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CONSTITUTIONAL JUSTICE AND DEMOCRACY BY REFERENDUM

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I. Introductory statement by Mr Antonio LA PERGOLA, - President of the European Commission for Democracy through Law

Mr President (of the Robert Schuman University), distinguished guests, Ladies and Gentlemen. We shall devote these two days to the study of the link between two very topical themes: direct democracy and constitutional justice. Of course, they are not new questions. They have been raised and explored by scholars. They have been debated in many meetings before ours. However, we shall see that these subjects, and especially the links between them, are now more topical and, above all, more universal than ever.

On the one hand, greater interest in the subject arises from the increasing complexity of the legal order, or of legal orders generally. On the other hand, the democratisation of many countries whose representatives I would like to greet here extends the territorial scope of direct democracy as well as of constitutional justice.

What do we mean by the increasing complexity of the legal order? At first sight, our themes for discussion appear neat and tidy: the first topic is concerned only with the referendum as a law-making or a decision-making procedure, one whereby the electorate legislates or decides in place of representative organs. The second topic relates to the constitutionality of laws or of whatever other enactments may fall within the purview of judicial control. In reality, however the picture is complicated by the hierarchy of sources that must be established by positive law to determine whether and to what extent constitutional controls can be exercised over requests and petitions for a referendum, or over such results as are produced in the domestic legal system once the referendum is held.

Here is a variety of issues that need to be settled. Is the referendum still seen as a manifestation of popular sovereignty, the validity of which cannot be questioned? This view seems hardly tenable and, at any rate, it is not commonly recognised by rigid constitutions. Basic charters will generally lay down an appropriate procedure for the referendum and define the possible scope of this instrument of direct democracy. The observance of such provisions can be secured by judicial controls, as is the case with any other constitutional rule. Yet the problem remains whether judicial controls should be prior to the popular vote or rather subsequent to it and so have a bearing only on questions of procedure. If this solution is adopted, the substantive outcome of a regularly held referendum cannot be contradicted by the law-giver or any other political body. The need for an *a posteriori* substantive control thus vanishes from sight.

Of course, the answers given by positive law to this question and many more that concern us may vastly differ, and they do. The point of the present seminar, I should think, is to view the whole matter in a comparative perspective, and begin

discerning the ways in which referendums fit into the pigeon-holes of constitutional justice.

It stands to reason that there is more than one possible approach to the field of interest covered by the Seminar. A Constitutional Court may be the judge of the regularity of elections, or, at least, of certain elections like, say, that of the Head of State, or of controversies regarding anyone's basic right to vote and stand as a candidate in the arena of political competition. The role reserved to the Court in respect of referendums may then be viewed as a corollory of this series of attributions, for the people's choice through direct democracy is after all an election, though one of a special kind. But our case can also be approached from an alternative angle, by assuming that while elections do not necessarily fall within the hard core of matters subject to judicial review a Constitutional Court may well be described as the natural judge of the hierarchy of the sources of law. Now, when a referendum affects legislation when the people's choice is designed to create new law or remove existing law the Court's staple task of seeing if legal rules conform to the Constitution should be held to extend to all the normative effects of such use of direct democracy as long, that is, as the will expressed by the people ranks on an even keel with ordinary legislation, and not on a higher plane.

The fact is that, however we explain this phenomenon and attempt to systematise it, the referendum has found its way into the workings of judicial review. Kelsen's admission that the Court he had invented, way back in the 1920's, was a striking novelty, a daring departure from the dogma of Parliament's sovereignty, should be reappraised: constitutional justice seems to have progressed further than its own famous inventor had foreseen, since it is making significant inroads even into popular sovereignty. Should we believe, therefore, that the only legal imperative over which a constitutional Court spreads its protective wings is the absence of a sovereign in a legal sense? Whatever the answer, there is a trend worth noticing in Europe towards the parallel growth of constitutional justice and referendums, attributable to what we commonly understand as the integration process. As is well known, the accession of more than one country to the Community or the adoption of the Maastricht Treaty by some of the present Members has been subordinated to popular acceptance by referendum. In our present European context, it is a novel adaptation of the time-honoured idea that events affecting the location of sovereignty and other constitutional features of the Nation State call for some kind of plebiscite. True enough, the Union is in no way conceived of as a super State. It is none the less a political community, a *Staatenbund* based on a common citizenship. Its members remain sovereign, but the limitation on their sovereignty resulting from membership in the Union is such that it may well, in the eyes of domestic law, have to be legitimised by a referendum, in the same manner as recourse to direct democracy operates to sanction important

constitutional changes. And it is a trend that bespeaks the Community's emergence as a modern confederation of the type considered in our Santorini seminar.

This appeal to direct democracy within the framework of European integration, if we look at it in terms of comparative law, is no more than a trend, however. There are member countries of the European Community, like mine, that have banned referendums from the entire field of international treaties, including those that delegate sovereign powers to international bodies, as well as from the corresponding area of internal implementing legislation.

It may be that in the case of Italy this is a traditional attitude of constitutional law, a hangover, as it were, from past times. It looks as if the Italian constitution-makers of 1947, in defining the relationship between the instrument of the referendum and the delicate sector of international treaties, were inspired by the conviction that the democratisation of the conduct of foreign affairs should not go beyond parliamentary control and representative democracy as understood in the good old days of the 19th century. There is no denying, however, that present day integration has come to mean a great deal more than the usual form of diplomacy, whether multilateral or otherwise. It does involve basic choices like opting in or opting out of the Union for which an appeal to the people suggests itself as eminently suitable. So much so that the Italian Parliament expressly amended the national Constitution in 1989 to introduce an *ad hoc* referendum, as a result of which the Italian members of the European Parliament were, by an overwhelming majority, empowered to draft a federal constitution for the European Union, if it must be added all the other conditions were met which are required to achieve such a far-reaching result. These conditions have not yet been fulfilled. It is far from certain that they ever will be. But the constitutional amendment of which I am speaking stands in the statute-books as a testimonial to the keen awareness, even in a country where international agreements are carefully kept out of the reach of direct democracy, that integration opens up the widening circle of a new citizenship which engenders, in turn, the right of the people to participate directly in the making of fundamental decisions.

I have said that the democratisation of many countries extends the territorial scope of direct democracy and constitutional justice. We have among us representatives of countries which have recently joined our family of democratic countries. Most of the new democracies already have a practice of direct democracy. The question of judicial review of the admissibility of a referendum has in fact been raised before the Hungarian and Russian Constitutional Courts, for example. There is no doubt that other constitutional courts in other new democracies will have to deal soon not only with judicial review of the validity of referendums, but also with questions of the material validity of texts submitted for referendum.

However, apart of course from the introductory and general reports, the main contributions will focus on older democracies with an established practice of recourse to referendums.

We shall hear reports on relevant law and practice in France, Switzerland, Italy and the United States.

- France, our host country, has a long practice of recourse to referendum. Traditionally of a plebiscitary nature, the extension of its field of application is being discussed: would such an extension transform the very nature of the instrument? This is one of the questions my distinguished colleague on the Venice Commission, Mr Robert, may wish to address.

- Switzerland is certainly the State with the largest and most important practice of direct democracy at national level. Direct democracy is practised in Switzerland not only at national level, but at cantonal and local level. It is the country of the people's assemblies in the municipalities, and even of the traditional *Landsgemeinden* in a few cantons. It will be interesting to hear Mr Häfelin speak about new developments of practice, particularly regarding the question of conformity to international law.

- The third report will concern Italy, which can be nowadays considered as a busy workshop for engineering referendums. A quarter of a century was required for the adoption of a statute on this question, in compliance with article 75 of the Italian Constitution. And the law on the referendum has now been in force for another quarter of a century. The increase in the number of referendums, and their important role in present-day Italy, is before our eyes. Truth to tell, the referendum in Italy is, technically speaking, only a means to repeal ordinary law better said, certain classes of ordinary laws. The admissibility of the referendum is controlled by the Constitutional Court, which has in the course of time spelled out a whole range of restrictions, implied in the constitutional text, as to the possible use of the instrument. In spite of its limited sphere of application, the referendum is growing in importance as a tool of political and constitutional strategy, in keeping with the new outlook on democracy as a system founded upon the majority principle. In fact, it is no longer in most cases a simple key to abrogation. As the deletion of single words of a normative text has been allowed by the Court, the proponents of referendums have developed notable skills in manipulating the provisions submitted for popular approval. Thus, for instance, if the law says "you cannot wear a white tie on a black suit", you can propose striking out just the words "a white tie on", so that the answer which may result from the vote is: "you cannot wear a black suit", while you can wear all the white

ties you like. It is a highly ingenious exercise in targeting legislative changes. Little by little, a real right of people's decision-making has been introduced. The subject is also topical: the vote of June 12 last will certainly have an impact on Italian political life and even Italian society in the years ahead, as Professor Bartole may explain to us.

- We shall also hear a report on the United States, giving our seminar a transcontinental dimension. Even if there is no referendum at federal level, the United States is certainly one of the countries where the referendum is most important in its practice and its effects. It has especially become well-known after the adoption of proposal 187 in California which denies certain social services, medical benefits and public education to illegal immigrants. As the U.S. participant in this seminar, Mr Eule, underlines, such votes raise questions as to whether acts adopted by popular vote should be submitted to the same scrutiny as those adopted by the legislature, or to a less strict scrutiny, or, on the contrary, to a stricter one. The variety and richness of direct democracy in the United States is perhaps not sufficiently known in Europe, and we shall try to fill this gap in part through our discussions in this seminar.

A number of shorter interventions will inform us about the position in other countries, in particular in Central and Eastern Europe, but also in South Africa and Canada. You know that the question is particularly crucial in the latter country, where the question of sovereignty for Quebec may be submitted to referendum. This reminds us of another facet of our discussion the plebiscite as understood in international law.

I don't want to say more about the various themes which will be examined during this seminar. They are so numerous that we would spend too much time enumerating them.

I would still like to thank the co-organiser of this UniDem Seminar, Professor Jean-François Flauss, of the *Institut d'Etudes européennes*, Robert Schuman University. You will soon hear his introductory report. He has been the inspiration behind this seminar, and it is fitting that Strasbourg, with its historical European values and its present important European functions, should provide a forum for the discussion of this most stimulating subject.

I thank you for your attention.

II. Constitutional Justice And Democracy By Referendum - Opening speech by Mr Norbert OLSZAK, Dean of the Faculty of Law, Robert Schuman University, Strasbourg

Mr Chairman, ladies and gentlemen, it is a great honour and pleasure for the teaching staff of Strasbourg University's law faculty to be associated with the Venice Commission at this UniDem seminar on constitutional justice and democracy by referendum. However, such co-operation is also a duty for the members of a university named after Robert Schuman, one of the founding fathers of Europe, who was, need I remind you, both a leading democrat and an eminent lawyer, and was awarded a doctorate by our faculty. He would certainly have supported the idea of developing democracy through law, including those most sensitive aspects of that task which concern you here.

The topic of this seminar strikes me as particularly important and also extremely difficult since you are I believe, for the first time dealing with direct participation of the people in the institutional process. Their immediate presence is a matter of some moment, since it brings in two factors which are highly likely to ruffle the perfection of our judicial systems: first of all, we are dealing with a power which is, in principle, invincible because it is supreme, and, secondly, we are facing the risk of a certain irrationality, since this supreme power has absolutely no need to base itself on reason in order to prevail.

For a long time, and indeed from the beginning, these factors were a cause of concern to the authors of French constitutions, who tried to ensure that the country's institutions functioned with some regularity precisely by ruling out direct intervention by the sovereign people or by trying to keep such intervention rational. However, the only effect of these restrictions was to weaken seriously the constitutions they were supposed to protect. As a legal historian, I can give you several examples from a past in which many approaches have been tried, even if referendums in the strict sense have been little used.

Take France's first constitutions and, above all, the highly complex review procedures which were meant to maintain a balance. The Constitution of 1791, for example, proclaimed the nation's indefeasible right to amend its basic law, and then laid down rules blocking constitutional reform for a ten-year period and making it very difficult after that: as we know, it did not last a year. Yet the makers of the 1795 Constitution, undoubtedly assuming that the key republican issue had been settled, adopted almost identical rules to prevent inopportune amendments; again a waste of time, as the Year III regime was overthrown only four years later in a *coup d'état* approved by plebiscite.

Of course, this simply made the sovereign people seem more dangerous and, when the republic was restored in 1848 and needed new institutions, Providence was even called in to guide this force that could no longer be disregarded. It was our great poet Lamartine who succeeded in calming the fears raised by a proposal that the President of the Republic should be elected by universal suffrage: "What would it matter even if the people were to choose the candidate that my reading of

the future most causes me to dread their favouring? *Alea jacta est!* Let God and the people make their pronouncement. We must leave something to Providence!" However, as well as entrusting this sovereign power, suspected as being in constant danger of going wrong, to divine guidance, a few legal precautions were taken: yet another highly complex review procedure, a limited term of office for presidents and, above all, the remarkable Article 68, which explicitly referred to *coups d'état* and indicated how they should be countered, even calling on citizens to refuse obedience to anyone who committed this crime against the Constitution. Scarcely three years later, the scenario was played out in every smallest detail, with one exception: the people did not refuse to obey the Prince-President Louis-Napoléon Bonaparte, and ratified the change of constitution in a further plebiscite.

Neither Providence nor the ingenuity of the constitution-makers is now enough to reassure those who clearly prefer the tranquillity of representative democracy to the sometimes violent forms taken by direct democracy. However, those early chapters in the constitutional history of France brought the people into a system that was still essentially unpolished, in which the main concern was necessarily to guarantee the primacy of the policy-makers at the top. In these circumstances and in these direct clashes between powers, the power of the people was bound to prove irresistible. Things are different in systems remote in time from the first conflicts that gave birth to democracy, systems which pay more attention to law and rely on more subtle machinery. Constitutional courts are one new factor, and can have the desired regulating effect provided, of course, that they do not generate that legal rigidity which has often given those who favour plebiscites ammunition. This is the central issue which you will have to consider at this seminar. I wish you every success in doing so.

III Constitutional justice and democracy by referendum - Introductory address by Mr Jean-François FLAUSS, Director of the "Institut des Hautes Etudes Européennes" (IHEE), Robert Schuman University, Strasbourg

The special attention paid by the Venice Commission to constitutional justice and the tradition in some Strasbourg university circles of supporting democracy by referendum would doubtless alone suffice as pretexts for launching an academic debate on the possible conflicts between the two principal, and apparently opposed, forms of modern democracy, constitutional democracy and popular democracy.

Yet, perhaps we could, or even should, be even more ingenuous and refer to the relative paucity, all things considered, of opinions from constitutional law specialists on this subject. There are no doubt a large number of studies dealing with the constitutional court as an opponent of the people, and vice versa, within a given constitutional system. On the other hand, there has been a much smaller number of attempts to approach the subject systematically from a comparative law

standpoint. Moreover, these attempts at giving an overall picture are generally regarded as adjuncts to studies on either constitutional justice[1] or democracy by referendum[2].

There are admittedly a number of explanations for the relative lack of interest shown by constitutional law specialists in an issue which they should in fact find fascinating. For instance, the diversity of constitutional concepts[3] and even of terminology[4] does not encourage comparison or confrontation of the workable solutions. Similarly, and above all, the infinite variety of techniques used in both constitutional justice and democracy by referendum introduces an additional factor of complexity. One might add the more prosaic fact that countries which traditionally hold referendums are frequently relatively unconvinced as to the ideal nature and virtues of constitutional review and that the opposite applies to countries that are unwavering supporters of constitutional justice[5]. However, it is obvious that the fault primarily lies with the inadequate consideration given to federal constitutional law, which is moreover regarded in centrally governed States (but not only in those States) as a poor relation of constitutional law itself[6]. Yet, comparative federal constitutional law is in fact one of the areas, *par excellence*, in which popular ballots and constitutional review can co-exist[7].

Whatever the case may be, the most recent constitutional developments prove, if any proof was needed, that the justification for our two days of proceedings is not to be found merely in a concern to restore federal constitutional law to its status as

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1 *See, for example, D. Rousseau's "La justice constitutionnelle en Europe", Montchrestien Clefs/Politique, 1992, pp. 123 and 124.*

2 *See, inter alia, M. Suksi's "Bringing In the People - A Comparison of Constitutional forms and Practices of the Referendum", M. Nijhoff, 1993, pp. 85-89 and 135-137.*

3 *For example, what would be the situation if the way in which a case can be referred to the constitutional court were amended.*

4 *On this subject readers are referred to the semantic variations that may be used to designate a referendum of co-decision or a referendum of repeal (see M. Guillaume - Hoffnung "Le référendum" - PUF - Que sais Je ?, 1987).*

5 *In this connection, readers may bear in mind the scarce attention paid to this issue in the 14 national reports referred to in the book edited by F. Delperée "Référendums", CRISP, Brussels, 1985, 404 pages.*

6 *For such an opinion see A. Auer's "Les constitutions cantonales : source négligée du droit constitutionnel suisse", Schweizerische Zentralblatt für Staats- und Verwaltungsrecht (Z/Bl.) 1990; pp. 14 ff).*

7 *Especially in the United States. See A. Auer's "Le référendum et l'initiative populaire aux Etats-Unis", Helbing et Lichtenbahn, Economica, 1989, p. 135.*

an essential ingredient of constitutional law. In a number of countries of Central and Eastern Europe the need to hinge together constitutional review machinery and referendum-type procedures is already a major institutional (and political) challenge[8]. In other older democracies, the dispute as to whether laws passed by referendum can be reviewed by the courts has given rise to some case-law which is apparently very forceful case-law; but which is perhaps not the last word on the matter for all that. This is essentially the case in France[9].

Into the bargain, the debate on constitutional review and semi-direct democracy has taken on a new dimension in the light of the most recent Swiss constitutional practice, endorsing the review at federal level of the international acceptability of uses made of the people's rights[10]. This "event", an extremely important new addition to constitutional theory, is a perfect illustration that the logic of constitutional democracy and that of popular democracy are not entirely irreconcilable[11]. Should it not be the role of constitutional justice to guard against the excesses of democracy by referendum? Conversely, is not democracy by referendum the antidote to any imperialist tendencies in the constitutional courts?

Therefore, the first question to be raised is whether it is necessary in a State governed by the rule of law to submit referendum procedures to a review of their constitutionality and, at the same time, whether judicial review of such procedures is acceptable in view of the people's sovereign rights. To avoid, as far as is possible, lumping different concepts together, we shall distinguish between ordinary laws passed by referendum and laws amending the constitution, likewise submitted to a referendum.

I. CONSTITUTIONAL REVIEW OF ORDINARY LAWS PASSED BY REFERENDUM

A. Whether such a review is justified

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[8] *In this respect, readers are referred in particular to the Constitutions of Romania, Croatia, Hungary, the Slovak Republic and even Slovenia.*

[9] *In the light of the Conseil constitutionnel's decision of 23 September 1992, known as the Maastricht III decision.*

[10] *In this connection, readers are referred to the finding of "inadmissibility" given on 16 March 1995 by the Council of State regarding the initiative "in favour of a reasonable policy of asylum".*

[11] *Quite apart from the fringe theory according to which a referendum can be a means of reviewing the constitutionality of laws. In this respect see J. Lemasurier's "La constitution en 1946 et le contrôle juridictionnel du législateur", LGDJ; 1954.*

1. Relevance of the requirement that the hierarchy of laws be respected

In a State that applies the principle of the hierarchy of (domestic) laws it is difficult to accept that ordinary laws passed by referendum should be considered as not subject to constitutional review. Such reasoning amounts to a contradiction in terms[12] and leads to "deconstitutionalisation" of the constitution[13].

Indeed, once any law passed by the electorate through a referendum can create exceptions from the constitution, the latter's provisions, and even its structure, are weakened. Such a law is also capable of sweeping away, like a house of cards, all the work done by the constitutional court. It might even threaten to destroy the existing system of constitutional justice or at least severely hamper it[14]. In any case, the ordinary people as legislator would be in a position to annul a finding of unconstitutionality by the constitutional court.

It is obvious that the argument that laws passed by referendum cannot be made subject to judicial review is scarcely defensible in a State that claims to be governed by the rule of law. In such circumstances, this reasoning is tantamount to a denial of the very concept of a constitution.

In other words, the position adopted by the French *Conseil constitutionnel* in the Maastricht III" case[15], in response to an application challenging the law authorising the ratification of the Treaty of the European Union, submitted for referendum, was an incongruous one in terms of the principles involved[16].

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[12] *In this connection, see J.L. Quermonne's "Le référendum: essai de typologie prospective", RDP, 1985, p. 589.*

[13] *To borrow an expression used by J.F. Prévost in "Le droit référendaire dans l'ordonnancement de la Cinquième République", RDP, 1977, p. 13.*

[14] *For example, what would be the situation if the way in which a case can be referred to the constitutional court were amended?*

[15] *See the Conseil constitutionnel's decision 92-313 of 23 September 1992:*

"... From the point of view of the balance of powers established by the constitution, the laws that were intended to come under Article 61 of the constitution are solely those passed by Parliament, and in no way those adopted by the French people following a referendum subject to review by the Conseil constitutionnel under Article 60 of the Constitution, which constitute a direct expression of the nation's sovereignty".

[16] *Even if we do not intend here to challenge the Conseil's refusal to bring into play the theory of implicit competence. However, it must be acknowledged that such a refusal was not in*

It is difficult to understand how the *Conseil constitutionnel* can accept that the same rules on repeal should simultaneously apply to laws passed by referendum and those that are merely voted by Parliament[17]. A law voted by Parliament that repeals or amends an earlier law passed by referendum can be subject to constitutional review by the *Conseil constitutionnel*. This being the case, what attitude could this institution take with regard to parliamentary legislation supplementing unconstitutional provisions previously enshrined in legislation adopted by referendum (or extending or restricting their scope)? The *Conseil constitutionnel* would be faced with a difficult choice, to say the least, between the solution of fully upholding its 1985 case-law (referred to as the "State of emergency in New Caledonia" decision)[18] and thereby acknowledging that a law voted by Parliament can be made subject to judicial review even with the ensuing risk of passing judgment - at least by rebound - on the constitutionality of a law submitted for referendum, or that of preserving the unreviewable nature of a law passed by referendum by limiting any constitutional review of laws already enacted solely to laws enacted by Parliament.

2. The lack of validity of the argument that laws approved by referendum are a direct expression of the people's sovereignty

- Approval by the people is said to confer additional value on a law submitted for referendum, not only in political terms but also from a legal point of view. This theory that laws passed by referendum rank higher than other laws already caused a fierce controversy at the time of the Weimar Republic, since some theorists argued that only a newly elected

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line with the policy enshrined in the previous case-law and, in any case, was an embarrassing precedent for the future.

[17] *See the Conseil constitutionnel's decision 89-266 of 9 January 1990, Law Report 15.*

The law introducing an amnesty for the main perpetrators of lesser political offences, in particular those linked with the 1988 events in New Caledonia, had been brought before the Conseil constitutionnel. This law repealed certain provisions of the law passed by referendum which ratified the Matignon agreements on New Caledonia. Refusing to consider that the partly repealed law ranked higher, given its democratic origin, that ordinary laws - which would have led it to hold that it had no jurisdiction to carry out a review - the Conseil constitutionnel instead took the opposite view that "... the nation's sovereignty in no way prevents the legislators, acting in the area of competence reserved for them under Article 34 of the amended constitution, from amending, supplementing or repealing amended, supplemented or repealed provisions resulting form a law voted by Parliament or passed by referendum".

[18] *See the Conseil constitutionnel's decision 85-187, confirmed in particular by decision 89-256 of 25 July 1989, known as the "TGV Nord" decision.*

Diet was empowered to repeal a law approved through a referendum[19]. The reasoning still prevails today, to a greater or lesser extent, in a number of constitutional systems[20]. It must, however, be observed that where judicial review of the constitutional validity of laws passed by referendum is accepted, the principle that such laws are of greater value is rejected. This is, in particular, the view upheld in the case-law of the American States, which, with a few exceptions, specifies that the two types of law must be treated on an absolutely equal footing[21].

- Such a solution moreover merely recognises that fact that the legislator by referendum is, by definition, an authority established by the constitution and subject to its pre-eminence.

- Therefore, in a constitutional democracy, a constitutional court must, in its judicial capacity, hold that it has jurisdiction and exercise supervision to ensure the supremacy of the Constitution over the people in their capacity as an authority established by the Constitution. Considering the people as a permanently "sovereign" power amounts to laying a constitutional mine-field[22].

It should be added that the theory of absolute sovereignty of the general popular will has been thrown out of balance since the law as an expression of general parliamentary will has lost its immunity from review. This means that the "Maastricht III" case-law[23] leaves the *Conseil constitutionnel* in an uncomfortable position[24]. Its (reiterated) definition of ordinary law[25], namely that

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[19] *See J.A. Frowein's "Les référendums, Aspects de droit comparé" in "La participation directe du citoyen à la vie politique et administrative", Bruylant, 1986, p. 115.*

[20] *For instance, in Hungary if a law passed by referendum is to be amended by an Act of Parliament, the constitution requires that a two-year waiting period be respected. See M. Suksi's "Bringing in the People - A comparison of Constitutional Forms and Practices of the Referendum", M. Nijhoff, 1993, p. 115 and note 3.*

[21] *On this matter see the details provided, inter alia, by J. Costello in "The Limits of Popular Sovereignty. Using the Initiative Power to control the legislation", California Law Review, vol. 74, 1986, pp. 506 and 507, and D. Nedjar in "Initiative et référendum aux Etats-Unis - contribution à l'étude des normes juridiques d'origine populaire et du droit référendaire", RDP, 1993, p. 1623, note 110 and p. 1632, note 145.*

[22] *In this connection see O. Beaud's "La puissance de l'Etat", PUF Collection Léviathan, 1994, p. 430.*

[23] *See note 15.*

[24] *Expressly so since decision 85-197 of 23 August 1985 on the regional organisation of New Caledonia.*

"the law expresses the general will only when it is in keeping with the constitution", will have to be revised and toned down.

- As for the objection based on the risk that the constitutional court may find itself obliged to review the constitutionality of any provisions of constitutional value contained in an ordinary law passed by referendum, this can easily be set aside. The constitutional court is free to avail itself of the theory of divisibility (distinguishing between constitutional and ordinary legislative provisions) whenever the need arises.

Moreover, French constitutional case-law shows that this is in no way an unfeasible solution[26].

3. The parallel with review of the treaty-compatibility of laws passed by referendum

The fact that laws passed by referendum are subject to a review of their compatibility with international treaties could, other things being equal, be used as an argument to justify the introduction of a constitutional review of such legislation.

In some cases, determining whether legislation is compatible with international treaties comes within the jurisdiction of the constitutional court itself, in so far as international treaty law (or at least treaty law relating to protection of human rights) is an integral part of the "constitutionality package". A particularly good example of such a situation can be found in Hungary[27].

