (referendums, statutory or by citizen's initiative) were introduced mainly in the western States, until they became frequent forms of political and legislative decision-making.

However, although the holding of referendums became a political device at State level, their use did not extend to the Union itself. In fact, the Constitution of the United States of America does not include any form of direct or semi-direct democracy. Representative government was enshrined as an absolute principle of the Union, thus establishing the checks and balances necessary to prevent the supremacy of factions, and to defend the rights of minorities. These considerations were thought to be essential to the survival and cohesion of the Union.

The argument that referendums are only possible in small communities is easily denied if we consider that some very large States uses referendums routinely. The essential argument for refusing semi-direct democracy devices was the challenge of uniting States with very different interests that should be democratically respected. The concept of common interest supported by Madison was based on the diversity of human society, and very far from the notion of the general will of the people espoused by Rousseau in the Social Contract (Marques, 2011, p. 122).

For the Founding Fathers, the problem was not the territorial dimension of the Union, but the very nature of representative democracy. This issue is stressed and its implications discussed by João Bettencourt da Câmara, who notes that Madison in the United States, like Sieyès in France, considered it quite clear that representative democracy was radically different from direct democracy, affording a higher form of representation. Direct democracy was, in this sense, false democracy, as opposed to the true form, present only in representative democracy (Câmara & Martins, 1997, pp. 169-170).²

In the Federalist Paper No. 10, James Madison criticised what he called a pure democracy, a *'society consisting of a small number of citizens who assemble and administer the government in person, which can admit of no cure for the mischiefs of faction. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political*

² See also Câmara (1998, pp. 76-122).

rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions’.

The main difference between that ‘pure’ but undesirable democracy and the desirable republic was precisely the advantages of the representative government: ‘the delegation of the government to a small number of citizens elected by the rest’. The effect of this difference is ‘*to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves*’.³

In the Federalist Paper No. 51, Madison and Hamilton stressed ‘*the great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. If a majority be united by a common interest, the rights of the minority will be insecure*’.⁴

In fact, as João Bettencourt da Câmara stresses, having in mind the Federalist Paper No. 63⁵, the main difference between the United States and the ancient Greek republics, in Madison’s view, was the total exclusion of the people, in their collective capacity, from any immediate and direct share in the government (Câmara, 1997, pp. 170-171).

3. The Referendum in the French Revolution

3.1. Rousseau versus Montesquieu

In Europe, the referendum began its development as a widespread institution following the French Revolution. It was then that the confrontation between the theories of representative democracy and direct democracy, having Montesquieu and Jean-Jacques Rousseau as figureheads, took place (Urbano, 1998, p. 8). At the end of the 17th century, thinking on ownership and representation of sovereignty was divided in two theoretical tendencies: Montesquieu’s national sovereignty

³ Available at: <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>, p. 44 [accessed 12 June 2012].

⁴ Available at: <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>, p. 233 [accessed 12 June 2012].

⁵ Available at: <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>, pp. 280-286 [accessed 21 June 2012].

and representative government, and Rousseau's popular sovereignty and rule by direct democracy. The political model built by Montesquieu was based on the idea of representation. He considered the mass of the people incapable of taking political decisions by themselves, and that the institutions of direct democracy held the danger of plebiscitary perversion and were in direct contradiction with the theory of national sovereignty.

The institution of referendum had its theoretical grounds in the *Social Contract: sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation; it is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified is null and void – is, in fact, not a law* (Rousseau, 1762/1973, p. 240).

Neither Montesquieu nor Rousseau expressly foresaw any form of popular vote in the manner of the modern referendum. However, Rousseau was one of the first to express the logical need for direct popular participation as a necessary condition for the creation and maintenance of a democracy, and for the legitimation of political order. In Rousseau's works, there are no specific references to the popular referendum. His kind of democracy was closer to that of Athenian assemblies, but the idea of a modern referendum underlies his conception of the process of government (Urbano, 1998, pp. 12-14). In the event, Article 6 of the *Declaration of the Rights of Man and of the Citizen* expressed a compromise, hedging between a solution based exclusively on representation, and the admission of the future enshrinement of devices typical of semi-direct democracy, like the referendum. Law is the expression of the general will and every citizen has a right to participate personally, or through his representatives, in its foundation (Rodrigues, 1994, p. 57).

3.2. Condorcet's Contribution

In the French Revolution, Condorcet and Sieyès led opposing sides in the debate between direct and representative democracy. Condorcet was the first supporter of semi-direct democratic institutions, proposing several measures inspired by Rousseau's ideal. These were aimed at correcting potential dysfunctions of the representative system, which was the form of government he supported. The representative system should be the basis of political organisation, but it should be complemented by corrective means of direct democracy (Duarte, 1987,

pp. 227-228). These measures, which in fact were the principles of referendum and popular initiative, were received in his *Girondist* Constitutional draft, and introduced at the Convention on 15 and 16 February 1793 (Urbano, 1998, pp. 16-18).

As Anne-Cécile Mercier (2003, p. 487) suggests, Condorcet had the courage to resist surrendering himself unconditionally before the representative system. With the right of popular initiative, his purpose was to adapt direct democracy to the geographic constraints of large States. The draft was received with indifference, but sparked confrontations between *Girondists* and *Montagnards*. The victory of the latter condemned the proposal to defeat.

Condorcet's concept was based on the idea that the first of all rights was the natural and primitive equality of Man. From that descends the right of suffrage, but also the right to participate in legislative processes through a system of popular initiatives. These turned popular sovereignty into something real (Mercier, 2003, p. 489). Condorcet was an admirer of the American Constitutional experience, particularly of the Pennsylvanian Constitution. The *Girondist* Constitution was the result of the systemic union between the principles of New England and the French philosophy of the 18th century (Mercier, 2003, pp. 490-491).

Condorcet's work was based on the conviction of the superiority of direct democracy, which he aimed to put in practice in a large nation. He went further than the Constitutional referendum in an essay written in 1789 titled '*Sur la nécessité de faire ratifier la Constitution par les citoyens.*' In it, he gave people the power to initiate a Constitutional dialogue between themselves and the Constituent Assembly, and he made reference to a desirable widening of the referendum to legislative matters (Mercier, 2003, p. 493).

The Constitutional draft drawn by Condorcet included a Title VIII on the 'censure of the people on the national representation acts'.⁶ This title gave fifty citizens, who lived in the circumscription of the same primary assembly, the right to scrutiny, along with Constitutional, legislative and administrative acts, and the right to initiate the procedure to change an existing law or to enact a new law.

For that purpose, these fifty citizens had the right to gather their primary assembly the Sunday following the submission of the draft or

⁶ Available at: <http://mjp.univ-perp.fr/france/co1793pr.htm#8> [accessed 10 February 2011].

subject. The discussion would continue for a week. On the following Sunday, the members of the primary assembly would decide if there should be any deliberation on the proposed subject. In the case of an affirmative vote, all the primary assemblies of the same commune would be called in order to deliberate on the same subject. If the majority of the citizens of the commune decided positively, all the primary assemblies of the department would be called to vote on the same subject. If the majority of the primary assemblies of the department voted in favour, the proposal would be submitted to the legislative body for consideration.

The legislative body should then decide within 15 days whether a deliberation should be taken. In the case of an affirmative vote, the proposal would be addressed to the representatives, who should decide on the concrete proposal within the next fifteen days. If the legislative body refused to decide, or rejected the proposal, all the primary assemblies of the whole territory would be called to vote directly on the legislative body's decision. If that referendum contradicted the decision of the legislative body, the latter should be dissolved, new elections should be held, and the representatives who opposed the popular will would not be eligible for re-election. The new assembly would decide again on the subject.

For a Constitutional revision, the citizens would have the right to call a National Convention for that purpose using the same process. However, the legislative body should always consult the primary assembly directly, submitting the draft amendments to popular suffrage. If citizens rejected the draft, it should be changed and submitted again to the people. In case of a second rejection, the Convention would be dissolved, and the people would decide directly if a new convention should be called.