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[25] *This is the case even if it is accepted that the constitutional revision of June 1992 had the effect of constitutionalising the Treaty of Maastricht (or at least in substance some of its provisions) and that the problem raised was accordingly that of reviewing a constitutional law rather than a mere ordinary law. In this respect, readers may consult with due circumspection B. Mathieu's "La supra-constitutionalité existe-t-elle? Réflexions sur un mythe et quelques réalités", LPA, 1995, no. 29, p. 14, and less reservedly O. Beaud's "La puissance de l'Etat", op. cit., p. 431 ("the ratification of the treaty of Maastricht must be interpreted as a constitution-making act").*

[26] *The Conseil constitutionnel acknowledged that the institutional legislators were entitled to amend institutional provisions contained in a constitutional law of 1962 on presidential elections. See decision 75-65 of 4 June 1976.*

[27] *On this point see G. Malinverni's "L'expérience de la Commission européenne pour la démocratie par le droit" in "Vers un droit constitutionnel européen. Quel droit constitutionnel européen ?", RUDH, 1995, special issue not published, and Ch. Gouaud's "La cour constitutionnelle de la République de Hongrie", RDP, 1993, pp. 1243 et seg.especially pp. 257-1259. See also the precedent established by Article 2, paragraph 1 b) of the constitution of the Czech and Slovak Republic (law no. 91 of 27 February 1991), which provided that the laws voted by the Federal Assemblies and Councils of the two republics would be subject to review*

However, reviews of compatibility with treaties and of constitutionality are dissociated in most instances[28].

For example, the Swiss Federal Court ensures that legal provisions adopted by referendum are compatible with international treaties. Following the more or less complete departure from the so-called Schubert case-law, it can be expected that the scope of this review will be further extended[29].

This latter development highlights even more the lack of symmetry of the review carried out by the Federal Court on the validity of federal legislation[30].

Similarly, in France the ordinary courts have jurisdiction, in the first instance, to review the compatibility of legislation with international treaties[31]. These courts are therefore in a position to undermine immunity, although this immunity was confirmed with regard to constitutional review in the so-called "Maastricht III" decision. In cases where treaty law and constitutional law had the same content, an ordinary court would even be in a position *de facto* to carry out what amounted to a constitutional review through its review of the legislation's compatibility with international treaties.

What is more, the introduction of a review of the compatibility with international treaties of government bills to be approved by referendum is now considered a

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with regard to "international treaties on human rights and fundamental freedoms, that had been ratified and promulgated" (R.F.D.C., 1992, p. 166).

[28] *Countries which make it a constitutional obligation to interpret the constitution in the light of the rules of international law (or some of those rules) must be considered separately.*

[29] *Swiss Federal Court Law Report (AFT) 99 Ib 39, Schubert decision of 2 March 1973. There have nevertheless been some departures from this case-law, although it was upheld on several occasions. For a global view of the question see O. Jacot-Guillarmod's "Le juge suisse face au droit européen", RDS, 1993, (vol. 112), II pp. 367 ff.*

[30] *On this subject see M. Hottelier's "Suisse : primauté des normes issues du droit international public" (judgment of the Federal Insurance Court of 25 August 1993), RFDC, no. 19, 1994, pp. 605-608.*

The inconsistency of splitting the verification of legislation's validity in two in this way was denounced a long time ago. See J-F. Aubert's "Traité de droit constitutionnel suisse (supplément)", Ides et Calendes, 1982, no. 1326.

[31] *Re this possibility see J-F. Flauss's "Prévalence du traité antérieur et contentieux constitutionnel. Des effets induits de l'arrêt Nicolo", LPA, 1990, no. 40, p. 9, note 5.*

particularly appropriate constitutional reform. It should be noted that, since laws passed by referendum, like all other laws, are less binding than international obligations, the *Conseil constitutionnel* should declare null and void any bill (whether government or private member's) which is contrary to an international obligation, and oppose the continuation of the procedure[32].

B. Ways of implementing a constitutional review of ordinary laws passed by referendum

1. Opting for a preventive verification of the legislation's formal validity

- Verification that formal admissibility conditions[33] are satisfied in the case of requests or proposals for referendums or of popular initiation of legislation[34] is entirely consistent with scrupulous respect for the "sovereignty" of the people as legislator. Moreover, the solutions adopted as a matter of comparative law are to a large extent, if not to say totally, based on acceptance of such a minimum degree of review[35].

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[32] *Report submitted to the President of the Republic on 15 February 1993 by the Advisory Committee on Constitutional Reform, French Official Gazette, 1993, p. 2549.*

[33] *That is, conditions relating to the number of signatures, compliance with time-limits (for filings etc), validity of signatures, the form and presentation of draft instruments, etc.*

Such a formal control could accordingly unquestionably include verification that the rule on coherence of form (as defined in Swiss and American law on referendums) had been adhered to.

[34] *With a view to safeguarding the people's rights to the greatest extent possible, it is indeed possible to envisage the performance of a review before the law is submitted for referendum or the popular initiative is "tabled".*

Such a solution is, however, neither the most appropriate nor the most realistic.

Nevertheless, for an argument against the practice followed in the State of Colorado see R.B. Collins and D. Oesterle's "Structuring Ballot Initiatives", University of Colorado Law Review, Vol. 66, 1995, no. 1, pp. 124 and 125.

[35] *Where Switzerland is concerned see E. Grisel's "Initiative et Référendum populaires - Traité de la démocratie semi directe en Suisse", Public Law Institute, Lausanne University, 1987, pp. 122 and 123.*

This being said, the fact remains that it can be difficult to classify (or define the nature of) certain admissibility criteria. The rule on coherence of subject-matter is an obvious example.

Is this a condition of form or a substantive requirement? The Swiss practice is that the admissibility of popular initiatives must indeed be verified to ensure that the subject-matter is coherent, but the supervisory authorities (the Federal Council and Federal Assembly) have generally been so circumspect in such matters[36] that the review performed can be considered as no more than vestigial. Refusing to allow legislation initiated by the people appears to be acceptable only in cases of manifest (or even gross) failure to comply with the principle of coherence of subject-matter[37].

In the United States the policy adopted in the case-law of the State Supreme Courts is just as cautious as that of the Swiss political authorities: prior verification (if any is allowed) of compliance with the rule on coherence of subject-matter is likewise limited only to severe breaches[38].

- The first ground relied on is that of the "anti-authoritarian" objective of legal instruments initiated by the people. Popular initiatives and referendums are considered to be a right which the constitution confers on the citizens alone[39]. However, such an argument is pertinent only in so far as the referendum process is triggered by the people.

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[36] *However, recently (March 1995) the federal authorities abandoned their legendary reserve. In this connection, see the recent "cancellation" by the Federal Assembly (but admittedly not by the Federal Council) of the socialist initiative "in favour of lower defence expenditure and an expansion of social policy".*

For opposite viewpoints on the ins and outs (so far) of this finding of inadmissibility, see inter alia the following articles: JF Leuba's "Les droits populaires eux-mêmes peuvent être limités", Journal de Genève, 10 April 1995, J. Philippin's "Au mépris des droits populaires", l'Express, 25 April 1995, and J-F. Aubert's "Quel avenir pour les droits populaires en Suisse?", Le Nouveau Quotidien, 11 April 1995.

[37] *"Overall, a firm stance has scarcely been adopted in the case-law. It is true that the decisions taken in two old cases (42) were perhaps excessively severe. However, where the remainder are concerned, the judicial divisions allowed applications which were obviously inadmissible." See E. Grisel's, "Initiative et référendum populaires", op. cit. p. 194 and notes 42 and 43 on the same page.*

[38] *See A. Auer's "Le référendum et l'initiative populaire aux Etats-Unis", op. cit., p. 123, note 7 and p. 124.*

[39] *In other words, this endorses "a two-sided concept of the separation of powers: on one side the people who have won the right to legislate as they wish; on the other side the*

- The second argument put forward relates to the merely hypothetical nature of the conflict of laws. In more prosaic terms, one might say that it is important to wait until the people has determined an issue ("Wait and see ..."). A prior review of the content of legislation submitted for a referendum would constitute an infringement of the people's rights from the outset.

2. Opting for a preventative verification of the legislation's material validity

- Although an attractive option in many respects, a decision to reject any form of prior intrinsic review can be countered with arguments that are at least of equivalent weight to those put forward by proponents of this option. Where a popular ballots's outcome will inevitably be subsequently annulled, public funds are squandered. Such a situation is also likely to be a source of frustration for the electorate, and a possible repercussion is that it will discredit all popular voting processes. In any case, a minimum degree of review can be justified as a means of preventing blatant breaches of the constitution. Would not the very credibility of the constitutional system be called into question if, for example, a popular initiative to enact legislation aimed at establishing casinos was voted upon, whereas the constitution banned games of chance? However, in the end, the most convincing argument is doubtless that of compliance with the allocation of legislative powers as set forth in the constitution. A matter cannot be referred to the electorate and the electorate cannot vote upon it where it is not competent to do so. Accordingly, at the very least, a verification of the substantive scope of the law submitted for referendum is essential. It must be said, on the basis of past comparative law experience, that the implementation of such a review is not without technical and political difficulties[40]. Nevertheless, it is increasingly

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legislature, the executive and the judiciary who have paid the price of this victory and are consequently incapable of restricting the use made of it". See A. Auers's "Le référendum et l'initiative ...", op. cit., p. 124.

[40] *In this connection, regarding the practice in some American States, see A. Auer's "Le référendum et l'initiative populaire ...", op. cit., p. 125, notes 736 and 737.*

With regard to the case-law of the Italian Constitutional Court, see J. Cl. Escarres's "Cour constitutionnelle italienne et référendums", RFDC no. 13, 1993, pp. 183-195, and S. Bartole's report to this seminar entitled "Referendums and the Italian Constitutional Court".

regarded as a means of ensuring the sound management of the process of adoption of legislation by referendum[41].

2. Opting for subsequent review of the legislation's formal validity

At first glance a subsequent review of a popular ballot limited to mere appraisal of its compliance with procedural criteria would appear to be a largely useless exercise - at least for those who believe in the adage that a vote makes good an error[42]. To prevent any over-zealous legalism, it is probably appropriate and realistic to regard popular ballots as having a purging effect. But, for all that, is it

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[41] *See, for example, the proposals along these lines made in France with regard to the law-making referendums provided for in Article 11 of the current constitution. In its report, the Advisory Committee on Constitutional Reform (the so-called Vedel Committee) proposed that the Conseil Constitutionnel should verify the purpose of the referendum as compared with the scope (re)defined in the amended Article 11. This verification, which would relate to both government bills and private member's bills, would in the latter case be carried out before the citizens' signatures were collected. The new powers to be attributed to the Conseil Constitutionnel would serve two objectives: (1) "preventing the bias inherent in referendums called at times of upheaval or violent emotion, not conducive to careful consideration of an issue, from jeopardising fundamental elements of the constitution or essential freedoms or rights". (2) "Such a verification necessarily entails a ban on using referendums to amend the constitution" (French Official Gazette, 1993, p. 2549). Legal theorists have proposed a verification of the purpose of the referendum (and incidentally of the fairness of the question posed in accordance with the requirement, now enshrined in the Conseil Constitutionnel's case-law (decision no. 87-226 of 2 August 1987 on the law organising the consultation of the relevant inhabitants of New Caledonia and its dependent territories under sub-paragraph 1 of law no. 86-844 of 17 July 1986 relating to New Caledonia), that "questions must be clearly worded and free from all ambiguity"), which would be the responsibility of the Conseil Constitutionnel, ruling in accordance with its decision-making jurisdiction. (See F. Luchaire's and G. Conac's "La constitution française", Article 11, Economica 1987, 2nd Edition, p. 498: "It is common ground among constitutional law specialists that questions put to the electorate and bills submitted to it should be drafted only with the Conseil Constitutionnel's consent. Many of them consider that the Conseil should be able to assess the legal correctness of the texts and also their intellectual soundness, with the result that the people are not asked to give a single answer to questions of different kinds and that there is an exact correspondence between the question put and the text submitted in the popular ballot".*

See also the private members' bills of constitutional law aimed at introducing referendums to adopt legislation by popular initiative (in particular the private members' bills of Mr Pasqua and others, Senate 1989/1990 no. 51, and Mr Toubon, National Assembly, 1988/1989, no. 517), which also favoured a constitutional review of the purpose of a referendum, as compared with the scope laid down for it.

[42] *This adage has been hallowed by the federal constitutions of the United States and, where appropriate, the case-law of the Supreme Courts. On this point see A. Auer's "Le référendum et l'initiative populaire ...", op. cit., p. 127, notes 739 and 740.*

acceptable that essential formal defects should be dealt with in the same way as less serious procedural errors? Similarly, is it not dangerous to rely on the above adage in cases where formal defects have misled a large part of the electorate or have adversely affected the genuineness of the ballot?

3. Opting for a subsequent review extended to include intrinsic validity

Quite apart from the justification that may be derived from compliance with the hierarchy of laws, another argument in favour of a review of the substance of legislation introduced by popular ballot can be found in the "checks and balances" theory. A review subsequent to a referendum can be perceived as a means of counter-balancing the people's prerogatives vis-à-vis the political authorities. In the case of provisions resulting from a popular initiative, it would also be conceivable to argue the need for good management of legislation, that is, harmonious integration of legislation initiated by the people into the legal system.

Although extremely desirable, is the establishment of such a substantive review a realistic solution? Is there not a risk that it will evolve into a mere bluff? The effectiveness of a review subsequent to a referendum is in fact entirely conditional on the independence of the constitutional court judges (especially with regard to the initiators or authors of the law passed by referendum). In other words, the review's effectiveness will be determined to a greater or lesser extent by the term for which the judges are appointed, whether they can be reappointed for a further term, and so on. It is obvious that where judges are elected by popular ballot and, what is more, their appointments frequently come up for renewal, they will be strongly inclined to set their own limits on any action they may take that is likely to run against the popular will[43].

Similarly, a judge whose status was not safeguarded by the fact that the constitution is subject to a special amendment procedure would be entirely at the mercy of the authorities or the electorate, should they have the power to amend the constitution. On the other hand, to ward off the likelihood of the government of the country being placed into the hands of judges, it is absolutely essential that

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[43] *In this connection see J.N. Eule's report "Constitutional Justice and Consultative Democracy in the United States", pp. 8-10.*

For an opposite stance, readers are referred to the (relatively isolated) case of the Supreme Court of California. From 1960 to 1982, out of 11 popular initiatives approved by the electorate, seven were held to be fully or partly unconstitutional (figures cited by A. Auer, op. cit., p. 128, note 743).

the people should be able to form "constitution-making seats of justice"[44], if necessary of their own initiative[45]. It is not possible to call for respect of the people's sovereignty while at the same time denying the people the possibility of instigating rectification of any decision holding that an ordinary law passed by referendum is unconstitutional[46]. In any case, the extent, and even the lack of limitation, of the people's power to form constitution-making seats of justice must not be over-rated. This would overlook the fact that constitutional courts can, through interpretation, render inoperative (at least in part) the provisions of constitutional law designed to have a remedial effect. Although open to the scrutiny of the people as the authority exercising the power of constitutional amendment, the constitutional court would retain the possibility of supervising such public scrutiny.

"From the point of view of separation of powers, this results in the second-degree situation. The people reviews and corrects the judges' action by means of referendums and initiatives, but the judges in a way have the last say since it is their task to work with those provisions of constitutional law that were intended to clip their wings. Admittedly they cannot do away with these provisions at a stroke of the pen, but by interpreting them restrictively they do sometimes succeed in reducing their scope"[47].

II. CONSTITUTIONAL REVIEW OF LEGISLATION INTRODUCED BY REFERENDUM WITH A VIEW TO AMENDING THE CONSTITUTION

A. The issues at stake

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[44] *As is usual practice in almost all of the American States where "direct legislation" procedures are in force. See A. Auer, op. cit., pp. 137 ff.*

[45] *The question of the right of popular initiative with regard to amendments of the constitution is therefore inevitably raised.*

[46] *This amounts to saying that criticism such as that levelled at the constitutional reform following the French Conseil Constitutionnel's decision no. 325 of 12 and 13 August 1993 (on the law relating to control of immigration and the conditions of foreigners' entry, reception and residence in France) would be particularly ill-advised, in so far as the general intention was to challenge in a round-about way the very right of reply of the authority having the power to amend the constitution. (See, inter alia, F. Luchairs's article "Inutile" in Le Monde of 28 August 1993, M. Duverger's article "Constitution, éviter à tout prix la révision" in Le Monde of 30 September 1993 and C. Teitgen-Colly's "Le droit d'asile: la fin des illusions" in AJA, 1994, p. 97).*

[47] *See A. Auer's "Le référendum et l'initiative populaire ...", op. cit., p. 139.*

Traditionally the debate on constitutional review of constitutional law passed by referendum has been fed by controversy as to the absolute or relative nature of constitutional reversibility (1).

Yet this debate must now take place in a context that is no longer confined to the strict limits of endogenous "supraconstitutionality". Indeed, the argument that a review must be performed to ensure that the way in which the people exercise their right to amend the constitution is compatible with international rules of law is no longer a mere point of academic theory (2).

1. The absolute or relative nature of constitutional reversibility

Judge Vedel's comments on the passing of the concept of (endogenous) supraconstitutionality could be likened to a truly final requiem, so brilliant and biting are his criticisms regarding the substantive limits of constitutional reversibility[48]. The former member of the *Conseil Constitutionnel* is vituperative in his condemnation of the disgraceful contradiction in terms embodied in the notion of supraconstitutionality. He views supraconstitutionality as an unacknowledged perversion of legal logic. The concept of supraconstitutional legislation is an aberration. It is thus not possible to seek traces of such a concept in comparative law theories relating to the international context[49].

This also means that the notion that the constitution can (expressly or implicitly) define the concept of supraconstitutionality is another bright idea which is misconceived. "Those with sovereign power cannot tie their own hands. Because of their sovereignty they can at any time change a law banning change"[50].

There is an all the more pressing need for absolute reversibility[51] in that supraconstitutionality is a threat to the democratic legal system. "By ousting the

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[48] *See G. Vedel's "Constitution et supraconstitutionnalité", Pouvoirs, no. 67,1993, pp. 79 ff.*

[49] *An opposite opinion is expressed by L.Favoreu, who refers to the existence of transnational supraconstitutional laws (Souveraineté et supraconstitutionnalité", Pouvoirs, no. 67, p. 74).*

[50] *See G. Vedel's "Constitution et supraconstitutionnalité", op. cit., p. 90.*

Concurring with Thomas Paine (democracy is lawful only because it has the living's consent), the eminent author denounces the scientifically outdated "creationist" ideology which underlies the theories of supraconstitutionality.

[51] *Naturally subject to the proviso that the constitutional legislator is required to comply with the rules of procedure and competences laid down in the constitution governing the act of constitutional reform.*

sovereign, it would leave the institutions with a choice between oligarchy or government by the judges"[52].

No matter how attractive it may be, the theory of absolute constitutional reversibility is nonetheless ambiguous and is so on three counts.

Politically, some amendments to a constitution, even if voted upon by the people, cannot easily be conceived in so far as they are at odds with the "sacred cows" of the constitutional system in question.

This would doubtless be the case if the Swiss people initiated a constitutional reform aimed at doing away with the Confederation's federal structure[53]. Similarly, would it be possible in France to imagine holding a referendum to abolish the way in which the head of State is currently elected (despite compliance with the principle that a decision taken by an authority in a given form can only be annulled by that authority in the same form)? At a more general level, would it be acceptable for the people as sovereign to decide by popular ballot to surrender their power to make a constitution[54]?

Historically, the practice of defending the need for absolute constitutional reversibility in the name of democracy has to a large extent been based on a misconception, or even an error of judgment. One should perhaps even say that this is a case of "historical misinterpretation". The key provision of the 1791 constitution usually cited ("The National Assembly shall decree that the Nation has the indefeasible right to amend the Constitution") should be resituated in the context prevailing at the time, in which case "... the theory of the essential changeability of constitutions (appears), like Father Sieyès' arguments on the power to make a constitution, to be a call for insurrection, a pleading in favour of natural law as opposed to positive law"[55].

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[52] *See G. Vedel's "Constitution et supraconstituionnalité", op. cit., p. 94.*

[53] *On this point see J.F. Aubert's "Traité de droit constitutionnel suisse", published by Ides et Calendes, Neuchâtel 1967, volume I, p. 131.*

[54] *For a reply in the affirmative readers are referred to the position adopted by the supporters of césarisme plébiscitaire (plebiscitary imperialism). Defenders of the political theory that universal suffrage lay above the constitution, of democracy without a constitution, the bonapartists were of the opinion (at least on the theoretical level) that the very principle of the people's sovereignty could be challenged by a popular decision (see J.M. Denquin's "Référendum et plébiscite", LGDJ, 1976, p. 62).*

[55] *See O. Beaud's "La puissance de l'Etat", op. cit., p. 409.*

Lastly, from a legal point of view the option of total reversibility is a very significant denial of the distinction between the power to amend a constitution and the original power to draw it up, or at least gives this distinction a merely procedural scope[56]. Buttressed by an absolutist idea of democracy, such an approach is a refusal to endorse any re-interpretation of the theory of the power to make a constitution in the light of modern-day trends in constitutional law, ie primarily the development and extension of the concept of constitutional democracy.

Such trends undeniably favour the promotion of the distinction between a constitution-making instrument and an instrument of constitutional reform[57]. In

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[56] *NB: The power to amend the constitution is subordinate only from an organisational and procedural standpoint. From a substantive point of view, it is equivalent to the power to make a constitution.*

[57] *To support the justification for this distinction, it would be possible, inter alia, to refer to German constitutional law, to Italian constitutional case-law and even, in the view of certain observers, to the decision given by the French Conseil Constitutionnel in the Maastricht II case.*

According to the accepted theory, the German Basic Law apparently firstly enshrines the power to amend the constitution (Article 20/2), within the substantive limits set by Article 79 (3), and secondly endows the people with a constitution-making power (Article 146) completely untrammelled by the need to comply with the substantive limits of Article 79 (3). (See for example C. Grewe's and H. Ruiz-Fabri's "Droits constitutionnels européens", PUF, Droit fondamental, 1995, pp. 56-57).

As for the Italian Constitutional Court, in its judgment no. 1146 of 1988, it expressly stated that "the Italian constitution embodies certain supreme principles which cannot be amended by a constitutional reform or other constitutional law" (for further details, see B. Caravita's "Principes suprêmes, principes supraconstitutionnels ou principes communs", RIDC, 1994, no. 2).

Lastly, the Conseil Constitutionnel's decision no. 312 of 2 September 1992 (Maastricht II) was understood to "accept constitutional review of constitutional laws passed by the Congress, in order to verify their compliance not only with the procedural rules, but also with the requirements or prohibitions contained in Articles 7 (sub-paragraph 11), 16 and 89 (sub-paragraphs 4 and 5). This last provision (Article 89, sub-paragraph 5) can, according to certain authors, be interpreted comprehensively so as to incorporate in it the fundamental values of the Republic. Could it be imagined, for example, that the Conseil Constitutionnel might refuse to review a constitutional law approving an exception from the ban on racial or religious discrimination?" (L. Favoreu and L. Phillip "Les grandes décisions du Conseil Constitutionnel", Sirey, 1993, 7th edition, p. 826).

other words, the people's sovereignty in constitution-making matters is perceived as absolute, completely unfettered and unlimited only when it lays down the constitution, that is when the people exercises its power to make a constitution, but not when it exercises its power to amend it[58]. Accordingly, while there is always a sovereign who is above the constitution, there is never a sovereign within the constitution[59].

In addition, the theory of absolute reversibility denies all credit to the idea that there may be different degrees of constitutional value attaching to constitutional laws[60], despite the increasing popularity of the theory of a hierarchy of constitutional rules[61].

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[58] *For a detailed account of this theory see, in particular, O. Beaud's "La puissance du peuple", op. cit., pp. 437 and 438. "The people's sovereignty only comes to the fore at the beginning and end of the constitutional State in order to make a constitution or terminate it ...".*

"Firstly, the sovereign who is "above the constitution" is the sovereign people as an authority holding and exercising the constitution-making power. This constitution-making sovereign is constitutione solutus, more or less as the sovereign ruler was legibus solutus. A nuance should be made with regard to this historical comparison between the constitution-making authority and the sovereign ruler ("more or less") since although the sovereign people are free to do away with existing constitutions, they are not free to repeal them, as we have seen. Those who consider the two notions of constitutione solutus and legibus solutus as formally identical are in fact proponents of the absolute concept of constitution-making power. Secondly, there can be no sovereign "within the constitution" in constitutional theory since only the constitution-making authority is sovereign and authorities established by the constitution are not sovereign. The latter are constitutional public authorities subject to the constitution. A constitutional State is therefore a State in which a governor is always a public authority and never a sovereign. There is usurpation of sovereignty where one of the authorities established by the constitution appropriates the constitution-making power".

[59] *See O.Beaud's "La Souveraineté ...", Pouvoirs no. 67, 1993, p. 32.*

[60] *See, inter alia, D. Rousseau's "Droit du contentieux constitutionnel", LGDJ, 1990, pp. 105 ff.*

[61] *As is now held even by French theorists. See for example:*

- D. Turpin's "Contentieux constitutionnel", PUF, 1986 p. 85.

- B. Genevois' "La marque des idées et des principes dans la jurisprudence du Conseil d'Etat et du Conseil constitutionnel", EDLE, 1988, no. 40, p. 181.

2. Development of review of the international validity of constitutional amendments adopted by referendum

At the European level, the Court of Justice in Luxembourg and the Court of Human Rights in Strasbourg are, at least indirectly, in a position to carry out a treaty-compatibility review of domestic constitutional law that contravenes either Community law or the law of the European Convention on Human Rights[62]. In exceptional cases, this has even taken the shape of a genuine review of the compatibility with the Convention of constitutional provisions adopted by referendum[63].

Such supervision is likely to lead to inextricable difficulties. What would happen, in particular, if the violated provisions of a treaty or convention were regarded as not subject to denunciation and, at the same time, the impugned constitutional provision was not susceptible of revision, even through a popular ballot? With a view to opening up a constitution internationally, and to establishing properly understood subsidiarity, it would at least be conceivable that the compatibility with international treaties of constitutional reforms should be subject to review at national level, even where such reform was popular in nature[64]. Along the way this treaty-compatibility review would moreover be likely to evolve *de facto* into a constitutional review, in so far as the treaty law referred to was identical in substance to a provision of domestic constitutional law.

- L. Favoreu's contribution to the round table held on 16 and 17 September 1994, on "Constitutional reform and constitutional justice", RFDC, no. 19, 1994, p. 662.

[62] *The Court of Justice of the European Communities can do so in particular under Article 177 of the Treaty by virtue of its competence to give a preliminary interpretation. As for the European Court of Human Rights, although it refuses to carry out any formal "abstract" review, it is in a position to render null and void, at least by repercussion, a constitutional provision adopted by referendum.*

[63] *In this connection, see the European Court of Human Rights' judgment of 29 October 1992 in the case of Open Door and Dublin Well Women v. Ireland, Series A no. 246. See also: F. Sudre's "L'interdiction de l'avortement: le conflit entre le juge constitutionnel irlandais et la Cour européenne des droits de l'homme", RFDC no. 13, pp. 216 ff, J.F. Flauss's "La contribution des organes de la CEDH à la formation d'un droit constitutionnel européen", RUDH 1995 special issue on "Vers un droit constitutionnel européen - Quel droit constitutionnel européen?" (not yet published).*

[64] *The innovation would be an important one, but less daring than it first appears. Is there not in fact already a hidden form of review of a constitution's compatibility with international treaties given that the procedures to verify treaties' compatibility with the constitution give rise to constitutional amendments where the constitution is at variance with a treaty?*

The example of Switzerland in fact shows that although it is not easy to introduce a review of the compatibility with international treaties of uses made of the people's rights, this is nonetheless a real possibility.