This right of initiative was defeated in the Convention. However, the *Montagnard* Constitution of 1793 included some provisions of direct democracy.⁷ Article 115 enshrined a Constitutional referendum by popular initiative. If the absolute majority of departments, the tenth part of their regularly formed primary assemblies, demanded a revision of the Constitution or an alteration of some of its articles, the legislative body was obliged to gather all the primary assemblies of the Republic in order to ascertain whether a national convention should be called. Articles 58 to 60 provided that all proposed laws should be printed and sent to all

⁷ Available at:

http://oll.libertyfund.org/index.php?option=com_content&task=view&id=862&Itemid=264 [accessed 10 February 2011].

the communes of the Republic. If, 40 days after sending the proposed law, the absolute majority of departments, one-tenth of all the primary meetings legally assembled by the departments, had not protested, the bill would be accepted and would become a law. In the event of a protest, the legislative body should call for primary meetings (Guedes, 1978, p. 160; González, 2005, p. 17).

Moreover, the 1793 French Constitution (Year I), as well as the 1795 (Year III) and 1799 (Year VIII) Constitutions were ratified by plebiscites (Wright, 1978, p. 139). The first referendum in France took place on 24 June 1793 to approve the *Montagnard* Constitution.

In an article criticising the Constitution of Year I, under the title '*Aux citoyens français sur la nouvelle Constitution*', Condorcet proposed what he believed should be the basis of a new social organisation at that moment of the Revolution. This included the absolute equality among citizens, the unity of the legislative body, the necessity to submit the Constitution to the immediate acceptance of the people, and the need to establish periodic assemblies that could amend the Constitution. It also provided the people with the means to call these assemblies when they felt their freedom was being threatened or their rights were violated by the established powers. The idea, above all, was to organise a way for the people to express their voice on the need for any reform, therefore avoiding both oppression and the need for insurrection (Mercier, 2003, p. 504).

Condorcet intended to make discussions and votes prevail over arms and violence. This revealed a different logic from the reasons for supporting the popular initiative in other countries, particularly in the United States at the end of the 19th century, where the central worries related to the dysfunctions of the representative system (Mercier, 2003, p. 505).

3.3. The *Bonapartist* Referendums

The use of popular consultations in France entered a second phase at the beginning of the 19th century. The referendum was used by Napoleon Bonaparte to ratify the Constitutional arrangements that made him consul (February 1800), consul for life (May 1802) and emperor (May 1804). The restoration of the empire was also ratified by a referendum in May 1815 (Wright, 1978, p.139).

Vincent Wright (1978, p. 140) refers to the way that the reputation of the referendum as a *Bonapartist* device was reinforced in the

19th century when Louis Napoleon, nephew of Napoleon I, used it to legalise and legitimise his coup d'état of 21 and 22 December 1851, his restoration of the empire (21 November 1852), his annexation of Nice and Savoy (15 and 22 April 1860), and his liberal Constitutional amendments (8 May 1870). The French Constitutions of 1852 (Article 6) and 1870 (Article 13) gave the President or the Emperor the faculty of appealing to the people.

One possible reaction to the *Napoleonic* plebiscites was that the 1875 French Constitution of the III Republic did not include any type of referendum. Indeed, referendums were to remain unmentioned until the end of World War II.

4. The Swiss Experience

In Switzerland, the referendum was used at the end of the Middle Ages in several cantons, most notably in Bern. In the 17th and 18th centuries it was suppressed by the development of a form of oligarchic government. It reappeared in the 19th century, first in isolation at the time of a national vote on a Constitution for the Swiss Republic, and then more generally in the liberal regeneration around 1830 (Aubert, 1978, p. 39).

In June 1802, the Swiss people voted for the first time on the text of the Helvetic Constitution. It was clearly announced that abstentions would be considered as affirmatives. The Constitution was accepted with 92,500 votes against and 72,500 votes in favour because there were 167,000 abstentions (Aubert, 1978, p. 39).

In Switzerland, the tradition of direct democracy helped to propagate the idea of referendum. The *Landsgemeinde* drew inspiration from the pact that united the three *Waldstätten* (Schwyz, Uri and Unterwald) in the 13th century. Its origin was not Athenian but Germanic. The Germans had a strong tradition of natural goods management by democratic and communitarian means (Mercier, 2003, p. 506).

The Constitution of the Republic of Geneva, voted by the citizens in February 1794, gave the people the right to approve or reject laws and edicts. Drafts made by representatives could be submitted for approval or rejection by the people, if required by 3,500 electors within 30 days of their publication (Rodrigues, 1994, p. 60).

Most cantons accepted the custom of submitting their Constitutions to the people. When Switzerland became a federation in 1848, the new Constitution was submitted to the people in the great

majority of cantons (Aubert, 1978, p. 39). Jorge Miranda (1996a, p. 240) notes that the scheme present in the 1848 Federal Constitution of Switzerland, with mandatory Constitutional referendums and optional legislative referendums required by the citizens, remains to the present day. According to José Luís López González (2005, p. 16), the institutions of direct democracy were enshrined in the Swiss Federal Constitution – such as in the canton's Constitutions – as a way to balance the transfer of powers from the cantons to the Federation.

Since 1848, and particularly since 1870, the Swiss have accepted the principle that almost every major national decision can become the subject of a popular vote (Butler & Ranney, 1978, p. 5). From 1848 until the end of the 19th century, 55 referendums took place in Switzerland at a federal level. Between 1900 and 1945, 87 referendums were held.

5. Other Experiences in the 19th Century

In the second half of the 19th century, a boom of referendums took place in the North American States and in Switzerland. Maria Benedita Urbano (1998, p. 24) sees common reasons for this development: the democratic traditions of both federations, and the federal structures, with their pronounced decentralisation of political power.

Butler & Ranney (1978, p. 6) explain that referendums are widely used only in Switzerland and a dozen States of the American Union, because only in these polities was there longstanding pre-referendum experience with direct government using face-to-face assemblies of citizens. Some small Swiss cantons have regularly made decisions by *Landsgemeinden* since the 13th century. Similarly, New England towns have conducted their affairs by town meetings since the 17th century. In the 19th and early 20th centuries, such assemblies were impractical in the pioneer western territories and States. Thus, referendums came into being as useful ways of adapting the principles of a direct democracy to the limitations and necessities of large populations.

Furthermore, the referendum was used in the 19th century to resolve territorial questions. In the case of the Italian Unification, referendums were held in Lombardy, Tuscany, Sicily, Naples, Venice and Rome between 1840 and 1870. The same happened in Greece, Prussia and Finland.

Until the end of the 19th century, the referendum was scarcely used in other countries and for other purposes. Only 13 States held referendums. From the first referendum in France, in 1793, until the end

of 1899, Switzerland held 56 referendums (55 since 1848), but the remaining sovereign States only held 24, including 10 in France. The others were in Greece, Romania, Malta, Canada, Australia, New Zealand, Mexico, Peru, Ecuador, the Dominican Republic, and Liberia.

However, in the transition from the 19th to the 20th centuries, the use of referendums and the theoretical debate surrounding their use, increased substantially. The referendum was introduced into the political practice of many countries, and the subject of the referendum interested some distinguished authors in the fields of political science and Constitutional law.

6. The Referendum in the 20th Century

6.1. The Theoretical Debate

The highest moment of referendums in the world was also the moment when this institution was most criticised. The contradiction between the referendum and representative democracy was stressed. However, it was also the time of an intensive debate about the advantages and disadvantages of the referendum, either as an instrument of semi-direct democracy against the representative government, or as a useful instrument to correct some of its recognised dysfunctions. The framework for this debate was provided by the philosophical conceptions that came from the 17th century, and by the practice of some referendary experiences.