It is true that for a long time the prevailing opinion was that there should be no form of substantive limit on constitutional reform. The relevant federal authorities, namely the Federal Assembly and the Federal Council, therefore preferred to evade the difficulty by taking refuge behind their obligation to denounce an international treaty that was breached by a constitutional reform[65] and thus ruled out any form of treaty-compatibility review of legislation initiated by the people[66]. Recently, however, the federal authorities have significantly changed, if not to say almost totally reversed their traditional stance[67]. If necessary, the Federal Assembly could take measures to render invalid any popular initiative that disregarded Switzerland's obligations under international treaties[68]. Moreover, the decision in favour of making legislation initiated by the people subject to a treaty-compatibility review was apparently based not only on international requirements[69] but also on the need for legal consistency in national law[70].

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[65] *See the Federal Council's message on new provisions relating to referendums with regard to international treaties (FF 1974, II 1152).*

[66] *In this respect, readers are referred to the attitude clearly adopted with regard to the so-called Rheinau initiative (FF 1954 I 72), the initiative against limitation of the people's rights in respect of international treaties filed by Action Nationale in 1973 (FF 1974 II 1133), and to the initiatives against foreign ascendancy of the sixties and seventies (FF 1969 II 1058, 1974 I 212, and 1976 I 1390).*

[67] *In this connection, see the message on ratification of the Agreement on the European Economic Area (FF 1992 IV 87). The Federal Council pointed out (but with some caution) that it was for the Parliament, to which a popular initiative at variance with the agreement had been referred, to either declare it null and void or make it subject to a popular ballot.*

See, above all, the message concerning the popular initiatives "in favour of a reasonable policy of asylum" and "against illegal immigration" (FF 1994 III, p. 1483). The Federal Council held that the existence of a denunciation clause in a treaty no longer amounted to a determining factor and that it followed that the Federal Assembly must not, at any rate, hesitate to render null and void a popular initiative which contravened a treaty provision guaranteeing human rights or affording protection to human beings.

[68] *However, see the cautious stance taken (for tactical reasons?) by Federal Councellor A. Koller before the Council of States on 16 March 1995, when he stated "In order for a popular initiative to be declared inadmissible, it is not sufficient that it should breach international law" (source: Le Nouveau Quotidien, 17 March 1995).*

[69] *For instance, to what extent would the old theory have been practicable if the popular initiative had been at variance with a treaty that did not include any denunciation clause, a*

Whatever the case may be, this endorsement of the principle of making legislation initiated by the people subject to a treaty-compatibility review is all the more remarkable, and even daring, in that it does not have any express basis in the constitution, unless one considers that this basis lies in the requirement that a popular initiative must be practicable. The same applies, and even more so, to the introduction of a review of the compatibility of legislation initiated by the people with the binding rules of international law. Only recently, ie at the end of March 1994, the Federal Assembly, following the Federal Council's lead[71], held that the initiative "in favour of a reasonable policy of asylum" was null and void in that it violated in particular the international rule that a foreigner seeking asylum may not be refused entry immediately where this would expose the person in question to a risk of persecution on grounds of race, religion, nationality, membership of a given community or political opinion[72].

The federal authorities considered that annulment of the popular initiative was the only solution imaginable[73]. Switzerland could not free itself of its international obligation not to refuse entry to asylum seekers either by denouncing the treaties

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possibility to be envisaged with regard to certain international treaties safeguarding human rights? (See J.F. Flauss's "La dénonciation des traités internationaux de protection des droits de l'homme", to be published by RSDIE).

[70] *In particular, it was necessary to bring to an end the contradiction between the rejection of any form of treaty-compatibility review of popular initiatives and the solutions adopted in the Federal Court's Schubert case-law of 1973 (ATF 99 I b 39) with regard to the binding nature of federal law and of the international treaty.*

In such cases, a law implementing an article of the constitution (adopted as a result of a popular initiative at variance with a treaty provision) could take precedence over the treaty only in so far as Parliament (the legislator) had announced its intention to commit a knowing breach of that treaty! (With regard to this curiosity see R.E. Germann's "L'initiative des Alpes et l'accord de transit: comment sortir de l'impasse" in Le Nouveau Quotidien of 31 May 1994, p. 4).

[71] *See the message of 22 June 1994 on the subject of the popular initiatives "in favour of a reasonable policy of asylum" and "against illegal immigration" (FF 1994 III, pp. 1480 ff.).*

[72] *Council of States, 16 March 1995. Bulletin officiel de L'Assemblée fédérale, CE, 1995/1, p. 348-349.*

[73] *"When the constitutional provisions in question came into force Switzerland would be obliged either not to apply them or to breach the most elementary principles of public international law - an unacceptable solution for a State governed by the rule of law ...", Federal Council's message of 22 June 1994, previously cited, pp. 1486 and 1487.*

making that obligation binding on it[74] or by any other legal action, in so far as that obligation also constituted a binding principle of customary international law (*jus cogens*) and was acknowledged as such not only by a large number of States parties to the Geneva Convention on the Status of Refugees, but also by the Federal Court[75], the Federal Council and the Council of States[76].

The novel stance taken by the federal authorities, which demonstrates their undoubted will to open up the constitution internationally, nevertheless entails a risk of possibly unforeseen repercussions on the way in which the right to initiate constitutional reform and more generally all rights conferred on the people are exercised[77]. In particular, is it not likely that restrictions of these rights will increasingly be based on the argument that international treaty provisions safeguarding human rights cannot be denounced, either because the treaty in question does not include a denunciation clause[78] or because, despite the existence of such a clause, some of the rules laid down in the treaty have in substance become incapable of being denounced, thus impeding to a large extent the power to denounce the treaty[79]? In the latter circumstances, this infringement of the people's rights could be considered all the more serious in cases where the international treaty was not made subject to an optional referendum at the time of its ratification on the ground that it included a denunciation clause[80].

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[74] *Namely, according to the Federal Council, the Geneva Convention on the Status of Refugees, and subsequently the European Agreement of 16 October 1980 on the Transfer of Responsibility for Refugees, the European Convention on Human Rights, the United Nations Convention against Torture, and the International Covenant on Civil and Political Rights.*

[75] *The Federal Court explicitly acknowledged the binding nature of the ban on refusal of entry deriving from Article 3 of the European Convention on Human Rights and the validity as customary law of Article 33 of the Geneva Convention on the Status of Refugees (ATF 109 I b 72, 111 I b 70).*

[76] *See FF 1990 II 595, BO 1992 p. 1015.*

[77] *Or should it be considered that the consequences were accepted in full awareness of the facts, so as to stealthily wear away the rights of initiative and referendum, a process which was unlikely to succeed in the framework of a constitutional reform conducted in the prescribed manner.*

[78] *This applies in particular to the International Covenant on Civil and Political Rights.*

[79] *This is no doubt the case with the European Convention on Human Rights, especially as a partial denunciation of the Convention is apparently not a conceivable solution. See J.F. Flauss's "De la dénonciation partielle de la CEDH", Mélanges, and J. Velu's "Présence du droit public et des droits de l'homme", Bruyland, 1992, pp. 1253 ff.*

[80] *For further details see J.F. Flauss's "Le contrôle de la validité internationale des initiatives populaires en Suisse", FRDC no. 22, 1995, not yet published.*

It remains to be seen, however, whether all categories of treaties are concerned or whether, on the contrary, distinctions should be made depending on the nature of the treaty. Similarly, there remains an uncertainty as to the policy that the federal authorities will adopt in practice with regard to differentiation between constitutional and ordinary legislative provisions affected by findings that a law must be considered void. Moreover, there is a growing controversy as to whether it is appropriate to leave the Federal Assembly full discretion in this area. For example, in connection with the total reform project now being implemented, there are apparently plans to endow the Federal Court with the power to declare legislation void following a decision by the Assembly finding that a popular initiative is incompatible with an international treaty[81].

B. Possible solutions

"... There are practical means of reducing, if not overcoming, the theoretical difficulties arising from the introduction of referendum techniques in constitutional democracies"[82]. Comparative constitutional law moreover shows that this opinion is by no means unrealistic. However, to avoid the risk of complete subjection of the people's power to amend the constitution, the authority to carry out reviews conferred on the constitutional courts must necessarily be counter-balanced by ensuring that the people continue to have the "last word".

1. Progress of the idea of "controllability" of constitutional reviews

Legal theorists conceive of the idea of instituting a verification of the constitutionality of constitutional amendments mainly in the case of constitutional reforms adopted by Parliament[83], and more readily accept the idea in such cases. It is true that this possibility has from time to time been enshrined in given constitutional systems. Doubtless we should overlook the unconvincing precedent

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[81] *In this connection, see J.F. Aubert's article "Quel avenir pour les droits populaires en Suisse?" published in Le Nouveau Quotidien of 11 April 1995.*

[82] *See O. Beaud's "La puissance de l'Etat", op. cit., p. 434.*

[83] *See for example in this respect:*

- L. Favoreu's "Supraconstitutionnalité et jurisprudence constitutionnelle en droit privé et droit public français", RIDC, 1994, no. 2, p. 557.

B. Mathieu's "La supraconstitutionnalité existe-t-elle? Réflexions sur un mythe et quelques réalités", LPA, 1995, no. 29, p. 16.

(if only because the theory was not put into practice) offered by Spain under Franco[84]. On the other hand, attention must be paid in future to the conditions of implementation of the constitutional review of parliamentary constitutional reform initiatives which is provided for (or made possible) in the constitutions of certain countries of Central and Eastern Europe[85]. However, the example to be taken into consideration, above all others, is that of Austria. Under Article 44-3 of the Federal Constitution, the Federal Constitutional Court is authorised to perform a subsequent review of the constitutionality of procedures by which federal constitutional laws passed by Parliament are drawn up. In this case, this review relates to whether, given its content, the constitutional law in question involves a "total revision" of the constitution, such laws being subject to a "stricter" procedure in that they must be approved in a popular referendum. In other words, the Austrian Constitutional Court thus carried out a review of constitutional law and may where appropriate hold that the law is flawed by a formal defect[86].

Comparative law offers fewer relevant examples of instances where constitutional amendments adopted by the people are subject to constitutional review, unless of course it is considered that the verification of the acceptability of popular initiatives amending the constitution as carried out in Switzerland by the Federal Council and Federal Assembly can be considered to amount to a constitutional review[87]. It is perhaps worth noting the subsequent review of the formal validity of constitutional laws that can be performed by the Austrian Constitutional Court where such laws are regarded as involving a "global amendment" of the constitution. Above all, reference should be made to the solutions endorsed in

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[84] *In this respect readers are referred to the remarks made by Mr Rubio-Llorente, Vice-President of the Spanish Constitutional Court, in RFDC 1994, no. 19, p. 659.*

[85] *An example is the Romanian constitution of 8 December 1991 (Article 144a). The Constitutional Court has jurisdiction carry out of its own motion a constitutional review of initiatives amending the constitution (regarding the ins and outs of such a review, see F. Julien Laferrière's "La constitution roumaine du 8 Décembre 1991 ou la difficulté d'apprentissage de la démocratie", RDP, 1992, pp. 1238 and 1239).*

Another example is the Ukrainian constitution. See M.P. Martinenko's paper "Constitutionality of referendums in Ukraine", p. 4.

[86] *For further details see S. Peyrou-Pistouley's "La Cour Constitutionnelle et le contrôle de constitutionnalité des lois en Autriche", Economica, 1993, pp. 174 and 220. See also O. Pfersmann's "La révision de la constitution en Autriche", La révision de la constitution, Economica, 1993, pp. 40 ff.*

[87] *In any case, this admissibility review could serve as a model, inspiring or at least providing a source of inspiration for countries wishing to introduce an a priori review of popular instruments of constitutional reform.*

certain American States, such as Colorado, where judicial review relates to compliance of popular initiatives amending the constitution with the ban on challenging (or changing) the existing constitutional structure[88].

2. The limits of the "controlability" of popular constitutional amendments

In view of the experience of a number of countries, it does not seem that a constitutional review (even *a posteriori*) of compliance with rules laying down the nature of the amendment procedure to be followed should necessarily be considered a heresy. It will moreover become evident that such a review involves an appraisal of the purpose or the content of the text of the amendment submitted to a referendum. Should we therefore go one step further and accept the principle of a "full-blown" review of the substance of the Act (or bill) of amendment, irrespective of any stake involved in the determination of the amendment procedure to be followed or any dispute on the subject.

For unhesitating proponents of the distinction between constitution-making instruments and instruments of reform, the reply could be affirmative - on condition, nevertheless, that the substantive limit placed on amendment by the people guarantees that the status (in the widest sense of the word) of constitutional judges is unchangeable[89]. Reversibility of constitutional provisions relating to the status of judges must be absolute. This clearly constitutes a safety valve that is absolutely essential to safeguard the people's right to have the "last word", which must be inalienable. At the least, such a prerogative would constitute an "*ultima ratio*" intended to remedy the problem, or even the impossibility, of establishing a constitution-making seat of justice through a popular ballot in cases where the

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[88] *A constitutional amendment of this kind necessitates use of the so-called "constitutional convention" procedure. On this subject see R.B. Collins' and D. Oesterle's "Structuring Ballot Initiatives", University of Colorado Law Review, Vol. 66, 1995, no. 1, pp. 121 and 122.*

[89] *Thus, although at first glance the ban on interfering through an amendment with the republican form of government (Article 89/5 of the French constitution of 1958) does not prevent any challenge of the institution of the Conseil Constitutionnel or of its functions, a ban on violating the principles of the rule of law (as enshrined in Article 79 (3) of the German Basic Law of 1949) severely restricts the freedom of action of the authority having the power to amend the constitution.*

On the issue of constitutional reversibility of constitutional review in Austria see O. Pfersmann's "La révision constitutionnelle en Autriche et en Allemagne", op. cit., p. 42.

constitutional court has held that a constitutional reform by referendum is a violation of the constitution[90].

IV. Constitutional justice and democracy by referendum in France - Report by Prof. Jacques ROBERT, Member of the European Commission for Democracy through Law, Member of the Constitutional Council

Article 3 of the French Constitution of 1958 proclaims: "National sovereignty belongs to the people, who shall exercise it through their representatives and by referendum".

Article 60 instructs the Constitutional Council to ensure "the regularity of referendum procedures" and announce the results thereof.

It would appear that in France at any rate, matters are perfectly clear. Yet these two lucid provisions conceal a multitude of uncertainties and debates, the extent of which will become clear once we have considered the variety of the types of referendum and the limits placed on intervention by constitutional judges in referendum disputes.

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I. THE DIFFERENT TYPES OF REFERENDUMS

Referendums can be classified according to the procedure used or according to the content of the question put.

A. The procedure used

Who may initiate the referendum? At what point?

a. The initiative may come either from those who govern or from the governed.

Where the former are concerned, one tends to think of the head of state freely deciding the time, the subject and the wording of the question. But that is perhaps less a referendum on a text than a plebiscite on an individual and his political programme, a distinction which invariably is difficult to draw, above all when the question has been tied to one person and when he who poses it intimates that he will assume all the consequences if the results are unfavourable.

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[90] *In other words, it must remain possible, inter alia, to hold a referendum amending the constitution through which a provision is included in the constitution with the aim of prohibiting the constitutional court from invalidating any constitutional amendment.*

Although the popular initiative referendum does not raise the same problems, some have expressed concern about demagogic manipulation if it is not kept within narrow limits[91].

In Switzerland, the popular initiative is used to challenge a federal Act or Treaty that is more than 18 years old at the request of 50 000 citizens or eight cantons, as well as to amend the federal Constitution, at the request of 100 000 citizens since 1992, either according to what is called the "pure alternative" system, still widely practised for cantonal and municipal referendums, or according to the "double yes" system, with a second question that makes it possible, when a counter-project is submitted to a popular vote at the same time as the initiative, to vote "yes" twice instead of once. It is to be hoped that this reform will improve the results of a procedure which, on the whole, does not attract many voters.

In the United States, popular initiative referendums exist in 24 states and may concern the most diverse subjects, such as legalisation of betting on greyhound racing (California), mandatory recycling of bottles and food tins (Massachusetts) or the opening of a casino (New Jersey), as well as questions involving the environment, morals, consumer protection or, frequently, tax reductions.

In Austria, the Volksbegehren procedure (Article 41 of the Constitution) gives a group of citizens the right to petition the Parliament directly on a particular question (the Volksabstimmung in Articles 43 to 46 is the equivalent of the referendum based on a government initiative).

In Italy, according to Article 75 of the Constitution, 500 000 voters or five Regional Councils may request the holding of a referendum, but only to repeal existing legislation and with the exception of certain matters (of a fiscal nature), subject to review by the Constitutional Court, which rejected six of the eight petitions initiated in 1978 and six of the eleven in 1981, including that of the Italian Communist Party to repeal the 1984 legislative decree abolishing variable salary scales. It is also possible for 50 000 people to propose a bill to Parliament, although the latter only very rarely examines it.

b. The "timing" of the referendum is not without importance, for it has an impact on the referendum's nature. A referendum may be held either before, after or instead of a parliamentary debate.

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[91] *In this connection, reference should be made to the invaluable remarks of Dominique TURPIN, "Droit constitutionnel", Paris P.U.P., second edition, 1994, pp. 243 ff., which this report relies on extensively.*

Before the debate, indicative referendums, similar to full-scale opinion polls, enlighten the representatives, but without binding them, about the decision that they will be taking. Napoleonic plebiscites were held prior to any legislative action, but were anti-democratic in spirit, because their purpose was to give the strong man of the moment carte blanche. In a completely different context, the British tradition only accords referendums an indicative value, the decision itself falling solely to Parliament (cf. referendums held in Great Britain on 5 June 1975 and on 1 March 1979, as well as the one concerning the Charlottetown Agreement voted on by Canadians on 26 October 1992).

Replacing a parliamentary debate, a referendum allows the people to exercise its sovereignty, which it does directly after withdrawing a question from its representatives, either on their initiative (cf. Article 11 of the French Constitution: "on a joint motion of the two assemblies") or on that of the executive (President of the Republic on a motion from the Prime Minister).

After a parliamentary debate, arbitration referendums may be envisaged in the event of a conflict between the two assemblies over texts relating to individual freedoms, following the failure of the equi-representational Joint Commission to resolve the conflict; this is tantamount to allowing the Senate to prevent their adoption when the National Assembly has the last word and to appeal to the people, rather than to the Constitutional Council, in its capacity as guarantor of liberties.

Ratification referendums are also relevant at this stage, either on constitutional questions, with the people rejecting the text drafted by an assembly or a convention specially elected for that purpose (in France: referendum of 5 May 1946) or, more frequently, approving it (in France: for the Constitutions of 1793, the Year III, those of the Consulate, the Empire and the Fourth and Fifth Republics), or else with regard to self-determination (the "interested populations" being asked to ratify legislation passed or agreements concluded on the subject).

Finally, referendums on the repeal of legislation, whether in Switzerland or in Italy, should also be included in this category.

B. The form of the question

The question may be constitutional or legislative in form.

 For constitutional questions, a referendum may be used as a single procedure for approving or amending a constitution, or it may be employed together with a favourable vote by a constituent assembly meeting to draft a constitutional text.

This category includes referendums on self-determination that give effect to a people's right to free itself either from tyranny in order to create a democratic egime or from colonial oppression in order to become an independent State, the express consent of the "interested populations" being required by both public international law and by Article 53 of the French Constitution of 1958.

As to legislative referendums, the Constitutions of many States provide for them to be held before, after or instead of parliamentary action. Unknown in France under the Third and the Fourth Republics, this type of referendum is covered by Article 11 of the 1958 Constitution, which allows the President of the Republic to "submit to a referendum any bill dealing with the organisation of the public authorities, entailing approval of a Community agreement, or providing for authorisation to ratify a treaty that, without being contrary to the Constitution, would affect the functioning of the institutions".

Thus, under the Fifth Republic, the referendum may only concern a "bill", i.e. a proposed legal text.

The phrase "dealing with the organisation of the public authorities" (broader than the "constitutional public authorities" of Article 16) has posed complex problems. It certainly applies to proposed legislation (including institutional and enabling Acts) and perhaps to proposed constitutional legislation, but excludes "blueprints for society", François Mitterrand having had to abandon their inclusion in 1984.

On 30 November 1992, the President of the Republic reintroduced his proposal to broaden the scope of Article 11 to include the "fundamental guarantees of individual freedoms", the Constitutional Council being required to give its view on whether the bill was consistent "with the Constitution, institutional Acts, our international commitments and the great principles that are the foundation of our liberties recognised by the laws of the Republic". In its report of 15 February 1993, the Consultative Committee for Amending the Constitution endorsed this suggestion and even added the authorisation to ratify treaties "having the same subject" (freedoms). It also specified that "the bill may only be submitted to a referendum after the Constitutional Council has found it to be constitutional".

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As France rather rapidly adopted a strictly representative notion of democracy, it in fact had little experience with referendums and most of it misguided throughout its constitutional history until the end of the Second World War. Those held under the First and Second Republics and the two Napoleonic Empires were actually plebiscites in disguise.

A referendum procedure in the strict sense did not make a real impact until after the Liberation.

On 21 October 1945, the French were asked a two-part question about the nature of the chamber that they were called upon to elect and about how they wanted to be governed in the immediate future.

On 5 May 1946, the French people was asked to vote on the first draft constitution, which it rejected.

On 13 October 1946, a second draft constitution put to the French people was approved and became the Constitution of the Fourth Republic.

Finally, on 28 September 1958, General de Gaulle submitted to the French people the text of what was to become the Constitution of 1958.

Most importantly, he saw to it that the new text included not only a provision to the effect that national sovereignty could be legitimately exercised through two different channels (the vote of elected representatives and the referendum), but also provisions allowing the referendum to be used in a number of situations.

Thus, the 1958 Constitution provides for recourse to a referendum in Article 11 (legislative referendum), Article 89 (constitutional referendum) and Article 53 (referendum on self-determination). The practice followed, frequently in the first years of the system and more cautiously after de Gaulle, gave rise to a number of controversies.

The two referendums on Algeria were referendums not only asking the French people to decide a difficult question, but also seeking approval for the presidential function as conceived by de Gaulle. They were personal plebiscites as well, because each time he put his office at stake.

The purpose of the referendum of 8 April 1962 was to seek the French people's approval of the Evian Agreements, ie the principle of Algerian independence, and to delegate to the President of the Republic numerous legislative powers so that he could issue concrete orders to make independence a reality.

The two referendums to amend the Constitution were that of 28 October 1962 on the election of the President of the Republic by direct universal suffrage and that of 27 April 1969 on changing General de Gaulle's Senate, the votes against (53.2 %) having prevailed over the votes in favour. These two referendums came under Article 11 of the Constitution.

Consequently, the referendum provided for in Article 89 has never actually been used under the Fifth Republic, because President Pompidou in 1973 (five-year presidency), Giscard d'Estaing in 1974 (reform of the system for replacing Members of Parliament) and Mitterrand in 1984 (broadening of the scope of Article 11) preferred not to pursue this uncertain procedure any further.

The referendums on Europe and New Caledonia were held on 23 April 1972 and 6 November 1988, respectively.

As to the referendum authorising ratification of the Maastricht Treaty, the Constitutional Council ruled on 2 September 1992 that the Treaty on European Union signed in Maastricht did not violate the Constitution, which had been amended by the Act of 25 June 1992 after its decision of 9 April. The Act of 23 September 1992, adopted by a narrow majority of the French people, subsequently authorised the President of the Republic to ratify the treaty. The same procedure was used in Ireland and Denmark.

Thus, there have been seven referendums in all, five during the first 15 years of the system, followed by 15 years during which the procedure was not used and then by something of a revival which, although still tentative, may be confirmed if the recommendations of the Vedel Committee are endorsed in due course.

II. THE ROLE OF CONSTITUTIONAL JUDGES IN DISPUTES RELATING TO REFERENDUMS

The referendum is a legally complex procedure involving a number of steps and acts that generate many conflicts and disputes.

Constitutional judges, to the extent that their theoretical jurisdiction is recognised over this entire difficult area, may be required to take action at a number of stages in the referendum process. But do they regard themselves as empowered to do so in the same fashion for all conceivable cases?

We shall consider three very different questions below.

A. Review of the decision to hold a referendum

French judicial doctrine has evidently always regarded the decision to hold a referendum as an "act of State" that is not subject to any form of appeal.

Hence, if the President of the Republic decides to avail himself of the procedure under Article 11 instead of that under Article 89 to amend the Constitution, if he submits to a referendum a bill on a subject not listed under Article 11 or if he uses this procedure despite the absence of a motion by the government or the two

assemblies, the administrative judge will invoke the theory of the "act of State". The Constitutional Council is not competent to hear cases involving such acts.

B. Review of the referendum's organisation and procedures

The Constitutional Council has adopted a narrow interpretation of the provisions of the Constitution and the institutional Order of 7 November 1958, which confer on it only a consultative role with regard to the organisation of referendums and a judicial role in respect of "complaints" about referendum procedures. Thus, in its decision of 25 October 1988 ("Diemert and Bannel"), it rejected a petition by two voters against the decrees on the referendum on New Caledonia and defined the term "complaint" restrictively, finding that it must apply "exclusively to objections formulated after the completion of the vote" and not beforehand, a position that it confirmed in three decisions on 15 and 18 September 1992 in connection with the referendum on authorising ratification of the Maastricht Treaty.

The 1988 decision is interesting because it goes into the details of a particularly difficult debate, but without closing the issue entirely[92].

The Constitutional Council has long considered that the powers conferred on it by Articles 46 and 47 of institutional Order No. 58-1057 of 5 November 1958 ("The Constitutional Council shall be consulted by the government about the organisation of the referendum. It shall be notified without delay of all measures taken on this subject" and "The Constitutional Council may present observations concerning the list of organisations authorised to use official campaign means") are consultative in nature but that they have a judicial character "as concerns the referendum procedures" and that the first paragraph of Article 50 of the Order, according to which "the Constitutional Council shall examine and rule definitively on all complaints", refers exclusively to "any protests against the referendum procedures after the completion of the vote". The Council examines any irregularities that may have occurred in the referendum procedures to determine whether they are serious enough to vitiate the procedures and lead to the referendum being declared void.

These decisions have been criticised for giving a too restrictive interpretation of the concept of "procedures", confined to the votes and the counting, whereas it could be taken to cover all the events and procedures leading up to the contested results.

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92 *See the valuable discussion of this legal controversy in D. G. LAVROFF, "Le droit constitutionnel de la V^e République", Paris, Dalloz, 1995.*

In its decision of 25 October 1988, the Constitutional Council, reiterating its traditional position on this question, indicated that the institutional Act only gave it judicial powers in respect of election procedures and that it only examined and gave final rulings on "complaints lodged against the referendum procedures after the completion of the vote". The decision mentions Articles 11, 19 and 39 of the Constitution, which empower the President of the Republic to hold a referendum (Article 11) without submitting the decree for countersignature (Article 19) but after discussion in the Council of Ministers (Article 39), as well as Article 60 of the Constitution, which instructs the Constitutional Council to ensure "the regularity of referendum procedures" and Article 63, which stipulates that "an institutional Act shall determine the rules of organisation and functioning of the Constitutional Council, the procedure to be followed before it and, in particular, the periods of time allowed for bringing disputes before it".

Thus, for questions concerning referendums, only duly recorded complaints involving voting and counting procedures may be brought before the Constitutional Council.

It is the Conseil d'Etat which has jurisdiction to hear appeals against measures concerning the organisation of referendums (Conseil d'Etat, Ass. 27 October 1961, Regroupement national, Rec. p. 194. Sirey, 1963, p. 28, note Hamon; Dalloz, 1962, p. 23 and Conseil d'Etat, Ass., 19 October 1962; Brocas, Rec., p. 553; AJDA, 1962, p. 612, note Laubadère; Sirey, 1963, conclusions Bernard; Conseil d'Etat, Ass., 28 October 1968, Centre national des indépendants et paysans, Rev. fr. Droit adm., 4-6 November-December 1968, p. 897 with the conclusions of D. Levis).