According to Butler & Ranney (1994, pp. 11) democrats have, since the 17th century, divided into two main schools of thought regarding the institutions required to enact the democratic principles of popular sovereignty, political equality, popular consultation and majority rule. One might be called the participationist or direct-democracy school, led by such classical theorists as Jean Jacques Rousseau and such modern theorists as Benjamin Barber, Lee Ann Osburn and Carol Pateman. Opposing this conception is the representationist or 'accountable elites' school of democratic theory, led by such writers as John Stuart Mill, Henry Jones Ford, Joseph Schumpeter, Elmer Eric Schattschneider and Giovanni Sartori.

Proponents of direct democracy have traditionally stressed Rousseau's objection to representative government: popular sovereignty cannot be subject to representation. As soon as the people transfer their powers to representatives, giving them a non-imperative mandate, they lose their freedom. Butler & Ranney (1994, p. 12) summarized the

arguments of this school as follows: **1)** the only way to achieve the ideal that political decisions be made in full accordance with the wishes of the people is to ensure that those wishes are expressed directly, not mediated or interpreted; **2)** the higher end that democracy seeks is the full development of each citizen's full human potential, which can be realised only by their direct and full participation in public affairs, not by delegating their civic powers to representatives.

On the other hand, the writers from the school of democratic theory argue that the dream of direct democracy is relevant only for polities so small that all citizens can meet face-to-face in one place at one time, and when all citizens can spend all their time on political decisions. The only way to achieve that dream is through the election of representatives who represent their constituents in lawmaking assemblies and, at the end of their terms, are held accountable by their constituents for their performance in the use of their temporary powers (Butler & Ranney, 1994, p. 13).

According to Butler & Ranney (1978, p. 24), the main argument for referendums consisted of two basic propositions: **1)** the popular and universal legitimation of the decisions, given that all political decisions should be as legitimate as possible and **2)** that direct democracy was the highest degree of legitimacy, since the decisions are made by the direct, unmediated vote of the people. For the supporters of the democratic advantages of referendums, people may or may not trust legislators, cabinets, and prime-ministers, but they certainly trust themselves most of all, and decisions in which popular participation is direct and unmediated by others produce more accurate expressions of their will than decisions in which they participate only by electing others who make the decisions for them (Butler & Ranney, 1978, p. 25).

From the 19th to the 20th century, the main arguments in favour of referendums were stated by Swiss writers like Simon Deplöige (1892) or William Rappard (1912), and particularly by the leaders of the Progressive Movement in the United States (Butler & Ranney, 1978, pp. 26-27). The Progressive Movement operated in most American States from the 1890s to World War I, having as principal leaders luminaries like Robert M. La Follette of Wisconsin, Hiram Johnson of California, Theodore Roosevelt of New York, and Woodrow Wilson of New Jersey. Their main purpose was to introduce several reforms in order to increase the participation of ordinary citizens in governmental decisions. The referendum was one of these reforms (Butler & Ranney, 1978, p. 27).

The progressive case rested upon two beliefs. The first was their faith in the unorganised, free individual. The second was hostility towards intermediary organisations. Any organisation that seeks to interpose itself between the people and their government is bound to subvert democracy and the public interest. When a group organises itself permanently, and seeks to influence government decisions on a wide range of issues, it will inevitably distort the popular will and promote its special interest over the public interest (Butler & Ranney, 1978, pp. 27-28).

The synthesis of benefits of direct democracy according to the progressives, were the following: **a)** any issue can be put on the law making agenda; **b)** decisions are brought close to the people; **c)** decisions are always made in the clean open air; **d)** popular will is accurately expressed; **e)** the end of apathy and alienation; **f)** public interest is served; and **g)** the citizens' human potential is maximised (Butler & Ranney, 1978, pp. 29-30).

The influence of the progressives in the United States had profound consequences. It was precisely from the beginning of the 20th century, as already seen, that the referendum was to become a common device in several States of the Union. Between 1906 and 1918, nineteen States adopted the referendum for Constitutional amendments or ordinary legislation (Ranney, 1978, p. 69).

Meanwhile, in Europe, some authors criticised the use of the referendum, concerned about its opposition to representative democracy. A. Esmein (1894), in a work published in the first issue of the '*Revue du Droit Public et de la Science Politique en France et à l'Étranger*', considered an illusion the idea that the referendum and the representative government could be superposed without inconveniences. According to him, the referendum could prevent bad and arbitrary laws, but it could also be an invincible obstacle to a good legislative process. The best laws, the most useful to national progress may come up against popular prejudices and thoughtlessness, sometimes due to a provision of secondary importance, hidden in some article (Esmein, 1894, p. 40). On the other hand, the possibility of a referendum decreases the responsibility of legislative assemblies, and consequently their ability to usefully discuss legislation (Esmein, 1894, p. 41). Later some other authors, including Georges Burdeau (1950, pp. 13-14) and Mirkine-Guetzévitch (1931), called into question the need or the opportunity for the referendum in the political context of the time.

In *The Case Against the Referendum*, published by the Fabian Society in 1911, the British author Clifford Sharp summarised the main arguments against the referendum, as follows: **a)** the weakening of the power of elected authorities; **b)** the inability of ordinary citizens to make wise decisions; **c)** the impossibility to measure the intensity of belief; **d)** the making of forced and not consensual decisions, while the true democratic decisions were not competitive; **e)** the danger for minorities; **f)** the weakening of representative government. He summed up by saying there was no particular reason to suppose that the adoption of the referendum in England would result in special advantage to any party. It must be admitted that when the unit of government is small and the population homogeneous in character, the advantages of the referendum are very considerable. But when the unit of government is large and the population heterogeneous, the inherent defects of 'majority rule' assume overwhelming importance (Sharp, 1911, pp. 18-19).

The scepticism of the strongest supporters of representative government regarding the advantages of the referendum does not mean that all those who criticised representative government as an expression of the popular will supported the referendum as a viable or suitable alternative. In fact, the Swiss and North American experiences never awakened great enthusiasm in Europe. Everyone considered that direct democracy, as a rule, could only be viable in small communities, not being suitable in societies with the dimension and complexity of the modern State. Furthermore, the use of plebiscites as devices to realise imperial ambitions, as in France under Bonaparte's rule, inspired some caution regarding the referendum as a means for expressing the citizens' will.

However, even among those who believed that representative government was the most democratic and effective system, there was some dissatisfaction regarding the perversions and dysfunctions resulting from the influence of the political parties. Concern was expressed that political parties captured the political system, substituting themselves for the sovereign will of the citizens. Even authors who coherently supported the representative government, from conservatives to progressives, recognised the need to correct its dysfunctions as a way to defend it.

This subject, the crisis of representative government and its divorce from citizens, which remains an ongoing concern in the 21st century, gave rise to strong criticisms at the beginning of the 20th century, particularly from Moisei Ostrogorski, who strongly criticised the influence of political parties in democratic systems. His seminal works,

Democracy and the Organization of Political Parties, contained studies of political parties in England (Volume I) and in the United States (Volume II), and were published for the first time in 1902. Ostrogorski argued that, in the modern conditions of universal suffrage, parties became oligarchic, with their bureaucratic structures aimed purely at gaining and retaining political power. Thus, parties substituted themselves for the true will of the citizens.

As Lipset (1964, p. xx) States in his *Introduction* to the North American edition of Ostrogorski's main work, the parties, which were created to promote the national interest upon some particular principle on which they all agreed, necessarily form permanent organisations staffed by professional politicians. The need to maintain the party apparatus inevitably leads parties to modify their initial principles and activities, instead favouring activities and policies that maximise financial and electoral support to the organisation. Rather than being a means to an end, parties (i.e. the perceived interests of the party elite) become ends in themselves.