To conclude, the Constitutional Council has consistently stated that it does not have the authority to hear complaints lodged before a referendum to contest procedures prior to the referendum, although the Conseil d'Etat has recognised its jurisdiction in respect of certain administrative measures forming part of these procedures. On the other hand, the Constitutional Council of course retains all its powers after the announcement of the results, although its power of review in reality applies to the legislation as such and not to its constitutionality, for which neither the letter of the law nor, above all, the spirit of the Constitution confers the slightest competence upon it.

C. Review of the legislation passed by referendum

Legislation passed by referendum is not subject to rulings on its constitutionality. This is the result of the decision given by the Constitutional Council on 6 November 1962 (Decision 62-20 DC, Loi référendaire, Les grandes décisions du Conseil constitutionnel, p. 170 and Rec. p. 27). An Act passed by referendum is a legislative text that cannot be equated with an institutional Act, which is

automatically referred to the Constitutional Council, or with an ordinary Act of Parliament, because it is passed by the people, not by Parliament. The institutional Act of 7 November 1958 on the Constitutional Council provides only for the review of Acts of Parliament, and according to the Constitutional Court's interpretation of the spirit of the Constitution, it cannot review the constitutionality of an Act that is the direct expression of the will of the people.

The line of reasoning of the Constitutional Council is based chiefly on the fact that neither the Constitution nor the institutional Act on the Constitutional Council speaks of the Act passed by referendum as one of the texts whose constitutionality may be reviewed, but that by using the term "Acts of Parliament" and referring to the fact that the President of the Republic may "either promulgate the Act with the exception of this provision" (the provision declared unconstitutional) or ask the chambers for a new reading, the drafters of the Constitution implicitly but clearly excluded legislation passed by referendum from the scope of Article 61 of the Constitution. The Constitutional Council stresses that an Act passed by referendum is the "direct expression of national sovereignty" and that in the absence of express provisions of the Constitution, this characteristic prohibits the court, which is a "body responsible for regulating the activity of the public authorities", from ruling on the constitutionality of an Act passed directly by the sovereign people.

The question of review of the constitutionality of legislation passed by referendum was raised again when the Act authorising ratification of the Treaty on European Union was passed by referendum of 20 September 1992. In its Decision No. 92-313 DC of 23 September 1992, the Constitutional Council concluded that it was not empowered to rule on the request submitted to it and thus confirmed the decision of 1962, arguing, as in 1962, that legislation passed by referendum "constitutes the direct expression of national sovereignty". It would not make sense for an official body to be able to rule on the constitutionality of an Act directly expressing the sovereignty of the people. Moreover, the Constitutional Council is no longer a "body responsible for regulating the activity of the public authorities", which it was until 1971, reviewing the constitutionality of legislative action, but is entrusted with ensuring "the equilibrium of the public authorities established by the Constitution". The Constitutional Council has also reaffirmed the theory that its jurisdiction "is strictly limited by the Constitution".

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By now, there should be no doubt about the ambiguous nature of the "dialogue" which has by necessity emerged between referendum procedures and the constitutional judges and which is of the essence for ensuring respect for the judicial system.

The chief concern of the constitutional judges is to exercise the powers vested in them by the constitutional and institutional texts, but they must also take constant care to ensure that they do not give these texts an unduly broad interpretation which would take them beyond the bounds of their primary function.

Furthermore, they are fully aware that their actions must in no way infringe the will of the sovereign people. More than anyone else, they know that it is the people that ultimately decides and that their legitimacy as constitutional judges in fact derives from their unswerving allegiance to the sovereign alone.

V. Referendums and the Constitutional Court in Italy - Report by Mr Sergio BARTOLE, Professor, University of Trieste

1. In choosing the model of government for the new Italian constitutional order, the Italian Constituent Assembly opted for parliamentary government. No-one thought that the new government would function according to the English experience of the Westminster model, thereby leaving only to the turnover of the political parties in power the guarantee of the stability of the Cabinet and the limitation of crises by political parties in dealing with public affairs. It would rather be the task of the President of the Council of Ministers to counterbalance with his authority the centrifugal and fractional influences of the different political groups and interests, even of his own majority, according to a rationalised model for relations between the powers of State. To avoid improvident and imprudent initiatives by occasional majorities, a special procedure provided for the withdrawal of the confidence of Parliament in the Cabinet, and the Head of State was entrusted with the task of ensuring the observance of the Constitution. He was supposed to have more power than "a king who reigns but does not govern" and was intended to become the first adviser to the Cabinet and the moderator of constitutional life. But commentators share the opinion that he cannot interfere in the adoption of the general policies of the State, which has to be the result of co-operation between the Cabinet and Parliament on the basis of proposals submitted by the former to the latter.

On the other side, the machinery for the election of members of Parliament and the provisions providing for their political responsibility were designed to ensure the adherence and responsiveness of the governing bodies to the political demands of the people. Representative government should be concerned to avoid decisions taken on the basis of passions and emotions stirred up by social and political events. Members of the Houses of Parliament are supposed to be able to take their decisions after a full consideration of their agenda paying attention to the general interests of the State and having regard to all connected questions. Article 67 of the Constitution states the general principle of parliamentary activity, whereby members of Parliament shall be the representatives of the whole Nation and are not allowed to be bound by orders or instructions.

Notwithstanding its commitment to representative government, the Constituent Assembly introduced the referendum to the Italian constitutional order. The purpose was not to convert indirect democracy to direct democracy, that is to change a democratic government established on the basis of elected parliamentary assemblies into democracy rule by decisions adopted by the people itself. The idea was that the referendum should serve as a democratic check on specific and individual decisions of the national legislature. They should not be used as a mechanism for the adoption of popular decisions in the matter of general national policy. Their subject matter was and is supposed to be restricted and limited. If the people want to change State policy, they cannot do this by way of referenda, but must wait for the occasion of parliamentary elections to change the political majority in the Assemblies.

The Constitution provides for three different kinds of referenda at the national and regional levels: legislative referenda, constitutional referenda, and consultative referenda concerning the territorial borders of regional and local government. Moreover, the Regions are allowed to introduce referenda in their own legal orders. Legislative referenda are called to settle a question about the abrogation of a parliamentary statute on the basis of a popular proposal. Consultative referenda are necessary steps in procedures for changing the territorial borders of the Regions, Provinces and Municipalities. Constitutional referenda are called on the basis of a popular proposal when a constitutional statute is adopted without the special two-thirds majority of the Members of the two Houses of Parliament.

We will deal with legislative referenda only, because these concern substantive matters. Moreover they require a specific and peculiar judgment of the Constitutional Court, whereas the other referenda do not require such intervention. Certainly a case can be brought before the Constitutional Court when a statute is alleged to be unconstitutional on the grounds that it was adopted without a required constitutional or consultative referendum, but in this case the Court judgment does not differ from ordinary judgments on the conformity of statutes with the Constitution.

Under Article 75 of the Constitution, a referendum can be called for the total or partial abrogation of a statute if a formal proposal is subscribed to by 500 000 electors or adopted by five regional assemblies. Such proposals cannot relate to tax regulations, the State budget, amnesty statutes, or to the ratification of international treaties. The Constitutional Court is entrusted with the task of checking the popular proposals and deciding on whether they comply with this rule. This is a very important facet of the constitutional provisions concerning referenda. If people had been allowed to call referenda to decide items of general State policy, it would have been irrational to submit the popular proposals to such a check and to thereby restrict and limit the freedom of political initiative of the

people themselves. The special competence of the Constitutional Court appears acceptable and rational only in consideration of the fact that the powers of the people are limited: in a constitutional order where the most important political decisions of general relevance were adopted by the people directly, an interference by the Court in the decision-making process would be unthinkable. The court should be the judge of the final decisions of the legislator, which might even include the people, but it must refrain from entering the political fray.

In fact the special nature of the Court's competence in this connection is confirmed by the fact that it was not conferred upon it by the Constitution but by a later constitutional Act adopted in 1953. What was evidently at first a very restricted and traditional doctrine of constitutional justice came to recognise in time that the scope of the functions of a Constitutional Court could be enlarged to cover the constitutional relations between State powers. It is true that in Article 134 of the Constitution the Constituent Assembly also conferred on the Court the competence of settling differences between the powers of State, but without elaboration. Its work was therefore completed in the following years by Parliament in extending the competence of the Court to referenda.

2. The constitutional provisions concerning referenda were not self-executing. They had to be implemented by Parliament in that an additional Act was required to entrust the electors with the power of submitting proposals for the calling of referenda. This Act was adopted only in 1970 (May 25*th* 1970, no. 352) as a result of a political trade-off between the political parties which favoured the introduction of divorce in Italy and other political parties who wanted to consult the people about this reform. But the attention of the legislator was attracted more by the procedure for calling the referendum than by the powers of the Constitutional Court in checking the people's initiative. If we look at the Act of 1970 (we'll have to make reference to its provisions very frequently in order to have a complete idea of the rules governing the matter), we get the impression that the legislature shared the opinion that referenda are limited by the explicit provisions of Article 75 of the Constitution only, and that the law itself cannot expressly or implicitly limit the possibility of a referendum under the Constitution.

For instance, the problem of the formulation of the questions to be submitted to the people was not dealt with in the Act implementing the Constitution, as it is not provided for in the Constitution itself. Nothing was said with regard to the power of the Constitutional Court to forbid the calling of a referendum for the abrogation of a rule, which abrogation would have unconstitutional results. And, finally, the Act was silent on the possibility of submitting to the people a decision not only on an entire Act or a part of it but also on an individual provision or subprovision thereof. When proposals for referenda were advanced, the Constitutional Court therefore had to look for the solution to a lot of new problems.

At the same time, developments in the Italian political system did not offer concrete alternatives for the proposal of new or unusual social and economic demands. Some political forces began thinking about referenda as a possible means for new initiatives in Italian political life. They thought that, whereas Cabinet had lost its power of initiative, Parliament was not in touch with the new political interests of the people, and legislation did not react promptly and efficiently to the new demands and exigencies of contemporary society. According to their view, referenda can have a double function, abrogating on the one hand old legislation which is no longer fitted to changing reality, and — on the other hand obliging the legislator to fill legislative lacunae with more suitable and convenient rules. But there is another, not yet explored possibility: referenda can be directed to another result, namely the partial or complete reform of legislation by abrogating some provisions of an Act only, and, therefore, by the referendum itself. For instance, if you have a provision stating that "a woman is not allowed to have an abortion after three months of pregnancy", you can transform the prohibition into a permission by seeking only the abrogation of the word "not". In this way, the new provision will state that "a woman is allowed to have an abortion after three months of pregnancy". Evidently such a novelty can produce more significant effects if by the referendum you touch other surrounding provisions also, and change their meaning in the same manner.

Everybody can understand that this at once unpredictable use of the referendum changes its function: originally conceived as a legal instrument capable of negative and restricted effects, it is transformed into an instrument which can be used in pursuing positive results of policy. But there is also another facet of the practice which deserves mention. Proposals calling for referenda are submitted and the signatures of the electors are collected not only for one referendum, but very frequently also for more than one referendum at the same time, which are distinct from the legal point of view but are politically connected in pursuing common purposes of policy: for instance, the reform of electoral legislation, the enlargement of the competences of the Regions, a more liberal approach to relations between the authorities and citizens, and so on.

All these trends of political life have put the Constitutional Court in a difficult position because it is in danger of being at the centre of political strife in circumstances where it must simultaneously attempt to ensure its own neutrality and the fairness of the referendum procedure.

We have to keep in mind also that the Court decides on the lawfulness of proposals for referenda not at the very beginning of the procedure, before the promoters start collecting the signatures of the electors: it intervenes at a later stage, after the signatures are collected and the Referendum Office of the Court of Cassation has declared the existence of the required amount of subscriptions

according to the law. In this way, the Constitutional Court has to decide on the matter following the clear expression of the people's consent for the calling of the referendum. The political importance of its decision is certainly more than it would have been if the Court had been due to decide before the collection of the subscriptions. This is a very irrational aspect of the rules governing referenda, but unfortunately Parliament has not yet approved the proposals submitted with a view to their reform.

The peculiar position of the judgment of the Court in the procedure for calling referenda is really quite dangerous. People can get the impression that in deciding the question of the lawfulness of a referendum, the Court takes the side of the promoters of the referendum or of their opponents. The case law in this field has often been criticised not only by trained commentators but also by people interested in political affairs. The credibility of the Court itself is thereby put at issue. Moreover, the fact that the Court's case law has to fill legal lacunae in this area apparently adds fresh support to the view that the Court has been pursuing a policy of its own in this field.

3. If we look at the jurisprudence of the Constitutional Court on referenda, we can distinguish at least four lines of development in the arguments of the Court:

a. Referenda in the constitutional order

In the opinion of the Court, referenda have to be treated as sources of law with a view to understanding their position in the legal order as a whole. Therefore, the Court has to define the scope of its competence with regard to other sources of law: the provisions of Article 75 of the Constitution are not sufficient because there are other implicit limits on referenda whose existence can be discovered on the basis of a systematic analysis of the Constitution (sentence no. 16/1978).

Moreover, the referendum is an instrument of direct democracy which cannot be used □ in a representative democracy □ to obtain a popular vote of confidence in the general political choices of the promoters of the referendum (sentence no. 16/1978). Notwithstanding the fact that proposals for a referendum can cover a whole statute or a part or one provision of it only, the promoters are not completely free in writing down the questions that they want to submit to the people. For instance, there has to be a rational connection between the different parts of the proposal. We'll see that the abrogation of different provisions should not be proposed at the same time if electors would be obliged to accept the abrogation of one provision (which they do not dislike) in order to have another provision (which they dislike) abrogated (sent. no. 16/1978).

Once in the past, but also recently, the Court accorded to the promoters of a referendum the position of a State power in allowing them to be a part of a

constitutional trial concerning the division of functions between them and a judicial body (sent. no. 69/1978 and 161/1995). Therefore, a State power can be a structure which as a group of promoters is situated outside the incorporated organisation of State bodies but has functions which are founded on constitutional provisions.

b. The competence of the referendum as a source of law

The case law of the Court identifies the scope of the legislative referendum having regard to the legal order at large (sent. no. 16/1978). The conclusion is that it is not only limited by Article 75 of the Constitution but also by other implicit limits which are derived from an interpretation of the text of the Constitution.

Notwithstanding the silence of the Constitution on the matter, the holding of a referendum is not permitted for the abrogation of constitutional statutes, because a special procedure is required for their approval and their modification. But this judicial rule has to be applied as well to proposals for referenda concerning ordinary parliamentary statutes which have to be approved by a special procedure, for instance those concerning relations between the State and the Catholic Church or other churches and religions, for the reason that these statutes can be approved only on the basis of an agreement with the church or religion concerned, a safeguard which is absent in the referendum procedure.

When the content of a statute is completely mandated by the Constitution without leaving any discretion at all to the legislator, a proposal calling for a referendum cannot be submitted: as the legislator does not have any discretion with regard to the content of the statute, the people cannot be allowed to modify or abrogate it either. This position was stated in the important judgment no. 16/1978, but the position of the Court has been partially qualified in following decisions. For example it has been decided that if there is room for some discretion on the part of the legislator, the referendum can be called because the people have room to reject the solution adopted by the legislator for the implementation of the Constitution, and room also to oblige Parliament to look for a different solution (sent. no. 27/1987).

The same does not hold true for a statute which is necessary for the functioning of the State according to the Constitution itself. Even if the legislator has some discretion in providing for the particular regulation of the matter, in this case a referendum is not permitted because a lacuna of law in the field in question would be unconstitutional. Only the parliamentary legislator could abrogate such a statute in adopting a new one: while the referendum is permitted to produce negative effects only, the parliamentary legislator is in the position of substituting a new statute for the abrogated one and therefore of avoiding the forbidden lacuna. But on this point two qualifications should be made. The conclusion can

be bypassed if the question of the referendum is written down in such a way that the abrogation will apply to a part of a statute only, and the remaining part of the statute will be sufficient to comply with the necessity of ensuring compliance with the constitutional obligation to provide for a legislative rule on the matter. For instance, the Court did not contest a proposal for a referendum on the statute concerning the election of the Senate, notwithstanding that this statute is a necessary one: the proposal was in fact aimed at the abrogation of some provisions of the statute only and, therefore, avoided the danger of a total lacuna in the field, even if the approval of the proposal implied a change in the electoral system for the Senate.

In these cases the Court looked at the possible effects of the approval of the question submitted, but this is not very frequent. On the basis of its own case law, the Court is not allowed to anticipate the results of a referendum when it is dealing with the question of the lawfulness of the proposal for a referendum (sent. no. 24 and 26/1981, and 26/1987). The two problems are mutually exclusive. The Court is of the view that before the referendum it is unable to appreciate all the possible implications of the approval of the question and of the abrogation of the statute concerned: the judgment of the effects of the referendum goes further than the analysis of the content of the proposal, because the Court should look at the lacuna produced by the abrogation of the statute concerned having regard to the elements available for filling the gap in the general system of law.

In another case, too, the Court decided that a referendum could not be called because the abrogation of the statute at issue would have resulted in a gap not permitted by the Constitution. The decision concerned certain rules providing for abortion when justified by reason of the mother's health: if the proposal were accepted by the people, the right to health of the mother would not have had legal protection.

c. The enlargement of the meaning of Article 75 of the Constitution

In the opinion of the Court, a referendum cannot be called in respect of a statute which is strictly connected to those statutes whose exclusion from referenda is provided for by Article 75 itself (sent. no. 16/1978). This opinion was adopted in judgments concerning proposals dealing with statutes implementing international obligations or covering allocations of money for expenses provided for by the State budget. But the Court changed its mind later, when it realised that the implementation of international obligations and the allocation of money on the basis of the State budget could imply some discretion on the part of the legislator in choosing different approaches and solutions to the matter concerned. In both cases it appeared advisable to distinguish between legislation which has to stick to some bounds and does not allow discretion to the legislator, and legislation which in some way leaves a free hand to Parliament. In this last instance the calling of a

referendum should be allowed, leaving to the people the power of checking and abrogating the decisions of the legislator. While in the past the Court decided that the calling of a referendum about the criminal punishment of drugs consumption was not permitted because of the international obligations of Italy in this field, in 1993 the Court declined to reject a new proposal for a referendum on this topic, for the reason that the international agreement in question left a lot of discretion to the national legislators in implementing their obligations (sent. no. 28/1993). In similar reasoning, a referendum was accepted on the abolition of the Ministry of Agriculture, notwithstanding the competence of this administrative structure in the implementation of European policies in the field of agriculture. European obligations were found not to exclude State freedom to comply with their provisions in a decentralised way, by, for example, entrusting the Regions with this task (sent. no. 26/1993).

It has to be underlined that this change in the court's case law is connected with the crisis of the political system over the last years. The previous strict jurisprudence of the Court in the field of referenda was probably justified by the implicit idea that the frequent calling of referenda could endanger the stability of the political system, which has to be allowed to find the solution to the most important political problems through parliamentary mechanisms which are appropriate to a representative government. Only the progressive weakness of the political parties and their inability in finding solutions to the problems underlying the initiatives for referenda suggested that this approach should be overruled and that new room should be created for direct democracy in the Italian political system. But recently the Court again adopted a restrictive approach, and rejected a proposal for a referendum concerning legal provisions strictly connected with the working of the State budget, notwithstanding that the legislator could have adopted a different solution in pursuing the same results and that the actual, preferred solution was therefore not mandatory (sent. no. 12/1995). Moreover, in a decision adopted by the Court this winter, a referendum about legal rules providing for the direct payment of income taxes by employees through their employers was disallowed because the matter of taxation was affected (sent. no. 11/1995).

d. The drafting of the question

The Constitution does not provide for the drafting of the question which has to be submitted to the people when a referendum is called. But the Court is of the view that the problem has constitutional implications and that it must be consistent with the framework of the constitutional system of law. It has therefore stated since the very beginning the criteria which have to be complied with by the promoters of a referendum if they want to have their proposals accepted by the Court. The Court has in this way enlarged the limits of the referendum and has considered itself to

be entrusted with the task of stopping questions by way of referenda which do not satisfy the drafting criteria elaborated on the basis of the Constitution.

First of all, the questions have to be homogeneous, that is to say that they cannot address different matters at the same time. For instance, the Court rejected a proposal for a referendum concerning a provision which deals with hunting and fishing at the same time. Electors must be in a position to realise the real content of the questions without any difficulty: when a question affects two different matters, they are not free to adopt their decision. If they have different opinions on the two parts of the question, they are obliged to ignore their opinion on one part in answering the remaining part in accordance with their opinion. In the example I quoted, the elector who wanted the abolition of hunting but did not want the abolition of fishing would have been obliged to vote in favour of the abolition of both activities or to prefer keeping the hunting to save also the fishing. The rational matrix of all the parts of a question has to be coherent. It follows that the questions have to be clear, not complicated and self-evident (sent. no. 28/1987).

The underpinning notion is that a referendum implies a simple alternative between yes or no, and that electors have therefore to be able to choose freely the solution preferred without being obliged to adopt one or another solution because of the connection between the parts of a question. This aspect of the jurisprudence of the Court implies some difficulties for proposals for referenda concerning a statute as a whole, and therefore suggests a piecemeal approach to the promoters of a referendum. Proposals for referenda dealing with only some specific provisions comply with the criteria of the Court better than do proposals of an organic and complex legal nature.

Obviously the problem becomes more difficult when the referendum is proposed as an instrument of positive, and not only negative legislation. In this case, the criteria of the Court are satisfied if the approval of the question by the people can modify the legislation according to a clear and rational design. Referenda are not permitted which would imply the maintenance in force of unclear and ambiguous legislation freedom of choice of the electors would otherwise not be guaranteed.

The reasoning of this case law might be criticised on the basis that the Court's reference to rationality as a criterion for judging the lawfulness of proposals for referenda could imply the substitution of the Court's rationality for the rationality of the proposers of the referendum. For instance, if we stick to the example I gave before, the Court probably misunderstood the rationality of the proposal to abrogate the provision concerning hunting and fishing at the same time. There is evidence that the proposers aimed at submitting to the electors a question dealing with both activities. Therefore the Court frustrated them in the fulfilment of their purposes when it objected that the question was not homogenous.

In any case the Court is not allowed to redraft the question submitted by the proposers. This is not its task. Only the Referendum Office of the Court of Cassation can intervene on the text of the proposals. This office is entrusted with the function of concentrating in one question different proposals which have a common subject matter. Moreover, its intervention can be required when there is a change in legislation which is targeted by the proposal. The submission of a proposal to abrogate a statute does not prevent the legislator from amending or abrogating that statute. In this way Parliament can avoid the calling of a referendum by satisfying the demands of the proposers directly. In one case, the legislator tried to take advantage of this possibility of bypassing a referendum by approving a new statute which formally modified and abrogated the statute in question but did not substantially change the principles and the content of the legal regulation of the matter at issue. The Court stated that this legislative move was fraudulent. To accept otherwise would mean that Parliament could avoid a referendum completely by mere formal changes to legislation. It was decided that the referendum had to be transferred to the new legislation, and the Referendum Office of the Court of Cassation was entrusted with the task of drafting the new question to be submitted to the people (sent. no. 68/1978). This precedent has become a firm feature of the case law of the Court in this area. In consequence, we can say that the submission of a proposal for a referendum in some way limits the powers of the legislator, who is allowed to change and abrogate the statute concerned but is prohibited from such a move if he wants to bypass the referendum only, substituting a new statute for the old one, but keeping in force the same principles and provisions which are the content of the old statute itself.

4. A referendum can have two different results, either the approval of the proposal by the people or its rejection.

If the proposal has been rejected, a new proposal with the same content is not allowed in the following five years. Its approval, on the other hand, does not produce effects immediately, but has to be declared by a decree of the President of the Republic and enters into force the day after its publication in the "Gazzetta Ufficiale".

The President of the Republic is allowed to delay the entry into force of the decision, at the recommendation of the Council of Ministers. The maximum delay is sixty days. It is interesting to remark that the Court does not consider this delay to be sufficient to leave room for the calling of referenda concerning statutes which are necessary under the Constitution. From an abstract point of view, sixty days should be sufficient for the substitution of a new statute for the abrogated one but there would be no guarantee that Parliament would be able to comply with its obligation within the deadline of sixty days. On the other hand, the Court itself neither has the power of suspending the effects of popular decisions which are previously established by law, nor of delaying the entry into force of those

decisions until the approval by Parliament of a new statute aimed at filling lacunae which are prohibited by the Constitution. This is the reason why the Constitutional Court sticks with its case law and does not permit referenda on statutes which are necessitated by constitutional provisions.

The above judgments of the Court on the lawfulness of proposals for referenda do not prevent the Court from reviewing the legislation resulting from the approval of the proposals themselves. The decision of the Court allowing for the calling of a referendum is not a legally binding precedent, so that the legitimacy of the results of a referendum could always be contested and a decision of the Court could be sought on the matter. The object of the two decisions would be different because the first is aimed at ensuring a lawful referendum procedure, while the second deals with the conformity to the Constitution of the rules which have to be complied with after the approval of the proposal submitted to the people. It is obvious that the Court is not in a prior position to appreciate all the possible effects of the people's decision. Only practical developments and subsequent experience can give a complete view of all the possible effects of the referendum.

As a final point, it could be objected that this general competence of the Court is properly directed towards legislative acts of State only, whereas referenda are acts of the people, a separate entity different from the incorporated authoritarian structure of the State. The doctrinal answer is that, when adopted by a decree of the President of the Republic, the people's decision is transformed into a legislative act of State. Therefore, a judgment of the Court on the legislation resulting from a referendum is admissible. But we do not have relevant case law on this point.

VI. The referendum and its control in Switzerland - Report by Mr Ulrich HÄFELIN, Professor, Zurich

A. REFERENDUM AND POPULAR INITIATIVE

I. Historical background

The institutions of democracy have a long history in Switzerland. Since the 19th century, the instruments of direct and semi-direct democracy have become more and more important. When the loose Confederation of 1848 was replaced by the Federal State, the referendum was introduced for all amendments to the Federal Constitution. The referendum for federal laws was set up in 1874, whereas the adoption of the popular initiative for amendments to the Federal Constitution followed at the end of the 19th century.

In the Cantons, i.e. the member states of the Swiss Confederation, referendum and popular initiative for the Constitution and for ordinary legislation have been in

existence since the middle of the 19th century. Since then the domain of the referendum has been extended.

II. The various kinds of referendum

Swiss constitutional law at federal law level as well as at cantonal law level provided for the instrument of referendum in various ways.

1. Compulsory referendum

In a compulsory referendum, an Act of Parliament requires the express consent of the people, in order to enter into force, i.e. the consent of the majority of the citizens taking part in the vote. In addition, amendments to the Swiss Federal Constitution can only enter into force if approved by the majority of the Swiss citizens taking part in the vote and by the majority of the Cantons, the most popular vote in each Canton being considered as the vote of that Canton. Several Cantons also require a compulsory referendum for ordinary legislation and even for financial matters.

2. Optional referendum

An optional referendum only takes place when a certain number of signatures as laid down in the Constitution have been collected within a certain time or when the Constitution gives the right to demand a referendum to another authority, for instance to Parliament or to a certain part of it.

On a federal level this kind of referendum is prescribed for ordinary legislation: 50 000 citizens or — and so far this has never happened — 8 Cantons can demand a vote. The optional referendum can be found in several Cantonal Constitutions with regard to ordinary legislation and expenditure exceeding a certain amount. In some Cantons the Parliament is also entitled to demand that an act of the parliament must have the express approval of the voters.

3. Referendum for popular initiatives

In Switzerland a certain number of citizens can propose an amendment of the Constitution or the enactment of an ordinary law. Contrary to the popular initiative in Austria and in Italy, in Switzerland a popular vote upon the proposed amendment of the Constitution or the law will take place whether Parliament agrees to it or not.

On a federal level 100 000 voters have the right to propose an amendment of the Federal Constitution. In the Cantons a similar kind of popular initiative is

recognised, but with a wider field of application: it applies for constitutional amendments as well as for ordinary legislation.

4. Constructive referendum

In the Canton of Bern a new type of referendum was established in 1993. The new Constitution of this Canton allows that 10 000 citizens can demand a popular vote for a law enacted by the parliament and propose at the same time an alternative for certain articles of this law. The people, when voting on the law, can therefore choose between the Parliament's draft and the proposed alternative draft. This kind of referendum overcomes the strictly negative effect which a referendum often has; people are not forced to approve or reject a law, but can take steps to improve it.

5. Consultative referendum and referendum on basic principles of a future law

Some Cantons allow a referendum in which the people are asked to give the Parliament their opinion on a fundamental question in a consultative non- binding manner. In a similar way a cantonal Constitution provides that the people can be asked to vote on a basic principle governing the drafting of a controversial law; in such a case the voters' reponse should be binding on the further elaboration of the law by the parliament.

6. Subsequent referendum on urgent decrees

The Federal Constitution (Article 89 bis) permits Parliament to enact urgent decrees which should be brought into force as soon as possible. This urgency does not exclude the use of a referendum, but the referendum in these cases has a subsequent character: if the decree is not approved by 50 000 citizens in the vote, it shall lose its validity one year after its adoption by Parliament. Urgent decrees which alter or amend a prescription of the Federal Constitution are subject to the subsequent compulsory referendum which requires the approval of the people and of the Cantons within one year of adoption by the Federal Assembly.

III. Matters subject to the referendum

In Switzerland the referendum procedures as established on the levels of the Confederation, the Cantons and the local communities concern a considerable amount of decisions of Parliament. In addition to constitutional amendments, ordinary legislation and decrees, in the Cantons and local communities approval by the people is also required for administrative decisions such as the granting of concessions for the exploitation of hydroelectric power and financial decisions especially expenditure exceeding a certain amount. The federal referendum in the form of the compulsory referendum and of the optional

referendum applies also to certain international treaties (Article 89 section 3-5). The referendum in the Cantons also often covers agreements concluded between two or several Cantons.

A great number of referenda therefore take place in the voting terms of every year, of which there are usually four. On March 12 this year, for instance, the citizens of the town of Zürich had to vote on 4 federal, 5 cantonal and 3 local issues.

IV. Provisions concerning procedure and form

The compulsory referendum presents no special problems concerning procedure and form, since decisions of Parliament constitutional amendments, laws or other decisions have to be submitted automatically to the popular vote.

1. Collection of signatures within a certain time for optional referendum and popular initiative

When the referendum is the result of a demand of the people or of a popular initiative, the Constitution requires that a certain number of signatures of citizens be collected within a certain time.

Before the collection of signatures, the text of the popular initiative for an amendment of the Federal Constitution must be presented to the Federal Chancery which makes preliminary checks as to the clarity of the text and potential misinterpretations. The text is then published in the Federal Gazette (LPR Article 69). To be valid, the initiative needs the signatures of 100 000 citizens, which have to be submitted to the Federal Chancery not later than 18 months following publication of the text (FC Article 121 section 2). The Federal Chancery then checks the lists of signatures and states whether the number necessary for the initiative has been achieved (LPR Article 71 et 72).

For the optional referendum concerning federal laws, 50 000 signatures must be collected within 90 days of publication of the law. Once again the Federal Chancery is charged with verifying whether the conditions for demanding a referendum have been fulfilled (LPR Article 66).

In the Cantons and the local communities, similar prescriptions govern the popular initiative and the optional referendum. The Canton of Zürich for instance, which has 770 000 citizens who are entitled to vote, requires that 10 000 of these signatures be collected within 6 months.

2. Form of the popular initiative

According to the Federal Constitution (Article 121 section 4) the popular initiative aimed at the amending of the Federal Constitution can take two possible forms. It can be formulated as a general proposal which will form the basis, with the detailed regulation drafted later by the Federal Assembly. Alternatively, it can take the form of a complete and detailed text which, with the approval of the people, can immediately enter into force. The principle of the "unity of form" means that a popular initiative cannot combine the two forms; the whole text of an initiative must follow one or the other of the two forms.

On a cantonal and local level we find similar rules concerning the form of the popular initiative.

3. Constitutional guarantee of the citizens' freedom of forming and expressing their political will

A peculiarity of the Swiss law on political rights is the unwritten right of the citizens to a free vote.

In a practice observed for many years, the Federal Court has recognised the right of voters to free political opinion. This means that voters have the right not to be disturbed or unduly influenced in their freedom to develop and formulate political decisions. This right is recognised as an unwritten guarantee of federal constitutional law. It is of importance especially with regard to votes and elections in the Cantons and the local communities.

The existence of this right has a variety of consequences, the most important of which is the protection of voters against government political propaganda. The freedom of voters in their political decisions does not prohibit the government from publishing information and recommendations on political questions submitted for approval by the people. Nevertheless, this information should not be biased; it should not only reflect the government's opinion, but must also be carefully based on fact and must give information on the arguments of those opposing the governmental or parliamentary proposal.

The government is not permitted to give any support for instance financial support to any party participating in the political discussion prior to the vote. A good example of this can be seen in a decision by the Federal Court in 1988. The citizens of a district of the Canton of Bern had to decide in a vote whether their district should be transferred to the neighbouring Canton of Rural Basel. The government of Bern supported the opponents to the change by secret financial backing. After the vote in which a very small majority rejected the change the existence of this financial support became known and a group of citizens declared

that their freedom to vote had been violated; they appealed to the Federal Court and the vote was cancelled. When the vote was repeated, a rather small majority of voters agreed that the district should be transferred to the neighbouring Canton.

V. Restrictions concerning the contents of the popular initiatives

1. Popular initiatives on the federal level

a. Homogeneity (unity) of proposal

In federal constitutional law we find besides the principle of unity of form (see IV/2) only one express restriction on the popular initiative. The Federal Constitution (Article 121 section 3) prescribes that the text of an initiative must be homogeneous in its content: "If by means of a popular initiative several different provisions are to be modified or introduced into the Federal Constitution, each one must be the subject of a separate initiative request". The Law concerning Political Rights (LPR Article 75 section 2) tries to define this requirement in a positive manner by saying that a relevant connection must exist between the various parts of a popular initiative.

The aim of the requirement of homogeneity is to ensure that citizens express their real political wishes. If an initiative combines different issues, the voters can only reject or approve the proposal as a whole. If they want to approve one part of the request, they have to accept the whole amendment, even if they disagree with another part of it. A popular initiative which is inconsistent with the principle of homogeneity must be declared invalid. It cannot be submitted to popular vote, if this includes partial submission or is submitted the division of the initiative into different parts each subject to a separate vote.

The constitutional provisions concerning the federal popular initiative have been in force more than 100 years. Throughout this entire period, the Federal Assembly - which has to decide on the validity of an initiative (see below B/II/4/c) has interpreted the principle of homogeneity in a very generous manner. The Parliament did not want to place too many restrictions on the rights of the people. To date, only once, in 1977, was an initiative declared invalid; in this particular case the initiative was aimed at numerous and very disparate economic measures between which there was either no connection at all or the connection which did exist was very loose. In recent years this wide interpretation of the requirement of homogeneity has been criticised, on several occasions. This year the Parliament modified its previous practice and followed a more restrictive interpretation. The Federal Assembly had to decide on the validity of a popular initiative which proposed to extensively reduce expenditure on the army and to use the money generated to support international peace-keeping and domestic social security. The Federal Assembly declared that the proposal had at one and the same time

completely different aims and did not accept the validity of the initiative which therefore would not be submitted to the vote of the citizens.

b. No impossible or inoperable measures

Although not mentioned in any constitutional or legislative prescription, it is generally recognised that a popular initiative does not have to be submitted to popular vote if its proposal cannot in fact be realised. An initiative presented in December 1954 required a considerable reduction of some parts of the federal budget for the year 1955. Its validity was denied. According to procedural provisions the vote would have taken place so late that even a positive result at the vote would have had no influence on the budget procedure, which had already been passed.

c. Conformity with international law

The Federal Constitution does not make any mention of the priority of international law over domestic law. However, in practice domestic law is, in general, interpreted in conformity with international law. Nevertheless it must be admitted that there have also been cases in which part of the text of an initiative did not conform to an international obligation. But this year the Federal Assembly has had the opportunity to clearly state that a popular initiative which contradicts a basic principle of international law is not valid. One Chamber has already rejected as invalid an initiative concerning persons seeking asylum, on the grounds that it violates the important international principle of non-refoulement. The other Chamber will no doubt uphold the same opinion.

d. The question of retroactive measures

Despite certain objections, it is generally accepted that a popular initiative introducing new regulations for a subject can provide for measures with retroactive force. In the past we voted an initiative which included the repeal of a lawfully awarded concession for the exploitation of hydroelectric power and an initiative requesting the partial annulment of a decision concerning the construction of a military training centre.

e. The question of basic principles of democracy and rule of law

In the literature on Swiss constitutional law, we find authors who declare that the basic principles of democracy, rule of law and federalism are limitations for popular initiatives. But these kinds of restrictions which because of their vague character would cause problems in practice do not meet with general agreement.

The Swiss Federal Constitution in contrast to the French and the Italian Constitution has no provision prohibiting any constitutional amendment aimed at changing the republican form of government.

2. Popular initiatives on the level of the Cantons

The Constitutions of all Swiss Cantons entitle citizens to submit initiatives which may concern the amendment of the Cantonal Constitution as well as the ordinary legislation of the Canton.

The restrictions existing for popular initiatives at a federal level, as for instance the priority of basic principles of international law, are also applicable to initiatives at a cantonal level.

The requirement of homogeneity (unity) of the contents of the proposal is recognized by the Federal Court as an essential part of the unwritten constitutional guarantee of the citizens' freedom in forming their political will (see above IV/3). It therefore also has to be observed by the Cantons; some Cantons stipulate this requirement expressly in their Constitution. The question whether a cantonal initiative pays sufficient regard to the requiirement of homogeneity plays a considerable role in practice and is often examined by the Federal Court.

Since federal law has priority over cantonal law, all popular initiatives presented in the Cantons must conform with all the rules of the Federal Constitution, federal laws and federal decrees. In practice, both the express and unwritten civil rights of the Federal Constitution are of special importance. The cantonal initiatives must also observe the limitations which the skeleton federal laws define for cantonal legislation. These skeleton federal laws lay down only the guiding principles for a certain matter as with for instance the federal law on construction and area planning leaving the detailed regulation to cantonal legislation.

Finally, popular initiatives which propose the amendment or the enactment of a cantonal law must comply with the rules of the Cantonal Constitution.

B. CONTROL OVER REFERENDUM AND POPULAR INITIATIVE

I. The instruments of judicial control in Switzerland

1. The Federal Court as constitutional court

The Swiss Confederation has no constitutional court enjoying a special standing apart from the ordinary judicial authorities. The Swiss Federal Court is the highest judicial instance in civil, penal and administrative law. Besides these competences it also exercises important functions as a constitutional court. It decides disputes between the Confederation and the Cantons or between the Cantons and it adjudicates on complaints by citizens concerning the violation of their constitutional rights.

There are however two restrictions. Firstly the Federal Court has no power to control federal laws and decrees adopted by the Federal Assembly, and secondly, citizens can use the framework of the constitutional complaint only to contest Acts issued by cantonal authorities, not Acts issued by federal authorities. The first restriction mentioned results from the fact that the Federal Assembly the rights of the people and the Cantons aside has the highest constitutional standing. However, just this year a proposal for a constitutional amendment has been recommended which should give the Federal Court the right to control federal laws and decrees adopted by the Federal Assembly when adjudicating on an actual act which applies this federal law or decee.

The Federal Court in practice plays a very important role with regard to the protection of political rights in the Cantons.

2. The competent authorities in the Cantons

With two exceptions, the Cantons have no constitutional courts of their own. In almost all Cantons it is up to the political authorities, particularly the cantonal government and finally to the cantonal Parliament, to decide disputes concerning the exercise of cantonal political rights, such as for instance the validity of a popular initiative or the correct organisation and procedure for a referendum. This has no serious disadvantage for the citizens, because they can appeal against a cantonal decision to the Federal Court and therefore in general the cantonal authorities follow the principles laid down by the practice of the Federal Court. One Canton, the Canton of Jura, has a Constitutional Court which is competent to decide on disputes concerning the execution of political rights.

II. Referendum and popular initiatives on the federal level

1. The Federal Assembly as "the supreme power of the Confederation"

In accordance with the priority of the principle of democracy governing the whole Swiss constitutional system, the Federal Constitution states expressly that, subject to the rights of the people and the Cantons, "the supreme power of the Confederation" is exercised by the Federal Assembly (Article 71). The fact that

the Federal Court is bound by laws and decrees adopted by the Federal Assembly and has no power to control them (FC Article 113 section 3) corresponds to this.

2. Compulsory referendum

In general, the organisation of a compulsory referendum does not lead to disputes which require decisions of a controlling authority. The Federal Council, the federal government, is charged with making official statements and publishing the results of the vote (LPR Article 15); such a statement is final and cannot be contested.

If a citizen claims that his right to vote has been violated in the organisation of the referendum, he can lodge a complaint with the Government of the Canton in which he lives. An appeal against the decision of the Cantonal Government can be made to the Federal Court (LPR Article 77 and Article 80 section 1).

3. Optional referendum

The Federal Chancery which in addition to exercising certain functions for the Federal Assembly is the secretariat of the Federal Council verifies whether the requested number of signatures which are necessary for a referendum and other procedural requirements (see above A/IV/1) are fulfilled. Citizens can appeal against its decision to the Federal Court (LPR Article 80 section 2).

When an optional referendum is held the official statement and the publication of the result of the vote are also within the exclusive competence of the Federal Council (LPR Article 15). Citizens who claim their right to vote has been violated can complain to the Cantonal Government and finally appeal to the Federal Court (LPR Article 77 and Article 80 section 1).

4. Popular initiative

a. Preliminary examination of the text of the initiative

The Federal Chancery decides at a preliminary examination whether the text of a popular initiative is clear and might lead to misunderstandings; it then publishes the text (LPR Article 69). An appeal against its decision can be sent to the Federal Court (LPR Article 80 section 3).

b. Statement of the success or failure vis a vis the signature collection

The Federal Chancery states whether the necessary 100 000 signatures have been collected and presented within 18 months of the publication of the text of the

proposal (LPR Article 71). This decision can be contested before the Federal Court (LPR Article 80 section 2).

c. Decision concerning the validity of the contents of the initiative

The Federal Assembly can recommend the adoption or the rejection of the popular initiative. If it disagrees, it may prepare its own draft on the subject of the initiative. The Federal Assembly then submits the proposal for the popular initiative together with the parliamentary recommendation and possibly with the parliamentary draft to the decision of the people and the Cantons (FC Article 121 section 6).

In addition to the power to recommend an alternative draft, the Federal Parliament enjoys a most important function with regard to reviewing popular initiatives: The Federal Assembly is charged with the decision on the validity of the contents of a popular initiative. There is no appeal to a court against the parliamentary decision. This predominant role complies with the constitutional prescription that the Federal Assembly exercises "the supreme power of the Confederation" (see above II/1).

According to the Law on Political Rights (Article 75), the Federal Assembly, before submitting the initiative to the vote, has to decide whether the text of the initiative corresponds to the requirement of "unity of form" (see above A/IV/2) and to the requirement of homogeneity (unity) of its contents (see above A/V/1/a). If the initiative does not comply with one of the two requirements, the Federal Assembly must declare it invalid, and it cannot be submitted to the vote.

Although the law speaks of the two above mentioned requirements, according to generally accepted practice the Federal Assembly is considered to be competent to decide on all cases of invalidity of popular initiatives. In the past, the Federal Assembly has declared an initiative invalid because it was impossible to implement it. In its sessions this year, the Federal Assembly declared an initiative invalid since it violated the requirement of homogeneity (see above A/V/1/a). It is anticipated that the Federal Parliament will, over the next few months, annul an initiative which clearly contradicts a basic principle of international law (see above A/V/1/c).

d. Statement of the result of the referendum

It is the Federal Council which officially states whether the proposal of the initiative or perhaps the Parliamentary draft found favour with the majority of voting citizens and the majority of Cantons and can therefore enter into force (LPR Article 15).

5. Critical valuation

There have been no notable procedural difficulties with the many federal referendums and popular initiatives we have held in Switzerland over the last decades. The fact that decisions for which the Federal Council is competent cannot be contested before a court has proved to be of no substantial importance; these decisions are to a great extent merely formal statements.

But there are two weak points in our system. Firstly, the reasons for which a popular initiative can be declared invalid should be clearly defined in the Federal Constitution and not be left to parliamentary practice. Secondly, it is not desirable that the Federal Parliament should decide on the validity of popular initiatives. This legal question should not be within the competence of a political authority; it should be entrusted to an independent judicial authority which can deliver a formal decision in which the grounds of the decision are also recorded.

In the official preparations for a revision of the Swiss Federal Constitution as is under discussion at present, we find the sound proposal that in future the Federal Assembly should maintain its capacity to decide on the validity of popular initiatives, but only after having asked the Federal Court to give its opinion on this question. The opinion of the Court will have the necessary weight only if it is of a binding character.

III. Referendum and popular initiative on the cantonal level

1. Control by cantonal authorities

In the Cantons very different regulations exist concerning the protection of political rights of citizens and the control of the referendum. The Constitutions of most Cantons declare that the Government and the Parliament of the Canton have to adjudicate on disputes concerning voters' rights. It is often the Cantonal Parliament which decides on the validity of cantonal initiatives. In some Cantons judicial authorities for instance the Cantonal Administrative Court are competent to decide on disputes concerning political rights. In one Canton, in the Canton of Jura, the Cantonal Constitutional Court is the only competent authority for all these cases.

2. Control by the Federal Court

The above differences between the cantonal provisions should not be emphasised, because the citizens can in any case appeal against cantonal decisions to the Federal Court. As we have seen (above A/IV/3), the federal constitutional law guarantees to citizens a matter of as unwritten law the possibility of discussing and expressing freely their political will. It is the function of the

Federal Court to protect this freedom as far as cantonal referenda and initiatives are concerned. According to Article 113 of the Federal Constitution, the Federal Court has to adjudicate on "complaints concerning the violation of the constitutional rights of citizens". Thus the Federal Court has a comprehensive competence to decide on all disputes concerning the preparation and procedure of the vote, popular initiatives, their restrictions and admissible contents.

If a complaint is presented early enough and the Court decides to give it suspensive effect, the vote will be postponed. If this is not the case and the Court approves the complaint, the vote will be cancelled and must be repeated.

In these procedures, it is the Federal Court which controls the application of federal and cantonal law. We must bear in mind however that this protection granted by the Federal Court applies only to cantonal, and not to federal, popular initiatives and referenda.

This comprehensive jurisdiction of the Federal Court not only has a favourable influence on the practice of the cantonal authorities as for example the cantonal Parliaments but also indirectly on the practice of the political authorities of the Confederation, in so far as they decide on the exercise of federal political rights.

C. CONCLUSION

The principle of democracy has besides the principle of federalism a totally predominant position in the constitutional system of Switzerland. Citizens enjoy many types of political rights. On a federal, cantonal and local level, they have long enjoyed the possibility to make decisions on constitutional, legislative and even administrative and financial issues.

There are various reasons why the institutions of direct democracy can work in Switzerland with good results. Firstly, a long tradition dating back to the first half of the 19th century has allowed the system of direct democracy to develop slowly step by step. Secondly, Switzerland enjoys a certain homogeneity of political culture which is supported by the federal system giving self-determination to regional and local sections and minorities. Thirdly, pressure groups have of course also influenced the popular vote in Switzerland, but public discussion is on the whole not dominated by them and the people often demonstrates that it can articulate an independent opinion.

The regulations concerning procedure and review are, in pursuance of the federal system and historical development, not homogeneous and in part rather complicated. They have been in place a long time with results which can be considered satisfactory.

The judicial review of the referendum and the popular initiative at a cantonal level is excellent due to the jurisdiction of the Federal Court. The fact that on a federal level the review of the validity of initiatives is in the hands of the Federal Assembly is a result of the predominance of the democratic principle, but must be considered as a limitation on the rule of law. Efforts to entrust the Federal Court which has played such a constructive role in the protection of political rights of citizens at a cantonal level with the review of popular initiatives have today become increasingly impressive and, I hope, successful.

Abbreviations

FC Federal Constitution of the Swiss Confederation of 29th May 1874 (with Amendments up to 1995)

LPR Federal Law on Political Rights of 17th December 1976

VII. Constitutional justice and consultative democracy in the United States - Report by Mr Julian N. EULE, Associate Dean, UCLA School of Law

Introduction — Origins and Scope of Consultative Democracy in the USA

The United States provides no opportunities for consultative democracy at the national level. Those who framed the U.S. Constitution in 1787 opted for an exclusive system of representative government, rejecting any role for direct democracy. The true distinction between the "pure democracies" of ancient Greece and the American government, explained James Madison, the Constitution's principal architect, lay "in the total exclusion of the people in their collective capacity from any share in the latter." It was this distinction that the Framers of the U.S. Constitution believed might permit American government to succeed where other democracies had failed. Placing the exclusive power of ordinary lawmaking in governors distinct from the governed, said Madison, would refine and enlarge public view "by passing them through the medium of a chosen body of citizens" whose wisdom , patriotism, and love of justice would make them unlikely to sacrifice the interest of the country "to temporal or partial considerations." Representative bodies afforded greater opportunities for deliberation and debate. Popular masses were perceived as too quick to form preferences, frequently failing to consider adequately the interest of others, and overly susceptible to contagious passions.

James Madison's preferences are reflected both in the Constitution's text and in its omissions. Article IV explicitly imposes an obligation on the United States to "guarantee to every State in this Union a Republican Form of Government," convincing evidence of the constitutional preference for a representative over a

direct form of lawmaking. As Madison made clear, the key word here "Republican" was meant to be distinguished from "Democratic." Democracy, said Madison, consists of continuous public participation in the conduct and operations of government decision making. "A Republic," in contrast, is " a Government in which the scheme of representation takes place." Although there were efforts to include in the First Amendment a right of the people to "instruct their representatives," Madison labored mightily — and successfully — to block this effort.

Despite periodic public opinion polls that appear to demonstrate widespread support for a national initiative[93], all subsequent efforts to introduce consultative democracy at the national level have failed. A 1977 effort to amend the Constitution to provide for national plebiscites died in the Senate Judiciary Committee despite the sponsorship of more than fifty members of Congress and supportive testimony by a wide range of both conservatives and liberals. Nor did 1992 independent Presidential candidate Ross Perot's call for direct voter consultation on issues of importance prompt any progress in this direction.

The story at the state level has been a very different one. In the early part of the twentieth century, a group of populists, known as the Progressives, successfully engineered the amendment of several state constitutions to provide for direct lawmaking by the citizenry. These American advocates of direct legislation traced their inspiration to ancient Athens and nineteenth-century Switzerland. The Progressives' innovative reforms, adopted as a part of the lawmaking process in more than half of the fifty states[94] — disproportionately located in the newer Western states — were a response to the widely perceived corruption and control of legislators by wealthy interest groups. The Progressives sought to curb legislatures by placing corrective power in the citizenry. Not long after many of the states began to use plebiscites, their constitutionality came under attack. In 1912 the United States Supreme Court was asked to rule whether any use of consultative democracy was consistent with the "Republican Form of Government" guaranteed to the states by Article IV of the U.S. Constitution. The challenger argued that the representative nature of republican government precluded the people from taking legislative functions into their own hands. The

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[93] *A nationwide poll conducted in 1977 found 57% in favor of a constitutional amendment for a national initiative with only 25% opposed. Polls conducted in 1978 and 1981 by different organizations found similar results.*

[94] *Statewide plebiscites account for only a small percentage of the output of popular legislation in the United States. Plebiscites abound on the local level, in counties and cities, including many situated in states that do not authorize statewide plebiscites.*

Supreme Court never reached the merits of the claim, holding in *Pacific States Telephone v. Oregon*, that whether a state government is "Republican" was a nonjusticiable political question that courts were not competent to answer. The matter was properly to be resolved — if at all — by Congress or the President. Although this ruling remains securely in place, ruling out general challenges to citizen lawmaking as a device under the United States Constitution, particular applications are very much subject to judicial review.

I. SESSION 1:
A Priori Judicial Review of the Validity of Plebiscites

A. Definitions

An initial caveat is in order here. Because of the absence of any plebiscitary process at the national level and the wide variations in their use in the various states, generalizations are dangerous. To the extent possible I have attempted in the following pages to discuss the prevailing practices, identifying significant deviations where practical within the space restraints.

No discussion of consultative democracy in the United States is possible without differentiating between two fundamentally different devices — the initiative and the referendum.

Initiatives represent direct democracy in its purest form. Here the voters *initiate* the ballot measure, completely bypassing the legislature and executive branches of government. Twenty-six state constitutions authorize voter initiatives — although the last twenty years have not produced a single addition to the states permitting them.

In order to exercise this option the voters neither need legislative permission nor legislative assistance. A measure may be placed on the ballot by any citizen who secures a specified percentage of signatures through the circulation of petitions. The percentage is usually keyed to the votes cast in the preceding general election. The twenty-six state constitutions authorizing voter initiatives have varying signature requirements ranging from a low of 2% (North Dakota requires 2% of the voting age population to sign) to a high of 15% (Wyoming requires 15% of those voting in the most recent election for Governor to sign[95]) with the median

[95] *The high signature requirement probably explains why initiatives so seldom reach the ballot in Wyoming. Having amended its state constitution in 1968 in order to provide for voter initiatives, Wyoming went sixteen years without a single initiative qualifying for the ballot. Several studies suggest — as intuition would suggest — that states with the most lenient signature requirements have the highest number of measures reaching the electorate. Others suggest, however, that a state's historical tradition and political culture, rather than the*

among the states falling at about 8%. Citizens wishing to place initiatives on the ballot must not only satisfy the signature threshold, but often must do so within a specified time[96]. These limits range from as few as 90 days (Oklahoma) to as long as 4 years (Florida). California, the largest user of the voter initiative, requires signature collection within 150 days. Eleven states have circulation times of a year or more. In order to monitor the time constraints, states require that any draft initiative be filed with a specified state office prior to circulation. Frequently a *de minimis* filing fee must be paid. California imposes a $200 fee. The state officer — usually the state's Attorney General — prepares a ballot title and drafts a brief summary of the initiative proposal. The title and summary must be printed on each petition. The time period for signature collection usually runs from the time the title is assigned.