The studies of Ostrogorski⁸ had a substantial influence on other European authors, including Robert Michels and Max Weber. Michels was a German Italian with a background in the socialist movement. He later became a strong supporter of Italian fascism. In his book published in 1911, *Political Parties – A Sociological Study of the Oligarchic Tendencies of Modern Democracy*, he used the German Social Democratic Party as an example of the 'iron law of oligarchy'. Michels argued that this organisational form had become endemic in the conditions of mass democracy (Michels, 2009).⁹

In his conference in Munich on 28 January 1919, *Politik als Beruf* (Politics as a vocation), Weber acknowledged the influence of Ostrogorski, making a detailed reference to his reflections about the political parties in England and in the United States and their effects on the political system. In England, the party machinery normally turned out MPs that were little more than well-disciplined 'yes men'. The caucus machine in the open country is almost completely unprincipled if a strong leader exists who has the machine absolutely in hand. Thus, the plebiscitarian dictator actually stands above parliament. He brings the masses behind him by means of the party machine, and the members of parliament are merely political clients enrolled in his following. From this

⁸ On Moisei Ostrogorski, see in Portuguese, Balão (2001).

⁹ On Robert Michels, see in Portuguese, Teixeira (2000).

viewpoint, in the United States, the spoils system means that quite unprincipled parties oppose one another. Thus, they are organisations of job hunters, designing their changing programmes according to the needs of vote-grabbing.

In post-World War I Germany, Weber saw only two options: leadership democracy with a 'machine', or leaderless democracy. He defined the latter as the rule of professional politicians without a calling, without the inner charismatic qualities that make a leader, i.e. what party insurgents usually designated as 'the rule of the clique'. At that time, in Germany, Weber perceived that the system had only the latter type of party. Also in Germany, Carl Schmitt, a steady supporter of the Nazi regime, published *The Crisis of Parliamentary Democracy*, strongly criticising the Republic of Weimar regime (Schmitt, 1988) in 1923.

The first decades of the 20th century were times of political instability and social crisis, sparking great dissatisfaction with representative democracy and the role of the political parties. The model of representative government was challenged from both the left and the right. However, these challenges did not increase support for semi-direct democracy devices like referendums. The reality was quite the reverse. In Russia, the 1917 Revolution challenged the bourgeois representative system with the first experience of a socialist State. In Italy, Spain, Portugal, Germany, and in other European States, fascism emerged from the ruins of representative governments and discredited party systems, offering the propertied classes protection from the rise of the workers' movement and against the spread of the Soviet revolution. It is significant, however, that fascism, while rejecting democracy as a political system and free elections as a method for choosing representatives, used plebiscites to assure their formal legitimacy in Italy, Germany and Portugal.

Even among the liberals, nobody wanted to replace representative democracy with any kind of semi-direct democracy. This was unanimously considered to be impossible in large communities. Not even Ostrogorski supported referendums as an alternative to the dysfunction of parties systems, perhaps thinking that their control over the political system could be further exacerbated by the referendums. The solution proposed by Ostrogorski was a form of temporary parties, supporting concrete causes and extinguished once they achieved their goals. However, debates about the advantages and disadvantages of referendums were kept alive inside the liberal camp, with several authors supporting their importance as a useful supplement to representative democracy.

This was the case of Albert Venn Dicey, who made an important contribution to the theory of referendums. Although he initially opposed the introduction of referendums (Qvortrup 2005, pp. 46-51), describing them in 1884 as one of the most dubious devices of Swiss democracy, he gradually changed his view. His primary concern was the lack of a Constitutional check on the powers of the House of Commons, which increased the possibility of a fundamental change passing into law, even if undesired by the majority of the nation. Dicey's main argument for introducing the referendum was a profound dissatisfaction, and frustration, with the practical implementation of the principles of representative government, which he hoped (and believed) could be remedied by elements of direct democracy.

Dicey did not view the referendum as an antidote for all the deficiencies of parliamentary government, nor did he believe that representative government could be replaced. The referendum was merely a popular veto, limiting the parliamentary system and balancing the powers of the legislative and executive bodies provided both could appeal to it. It would also set boundaries on the influence of the parties in political life. According to Dicey (1915, p. xcii), parliamentary government had suffered an extraordinary decline. The causes were the same referred by Ostrogorski. Party government inevitably gives rise to partisanship. At the very least, this produced a machine that might engage in political corruption, thus distorting the work of the fairly-elected legislature and misrepresenting the permanent will of the electors (Dicey, 1915, p. xciv).

However, Dicey did not ignore the arguments against the referendum. In England the introduction of the referendum would mean the transfer of political power from knowledge to ignorance. The Parliament contained a far greater proportion of educated men, endowed with marked intellectual power and trained in the exercise of high political virtues, than would be found among electors assembled merely by chance (Dicey, 1915, p. xciv). The referendum might indeed often stand in the way of salutary reforms, but it might on the other hand delay or prevent innovations condemned by the weight both of the uneducated and of the educated opinion (Dicey, 1910, pp. 551-552). The same arguments were used by James Bryce (1921, p. 159): while it was possible to achieve consensus in the Parliament, the same was not possible by referendum, because it did not give any opportunity to amend a measure or arrive at a compromise upon it; in other words, it is the bill, the whole bill, and nothing but the bill.

For these reasons, Dicey (1915, p. c) recommended that the referendum should be used purely as a means for the people to veto legislation passed by the House of Commons. According to him, the referendum, if introduced in England, would be strong enough to curb the absolutism of a party possessed of a parliamentary majority. The referendum is also an institution that promises some considerable diminution in the most patent defects of party government and, if judiciously used, might revive faith in the parliamentary government by checking the omnipotence of partisanship (Dicey, 1915, p. xcvi).

In a similar vein, authors like Leon Duguit (1948, pp. 148-149), Maurice Hauriou (1929, pp. 134, 144-146, 547, 549-550) and mainly Carré de Malberg (1931, pp.15-27), considered that the referendum was not only perfectly compatible with representative democracy, but even a necessary complement to it, in order to limit the absolute power of parliaments, governments and political parties. Carré de Malberg even considered that the referendum should work as an element to moderate the absolute supremacy of parliament, joining the advantages of a parliamentary system and democracy. The representative powers of the parliament would remain, but they would be constrained by the powers of the represented people.

Butler & Ranney (1994, pp. 14-15) also stressed the idea of the referendum as a supplement, rather than an alternative, to the representative government. Representative government must, and should, be the basic institutional form for democracy in any densely populated community, such as modern nation States. But representative democracy can be improved by permitting, under certain conditions, the direct votes of citizens to confirm, reject, or even make laws.

Therefore, those who supported the referendum as a useful supplement for representative democracy excluded the referendum by popular initiative, i.e. referendums invoked by the will of the citizens who gathered a certain number of signatures. In such cases, the referendum could be indeed a challenge to representative government. However, the use of the referendum decided by parliament, i.e. suggested and approved by the main parliamentary parties, could reinforce the popular legitimacy of certain decisions which might otherwise lead to divisions inside the parties. The referendum would be a pacifying element inside the parties, preventing the risk of divisions on fragmenting issues.

The main parties could decide if, how and when the referendum should be called. However, by delegating the decision on the submitted

issue to the electors, they would escape the responsibility of the choice. In this manner, the risk of discredit of parties or governments by referendums could be limited, but could not be avoided entirely. For example, the referendums of the 21st century on the Treaty Establishing a Constitution for Europe were implemented to strengthen the legitimacy of the European integration, but became an instrument for its rejection and highlighted the chasm between rulers and citizens on this issue.

In summary, the main benefits anticipated from referendums were the increase of legitimacy and participation. Democratic regimes rely on the consent of citizens rather than on the coercive power of governments to ensure the rule of law. One of the greater virtues of referendums derives from the belief of most ordinary people that decisions they make themselves are more legitimate than those made by public officials, even if they are elected public officials. Direct popular decisions made by referendums have a legitimacy that indirect decisions by elected representatives cannot match. This does not mean that all decisions should be made by direct vote of the people. It does not even mean that decisions made by referendums are wiser or more prudent than those made by representatives. It means only that when a representative democracy wishes a particular decision to be made with maximum legitimacy, it would do well to make that decision by referendum (Butler & Ranney, 1994, pp. 14-15).