In contrast to the Swiss system, no state sets an absolute number of minimum signatures for ballot qualification, preferring to rely instead on percentages. Because of the rapid growth of the American population the number of signatures constituting the requisite percentage has correspondingly grown. In California, for example, it now takes hundreds of thousands of signatures to qualify a measure for the state ballot. Because initiative campaigns are among the best financed state-wide elections in the United States, special interest groups increasingly have employed professional firms to gather the required number of signatures within the allotted time. These firms in turn hire petition circulators who are paid a sum certain — perhaps 25 cents — for each signature collected. The rapid development of this "initiative industry" is a central factor in the proliferation of ballot measures in many states. While signature requirements were initially set in order to ensure sufficient popular concern about the issue to justify submitting the measure to popular vote, recent experience suggests that ballot qualification is often attributable more to financial resources than to popular support. In an effort to reverse the trend, a handful of states sought to prohibit the use of paid circulators, making it illegal to accept financial remuneration for signatures raised. In 1988, however, the United States Supreme Court, in *Meyer v. Grant,* unanimously held that a Colorado ban of this sort abridged the rights of political speech guaranteed by the First Amendment. Finding that the ban limited the ability of citizens to make matters of general interest the focus of statewide discussions, the Court rejected Colorado's argument that the prohibition was justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot. "The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might

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stringency of the qualifying requirements, may be the most critical factor determining frequency of use.

[96] *A very small number of states — Arkansas, Nevada, Ohio, Oregon and Utah — impose no time constraints on the time required for signature collection.*

otherwise have failed," concluded the Court, "cannot defeat First Amendment rights."

When the requisite number of signatures have been gathered, the initiative petition is filed with a designated state official who verifies a random number of the signatures and certifies qualifying measures for the ballot[97]. The initiative measure is enacted if a simple majority of those voting signify their approval at the subsequent election.

Referenda, in sharp contrast to initiatives, originate with legislative action[98]. Here the legislature *refers* the measure to the electorate for ratification. Legislative passage is prerequisite but inadequate. Without voter endorsement the legislative effort fails; without legislative passage, the electorate has nothing to vote on. Referenda come in three versions, differentiated by who or what precipitates the referral. In the first, the so-called mandatory or compulsory referendum, the state constitution commands submission of certain legislative enactments — like debt authorization — to the electorate. In the second, often styled the voluntary referendum, the legislature is given the option to refer measures to the voters. In neither of these are the circulation of petitions and the gathering of signatures needed. In the final — and rarely used — form, usually known as the popular referendum, citizens can petition to force a legislative referral of a previously enacted — but not yet effective — legislative measure. Some writers characterize this third form as a version of initiative. The characterization has intuitive appeal but is incomplete. Here the voters act to veto legislative enactment rather than to initiate law. In any event, the very short time frame permitted for signature gathering for popular referenda has largely rendered them an extinct species in the United States.

B. *A Priori* Judicial Review

Legal challenges to ballot measures most often take the form of questioning their substantive validity under "superior" law — state constitutions, federal statutes or the United States Constitution (*See* II, below). Much less common have been attacks focused on formal validity — titling and signature requirements; prohibitions on addressing more than a "single-subject" in a single plebiscite; and

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[97] *Courts largely defer to these administrative judgments and will seldom review questions of signature certification.*

[98] *Usage of terms is not uniform and seldom precise. The term Referendum is frequently used synonymously with "plebiscite" to describe all ballot measures placed before the voters — occasionally differentiating by calling measures initiated by citizen petitions "popular referendum," and calling those originating with the legislature "legislative referendum." Because the process, however, fundamentally differs for the two forms identified in my text, I believe use of more precise terminology will better assist understanding.*

restrictions on the subject matter of plebiscites.[99] With rare exceptions, these restraints apply only to initiatives. The major controversy over questions of formal validity has concerned the appropriate timing of the judicial review.

American courts never intervene to review traditional legislation prior to approval by both houses of the legislature and signature by the Governor. Whether barred by constitutional restraints on the rendering of "advisory opinions" or guided by prudential desires to conserve judicial resources and political capital, judges rightly refuse to review legislative bills before passage. The approach to ballot measures, while less uniform, retains much of the same flavor. Easiest to understand is the resistance to pre-election review of referenda. Just as ordinary legislation lacks the force of law until gubernatorial signature, "referred" legislation does not take effect prior to voter ratification. The resistance to premature judicial review does not seem largely affected by the nature of the remaining step. In either case the legislative process remains incomplete and judicial review is deemed unripe.

Judicial resistance to pre-election review of voter initiatives is marginally less firm[100]. The prevailing view remains that review prior to passage is generally undesirable and impractical. It increases the cost of petition circulation; places judges under enormous time pressures to make decisions within short deadlines; and — in view of the high percentage of initiatives that fail at the polls[101] — unnecessarily increases judicial workload and congestion. Moreover, judicial intervention in the midst of heated initiative campaigns or just weeks or days prior to election leads to cynicism and threatens popular support of the judiciary. As the California Supreme Court observed in 1982, "[i]t is usually more appropriate to review...challenges to ballot propositions or initiative measures after the election, rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." This judicial reluctance extends beyond questions of constitutional validity (*see* II, below) and often precludes pre-election review of questions of procedural regularity and formal validity as well. In the latter context, however, pre-election review of proposed initiatives is more common. Occasional cases have kept initiatives off the ballot because of improper form or misleading titles. Some commentators have identified recent trends toward increased judicial willingness to take defective initiatives off the ballot. The pattern seems cloudy and it is

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[99] *For example, Massachusetts precludes the use of voter initiatives to address religious issues and California denies the right to appoint any individual to public office by ballot measure.*

[100] *In the eighty-four years since California embraced consultative democracy, only seven initiatives have been invalidated prior to the election.*

[101] *For example, in California, fewer than one-tenth of the initiatives titled by the attorney general qualify for the ballot and only one-third of those that qualify receive voter approval.*

unclear whether a series of recent cases signals a change of heart or, is, rather, a cluster of anomalous decisions[102].

In one state, Florida, the state constitution now *requires* the Florida Supreme Court to review all voter initiatives before they are placed on the ballot in order to ensure compliance with the state constitutional command that a single initiative may address only a "single-subject." No other state has embraced this approach. Although six other state constitutions contain a "single-subject" limitation, pre-election review on this ground has been rare. On the other hand, post-election judicial review under the "single-subject" rule has recently become quite spirited. "Single-subject" violations are routinely asserted as a first ground of attack by persons who opposed the measure during the campaign because the fruits of victory are great — an invalidation of the measure in its entirety. Although courts have traditionally been quite liberal in defining what constitutes a single subject[103], with the growing complexity of voter initiatives, even the liberal definition has become strained. In two recent California cases, the definition stretching reached its limits, causing the courts to invoke the rule and invalidate initiatives. One of these decisions was post-election; the other was pre-election.

II. SESSION 2:
Statutory Plebiscites and Constitutional Review

Statutory plebiscites enacted by the citizens of a state can be potentially challenged as in conflict with any of three possible instruments — the state constitution, federal statutes or the United States Constitution. As suggested above, review rarely occurs prior to passage. The judiciary's ability to command popular acceptance is a limited resource and is seldom squandered on hypothetical constitutional transgressions. But once enactment has occurred, litigation is seldom far behind. Because ballot measures disproportionately involve controversial subjects, those who lose at the polls waste little time seeking judicial relief[104].

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[102] *An odd twist is presented by provisions in the Montana and Ohio Constitutions which prohibit attacks on the sufficiency of the initiative petition after the elections have been held. In these states, therefore, pre-election judicial review is not merely permitted, it is exclusive.*

[103] *The California courts, for example, hold that an initiative satisfies the "single-subject" rule if all of its parts are "reasonably germane."*

[104] *In a few instances, the losers may also seek legislative relief. State legislatures, however, are often limited in their ability to amend or repeal even statutory initiatives (state constitutional initiatives, of course, are never subject to legislative revision). Some states entrench these statutory initiatives for a specified period of time — Alaska, for example, sets a two year ban — while others require legislative supermajorities. One state, California, prohibits any legislative modification without voter approval regardless of how long has transpired since passage or how great a percentage of the legislators favor such a change. Of course, even in those states*

A. Review under State Constitutions

State Constitutions are the exclusive bailiwick of state courts. According to the view of the California Supreme Court offered in 1983 a "statutory initiative is subject to the very same state constitutional limits as are the Legislature and the statutes which it enacts." Yet, despite paying lip service to this viewpoint, state courts have been slow to invalidate statutory plebiscites under their state constitution. Two principal factors prompt this judicial reluctance Fear and Futility.

The sitting judges of the highest courts of all but two of the states that permit voter initiatives are ultimately held directly accountable to the voters for their decisions. In roughly half of these states the judges serve a limited term and must thereafter run for re-election. In the remaining half, the electorate is periodically asked to vote whether the judge should be "retained." The electoral accountability of the state courts raises significant doubt about their desire to take a leading role in curbing voter lawmaking. Nowhere are judges greater at risk then when they overturn plebiscites. Judicial nullifications of ballot measures tend to be highly visible decisions, what one deposed California justice has called "political hot potatoes."

Recently the voters of California enacted a voter initiative (Proposition 187) which denies most social services, medical benefits and public education to illegal immigrants. Injunctions issued from several courts have temporarily held up the implementation of Proposition 187 pending a determination of its constitutionality. The voters are livid. A poll conducted by the *Los Angeles Times* in March 1995 revealed an overwhelming percentage against judicial intervention. Hostility to court action appears so profound that even 30% of those who voted *against* the controversial measure thought judicial thwarting of the majority will inappropriate. "The voters voted for it and if that's what people want, that's what should be done," said one man who voted against the measure last fall.

If the public views plebiscite invalidation as thwarting the will of the people, the judge's opponents at the next election are certain to exploit this angle in campaign literature. Nor is the high visibility of judicial decisions reviewing voter initiatives the only factor that renders such cases high risk for an elected judiciary. Plebiscites pass as a result of well-organized — and usually well-financed — associations behind them. These groups are in place to mount anti-retention

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where legislative revision is possible, legislators are certain to be wary of reversing popular voter action for fear of reprisals at the next election.

elections should the judiciary thwart their efforts. Monied special interests that have sunk considerable resources into the passage of a ballot measure may be willing to spend more to depose the judges who stand in the way of the measure's enforcement. State judges considering the constitutionality of measures prompted by popular passion and self-interest are not likely to be blind to the specter of an interest-group structure energized to carry out the same kind of voter campaign in displacing offending judges as was used to get the plebiscite passed in the first instance.

Judicial accountability for the invalidation of voter lawmaking was not unintended by those who first championed direct democracy. The Progressive movement that injected the initiative and the referendum into so many state constitutions feared special interest control of courts as well as of legislatures. It is not surprising, therefore, that the concept of judicial retention elections was developed at the same time — and in the same states — as the voter initiatives and referenda. Reduction of judicial independence was an integral part of the movement toward popular rule and away from representative government. Without a recall power over judges, reformers argued, the referendum and initiative would be "rendered valueless" by judges seeking to reinstate the status quo. As one initiative sponsor put it, "[i]n an ideal world, when the people spoke, that would be the end of the subject." Such sentiments indeed prompted two states, Colorado and Nevada, to amend their state constitutions to prohibit judicial invalidation of direct legislation. Although the Colorado provision is no longer in force and it is unlikely that Nevada courts today would adhere literally to the terms of this bar, the more constrained efforts to control the state judiciary remain a potent force.

It is undeniably difficult to demonstrate that the threat of electoral reprisal affects the behavior of state judges. Until recently we have had little to go on but the occasional anecdote, like the confession by a former California Supreme Court justice that his vote to uphold the constitutionality of a ballot initiative may have been induced — at a subconscious level — by the pendency of his retention election. Fortuitously there has just appeared a ten-state survey of judges subjected to retention elections. The survey's most important finding is the high percentage of state court judges who acknowledge that retention elections exert a major influence on their behavior. It hardly seems far-fetched, therefore, to conclude that even the most principled of jurists may hesitate to void an electoral mandate in the face of an impending election. A judge may hope that conscience will triumph over retention anxiety, but as one justice put it so well, ignoring the political consequences of visible decisions is "like ignoring a crocodile in your bathtub." Furthermore, even if we assume that some judges will be able to ignore the prospect of electoral reprisal, the voters will have the final word. Judges who fail to heed voter messages may soon find themselves replaced by those with better hearing.

Invalidation of a statutory initiative under the state constitution is not only dangerous; it often has a sense of futility about it as well. Sixteen of the States that permit statutory initiatives also permit amendment of the state constitution by voter initiative. Although such measures demand higher signature percentages to qualify for placement on the ballot (*see* III below), no more than the simple majority required for passage of statutory ballot measures is needed for the passage of constitutional ones. If a court strikes down voter legislation as incompatible with the state constitution, the same electoral majority may join together to amend. Constitutional initiatives are often responses to state judicial rulings. Voters show no inclination to act with greater circumspection or self-restraint when confronted with constitutional amendments. The success rate for constitutional initiatives does not differ significantly from the passage rate for legislative initiatives. Using the state constitution as a judicial shield against the people's legislative effort places an awful lot of weight on the form initially selected by the plebiscite's promoters. Considering the ease of amending state constitutions and the scant attention voters appear to pay to the form of the ballot measure, a court's invalidation of a legislative plebiscite because of its conflict with the state constitution is unlikely to be durable.

B. Review Under Federal Instruments — Federal Statutes and the U.S. Constitution

State voter measures — like all state laws — are voidable if in conflict with either federal law or the United States Constitution. Although state courts generally have jurisdiction to review such claims, challengers almost uniformly seek out the federal courts when invoking federal bars. The reasons are twofold. First, the federal judiciary enjoys life tenure and is thus immune from the political pressure discussed in the prior section. Second, federal judges are historically less hostile to claims that rest on federal supremacy.

Under Article VI, the Supremacy Clause of the U.S. Constitution, state law must give way if in conflict with congressional enactment. Federal law "*preempts*" the state law if (i) Congress has explicitly precluded state regulation of a particular subject matter; (ii) congressional regulation on a subject is so pervasive or touches on a subject in which the federal interest is so dominant as to compel the conclusion that no room was left for state supplementation; (iii) there is an actual conflict between federal and state commands such that compliance with both is impossible; or (iv) state law impedes the achievement of the federal objectives. There is nothing in either the cases or the academic commentary to suggest that preemption issues play out differently depending on how the state law was produced — by ordinary legislation, referendum or voter initiative. This is not surprising. The focal point for most preemption claims is *congressional intent* — Did Congress mean by its enactments to preclude state legislation on the same subject? The nature or strength of the state interest is collateral to this central

inquiry. Thus, as federal courts currently grapple with the question of whether Proposition 187, the recent California initiative denying social services, medical benefits and public education to illegal immigrants, is preempted by federal regulation of alienage and immigration, it is unlikely that attention will be paid to the method of enactment.

Challenges to ballot measures under the U.S. Constitution are an entirely different matter. Here the appropriate level of judicial deference has been the subject of recent academic debate.

American judges and commentators have been obsessed with the tension between judicial review and majoritarian democracy (the so-called "counter-majoritarian difficulty") since at least the 1803 decision of *Marbury v. Madison*. A nation that traces power to the people's will does not easily digest the practice of judges denying the populace what most of them appear to want. Judicial review in its conventional guise, however, does not entail a direct conflict between the judiciary and the people. It is instead the will of a legislature that is being thwarted when the commands of the Constitution are invoked. In fact, this very lack of identity between the people and their representatives formed the foundation for Alexander Hamilton's defense of judicial review in the eighteenth century. "Where the will of legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter." While we ordinarily engage in the fiction that legislative enactments represent majority will, we discard this fiction when courts find that the people's agents have acted beyond the power delegated to them by "the People" through the constitutive document.
Should the conflict between lawmaker and judge be played out differently when the people express their preferences directly rather than through an agent? Judicial opinions resolving constitutional challenges to laws enacted by plebiscite seldom explicitly address the matter of the appropriate standard of review. The nearly three dozen U.S. Supreme Court cases reviewing ballot propositions contain scarcely a word on the subject. The rare recognition that the law under attack originated with the electorate is usually followed with a "boilerplate" statement like Chief Justice Burger's in 1981: "It is irrelevant that the voters rather than a legislative body enacted this law because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."

Intuitively, Chief Justice Burger's position seems wrong. If the people are the sovereign from which all power originates, then why should their expression of will not carry more weight than the legislature's crude effort to approximate it?[105]

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[105] *For purposes of simplicity I am ignoring a central difficulty with this argument — sovereignty under the United States Constitution resides in the People of the United States as a*

If the root difficulty of judicial review is its counter-majoritarian nature, why doesn't the legitimacy of judicial review diminish as it becomes clearer what the majority prefers. This claim struck a responsive chord with Supreme Court Justice Hugo Black. During a 1967 oral argument before the Court, then Solicitor General and future Supreme Court Justice Thurgood Marshall called attention to the fact that California's authorization of discrimination in the private housing market had been enacted by voter initiative. "Wouldn't you have exactly the same argument," Marshall was asked, "if the provision had been enacted by the California legislature?" "It's the same argument," Marshall replied, "I just have more force with this." "No," injected Justice Black, "It seems to me you have less. Because here, it's moving in the direction of letting the people of the State — the voters of the State — establish their policy, which is as near to a democracy as you can get."

As noted earlier, it is more than abstract theories of sovereignty and democracy that give judicial review of voter lawmaking a different cast. A judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted.

In a 1990 article in the *Yale Law Journal*, I proposed a different standard for constitutional review of voter initiatives. In contrast to Justice Black and quite counter-intuitively, however, my conclusion was that judicial review of direct democracy calls for more judicial scrutiny, not less. Hugo Black may well be right when he observes that direct voter legislation is quite a bit closer to "democracy" than the legislative product. What his vision obscures, however, is the intentional gap between true democracy and the "Republican Form of Government" guaranteed by those who drafted the U.S. Constitution — a structure that is designed to ensure sensitivity to minority interests as well as majority preferences.

My thesis may be roughly summarized as follows: The Constitution seeks to balance majority rule and minority rights. It enforces the government's obligation to the majority by requiring frequent elections. Legislative agents periodically return to the people for a renewal of their transitory mandates. They are held accountable for past actions and are exposed to shifting waves of public sentiment. Yet government has an obligation to *all* of its citizens; the rights of individuals and minority groups must be protected against the actions of the majority. The Constitution seeks to enforce this obligation by (i) investing primary lawmaking authority in "civic-minded" representatives rather than the people themselves; (ii) dividing the power of lawmaking bodies with a system of checks and balances to ensure that power is not concentrated in any one body or

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whole, rather than in the people of each state. While the legislating electorate in a state may be regarded as sovereign for purposes of the state constitution, it cannot be so treated within the context of the United States Constitution.

individual; (iii) placing certain principles beyond the reach of ordinary majorities. These protections are enforced by the mechanism of judicial review by an independent judiciary appointed for life. Much sentiment exists for the proposition that the judiciary should exercise substantial self-restraint in performing its role. The argument for judicial deference, however, rests on the assumption that the structure itself — (i) and (ii) — guards against neglect of minority interests. Our Framers assumed that legislative deliberation and separated and divided government do make a difference in protecting minorities from the tyranny of the majority. Voter initiatives (but not referenda[106]) bypass internal safeguards designed to filter out or negate factionalism, prejudice, tyranny and self-interest. The judiciary must compensate for these process defects. Where legislators act, many filters exist. The judiciary is just a back-up. Where majoritarian preferences are unfiltered as in voter initiatives, the judiciary must serve as the first line of defense for minority interests. The absence of structural safeguards demands that the judge take a harder look.

I tentatively believe that this thesis works as explanation as well as proposal. A survey of the three dozen U.S. Supreme Court decisions scrutinizing voter initiatives reveals a disproportionate number of them struck down as unconstitutional. Moreover, attention to the detail of the reasoning therein suggests a more rigorous form of judicial review being used to assess initiatives than is ordinarily applied to legislation adopted through the ordinary legislative processes. It would, of course, be foolhardy to suggest that the Court has been explicit about any of this. Judicial opinions resolving constitutional challenges to laws enacted by plebiscite seldom address the matter of the appropriate standard of review. Indeed, if confronted with my explanation, most judges would undeniably disavow a differential approach. Yet, the logic of altering levels of deference according to the nature of the lawmaker has not been lost on the Supreme Court, as revealed in a different but surprisingly analogous setting. In a 1990 decision, *Metro Broadcasting v. Federal Communications Commission*, the Court applied a lower level of scrutiny to a Congressional affirmative action plan than it had applied the previous year to a similar plan adopted by a city council in the state of Virginia. In justifying this differential stance, the Court noted that "as a matter of social reality and governmental theory the Federal Government is unlikely to be captured by political factions and used as an instrument of discrimination." Smaller political units like states and municipalities, because they pose heightened danger of oppression, warranted less deference. The Court thus

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[106] *Because referenda originate in the legislature, they must pass through its elaborate filtering system. The drafting reflects a more experienced hand. Committees are consulted. Hearings usually precede passage. More importantly, the end result frequently represents compromise. The voters in a referendum supplement the legislative process. In an initiative they bypass it.*

acknowledges that deference[107] and the threat of majority oppression are in inverse correlation[108]. As a matter of social reality and governmental theory, the case for differential treatment of initiatives and legislative enactments stands on an even firmer foundation.

The call for more rigorous review of voter initiatives has encountered three basic criticisms. The first has been to question the "idealism" of the legislative process against which initiatives are compared. The reality, it is argued, is considerably short of the Framer's deliberative model. The second challenge takes the form of defending voter initiatives as more deliberative, more constrained, more enlightened and less tyrannical than those proposing stepped-up scrutiny suggest. These first two critiques come from academics and are, I believe, easy to refute. It is not disputed that legislatures frequently fail to live up to an idealized model. Informed deliberation and "civic virtue" are too often strangers to the legislative halls. Legislators are motivated by a desire to save their seats at least as often as they are moved by a desire to further the public good. But this unfortunate reality does no damage to the preferred position of representative government. When legislators stumble, the result is more often impasse than bad law. The central claim is not that legislators are inherently more fair minded than the people who vote for them at the ballot box. The difference is that the structural safeguards built into legislative process — the checks and balances and separation of powers — limit the damage a bigoted legislator can do to minorities. The second critique, that initiatives are not nearly so flawed as suggested, usually comes from someone in a state which has no initiatives. Their snapshot of informed voters debating well-drafted ballot measures at town halls and grocery check-out lines without the slightest hint of intolerance for minorities is a picture that doesn't ring true. Perhaps I have been hardened by my own exposure to direct democracy during the years I have lived in California, but I can't help but believe that the California experience demands that we wake up to the dangers. Initiatives in recent years have played a significant part in curbing the rights of immigrants, homosexuals,

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[107] *In a very recent ruling, five justices of the Supreme Court rejected Metro Broadcasting's dichotomous approach, holding that federal and state affirmative action programs alike were justifiable only if they satisfied the most rigorous judicial scrutiny. See Adarand Constructors Inc. v. Pena (U.S. Supreme Court — June 12, 1995). The four dissenters remain very much wedded to applying less stringent review of federal legislation. Which view prevails in the long run may well depend on the results of the 1996 Presidential election and future appointments to the Court.*

[108] *This is not dissimilar to the accepted constitutional practice of diminishing the deference due legislative enactments when they are directed at particular religious, national or racial minorities. Since the 1938 Supreme Court decision in Carolene Products, these have been recognized as "special conditions which tend seriously to curtail the operations of those political processes ordinarily relied upon to protect minorities and which call for a correspondingly more searching judicial inquiry."*

racial minorities and the non-English speaking. James Madison's fear that popular masses will fail adequately to consider the interests of others and be overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders has not lost its force with time.

The third critique is more troubling. Perhaps it is no accident that it comes from the public. There are many in the United States that seem to regard the Constitutional structure, and the Framers' vision that precipitated it, as unable to withstand the test of time. Government no longer serves large numbers of our citizenry well. Plebiscites serve as an escape valve for the frustrations of day-to-day encounters with faceless, unresponsive and oppressive bureaucracies. If courts afford this spleen-venting little deference and we block judicial accountability by placing the dirty task of checking in the unelected and unaccountable Federal judges, where will citizen anger be directed? Could it take the form of diminished respect for and obedience to the courts, resentment towards the national government by an increasingly alienated populace, or apathetic retreats from civic responsibility? The level of electoral participation in the United States is already the lowest among any Western nation. There is a real danger that the minority of citizens who still vote will cease to do so as they perceive that small power elites make all the basic decisions, that elections change little or nothing and that government does not really care what the "little person" thinks. Recently, Sonny Bono, a former popular singing star and newly elected California Congressman, introduced a bill that would make it more difficult for federal courts to block state voter initiatives. The bill seeks to end the system that allows a single federal judge to halt by injunction a measure passed by the voters. The proposal would require the convening of three federal judges to hear the challenge. The bill is unlikely to pass, and its constitutionality is suspect, but there is little doubt that the majority of California's voters cheered when it was introduced. People care deeply about many of these initiative issues and the federal judiciary's active role has been a sense of increasing voter frustration and anger.

This coming fall, the United States Supreme Court, in *Romer v. Evans*, will review the constitutionality of a Colorado initiative prohibiting the enactment of any state or local law protecting gays and lesbians against discrimination. The initiative, passed in response to the adoption of such anti-discrimination laws by a number of local Colorado communities, like Vail and Aspen, was struck down as unconstitutional by the Colorado Supreme Court. In invoking the Equal Protection of the United States Constitution, it is clear that the Colorado court offered considerably less deference to the popular will than it ordinarily affords legislative efforts. Challenges to the Colorado ruling await in two forums. Shortly the United States Supreme Court will be scrutinizing the Colorado stance and many Court-watchers are predicting reversal. In the longer run — and regardless of the result in the United States Supreme Court — the voters may administer their own form of reversal. Several justices of the Colorado court are due for electoral votes of

confidence. There is no denying that protecting republicanism is a high-stakes proposition. The very volatility of transient passions that, to increasing numbers of commentators, demands stricter scrutiny, undoubtedly renders execution of this task by the courts an undeniably treacherous venture.

III. SESSION 3:
Constitutional Amendment by Plebiscite

A. Amendment of the State Constitution

In all but one state, voters are an integral part of amending the state constitution. Only Delaware excludes direct voter participation in the amendatory process. In forty-nine states, amendments ordinarily originate with the legislature, but require voter ratification — usually by no more than a simple majority. In sixteen of these states, an alternative route to amendment has been provided. Voters may bypass the legislature altogether and "initiate" an amendment to the state constitution. Legislative review is not required. Legislative veto is not permitted. Several of these states limit constitutional initiatives by distinguishing between "constitutional amendments" which may be done by voter initiative and "constitutional revision" which requires the prior approval of a super-majority of the legislature or the convening of a constitutional convention by both legislature and electorate. The line between "constitutional amendment" and "constitutional revision" is sometimes elusive and an increasing amount of judicial ink is being expended on the subject. In 1978, for example, the California Supreme Court opined that an enactment so extensive as to change the "substantial entirety" or which accomplishes "far reaching changes in the nature of the basic governmental plan" may constitute impermissible revision.

State constitutional amendment by voter action is often criticized for being too easy. Although constitutional initiatives generally require more signatures to qualify for the ballot than a statutory initiative (In California, for example, statutory initiatives require 5 % of the voters in the past election; constitutional initiatives require 8 %), the same simple majority will suffice for passage in both instances. The higher signature requirements do not seem to serve as much of a brake here. In those states permitting both statutory and constitutional initiatives, there have been nearly as many of the latter as the former. Indeed, in eight states there have been more constitutional initiatives than statutory ones. Nor have voters shown any inclination to act with greater circumspection or self-restraint when confronted with constitutional amendments. The success rate for constitutional initiatives does not differ significantly from the passage rate for legislative initiatives. One study revealed that from 1898 to 1979, the passage rate was 38 % for statutory initiatives and 34 % for constitutional initiatives.