However, there are consistent arguments against referendums in democracy: **1)** ordinary citizens have neither the analytical skills nor the information to make wise decisions on technically complex issues; **2)** decisions by elected officials involve weighing the intensity of preferences and melding the legitimate interests of many groups into policies that will give all groups something of what they want; **3)** decisions made by representatives are more likely to protect the rights of minorities; **4)** by allowing elected officials to be bypassed by encouraging officials to evade divisive issues by passing them on to the voters, referendums weaken the prestige and authority of representatives and representative government (Butler & Ranney, 1994, pp. 16-17).

In an attempt to summarise the causes of popularity of the referendum at the beginning of the 20th century, Maria Benedita Urbano (1998, pp. 25-28) refers to three main reasons: **1)** the crisis of the parliamentary system: the excess of power of the executive bodies, reinforced by the World War I and led to the discredit of parliament, labelled by its instability; **2)** the success of the Swiss and North American experiences, and the good results from the popular consultations for the

resolution of territorial issues after the end of the World War I; **3)** the transition from the liberal State to the mass State, when the widening of suffrage spurred a conception of parliament as an instrument of the bourgeoisie, which disregarded popular interest.

Another Portuguese author, Maria Luísa Duarte (1987, p. 220), stressed this last point. The liberal State was founded on a representative model, characterised by the hegemony of the parliament, the strictly representative nature of the mandate, and the censitary suffrage. The rules to check the right to vote were undoubtedly aimed at safeguarding the oligarchic structure of the liberal society and the political supremacy of the bourgeoisie. The restriction of suffrage left out those who could jeopardise the political uniformity of the parliament.

The most evident signs of challenge to the liberal political model came from the struggle for universal suffrage and from the critics of the parliamentary system. The causes of that challenge came essentially from the changes of the liberal economic system which had unavoidable effects on the social structure, with the appearance of intermediate bodies between the individual and the State, namely the political parties.

The steady growth of a working class, and the concentration of population in urban centres, created a working class that was politically vocal and organised around trade unions. Some political parties followed ideologies against capitalism, liberalism and the parliamentary system, and developed intense campaigns for universal suffrage. The transition from representative government to representative democracy became indispensable to the survival of the representative system. The direct participation through referendum appeared as a possible way of compromise, a solution to the insufficiencies of the pure representative model.

6.2. The Weimar Constitution

Within the first decades of the 20th century, the referendum was enshrined in the Constitution of several States in all continents. However, the most complete example of Constitutional reception by direct democracy institutions was the 1919 Weimar Constitution of Germany.¹⁰ In fact, in the Weimar Constitution, we can see several types of direct democracy institutions (Rodrigues, 1994, pp. 64-65):

¹⁰ Available at: http://www.zum.de/psm/weimar_vve.php [accessed on 15 February 2011].

- a) Recall of the *Reich President*, who could be deposed by plebiscite, which had to be suggested by the *Reichstag*, whose decision required a majority of two thirds. The rejection of the deposition was regarded as a re-election and resulted in the dissolution of the *Reichstag* (Article 43).
- b) Legislative referendums, by popular, presidential or parliamentary initiative: a law passed by the *Reichstag* had to be presented in a plebiscite, if the *Reich President* decided so, within the period of one month. A move supported by one third of the members of the *Reichstag* and one twentieth of the registered voters could suspend the proclamation of a law and submit it to plebiscite. A plebiscite also had to be held if one tenth of the registered voters demanded a law draft to be presented. The plebiscite would not be held if the law draft in question had been accepted or unaltered by the *Reichstag*. In regard to the budget, taxation laws and pay regulations, only the *Reich President* could request a plebiscite (Article 73).
- c) Referendum of arbitrage between parliamentary chambers: in case of disagreement with the *Reichsrat* regarding a law passed in the *Reichstag*, the *Reich President* might call for a plebiscite. If the President did not call the plebiscite, the law was regarded as not having been passed. If the *Reichstag* decided against the *Reichsrat* objection with a vote of more than two thirds, the *Reich President* had to either proclaim the law or call for a plebiscite (Article 74) within three months.
- d) Constitutional referendum: Constitutional changes should be passed by a two thirds majority both in the *Reichstag* and in the *Reichsrat*. The amendments could be submitted to plebiscite if demanded by one tenth of the registered voters. An absolute majority of the registered voters was required in order for the amendment to pass. If the *Reichstag* decided on a Constitutional amendment against *Reichsrat* objection, this could require a plebiscite to be held (Article 76).
- e) Local referendum: The alterations of territory must be decided by the majority of the population (Article 18).

6.3. Referendums in the 20th Century: 1900-1945

In the first four decades of the 20th century, the devices of semi-direct democracy were disseminated across Europe and the rest of the

world. Between 1900 and 1945, there were, in Europe alone, 87 referendums in Switzerland, and 98 referendums in 32 other countries (see Table 2). Australia was the second State in the world in terms of the number of referendums (22 in that period). It is interesting to note the significant use of referendums in America, probably influenced by the tradition and frequent use of referendums in the North American States, though not in the United States as a whole. During that period, referendums were also held in Bolivia, Canada, Chile (4), Guatemala, Panama, Paraguay, Peru and Uruguay (4). In Europe, several referendums took place in Germany (6), Greece (4), Austria, Denmark (3), Iceland (6), Italy (2), Estonia (5), Latvia (4), Finland, Portugal, Romania (3), Luxembourg (3), Poland (3) and Sweden.

However, not all of these referendums were democratic consultations. On the contrary, several plebiscites were designed to give formal legitimacy to authoritarian regimes. These were held without any possible alternatives or public freedoms, and under the severe repression of any type of opposition. Mussolini in Italy, Hitler in Germany, Salazar in Portugal, among other dictators in Europe, used the referendum to give formal legitimacy to strengthen their absolute powers. In these kinds of plebiscites, which were made in a non democratic context, the official propaganda completely nullified the significance of a referendum as an instrument of direct democracy (González, 2005, pp. 20-21).

6.4. The Referendum after World War II: 1945-1969

Some authors, like Michael Gallagher (1996, p. 230) highlight a retreat from the use of referendums in Europe after World War II. The referendum was used to decide some institutional problems, including in: Belgium in 1950 on the return of Leopold III; Italy in 1946 on the choice between the Republic or the Monarchy; Greece in 1946 on the return of George II; Iceland in 1944 on its separation from Denmark; and France, where it was restored 76 years after, by the hand of General De Gaulle, in 1945, in order to put an end to the III Republic, and later in 1946, 1958, 1961, 1962 and 1969.

However, the number of referendums increased substantially in the world. Between the beginning of 1900 and the end of 1944, 61 sovereign States held 214 referendums. Even considering the number of referendums held in Switzerland (84), more than 130 referendums were held in the rest of the world. A significant number of States that became independent after World War II, and particularly at the beginning of the 1960s as result of the decolonisation movement, used the referendum as a

process to declare the sovereign will of their people in favour of independence. This was the case in Cambodia (1955), Togo (1956), Benin, Burkina Faso, Central African Republic, Chad, Congo, Ivory Coast, Djibouti, Gabon, Guinea, Madagascar, Mali, Mauritania, Niger, Senegal (1958), Somalia and Samoa (1961) and Algeria (1962).

6.5. The Referendum in the 1970s and 1980s: 1970-1989

In the following years, the number of referendums increased further. From the beginning of 1970 to the end of 1989, 68 States held 324 referendums. Switzerland held 147 while the other countries had 177 (see Table 2). During this period, there was a visible dispersion of referendums around the world. In Australia, after some retraction in the 1950s and 1960s, the referendum was once again used frequently (16 times). Meanwhile, Italy became the second user in Europe, with 15 referendums. Other significant cases were the Philippines (12), Ireland (9), Egypt (8), Samoa (7), and New Zealand (5).

In 1972, the first referendums regarding the European integration process were held at the time of the first enlargement. Denmark and Ireland decided to join by referendum, while Norway resolved not to accede by referendum as well. France submitted the EEC enlargement to a national referendum. In 1975, the United Kingdom held the first national referendum of its history on the renegotiation of the terms of European integration. Finally, in 1986 and 1987, Denmark and Ireland submitted the ratification of the Single European Act to a referendum.

6.6. Referendums in Modern Times: 1990-2011

Again, over the past two decades, the use of referendum increased substantially (LeDuc, 2003, p. 13). Between the beginning of 1990 and the end of 2011, 107 States held 642 national referendums, with 200 held in Switzerland and 442 in the rest of the world (see Table 2). Italy distinguished itself as second most active referendum user in the world, holding 54 in that period on several public issues. Ireland also increased the frequency of referendums, holding almost one referendum per year (a total of 20).

In recent times, a significant use of the referendum has been in relation to the appearance of new independent States in the International Community, following the fall of the Soviet Union and the disaggregation of former Yugoslavia. The new independent States used the referendum not only as a device to decide on their independence, but also to approve

Constitutions or to decide several public issues. Therefore, we can note that 41 referendums were held in Azerbaijan, 19 in Lithuania, 15 in Slovakia, 12 in Slovenia, 11 in Kyrgyzstan, eight in Latvia, seven in Ukraine, six in Russia, four in Georgia, three in Armenia, Belarus, Estonia, Moldova and Serbia, two in the Czech Republic, Kazakhstan, Macedonia, Montenegro, Tajikistan and Uzbekistan, and one in Croatia and Turkmenistan.

Other States held referendums in significant number, like the Federated States of Micronesia (16), Ecuador (15), Uruguay (11), New Zealand (10), or Bolivia and Venezuela (6). In these years, for the first time in history, the number of States with referendums became the majority (107 against 73).

6.7. The Special Case of 'European Referendums'

The referendum has been a common feature of the European integration process since 1972, when the enlargement of the European Communities from six to nine members was submitted to referendum in France on 23 April. With the accession of new members, there were new submissions to referendum in Ireland on 10 May and in Denmark on 26 September, both with affirmative results. However, in Norway, which held a referendum on 26 September 1972, the electors voted against joining the EEC.

In the United Kingdom, there was no referendum on accession to the EEC, although the Labour opposition demanded one. After the electoral victory of Labour in 1974, Harold Wilson, who had strongly criticised the Conservatives for signing a treaty that he believed was economically disastrous for the UK, sought to demand a re-negotiation of accession conditions. A national referendum on EEC membership was held on 5 June 1975, the first national referendum in the history of the United Kingdom.

A second wave of referendums was held in 1992 with regard to the Maastricht Treaty. The Danish people rejected the treaty on 2 June. It was accepted in Ireland (18 June) by a comfortable margin, and more narrowly in France (51.04%) on 20 September.

According to its own rules, the Treaty could not come into force unless ratified by all twelve Member States. The ratification process was suspended and the Danish electors recipients of strong pressure from European governments pushing for a fresh referendum to consider a set of derogations agreed in Edinburgh. The Edinburgh Agreement was

submitted to referendum in Denmark on 18 May 1993, under the threat that Denmark's would be excluded from the European Union in case of a negative answer. The 'Yes' campaign won at last.

After Maastricht, the referendum was used again regarding the adhesion of Austria, Sweden, Finland and Norway. Austria (12 June 1994), Finland (16 October), and Sweden (13 November), voted 'Yes' on the referendum regarding their EU membership. On 28 November, Norway voted 'No' again.

In 1998, two Member States submitted the Amsterdam Treaty to referendum: Ireland on 22 May and Denmark on 28 May. The result was affirmative in both cases.

On 28 September 2000, the Danish electors refused to approve the European currency by referendum. On 7 June 2001, Ireland held a referendum on the ratification of the Nice Treaty. The result was a refusal. A fresh referendum was held on 19 October 2002, and approval was gained after the opportunity was offered for Ireland to avoid taking part in a EU mutual defence pact.

At the time of the 2004 enlargement, the accession of 10 new Member States led to nine referendums. Cyprus was the only nation that did not submit its accession to a referendum. Referendums were held in Malta (8 March 2003), Slovenia (23 March), Hungary (12 April), Lithuania (10/11 May), Slovakia (16/17 May), Poland (7/8 June), Czech Republic (13/14 June), Estonia (14 September) and Latvia (20 September). The results were affirmative in every cases.

On 14 September 2003, the Swedish voters refused the single currency by referendum. Sweden remains outside the euro zone.

In 2005, after the signature of the Treaty Establishing a Constitution for Europe, four Member States held referendums: Spain, on 20 February, voted 'Yes'; France, on 29 May, voted 'No'; The Netherlands, on 1 June, voted 'No'; Luxembourg, on 10 July, voted 'Yes'.

The negative results in France and The Netherlands, two founding States of the European Community, threw the EU into a crisis. It would not be possible to save the Constitutional Treaty. The solution previously used for two small countries, Denmark and Ireland, was not appropriate for two founding States at the heart of the European Union, one of them a major power and a key part of the 'European locomotive'.

The agreed 'solution' among the European leaders was the Lisbon Treaty, signed on 13 December 2007. The new Treaty would drop the Constitutional formula, but it would contain the essence of the Constitutional Treaty. Referendums would not be held in the ratification process, avoiding the risk of fresh defeats. Spain would not repeat the referendum because the Treaty was the same; France and The Netherlands did not repeat the referendums because the Treaty was different. Despite the protests of those who supported the need for referendums to grant legitimacy to the European integration process, the only recognised exception was Ireland; its Constitution required a referendum to ratify the Treaty.

After 32 referendums on the European integration process, European leaders now had a change of heart, refusing referendums on the Lisbon Treaty. The referendum, recognised since 1972 as a proper and democratic way to legitimise European integration was, by 2007, treated with suspicion. It became clear that, for European leaders, there are other values in the European Union that are heavier than popular participation.

The referendum, as a democratic device was defeated, except for the only exception allowed, Ireland, which saved the honour of the institution. On 12 June 2008, the Lisbon Treaty was refused by the Irish people, who, so to speak, voted on behalf of all like-minded European citizens who did not have the possibility to pronounce themselves.

However, higher interests prevailed, and the Irish people had to vote again in a referendum on the Lisbon Treaty on 3 October 2009. That time the 'Yes' became the winner and the way was open for the enactment of the Lisbon Treaty. Nevertheless, nobody has doubts that the Irish Republic should hold as many referendums as needed for the approval of the Treaty. The European Union process defeated the referendum as an institution and disregarded it as an expression of popular will.

7. Defining Referendums

7.1. Types of Referendums

According to Arend Lijphart (1984, p. 206), referendums fail to fit any clear universal pattern. The referendum label includes a variety of situations and usages which bear only a superficial similarity to one another (Uleri, 1996, p. 3). In fact, each referendum is unique, and the political context can differ widely (LeDuc, 2003, p. 15).

Table 1 - Referendums around the World

	1793-1899	1900-1944	1945-1969	1970-1989	1990-2011	Total
Number of States	52	68	121	146	180	180
With referendums	13	32	61	68	107	139
Without referendums	39	36	60	78	71	40
Number of referendums	80	185	214	324	642	1445
In Switzerland	56	87	84	147	200	574
In other States	24	98	130	177	442	871
Constitutional referendums	44	73	105	249	258	638
Referendums on international treaties	0	2	8	15	42	67
Referendums on sovereignty Decisions	3	14	29	6	23	75
Referendums on other public issues	33	96	72	136	328	665

Sources: LeDuc (2003); Uleri (2003); Butler & Ranney (1994); Gallagher & Uleri (1996); Centre for Research on Direct Democracy, available at http://www.c2d.ch/inner.php?table=dd_db [accessed 29 February 2012].

Table 2 - Number of Referendums by State

Number of referendums	Number of States
20 or more	8
10 or more but less than 20	12
More than 5 but less than 10	28
Between 1 and 5	91
None	41

Nevertheless, it is possible to distinguish some types of semi-direct democracy devices which come under the label of referendums. Several authors have created typologies, and some of these are summarised below.