Almost by definition, the substantive validity of a voter amendment of the state constitution is not ordinarily reviewable under the state constitution. As the

Massachusetts Supreme Court once noted, "it is difficult to comprehend how a constitutional amendment can be unconstitutional under the state constitution." Any substantive conflict can hardly be a logical basis for litigation. The conflict is the precise reason an amendment — rather than a statute — was necessary. Constitutional initiatives can, however, be challenged under the state constitution as defective in form or beyond the scope or subject matter of permissible voter amendments — for example, that the initiative constitutes a "revision" or addresses more than a "single-subject."

Voter amendments are, of course, subject to attack as in conflict either with federal statutes or the United States Constitution. And there appears complete agreement among courts or academics that no significance attaches for these purposes to whether the state "law" challenged is a simple statute or a state constitutional provision. The standard of review is precisely the same. Article VI, the so-called Supremacy Clause of the United States Constitution, declares that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme law of the land...any Thing in the *Constitution or Laws of any State* to the Contrary notwithstanding" (emphasis added by author).

B. Amendment of the Federal Constitution

When, following the American Revolution, the Articles of Confederation were adopted by the Continental Congress, they were submitted for ratification to the state legislatures. Several years thereafter, in 1787, when the current version of the Constitution was drafted, the Framers — apparently subscribing to the notion that the legitimacy of a constitution increases commensurately with the role the citizenry plays in its adoption — sought a more direct link with the people. "The fabric of the American Empire," said Alexander Hamilton, "ought to rest on the solid basis of the consent of the people." Instead of submitting their draft to the state legislatures, popularly elected conventions in each state were convened.

In view of the Framer's articulated desire for a more direct link with the people, the Constitution's provisions for subsequent amendment are very odd indeed. Article V, the provision of the United States Constitution governing amendments, permits amendments to originate from two sources — the Congress (by a 2/3 vote of both Houses) or on the application of 2/3 of the state legislatures convening a Constitutional Convention. The latter process has never been utilized successfully. Every one of the twenty-seven amendments of the U.S. Constitution has originated with Congress. Completely absent from Article V's scheme is any opportunity for the electorate to directly initiate an amendment.

The ratification process similarly cuts the voters out of the loop. Once an amendment has been proposed, it must be ratified by 3/4 of the state legislatures.

Congress, at its sole discretion, may bypass the state legislatures in favor of a state constitutional conventions[109]. Noteworthy again, however, is the fact that Congress enjoys no power to submit the proposed amendment to popular referendum.

All this is captured quite succinctly in the California Supreme Court's 1984 decision in *AFL-CIO v. Eu*. Ruling that a voter initiative directing the California legislature to apply to Congress for a Constitutional Convention (to consider a balanced budget amendment) was without any binding force, the Court starkly concluded: "The Framers of the Constitution chose to give the voters no direct role in the amending process."

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[109] *On only one occasion — in the 1933 repeal of Prohibition — has Congress opted for this route and it is safe to say that it is not likely to tread this path again.*

VIII. Referendums in Canada (federal level) and in Quebec - Contribution by Mr José WOEHRLING, Professor, University of Montreal

In Canada, referendums were long considered incompatible with the system of representative government inherited from Britain. Today, there exists at federal[110] level and in Quebec[111] (as well as in a number of other provinces, which we will not examine) a framework Act that allows for the holding of referendums to obtain the opinion of the population on constitutional questions (at both levels) or, in Quebec, on any other question, as well as on legislative proposals. But in any event, the results of the referendum are not legally binding for the public authorities: thus, the referendums are purely advisory (from the political point of view, of course, the government in power will be reluctant to contradict the will of the population as expressed by the referendum). The referendum has also been rejected, in constitutional decisions, as an instrument for amending the Constitution, which nowhere imposes recourse to a referendum for that purpose. However, during the last attempt, in 1992, to obtain a constitutional reform, which was unsuccessful, the federal and provincial governments deliberately put the proposal to the population, which rejected it. This precedent may well have created a constitutional convention, external to formal procedure, whose binding force at political level now appears to be unquestionable.

1. Canadian constitutional tradition and the pre-eminence of Parliament: rejection of the referendum as a means of expression of sovereign power

The absence of a referendum tradition is one of the characteristic features of the British constitutional system. This seems to be due, at least in part, to the historical foundations of parliamentary power in British tradition. Originally representing the Three Estates, Parliament succeeded in imposing its authority through two parliamentary, not popular, revolutions. According to Dicey, Parliament draws its authority from within, and not from any popular sovereign power that may have been delegated to it. He writes:

> *"[I]n a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state [...].*

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110 *Loi référendaire*, L.C. 1992, ch. 30.

111 *Loi sur la consultation populaire*, L.R.Q., c. C-64.1.

Accordingly, in British tradition the sovereign power is that of the representatives of the people, and not that of the people through its representatives. This notion of sovereignty is reflected in a variety of ways in British and Canadian constitutional law, notably in an indifference towards referendums as a legislative mechanism. In its decision *In re Initiative and Referendum Act* [1919] A.C. 935, the Judicial Committee of the Privy Council went so far as to declare invalid a direct democracy mechanism set up by the legislature of Manitoba. Although officially based on the maintaining of the powers of lieutenant-governor with regard to royal sanction for proposed legislation, Viscount Haldane's argument suggests that a binding referendum mechanism would, by its very nature, be incompatible with the parliamentary democracy introduced by the *Constitutional Act* of 1867.

From the first years of the federation, Canada made an unsuccessful attempt to use the referendum as an accessory to the process for amending the Constitution. Between 1867 and 1982, a constitutional amendment required action by the British Parliament. In 1868, for example, Nova Scotia asked London to pass legislation restoring its independence from Canada. Although this proposal was never formally put to a referendum in that province, it was accompanied by a petition signed by 31 000 of a total of 48 000 voters, a considerable majority. But the Imperial Parliament refused to approve the province's request, arguing that the application had not received the support of the federal authority.

Subsequently, apart from one exception, there have not been any constitutional amendments by means of the referendum procedure. The sole exception concerned Newfoundland's joining the Canadian federation in 1949, which was preceded by a provincial referendum. It should, however, be noted that this example did not create a precedent in Canada in the strict sense. Nor was Newfoundland's joining the federation the subject of any popular approval procedure at national level.

2. Review of the legality of the referendum by Canadian and Quebec courts

There are two levels of review, a review of the conformity of the referendum with the framework Act on the basis of which it is held and a general review of compatibility with the Constitution, which serves solely to verify whether the referendum procedure has respected the relevant applicable rights and freedoms.

A. Conformity with the law

a. Conditions of validity

1. *The competent body for initiating a referendum*

The government has the initiative for both the federal and the Quebec referendums (S. 3 of the *Referendum Act* and S. 7 of the *Act on Popular Consultation*). In both cases, the participation of the legislative body is also provided for. But whereas the provincial act *requires* the participation of the Assembly in the drafting of the referendum question (S. 7), the federal act is ambiguous: it states that the two Houses *may*, each in turn, be required to give an opinion on the text in question if a motion to that effect is initiated by a minister in the House of Commons (S. 5). The motion may then be approved, with or without amendments (*idem*). It should be noted that nothing in the text of S. 5 indicates that House approval is necessary or even that the motion is officially binding if approved. But the definition of "referendum period" (S. 2) implicitly suggests that approval is in fact necessary.

2. *The referendum question: object and form*

Federal and Quebec legislation differ most on the object of the referendum. At federal level, the question must necessarily be constitutional in nature (S. 3), whereas Quebec law allows a popular consultation on any question or proposed legislation that contains a provision to that effect (S. 7 and S. 10), provided that the question has not already been the subject of a referendum during the same legislative period (S. 12). However, the federal Act does not in any way explain the expression "question relating to the Constitution of Canada". It is thus difficult to determine whether its meaning should be confined to constitutional questions in a formal sense or whether a referendum may be held on questions which, although constitutional in subject-matter (materially), are not presently contained in a provision in the Constitution itself.

As to the form of the question, the federal referendum must offer an alternative, ie permit an either/or choice to be made through a mark next to the word "yes" or the word "no" [para. 3(1) and 3(3)]. This choice can then concern either a set of constitutional proposals submitted together or a series of separate questions, one for each proposal [para. 3(2)].

In Quebec, the referendum question is subject to no requirements of form.

3. *The referendum procedure*

i. the federal referendum

The government proclamation announcing the referendum is immediately followed by the issuance of referendum briefs by the Director General of Elections. The date of the referendum is fixed by the government. The briefs cannot, however, be issued during a general election, and a period of at least thirty-five (35) days must separate the date of the referendum from that of the briefs (S. 6).

It should be noted that S. 3 of the *Referendum Act* expressly authorises the holding of a referendum in certain provinces alone. Thus, to be valid, a referendum need not be held at national level.

ii. Quebec referendum

The referendum is announced by a government decree addressed to the Director General of Elections (S. 13). The decree cannot be issued until 18 days after the referendum question has been *brought before* the Assembly (S. 14). As in the case of the federal referendum, no referendum may be held during a general election (S. 15).

The referendum period is to last approximately five weeks, and the referendum must take place in the fifth week following the promulgation of the decree (appendix 2 of the *Act on Popular Consultation* amending S. 131 of the *Electoral Act*). Thus, it is a period comparable with that fixed for the federal referendum (35 days).

b. Review of compatibility

1. *The federal referendum*

The *Referendum Act* provides for the possibility of a judicial recount, which may take place at the initiative of either the federal or provincial government or of a voter (S. 29). Concerning the other provisions of the Act (for example referendum expenses or the distribution of broadcasting time), the Director General of Elections is entrusted with ensuring the observance of the Act (S. 7). His decisions can then be amended by the Federal Court in accordance with the *Federal Court Act*. Similarly, he can be compelled to perform his duties or apply a particular provision of the Act by mandamus.

2. *The Quebec referendum*

The *Act on Popular Consultation* provides for the creation of a "Referendum Council", a special court made up of three judges of the Quebec Court (S. 2) and with "exclusive jurisdiction to review all procedures relating to a popular consultation and to the application of this Act" (S. 3), including recounts (S. 41). Its decisions cannot be appealed, except those that concern recounts (S. 41) or objections challenging the actual validity of the referendum (S. 42), in which case there is provision for an urgent appeal to the Court of Appeal (S. 3).

B. Compatibility with the Constitution

As referendums are not specifically envisaged in the Constitution, they are not the subject of any particular provisions. However, being initiated by the state, referendum procedures and the Acts authorising them must comply with the requirements of the *Canadian Charter of Rights and Freedoms*. We should point out in this connection that the right to vote, recognised in art. 3, relates only to elections as such, and not to referendums. But certain guarantees, in particular freedom of expression [art. 2(b)] and the right to equality [para. 15(1)], may have an impact on the referendum procedure.

Without speculating on the range of possible objections, let us refer, as an example, to the constitutional difficulties to which the provisions of the Quebec Act on "national committees" (S. 22 and ff.) may give rise. By making obligatory the grouping together in two committees of all those active in the referendum campaign[112] and by imposing upon them the rules of these committees, these provisions restrict public debate considerably and thus invite criticism in the name of freedom of expression. The federal *Referendum Act*, which provides for the creation of similar committees, is much less restrictive, and does not limit the number of committees (S. 13 and ff.). These committees thus find themselves, with regard to financing and the supervision of expenditure, in a position similar to that of the political parties under *Canadian Electoral Act*.

No sole court is in charge of reviewing the compatibility of the referendum procedures with the Constitution. An objection to a federal referendum may be formulated in the Federal Court or the Superior Court. Under Quebec law, as the Referendum Council has, by virtue of S. 3 of the *Act on Popular Consultation*, exclusive jurisdiction "for hearing all cases relating to a popular consultation", a constitutional question concerning a provincial referendum could probably be brought before it. However, depending on the case law, the Superior Court may act as a rival jurisdiction in this regard. Recourse to this court may prove advantageous, given the broader range of remedies available to it.

IX. Some remarks on referendums in Finland - Contribution by Mr Matti NIEMIVUO, Director of the Department of Legislation, Ministry of Justice, Helsinki

Representative democracy is one of the leading constitutional principles in Finland. The Finnish constitution includes the possibility of referendum as a form of direct democracy. A referendum can, however, only be consultative. The main

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[112] *With a view to supervising referendum expenses, which is linked to a desire to ensure the integrity and fairness of the process, the Act provides for the establishment of national committees limited in number by the options put to the population (S. 22). For example, assuming a typical question that allows for a choice between two options, there will be only two national committees.*

aim of a referendum is therefore to supplement representative democracy. At the same time it increases the possibility for citizens to influence public decision-making and thereby furthers the legitimacy of decisions. The institution of people's initiative, through which a certain number of citizens can initiate a referendum or the handling of a proposed law in Parliament, does not exist in the Finnish constitution.

In the following, I will begin by viewing the provisions and practice concerning national referendums. Then I will look at referendums on the municipal level. Finally I will briefly mention the pending Finnish constitutional reform, in connection with which the development of the institution of referendum will have to be considered.

1. The Constitution Act of Finland of 1919 was amended in 1987 by the adding of provisions concerning national consultative referendums. According to the amendment (new section 22 a), the organising of a consultative referendum shall be determined by means of an Act of Parliament. The Act shall stipulate the date of the vote and the alternatives to be submitted to the voters. The State shall inform the voters of the alternatives and support the dissemination of information concerning them. In 1987 a special Act was passed which included the provisions concerning procedures at consultative referendums and specified the relevant constitutional provisions.

There has been only consultative referendum in Finland under the 1987 legislation. This referendum pertained to the question of Finnish membership in the European Union. In accordance with an Act of 1994, the citizens had to answer either "yes" or "no". Even though the referendum was consultative, the Constitutional Committee of Parliament during the handling in Parliament stressed that the result of the referendum was to be given great importance in fact, when the matter was decided upon later in Parliament. The referendum was held on 16 October 1994 and almost 71 % of those eligible used their vote. A little less than 57 % voted for membership and a little more than 43 % voted against. Later in the autumn, Parliament accepted Finland's membership in the European Union by 152 votes to 45.

A separate referendum about membership in the European Union was arranged in the province of Åland, which enjoys quite a substantial degree of autonomy. A separate provincial Act was enacted in the matter, since the institution of referendum does not exist in the Act on the Autonomy of Åland of 1991. The referendum on Åland was held on 20 November 1994, i.e. after the referendum in Sweden on 13 November 1994. The questions and procedure were similar to those of the national referendum, in which the Ålanders had also participated. The result in this provincial referendum was clearer than in the national one: 73,7 % for and 26,3 % against joining the EU. The turnout percentage was a little less than 50 %.

A national referendum has been held only once before. In 1931 a consultative referendum on the Prohibition Act was held, based on a special Act. The arranging of referendums has also every now and then been raised in initiatives put forward by Members of Parliament. These initiatives have concerned the arranging of referendums on certain specific matters as, for example, bilingualism, economic support for political parties and nuclear energy.

It should be pointed out that there is no Constitutional Court in Finland, which could control the constitutionality of laws concerning referendums. The constitutionality of Acts of Parliament is considered during the enactment of them. Parliament's Constitutional Committee plays a central role in the preliminary control of the order of enactment of acts.

2. Local autonomy has long traditions in Finland and it is of importance in administration. Nowadays the country has 455 municipalities, which differ a lot from each other both in size, number of inhabitants and financial resources. The highest decision-making municipal body is the municipal council, whose members are elected in direct elections once every four years. The council elects all other elected bodies. Democracy in municipal administration is therefore indirect and representative.

The use of direct democracy is also possible in the municipalities. Provisions on municipal referendums were established for the first time in the Local Government Acts of 1917. The possibility of municipal referendum was, however, abolished after only about one year. There was time to arrange only one municipal referendum according to the aforementioned laws. The referendum in question concerned the establishing of a separate municipality of parts of an old one.

Provisions concerning municipal referendums were included in the Local Government Act of 1976 only in 1990. A separate Act with provisions on the procedure at referendums was enacted the same year. According to the Act, a referendum was — like national referendums — only consultative. During the years 1990-1994 there have been altogether 12 municipal referendums. They have concerned the unification of municipalities (10) and road projets (2). At these referendums the decision-making body of a municipality, the municipal council, has not always complied with the result of the referendums, but made deviating decisions.

A new Local Government Act came into effect in Finland in the beginning of July 1995. The Act also contains a provision on municipal referendums (section 30), which are still consultative. It was suggested in the government bill that the results of referendums should be binding for the council, if the council so decides, and on

the council's conditions. The possibility of binding effect was, however, abandoned during the bill's consideration in Parliament. Binding referendums were considered to be in conflict with representative democracy. There were also some problems of interpretation connected to the question of binding effect. According to the law, the decision-making power for the arranging of referendums is in the hands of the council. The council makes the decision on whether or not to arrange a referendum and what the voting alternatives would be.

As opposed to national referendums, the initiative for a referendum according to section 31 of the Local Government Act can also be taken by a minimum of 5 % of the municipality's inhabitants. The council immediately has to decide whether or not to arrange the suggested referendum.

It is not possible to appeal against a decision made by the council on the arranging of a referendum. This prohibition is based on the fact that if such appeals were allowed, the arranging of a municipal referendum could be postponed until the matter would no longer be topical.

3. The most important of Finland's constitutional laws is the Constitution Act of Finland of 1919. There are three other constitutional laws. A constitutional reform has been under preparation almost continuously since 1970, when a complete constitutional reform was the aim. The plans for a complete reform were abandoned, basically because of political disagreements, and the constitutional laws have been amended through partial reforms instead. The establishment of the institution of referendum in 1987 was among the first partial reforms. During the last years the pace of change has been fast. This is illustrated by the fact that only 37 sections of the Constitution Act retain their original form of 1919. 54 sections have been amended, 17 sections are completely new and 4 have been repealed.

Because of some standpoints taken by Parliament, the government programme of Paavo Lipponen's government, which began its work in the spring of 1995, includes a statement according to which the need for unification and updating of the constitutional laws will be examined and the necessary changes in legislation made. Furthermore, the constitutional reform is to be continued, with the aim of a new coherent constitution. The Ministry of Justice has therefore begun the preparation of a coherent constitution so as to enable the new constitution to come into force in the year 2000. In this context the need for a revision of the institution of referendum also has to be examined. It seems to be generally considered in Finland that the possibility of consultative referendums should be preserved, and that referendums should be used with restraint and caution. A major problem is the question of whether a referendum has binding effect on an individual Member of Parliament. Juridically speaking, the decision-makers are not bound by the result of a referendum. The politically and morally binding effect of a result is,

however, a more complicated question, and one which can hardly be solved through legal provisions.

X. Constitutional justice and democracy by referendum in Hungary - Contribution by Prof. János ZLINSZKY, Member of the European Commission for Democracy through Law, Member of the Hungarian Constitutional Court and by Mrs Magdolna SIK, LLD.

The Hungarian Constitution does not make detailed provision for referenda. Article 2 simply states that in the Republic of Hungary, all power shall belong to the people, who shall exercise national sovereignty through their elected representatives as well as directly.

The Constitution does not lay down which areas may be subject to referendum and which are excluded. Responsibility for referenda is left entirely to Parliament. According to Article 19 paragraph 5, national referendums may be decreed by Parliament, while the adoption of the Referendum Act requires a two-thirds majority vote of the members present.

The Referendum Act (Act No. XVII of 1989) was adopted before the Constitution was changed, and conformed to the Constitutional order in existence before this change. In its original form, it contained rules governing both national and local referendums. Since September 1990, the Act has been concerned only with national referendums, local ones being governed partly by Act No. LXV of 1990 on local self-government and partly by local authority decrees.

In Hungary, the calling of national referendums is one of the National Assembly's responsibilities. There are two types of referendum :

- a referendum which aims to produce a decision, the result of which is binding on Parliament, and

- a referendum which aims to demonstrate popular opinion, assuring the participation of citizens in the Parliamentary decision-making process, but where the result has no obligatory force (indicative referendum).

Any matter falling within parliamentary purview may be the subject of a referendum, unless expressly excluded by law.

Referendums may be called to approve legislation adopted by Parliament or cover other matters for which it is responsible, for example, defining the principles on which a law should be based or issues of national interest not requiring legislation.

The following areas may not be the subject of referendums:

a. national budget legislation, government taxes and nationally laid-down conditions governing the imposition of local taxes;

b. decisions relating to appointments for which Parliament is responsible;

c. obligations arising from commitments under international law or legislation implementing international treaties or conventions.

A national referendum is mandatory only in the case of a new Constitution, which must be approved by national referendum.

Referendums may be initiated by:

a. the President of the Republic;

b. the government;

c. at least 50 members of Parliament;

d. at least 50 000 citizens.

Petitions must be lodged with the President of the National Assembly, who will reject any petition submitted by persons or institutions who lack the manifest authority to do so. He will also reject petitions signed by fewer than 50 000 persons.

Referendums are called by the National Assembly. The decision requires a two-thirds majority vote. Parliament's decision takes the form of a decree, even if it refuses to call a referendum. The National Assembly is obliged to call a referendum if the relevant petition is signed by at least 100 000 persons.

If a question has already been the subject of a referendum, Parliament may not call a new one within two years. If the referendum rejects the new Constitution, the National Assembly must call a new one within one year. As regards the modification (by an Act of Parliament) of legislation approved by referendum, the Hungarian Constitution imposes a 2 year waiting period. Parliament may only modify legislation approved by a referendum after it has been in force for two years.

These are the most important rules governing national referendums in Hungary. As can be seen, the Constitution does not expressly lay down, either positively or negatively, the areas that may be covered by referendum. This is simply dealt with in a special statute, which gives extremely wide scope for calling national referendums.

Within the Hungarian legal system, the Constitutional Court does not have direct responsibility for reviewing the admissibility of referendums. However, it can express its views on admissibility indirectly through its interpretation of certain constitutional provisions.

According to section 32 of the Referendum Act, a constitutional complaint may be lodged with the Constitutional Court by at least 500 citizens on the following grounds:

1. refusal to call a national referendum because the signatures have not been certified;

2. violation of the legal rules governing the conduct of the referendum or the recording of the results.

The Constitutional Court has equivalent responsibilities regarding local referendums. Constitutional complaints may be lodged on the grounds of:

1. unlawful refusal to call a local referendum, or

2. violation of the legal rules governing the conduct of the local referendum.

In such cases, the Constitutional Court controls the formal legality of the referendum and considers the procedural aspects of the referendum but is not empowered to examine the material validity of the text submitted. Such cases frequently appear before the court with regard to local elections.

The Constitutional Court may review *a priori* the constitutionality of draft legislation or of legislation that has been adopted but not yet enacted, at the request of the National Assembly, one of its standing committees, 50 members of Parliament, the President of the Republic or the government.

The Constitutional Court may review the constitutionality of a text to be submitted for referendum in cases where it receives a request for an interpretation of particular constitutional provisions which have a bearing on the questions to be asked in the referendum.

The first decision taken by the Constitutional Court concerning a national referendum was in 1990 when the National Assembly asked the Constitutional Court to interpret Article 29 (A) (1) of the Constitution, which governed the length of office of the President of the Republic. The problem was that in 1989 a national referendum on several questions had been organised and four decisions taken, one of which had dealt with that same Article and specifically with the

election procedure for the President of the Republic (the people had voted that the President be elected indirectly).

In 1990 the question was to determine whether the National Assembly could alter the length of the Presidential term or whether it was prohibited for two years from changing the regulation in question.

In Judgement No. 1/1990 (II.12) the Constitutional Court stated that the decision taken by the people had only been a referendum in so far as it dealt with the system of Presidential election and not in so far as it dealt with the length of the Presidential term.

This occurred for the second time in 1993 when a parliamentary standing committee asked the Constitutional Court to interpret three articles of the Constitution and, in the light of its interpretation, to state its position on the following questions:

- could Parliament be required by a referendum to dissolve itself before the expiry of its term of office?

- should such a petition for a referendum be considered to constitute collective dismissal, and was this not contrary to the principles of electoral law and representation?

- were there other areas where the requirements of the rule of law excluded referendums on constitutional grounds, apart from those cases already provided for in the Referendum Act?

In its decision No. 2/1993 (I.22), the Constitutional Court declared that under the Hungarian constitutional system, representation was the basic means by which popular sovereignty was expressed. Taking decisions by referendum was the exception. It was for Parliament to decide in which areas power could be exercised through referendum.

The Constitutional Court also held that a question submitted to referendum could not contain a disguised modification to the Constitution. Since the latter included an exhaustive list of the circumstances in which Parliament could be dissolved, Parliament could not be obliged to dissolve itself. Since Parliament was bound by the results of the referendum, submitting this question to referendum would constitute a new means of ending its term of office, thus amounting to a disguised modification to the Constitution.

The Constitutional Court at the same time recalled that although a referendum can, in place of Parliament, conclude with obligatory force a question falling

within Parliamentary purview, it cannot prescribe how the Assembly should decide a question. In the same way a referendum can only serve to demonstrate an opinion which is not obligatory for Parliament.

The Constitutional Court refused to identify - by interpreting the Constitution - areas excluded from referendum other than those specified by the Referendum Act. The opinion of the Court was that it was Parliament in the first instance which was competent to fix areas which could be subject to a referendum and those which were excluded.

At the same time, the Constitutional Court stated that the fact that Parliament had failed to harmonise the Referendum Act with the Constitution in force had provoked an unconstitutional omission. The Court invited the National Assembly to complete its task as legislator by 21 December 1993.

In 1995 the National Assembly asked for an interpretation of the Constitution with regard to a referendum initiative. The Constitutional Court stated once again that the Referendum Act in force did not conform with the modified Constitution and that the situation of unconstitutionality had not been eliminated. Harmonisation of the law with the Constitution had not yet been achieved.

Consequently, the Constitutional Court returned to the National Assembly the task of solving the difficulties resulting from this nonconformity.

In the light of this, several questions arise, for example : which are the areas which might be submitted to referendum and which should be excluded by a new Referendum Act.

Another controversial question is that of knowing whether constitutional arrangements can be changed by referendum. The Constitutional Court confirmed in Judgment No. 2/1993 that a question submitted to referendum should not contain disguised alterations to the Constitution. The question is then whether it can contain overt alterations.

According to one viewpoint : yes, it can, since any matter falling within Parliamentary purview can be the subject of a referendum (except for exceptions provided for by law).

An opposing viewpoint says : no, it cannot, that the Constitution can only be modified by the National Assembly and that, afterwards, the alterations must be approved by referendum since only the exercise of the two types of sovereignty together can change the Constitution.

In my opinion, if one accepts that the Constitution can be changed by referendum, the same proportion (i.e. two thirds) of the electoral vote must be insisted upon just as would be the case if Parliament were to change the Constitution.

Another problem of the present legislation is that according to the Referendum Act in force, the new Constitution (which the government is in the process of preparing) must be approved by referendum.

How is it possible to say 'Yes' or 'No' to a Law which contains about 80 Articles? In my opinion, it would be useful to organise a referendum on the principles of the new Constitution only.

Another question which arises : which would be the best institution to control the material admissibility of referendum initiatives (legality, constitutionality and conventionality)?

Parliament is in some sense hostile to the referendum, since the referendum removes its right to take decisions. In my opinion the Constitutional Court should exercise preliminary control over the material admissibility of initiatives, as it does with regard to local referendums.