First, we must properly distinguish between referendums and recalls. The latter are a negative variant of personal election involving a vote that terminates the mandate of an elected person (Butler & Ranney, 1978, p. 5). In recent years, Venezuela in 2004 and Bolivia in 2008 have seen recalls. These ended in the victory of the elected presidents.

In Portugal, Jorge Miranda (1996a, pp. 237-238) refers to a large number of possible classifications of referendums: **a)** internal or international law; **b)** national, regional or local scope; **c)** Constitutional, legislative, political or administrative; **d)** mandatory or optional; **e)** of popular, parliamentary, governmental, presidential or monarchic initiative; **f)** binding or advisory; **g)** positive or negative; **h)** suspensive or resolute.

Maria Luísa Duarte (1987, pp. 207-208) distinguishes the types of referendums by having in mind **a)** the subject of the consultation, on constituent (to approve a Constitution), Constitutional (to approve a Constitutional revision), legislative, administrative, or international issues; **b)** the territorial scope, at national or infra-State levels; **c)** the nature of a mandatory or optional consultation; **d)** the effects of the consultation, which may be binding or advisory.

In France, Jean-Louis Quermone (1985, pp. 577-590) adopted a classification that is not so different: **a)** mandatory or optional; **b)** binding or advisory; **c)** by governmental origin (Head of State, Head of Government or parliamentary majority) or popular initiative; **d)** Constitutional or legislative; **e)** on rules or plebiscitary; **f)** of national, regional or local scope.

David Butler and Austin Ranney, (1978, pp. 23-24) in their comparative study, classified referendums into four basic types:

- a)** Government controlled referendums, when the government has the power to decide whether a referendum will be held. This includes the subject matter and wording of the proposition to be voted on, the proportion of yes votes needed for the proposition to win, and whether the outcome will be binding or merely advisory.

- b) Constitutionally required referendums, when the Constitution requires certain kinds of measures adopted by the Government to be approved by the voters before they can take effect.
- c) Referendums by popular petitions, when ordinary voters are authorized to file a petition demanding that a certain measure adopted by the Government be referred to the voters. If a majority of the voters support a repeal, the law is voided regardless of whether the Government wishes to retain it.
- d) Popular initiatives, when ordinary voters are authorized to file a petition demanding that a certain measure, which the Government has not adopted, be referred to the voters. If the required majority of voters vote in favour, it becomes a law regardless of whether the government opposes it.

An interesting classification was drawn by Gordon Smith (1976, p. 6). This author establishes a functional variance of the referendum, based on the degree of control exercised by political authorities. The referendum is controlled if the government can decide if, when and how it will be held in order to obtain foreseeable results in favour of the governing authority. The reverse applies to an uncontrolled referendum. The continuum of control has to be construed as an expression of manifest intention, apart from the particular issue and irrespective of the actual result.

However, the intention behind the referendum is one thing; the consequences are quite another, and the sum of them may be supportive or detrimental to a regime. The consequences may have a fundamental impact on the system. Thus, in a similar fashion to the continuum based on control, it is feasible to distinguish a second type of effects with two extremes: pro-hegemonic and anti-hegemonic (Smith, 1976, p. 7).

For the purpose of Gordon Smith's classification, Arend Lijphart (1984, pp. 261-262) points out that the majority of referendums are controlled and pro-hegemonic. Governments have used the referendum when they expect to win. The mandatory referendums were not totally controlled, and not all the controlled referendums are pro-hegemonic because governments cannot always foresee the results. The referendums in France and The Netherlands on the European Constitutional Treaty are good examples of controlled but anti-hegemonic referendums.

Pier Vincenzo Uleri (1996, pp. 6-7), distinguishes some types of referendums:

- a) Prescribed referendum is a referendum according to rules and a discretionary referendum is one at the discretion of some person or institution.
- b) Prescribed referendums can be mandatory or optional. If it is mandatory, the procedure is automatic in the sense that the vote must be called in order for a decision to be valid and enter into force. It is optional when it is promoted at the request of an agent entitled by the Constitution or law.
- c) Binding and advisory votes. A vote is binding when its outcome must be accepted and adopted by Parliament and Government, or when the referendum vote is itself the decisive act. It is advisory when its outcome has only an indicative value, with the last word going to Parliament and Government. However, most *de jure* advisory votes have been considered *de facto* as binding ones.

The same author also distinguishes two general classes of popular votes: referendum and initiative. The criterion should be the promoter of the vote: promoted at the voters' request and promoted by other agents.

Another criterion is the comparison between the promoter of the request for consultation and the author of the act put to the vote. Decision-promoting votes are those in which the promoter of the consultation and the author of the decision put to vote coincide. Decision-controlling votes are all votes in which the promoter of the consultation and the author of the decision put to vote are two different agents. The decision-controlling vote can be a rejective vote, on a decision taken but not yet implemented, and an abrogative vote on an existing State of affairs (Uleri, 1996, pp.10-14).

Finally, the Canadian author Lawrence LeDuc (2003, p. 39) distinguishes four forms and variations of the referendum: **a)** mandatory Constitutional referendum (binding referendum); **b)** abrogative referendum (popular veto); **c)** citizen initiated referendum (popular initiative); **d)** consultative referendum.

According to another criterion, the same author (2003, p. 47) refers to different political functions of the referendum, which he classified as follows:

- a) The referendum as the recourse of the Prince: implemented by a State President, Head of Government, or ruling figure to obtain public endorsement of a person, regime or programme.
- b) The referendum as the recourse of the citizens: initiated by citizens or groups either against the governing authorities or without their approval.
- c) The referendum as the recourse of the parties: a vote organised by the governing party as part of its political agenda or to resolve internal political conflicts.

7.2. Typology of Subject Matters of Referendums

How have referendums been used around the world? Butler and Ranney (1978, pp. 18-19) point out that a look at the list of referendums offers a powerful deterrent to easy generalisations about why they have been held. Each seems to have a special history, rooted in an individual national tradition. The reasons for each referendum, its treatment by politicians and by voters, and its consequences fail to fit any clear universal pattern. However, according to the same authors, common elements can sometimes be detected: first, where there is Constitutional necessity; second, where there is a legitimating function; third, where there is a transfer of decision-making.

On his turn, Lawrence LeDuc (2003, p. 33) establishes a typology of subject matters for referendums in the following terms:

- a) Constitutional issues: amendments to the Constitution and changes in political institutions, forms of governance, basic laws, etc.
- b) Treaties and international agreements: all agreements between nations, supranational organisations, etc, whether such referendums are Constitutionally mandated or not.
- c) Sovereignty: referendums on territorial questions, issues of national self-determination, devolution of authority, federation, secession.
- d) Public policy: referendums on policy questions, including consultative votes on government proposals, abrogative votes on public laws, citizen initiatives, etc.

8. Towards a Global Balance

When discussing referendums, we can speak about two different worlds: in Switzerland, California, and a few other States of the USA, initiatives and referendums are prominent strands in the fabric of political life. In all other countries referendums are held infrequently, usually only when the government thinks they are likely to provide a useful ad hoc solution to a particular Constitutional or political problem or to set the seal of legitimacy on a change of regime (Butler & Ranney, 1978, p. 221).

In fact, referendums are relatively rare events in the politics of most nations. In only a few countries is the referendum a long-established and frequently used device for obtaining popular consent on major public questions. Switzerland uses the referendum as an integral part of its process of government, and Australia and Ireland do so for all Constitutional changes. In a few other instances, notably Italy, the referendum is a more frequently used, but still far from routine, part of the political process (LeDuc, 2003, p. 30).

As we can see in Table 2, until the end of 2011 there were only eight States in the world which used the referendum for 20 or more times in their history, and only 12 more States that used it for 10 or more times. However, 127 other States held referendums. Table 1, having considered 180 sovereign States (all with more than 100,000 inhabitants), allows us to conclude that the large majority (139) held referendums only occasionally.

Switzerland is a world apart. From the 1,445 referendums that we could identify around the world, at a national level in sovereign States before the end of 2011, 574 of them were held in Switzerland and 871 in other States. In these latter, the referendum was used more frequently in Italy (72), Australia (48), Azerbaijan (41),¹¹ Ireland (33), New Zealand (26), France, and Uruguay (25).

Using Lawrence LeDuc's typology of subject matters for referendums, we can see that the majority were Constitutional referendums, held to approve or ratify new Constitutions, Constitutional amendments, changes in political institutions, forms of governance or basic laws (638); 75 were held to decide on territorial questions, issues of national self-determination, devolution of authority, federation, or secession; 67 were held on treaties or international agreements, and 665 were held on other policy questions submitted to voter decision.

¹¹ 29 on the same day.

As LeDuc points out (2003, p. 30), the referendum has been used not only to manage questions of major Constitutional change but also to allow citizens to influence the decisions of government directly on a wide range of policy matters, at least partly in response to a widespread sense of dissatisfaction with democratic performance in many countries. But, as Uleri refers (1996, p. 1), sometimes they have made life more complicated for governments, parliaments and political parties. At other times they have been useful instruments to solve difficulties that these bodies seemed unable or unwilling to tackle.

9. Referendum and Democracy

At the very beginning of their comparative study, Butler and Ranney (1978, p. 1) assert that referendums, as a means of making government decisions or giving legitimacy to them, have a history that is almost as old as democracy. However, they point out that a few admirable democratic societies have never tried the device, while some authoritarian ones have grotesquely abused it.

Returning to Uleri (1996, p. 1), we can say that the referendum phenomenon needs to be considered in the light of the origins, tradition and development of liberal democratic representative institutions and government. The tension between Montesquieu and Rousseau, between representative and direct democracy, traversed the history of the modern Constitutional State. Nevertheless, its fundamental structures had been built on the basis of representative democracy. However, the referendary appeals for the people to ratify government decisions, from Rousseau's concept of democracy, were never forgotten (Vega, 1985, pp. 102-103).

In theory, the referendum is not incompatible with representative institutions, but only with a certain form of representative government. Historically the referendum has been defined with the liberal State of pure parliamentarianism, with its corollaries, restricted suffrage, representative mandate and primacy of the parliament. However, the parliamentary system suffered the influence of a dynamic that seeks to limit the powers of the parliament, through the strengthening of the executive and the effectiveness of the direct participation of voters. The referendum does not, however, necessarily undermine the parliamentary institution, since its integration in the system is submitted to a basic principle of complementarity (Duarte, 1987, p. 230).

In each institutional crisis, from the representative government to representative democracy, from liberalism to the interventionist State, from the latter to neo-liberalism, the idea of referendum is reborn, as a

corrective device, as a way of control, as a formula of citizen participation and an expression of popular will, and as a counter power regarding or vis-avis the parties (Vega, 1985, cited in Cardoso, 1992, p. 26).

The referendum, as an arbitrage process, is a serious inconvenience to the balance of powers. In the case of conflict between the Head of State and Parliament, it can degenerate in plebiscitary consultation, with the strengthening of the President and the weakening of the Parliament. In the case of conflict between the chambers, it nullifies the High Chamber. In the case of conflict between the Parliament and Government, it causes institutional instability, leading to the fall of one of them (Duarte, 1987, pp. 225-226). The referendum as a process of control does not have these risks. It allows for the control of the representatives by the electoral body, through the expression of their will on this or that political decision, in addition to the guidance of the parties (Duarte, 1987, p. 226).

As a way of direct participation, the referendum allows for the approximation between the adoption of public decisions and the electoral body affected by such decisions. But it is not possible to conceive of a democratic system based exclusively on successive direct decisions taken by the voters. The problem is not technical. Indeed, it is easy to admit that, in a near future, the development of technology for electoral purposes, namely by electronic means, can make easier the holding of referendums (Câmara, 1997, pp. 166-176). If the Constitutional State presupposes the limitation of power, such limitation would be impossible in a direct democracy, because it is not capable of guaranteeing political pluralism (González, 2005, pp. 9-10). If the referendum is used with electoral purposes, not as a complement of the elections but as their replacement, it becomes a device opposed to the democratic principle. It does so because runs contrary to the purpose of elections. It is the choice between several options that gives suffrage its genuine significance (González, 2005, p. 32).

As Uleri stresses (1996, p. 2), it is not possible to contrast representative democracy and direct democracy, simply because no modern political regimes use referendums as the main decision-making system. The referendum phenomenon generally presupposes an interaction with the mechanisms and processes of the political system that work within it. In fact, as LeDuc (2003, p. 31) refers, many nations have traditionally combined elements of both direct and representative democracy in their political institutions and have merely shifted the

balance more towards one or the other at different moments in their history.

Representative democracy, that is, parliamentary democracy, is the general rule followed in the exercise of constituted power. In that sense, and apart from certain exceptions like the Swiss case, the referendum as a direct democracy device has a complementary role. From the participative point of view, it adds value to representative democracies. The referendum is one of the several participative techniques in a fully pledged democracy, endowed with effective political pluralism and with guaranteed fundamental rights under the rule of law. Even the referendum in Switzerland is used as a supplement to representative democracy (only 4% of the bills are decided by popular referendums). The experiments with deliberative democracy clearly indicate that referendums can serve only as supplements to representative democracy (Qvortrup, 2005, pp. 40-41).

In unusual situations, like the adoption of fundamental decisions or the option between alternatives that seriously divide public opinion in a democratic context, the referendum can assure that the final decision adopted has sufficient social support (González, 2005, p. 24). However, the authoritarian experience of referendums goes to show that the referendum is a technique and, consequently, it is value-free, in principle. It is necessary to know in which context, with which contents, purposes, conditions and guarantees the referendum takes place, in order to establish a concrete evaluation (González, 2005, p. 21). It would be difficult to conclude that there is a clear pattern connecting the use of referendums with democratic practice (LeDuc, 2003, p. 29). The referendum is a political device, which can be democratic, but which is not necessarily democratic. Governments have chosen to hold referendums mainly for reasons of political convenience rather than in response to overarching general theories about how laws should be made and unmade (Butler & Ranney, 1978, p. 24).

Indeed, as Matt Qvortrup (2005, p. 10) points out, democracy is more than plain majority vote. The essence of democracy is not the vote but the discussion. The vote is assuredly an integral part of democratic decision-making. When the matter has been fully discussed, then a vote must be taken. This understanding of democracy has usually led theoreticians and practitioners to the conclusion that representative democracy must be the norm and that referendums are to be avoided as a device of pure direct democracy. A system that allows voters to vote only

‘yes’ or ‘no’ would institutionalise majoritarianism, and consequently be inimical to the ideal of democracy as discussion.

The referendum as an institution cannot represent the future of democracy, but in the democracy of the future there could be an increasing number of votes by referendum. There are important differences between countries, especially with regard to those that adopt referendum by initiative and those that do not (Uleri, 1996, p. 17). Giving citizens the chance to express their views directly on important political questions, or providing them with additional opportunities to intervene in the sometimes impenetrable processes of political decision-making, seems an obvious remedy for the present democratic malaise. While the referendum may not be capable of resolving all of democracy’s problems, it does respond to at least some of the concerns expressed by many citizens in contemporary democratic societies (LeDuc, 2003, p. 20).

The framework of references for the democratic participation of citizens cannot, therefore, be reduced to the dilemma between the typical work of representative democracy and the appeal to the referendum. Between the extremes, there are all the mechanisms of participative democracy that coexist with representation, such as the exercise of the right of petition, the participation in a wide range of associations (political, civic, trade unions), the legislative initiative of citizens, and the free exercise of fundamental rights of citizenship.

In 1975, during the electoral campaign for the first free elections in Portugal after the revolution, which had the participation of 92% of registered voters, it was said that the vote is the weapon of the people. There is no doubt that, in democracies, the vote is, and must remain, a decisive and fundamental way of expressing the popular will. However, the participation of the citizens in a democracy cannot be limited to periodic voting in elections or referendums. If it is true that there is no democracy without the right to vote, it is also true that there is more to democracy than the vote.