XI. Constitutional justice and democracy by referendum in Ireland - Contribution by Mr James CASEY, Professor, University College, Dublin

Introduction

The Irish Constitution contemplates a referendum in two distinct and separate situations:

a. to approve, or disapprove, a proposed amendment of the Constitution which has already been passed by parliament. Since this is the only procedure established by the Constitution, it follows that amendment *always* involves a referendum[113];

b. to approve, or disapprove, a Bill passed by parliament which the President has declined to sign and promulgate as a law until the will of the people thereon has been ascertained.

[113] *There have been eleven separate referenda since 1937, when the Constitution came into force, though some of them were held on the same day. The electorate has rejected four proposed amendments, two of them — in 1986 and 1992 respectively — on the always controversial subjects of the introduction of divorce and on abortion.*

The President may act in this way only under very restricted conditions which have never so far been fulfilled[114]; consequently no such referendum has ever been held.

A priori judicial review of the validity of a referendum

In the case of a referendum to amend the Constitution, only one body — parliament is competent to initiate this. Every proposed amendment must be initiated as a Bill in Dáil Éireann the popularly elected chamber and passed, or deemed to have been passed[115] by both Houses. It is then submitted for the decision of the people in a referendum.

As regards form, the Constitution requires that every such Bill be expressed to be "An Act to amend the Constitution[116]." And it also stipulates that a Bill containing a proposal or proposals for the amendment of the Constitution shall not contain any other proposal[117].

Unlike some other European constitutions e.g. those of France, Germany, Greece and Portugal[118], the Irish Constitution imposes no restrictions on the subject-matter of amendments. Article 46.1 provides:

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[114] *A precondition of the President's exercise of this power would be a petition against signature of the Bill signed by a majority of the Senate and not less than one-third of the members of the Dáil. The petition would assert that the Bill contained a proposal of such national importance that the will of the people thereon ought to be ascertained. But the Government normally enjoys a majority in the Senate, not least because eleven of its sixty members are appointed by the prime minister.*

Should the President receive such a petition and decide to accede to it, a referendum would not necessarily follow. Article 27 posits two methods of ascertaining the will of the people on the Bill — a referendum or a general election — and the choice between them seems to lie with the Taoiseach (prime minister), not the President.

[115] *The Senate has no power to prevent the enactment of Bills, but merely to delay them. Should it reject a Bill the Dáil may resolve that the Bill be deemed to have been passed by both Houses: Constitution, Article 23.1.*

[116] *Article 46.3.*

[117] *Article 46.4.*

[118] *French Constitution, Article 89: Basic Law, Article 79(3): Greek Constitution, Article 110, para. 1 : Portuguese Constitution, Article 290.*

> "Any provisions of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article."

In *Finn* v. *Att. Gen*.[119] the plaintiff sought an injunction to restrain the holding of a referendum on the Eighth Amendment of the Constitution Bill 1983. He argued that the proposed amendment was superfluous and not permitted by the Constitution, because the right to life of the unborn child, which the amendment sought to protect, was already guaranteed by the Constitution[120].

But Barrington J. rejected the application, holding that by Article 46.1 the people intended to give themselves full power to amend any provision of the Constitution and that this included a power to clarify or make more explicit anything already in the Constitution. The Supreme Court dismissed an appeal from this ruling in a judgment of just twelve lines. O'Higgins C.J. (Walsh, Henchy, Griffin and Hederman JJ. concurring) said:[121]

> "The judicial power to review legislation on the ground of constitutionality is confined (save in cases to which Article 26 of the Constitution applies) to enacted laws. Save in these excepted cases, there is no jurisdiction to construe or to review the constitutionality of a Bill, whatever its nature. The Courts have no power to interfere with the legislative process. For this reason the plaintiff lacks standing to maintain these proceedings and has no cause of action. As these proceedings cannot be maintained, the Court should not find it necessary to consider the matters dealt with in the judgment of Mr. Justice Barrington."

An earlier attempt to block the holding of the same referendum had likewise failed in the High Court in *Roche* v. *Ireland*[122]. The plaintiff contended that the proposed amendment was so vaguely worded that he could not know how he should vote and would have to abstain; thus he would be deprived of his constitutional right to vote in the referendum. Carroll J. did not accept this submission, but in any event went on to observe that a constitutional amendment involved "a particularly solemn legislative process"; not only parliament but also the people took part. With this process the courts had no jurisdiction to interfere; the separation of powers under the Constitution would preclude that. Citing the 1956 Supreme

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119 *[1983] I.R. 154.*

120 *The Bill was subsequently approved in a referendum and became Article 40.3.3° of the Constitution.*

121 *(1983) I.R. 154-164.*

122 *Unreported, High Court (Carroll J.), 16 June 1983.*

Court decision in *Wireless Dealers' Association* v. *Fair Trade Commission*[123], she said it showed that the courts could not intervene in the normal legislative process; *a fortiori* they could not do so in the more solemn legislative process of a constitutional amendment.

This unpromising background did not deter subsequent plaintiffs from trying to halt the referendum on a constitutional amendment to permit ratification of the Maastricht Treaty[124]. In *Slattery* v. An Taoiseach[125] the plaintiff sought an injunction for this purpose, contending *inter alia* that the broad sweep of the proposed amendment could authorise EC institutions to override the protection given to unborn children by Article 40.3.3° of the Constitution. This application was rejected by the High Court and, on appeal, by the Supreme Court. In the latter forum Hederman J. said[126]:

> "The real point in this case is to ask this Court to prevent the operation of legislative and constitutional procedures which are in train. This is something the Court has no jurisdiction to do. What the defendants are doing is implementing the decision of the Dáil and the Seanad. They are not controlling the referendum. There is no constitutional or legal obligation on the defendants to provide funds for those seeking to oppose the referendum."

McCarthy J. said[127]:

> "In my judgment, the application made by the plaintiffs has no foundation whatever; to grant an order such as sought would be a wholly unwarranted and unwarrantable intervention by the judiciary in what is clearly a legislative and popular domain..."

And Egan J. spoke to similar effect[128]:

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[123] *Unreported, Supreme Court, 14 March 1956.*

[124] *It was clear that a constitutional amendment was necessary to permit such ratification, given the Supreme Court's decision in Crotty v. An Taoiseach [1987] I.R. 713, on the ratification of the Single European Act.*

[125] *[1993] 1 I.R. 286.*

[126] *At 299.*

[127] *At 301.*

[128] *At 304.*

"In my opinion, it would be totally wrong if the courts were to intervene in a process authorised by the Constitution[129]."

Constitutional jurisdiction and review of material validity of texts submitted for referendum

As explained above, the only texts so far submitted for referendum in Ireland have been Constitution Amendment Bills. The only possibility of judicial review in regard to such bills would be *a priori* review and, as has been indicated, the courts have not been receptive to this idea.

Were an ordinary (i.e. non-Constitution Amendment) Bill approved by the electorate in a referendum[130] it would not, by virtue of that fact alone, be protected against subsequent constitutional challenge. Like any other piece of legislation, the resultant Act would enjoy a presumption of constitutionality, but this would be open to rebuttal. In principle, therefore, the resultant Act would be open to *a posteriori* judicial review and could be condemned as invalid if, for example, it violated the Constitution's separation of powers or fundamental rights provisions.

Such an Act could be reviewed for compliance with international law in limited circumstances only. The Irish Constitution plainly adopts a dualist position as regards international law; no international agreement forms part of the State's domestic law unless parliament so determines (Article 29.6). The Supreme Court has consistently held that legislation which is otherwise valid cannot be challenged by reference to an international agreement which does not form part of domestic law[131]. Thus, to take one example, it would not be possible to challenge an Act approved by the electorate on the basis that it violated the European Convention on Human Rights.

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[129] *In McKenna v. An Taoiseach (unreported, High court, 8 June 1992) the plaintiff applied for an injunction to restrain the holding of the same referendum. She contended, inter alia, that the Government intended to behave unconstitutionally because it proposed to mount a "partisan campaign", financed from public funds, in favour of a "yes" vote. Costello J. rejected this argument, holding that it raised a political and non-justiciable issue.*

[130] *Article 47.2.1° of the Constitution lays down a special rule in regard to any such referendum. The Bill will be held to have been vetoed if a majority of the votes cast are against its enactment and those votes amount to not less than $33^1/_3$% of the voters on the register. (In the case of Constitution Amendment Bills a simple majority in favour will suffice, and no minimum level of voter participation is stipulated: Article 47.1).*

[131] *Re Ó Laighléis [1960] I.R. 93: Application of Woods [1970] I.R. 154.*

On the other hand, Article 29.3 of the Constitution provides:

> "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

If, therefore, it could be argued that the Act approved by the electorate violated a principle of customary international law, judicial review *a posteriori* would appear possible[132].

It seems unlikely that an Act approved by the electorate would enjoy any greater judicial deference than one simply passed by parliament. The people have the power to amend the Constitution, but when invited to take part in the ordinary law-making process they have no more authority to flout the Constitution than the legislature itself.

Constitutional jurisdiction and review of the material validity of constitutional amendments by way of referendum

Review of the material validity of constitutional amendments effected by way of referendum appears to be totally precluded. As already noted, Article 46.1 imposes no restrictions on the amendment of the Constitution[133]. And Article 26, which empowers the President to refer Bills to the Supreme Court for a ruling on their constitutionality, excludes "a Bill expressed to be a Bill to amend the Constitution." In *Finn's* case Barrington J. observed[134]:

> "The logic of this seems obvious, for the Bill, being a Bill to change the Constitution, may well contain a proposal which conflicts with something already in the Constitution. To ask the Supreme Court to enquire whether the Bill was or was not "repugnant" to the existing provisions of the Constitution would be a futile exercise."

And in *Slattery's* case Hederman J. said[135]:

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[132] *See further James Casey, Constitutional Law in Ireland (2nd ed., London 1992), Chapter 8.*

[133] *There may be a technical exception to this, in that it may not be possible to amend the Preamble. Article 46 refers to the amendment of "this Constitution". The terms of the Preamble indicate that only what follows thereafter qualifies as "this Constitution"; thus the amending power may not extend to it.*

[134] *[1983] I.R. 154 at 161.*

[135] *[1993] 1 I.R. 286 at 300.*

"A proposal to amend the Constitution cannot *per se* be unconstitutional and the procedure adopted for so doing cannot be unconstitutional if it complies with the requirements of the Constitution."

Thus the only possible grounds of challenge would relate to procedure, as where, in defiance of Article 46.3, the Bill was not expressed to be an Act to amend the Constitution, or where, contrary to Article 46.4, the Bill contained some other proposal.

It is not clear whether judicial review would be possible where the constitutional amendment was alleged to conflict with extrinsic restrictions on amendment. If the claim was that it conflicted with an international agreement to which the State was a party, but which formed no part of domestic law, it would seem bound to fail, given the Constitution's dualist stance. An argument that the amendment conflicted with a principle of customary international law would likewise appear to be futile, for the courts would presumably hold that the amendment operated to modify the State's acceptance of the generally recognised principles of international law in Article 29.3.

A more difficult issue would arise where it was contended that the constitutional amendment was in breach of the Treaties governing the European Communities. Those Treaties have, of course, been incorporated into the domestic law of the State and they appear to have the status of constitutional norms[136]. If such an argument were advanced before the High Court it could presumably invoke Article 177 of the EC Treaty to seek a ruling on whether the constitutional amendment really did conflict with the Treaties. And if the High Court did not do so, the Supreme Court, were its appellate jurisdiction engaged, would presumably be obliged to do so[137].

XII. Constitutional justice and democracy by referendum in Japan - Contribution by Mr Yoichi HIGUCHI, Professor

It may seem a little strange to hear constitutional justice and democracy talked about by someone from a country which certainly has both concepts in its constitution, but where the two have never yet been combined.

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[136] *In Campus Oil Ltd. v. Minister for Industry [1983] I.R. 82 the Supreme Court treated Article 177 of the EC Treaty as qualifying Article 34 of the Constitution, so that no appeal lay to it from a High Court decision to seek a preliminary ruling under Article 177.*

[137] *See further Casey, op.cit., pp. 171-172.*

As far as our central theme, democracy through law, is concerned, the fact remains that the Japanese first began to learn the basics of democracy one hundred and forty years ago, taking European and North American law as their models, and that, after much trial and error, accompanied by various tragic events, they committed themselves □ this time, for good □ to constitutional democracy under the current Constitution of 1946. I say models because, as the excellent reports we have had here show, democracy is not restricted to one version. I shall come back to this later.

I. Let us first look briefly at the situation in Japan concerning democracy by referendum and constitutional justice.

On the subject of referendums, and direct democracy in general, constitutional amendments must, under the 1946 Constitution, be approved by referendum once the initial decision has been taken by a two-thirds majority of both chambers of parliament. However, there have been no constitutional reforms in Japan for almost fifty years. Strange as it may seem, it should at once be said that the 1946 Constitution, which is the very symbol of post-war democracy, is more our version of the Declaration of the Rights of Man of 1789 than of any of the constitutions adopted later by successive French republics.

The Constitution, which is essentially based on representation, makes no provision for referendums on legislation. The Local Self-Government Act does provide, however, for various direct democratic processes, including popular initiatives concerning adoption, amendment and repeal of by-laws, in the local government sphere. It should be noted that the Tokyo Court of Appeal has ruled that by-laws proposed through popular initiative may not, at least in principle, be submitted to preliminary review by a mayor.

This brings us to our second topic: constitutional justice. We have an American-style system of constitutional review, with the ordinary courts, the chief of which is the Supreme Court, reviewing legislation after its adoption in response to pleas of unconstitutionality.

These then are the two institutions which concern us here. The lack of constitutional case-law in Japan means that I can contribute little to our discussion. On a theoretical level, however, our constitutional specialists have paid some attention to our problem, and are still doing so today. I shall therefore say something about one of the issues they have been discussing, and this will lead us on to some more general comments.

II. The question is whether a constitutional amendment, which must be approved by referendum, may be reviewed by the courts.

The argument for judicial review is based on the belief that the fundamental principles of a constitution may not be changed, and that the power of amendment is therefore limited. Most specialists tend to take this view, but are slow to infer from it that the courts have authority to rule that a constitutional provision approved by referendum is in fact unconstitutional.

The opponents of judicial review use two different, if not actually contradictory, arguments: the positivist argument that there can be only one category of constitutional standards and that these are governed by the rule that later laws supersede earlier, and the voluntarist argument that the sovereign will of the people is decisive. If most Japanese specialists are against judicial review, this is because the voluntarist position ultimately limits the courts' powers in this area.

We have had two reports, one on each side, giving us plenty to think about.

Professor Robert's version of democracy is ultimately true to the French tradition that the people's will, expressed in a democratic referendum, is paramount. Professor Eule, on the other hand, embodies the republican (in the American sense of the term) principle that the existence of a judicial counterweight to the excesses of democracy is important.

Much can unquestionably be said for both positions, but each has its dangers populism in the first case, democracy controlled by a sage elite in the second. The only answer may be to switch constantly from one position to the other, weaving and unraveling in turn, like Penelope with her web. In referring to the Greek myth, I am not trying to suggest that the whole task is futile, but to underline the virtues of the dialogue that typifies democracy through law.

XIII. Referendum in Lithuanian constitutional practice - Contribution by Dr Kestutis LAPINSKAS, Member of the European Commission for Democracy through Law, Judge at the Constitutional Court of Vilnius

1. The Constitution of the Republic of Lithuania (1992) while declaring that sovereignty shall be vested in the People and that they have the natural right to create their own State, simultaneously establishes that the People shall exercise the supreme sovereign power vested in them either directly or through their democratically elected representatives. This provision has been specified in Chapter 2 "The Individual and the State" of the Constitution in Article 33 of which it is declared that citizens shall have the right to participate in the government of their State both directly and through their freely elected representatives. Therefore, constitutional provisions have consolidated direct as well as representative forms of democracy in Lithuania. The examination of

constitutional norms allow us to conclude that the basic form of government in Lithuania as permanently applied, is representative, parliamentary democracy

2. The Constitution has assigned importance to the referendum as a principal element of democracy, in special Article 9, which provides as follows:

> "The most significant issues concerning the life of the State and the People shall be decided by referendum.
>
> In the cases established by law, referendums shall be announced by the Seimas.
>
> Referendums shall also be announced if no les than 300 000 of the electorate so request.
>
> The procedure for the announcement and execution of a referendum shall be established by law."

Some questions concerning referendums are regulated in five other articles of the Constitution. In addition, some questions are also regulated in the Final Provisions of the Constitution, where the constitutional referendum for the adoption of the Constitution and the procedure for the enforcement of the Constitution have been fixed.

Similar provisions were also provided for in the Provisional Basic Law of the Republic of Lithuania (1990).

The Law on Referendums had already been adopted in Lithuania, on 3 November 1989. It was the first law of such kind on the territory of the former USSR. It played quite an important role in Lithuania's struggle for independance. Later this law was amended and supplemented in order to reconcile it with norms of the Provisional Basic Law and provisions of the new Constitution (1992).

In the Law on Referendums there are established: common principles on the organisation of referendums, announcement of referendums, preparation for referendums, ballots, and the ascertainment of the results of a referendum.

The draft law or other measure is considered adopted if in the referendum the majority of Lithuania's electorate vote in favour of such law or other measure. But if less then half of Lithuania's citizens having suffrage take part in the referendum, the referendum is considered null and void.

3. The Constitution of the Republic of Lithuania has opted for a decisive referendum. A consultative referendum is not directly provided for in the

Constitution, but it does not mean that in case of necessity such a referendum cannot be organised. Furthermore, a consultative referendum does not create any legal consequences.

There are no exactly defined subjects for referendum (questions assigned to referendum). The Constitution has defined these in an abstract form as "the most significant issues concerning the life of the State and the People". An examination of constitutional norms allows for the conclusion that Lithuania recognises two kinds of referendums: constitutional and legislative (for adoption of the laws).

Thus, except questions concerning amendments to the Constitution or draft laws, other issues (at least, their rough list) must be defined in the Law on referendums. Such a supposition is founded on constitutional provisions that "in cases established by law, referendums shall be announced by the Seimas". The above mentioned provision has restricted the powers of the Seimas it has no power to announce a referendum in any case without legal grounds.

4. The issues of the constitutional referendum are established in the Constitution. Article 148 has determined that:

> "The provision of Article 1 of the Constitution that the State of Lithuania is an independent democratic Republic may only be amended by a referendum in which at least three-fourths of the electorate of Lithuania vote in favour thereof.
>
> The provisions of Chapter 1 ("The State of Lithuania") and Chapter 14 ("Amending the Constitution") may be amended only by referendum."

These questions can therefore be the subjects of compulsory constitutional referendums only because they can be solved only by way of constitutional referendum.

At the same time, amendments of other chapters of the Constitution may be made by the Seimas itself after consideration and double vote with a lapse of, at least, three months between each vote. Bills for constitutional amendments shall be deemed adopted by the Seimas if, in each of the votes, at least two-thirds of all the members of the Seimas vote in favour of the enactment.

For the Seimas decision, such amendments may be put forward to referendum. Such referendums are called as optional (facultative) referendums.

5. Constitutional regulation of the legislative referendum is somewhat contradictory. In Part IV, Article 69 establishes that "Provisions of the laws of the Republic of Lithuania may also be adopted by referendum". This provides

grounds for the supposition that the Constitution does not provide for adoption of laws by referendum.

But in part III of Article 71 of the Constitution, there is a provision that "the President of the Republic must, within five days, sign and officially promulgate laws and other acts adopted by referendum. So, on basis of this provision it may be supposed that laws (or their provisions) as well as other legal acts can be adopted by referendum. This is confirmed by the practice of organising referendums in Lithuania: on 25 October 1992, the people approved by referendum the present Constitution of the Republic of Lithuania and the "Law on the procedure for the enforcement of the Constitution of the Republic of Lithuania".

The right of initiative for referendums belongs to the Seimas and to a qualified minority (no less than 300 000) of citizens of the Republic of Lithuania who have the right to vote. In every case, the referendum shall be announced by a Seimas special resolution adopted by the majority of the Seimas members participating in the sitting. Before the adoption of such resolution, the Seimas should consider if the issue proposed for referendum is in compliance with the constitutional formula, that by the referendum shall be decided "the most significant issues concerning the life of the State and the People". In addition, the issue proposed for referendum should be in compliance with the list of possible questions defined in the Law on referendums.

7. In Lithuania, since the restoration of the independent State (11 March 1990), 4 referendums and 1 plebiscite have been organised. Not all of them succeeded, though all of them have been concerned with quite a significant issue. Positive results have been achieved in the plebiscite and in two referendums. Among the next two referendums, one was invalid (because too many citizens were absent from the voting), and the following one failed too because the number of voters was less than the minimum for making a decision as provided for in the Law on referendums.

The following is a brief summary of each referendum:

At the initiative of the Supreme Council of the Republic of Lithuania, a population poll (plebiscite) on the issue of constitutional significance "The State of Lithuania is an independent democratic Republic" took place on 9 February 1991. 84.7 % of all the electorate participated in the plebiscite and 90.5 % of them, i.e. more than 3/4 of all Lithuania's electorate, by secret ballot voted in favour of this statement. In the light of the results of the plebiscite, the Supreme Council proclaimed the Constitutional Law "On the State of Lithuania" on 11 February 1991. By this Law the statement "The State of Lithuania is an independent democratic Republic" was announced as a constitutional norm of the

Republic of Lithuania and a fundamental principle of the State. Then it was established that the mentioned constitutional norm may be amended in future exclusively by a population poll (plebiscite), and only if no less than three-fourths of Lithuania's electorate vote in favour of the amendment.

On 23 May 1992 the referendum "On restoration of the institution of the President" took place. It had been organised at the initiative of citizens who put forward draft laws prepared by the Lithuanian Sájúdis (the main public political movement for Lithuania's independence). The referendum was carried out (57.6 % of Lithuania's electorate participated) but the relevant laws were not adopted because only 42.8 % of citizens who participated in the ballot voted in favour.

Another referendum initiated by the same subjects took place on 14 June 1992. The issue raised for the population vote was "On the unconditional and urgent withdrawal of the former USSR Army, now belonging to the Russian Federal Republic, from the territory of the Republic of Lithuania in 1992 and compensation for the damage done to Lithuania". The referendum was carried successfully: more than 76 % of all the electorate participated, and 68.95 % voted in favour of the immediate withdrawal of Russian troops from Lithuania and for the compensation for damage.

On 25 October 1992, on a parliamentary initiative, a constitutional referendum was organised on the subject: for the adoption of the draft Constitution, prepared and preliminarily approved by Lithuania's Paliament. 75.3 % of all citizens having the suffrage right took part in the referendum, and 56% of Lithuania's electorate voted in favour of the adoption of the new Constitution. This was the first and, to date, the only constitutional referendum in Lithuania.

On 27 August 1994, under a citizens' initiative (stimulated by the right wing party Union of Homeland/Lithuania's Conservatives) a referendum was announced on the issue "On Unlawful Privatisation, Devaluated Accounts and Shares, also Transgressions of Legal Protection". On the basis of the draft laws prepared for referendum, 7 original questions were formulated and were presented to the electorate. But the activity of citizens was quite low: in the referendum only 36.8 % of Lithuania's electorate participated from whom 30.8 % voted in favour of the presented draft laws. Under the Law on Referendums these proposals were accordingly not adopted. Because of insufficient participation by the electorate, the same referendum was invalid.

8. The Constitutional Court of the Republic of Lithuania has considered two cases concerning questions connected to a referendum. The first one was initiated in 1994 by a group of Seimas members requesting an examination of whether some provisions of the Law "On Amending and Appending the Law of the Republic of Lithuania on Referendums" were consistent with the Constitution.

The Constitutional Court, in its Ruling of 22 July 1994, recognised that some provisions (4 out of 8) of the Law in dispute contradicted the Constitution of the Republic of Lithuania. So they were null and void.

The second case on referendums considered by the Constitutional Court arose from a petition submitted to the Court by a group of Seimas members requesting an examination of whether some of Parliament's Acts concerning the organisation of referendums were in compliance with the Constitution. The Constitutional Court, in its Ruling of 1 December 1994, recognised that the Acts in dispute were in conformity with the Constitution of the Republic of Lithuania.

It should be noted that supplementary information concerning the cases mentioned above has been published in the "Bulletin on Constitutional Case-Law" issued by the Venice Commission.

9. In case of decisive referendums, especially as they are used in practice very often, there arise problems concerning relations between representative and direct democracy. They both have the same object (legislative activity and the resolution of the most significant issues concerning the life of the State). As a matter of fact, beyond them there is one and the same subject the sovereign People. Usually the People act through their own elected representatives Parliament. But sometimes the People exercise supreme sovereign power by themselves by way of a decisive referendum. Such a situation may be estimated as a competition and contradiction between these forms of democracy. There may also arise questions concerning the priority between them.

Doubtless, competition and contradiction between direct and representative democracy are useless, unnecessary und unwanted. A decisive referendum should not be put into practise too often, only in necessary and very serious cases. It should be treated as a reserve (or emergency) method of legislative action for the resolution of certain significant issues.

XIV. THE REFERENDUM IN POLISH LAW AND PRACTICE

Contribution by Mr Piotr WINCZOREK, Professor, University of Warsaw

1. The referendum was unknown in Poland during the interwar period. The first national referendum was held in 1946. Its official goal was to give Polish citizens the chance to express their opinion about political and social revolutionary reforms, which had just begun in Poland. Unofficially however it was aimed at measuring peoples potential behaviour in the approaching parliamentary elections of 1947. The result of the referendum was falsified by the communist authorities of the time. The next and most recent referendum was held in 1987. This referendum focused on some proposals for political and economic change which were planned by the Government in power. Citizen participation in this

referendum was relatively weak and it did not produce a clear and decisive result. The far reaching process of fundamental change promoted by political forces of anticommunist origin began two years later. In general, one may say that Polish experience of referenda has been rather poor and discouraging. On the other hand, however, public opinion surveys effected in the last six months show a high (80 %) level of public interest for national and constitutional referenda.

2. Current Polish law recognises the institution of the referendum.

a. On the level of general constitutional provisions, Article 2 point 2 of the constitutional provisions (December 1989 text), still in force, provides that "supreme power in the Republic of Poland shall be vested in the Nation. The Nation shall exercise its power through its representatives elected to the Sejm and to the Senate. The exercise of such power may be implemented by means of referendum (...)" and by Article 19 of the so called "little constitution" of 17 October 1992. This article states that "a referendum may be held in cases of particular interest to the State. The right to order a referendum shall belong: (i) to the Sejm, by its own resolution, carried by an absolute majority vote or (ii) to the President, with the consent of the Senate, passed by an absolute majority vote. The result of a referendum shall be binding when more than a half of the total number of persons eligible to vote have participated. The principles and the methods of holding a referendum shall be established by law".

b. The law (statute) mentioned above dates from May 1987, but because of its incompatibility with the present political conditions and with binding constitutional provisions, it cannot be implemented.

c. Polish law also provides for the possibility for local referendums to be held in the local communities. "The little constitution" states (Article 72 point 2) that "the inhabitants may take decisions by means of a referendum. The requirements and procedures for holding a local referendum shall be established by law". The law on local referenda was passed in 1990. It provides for two kinds of referendum: the first may deal with certain substantial community problems (e.g. local taxes); the second affords voters an opportunity to recall the community's council. Referenda of this second kind have been held in Poland many times already.

d. A referendum shall always be necessary to adopt the new constitution of the Republic of Poland. This is provided for by the constitutional act of 23 April 1992 on the preparation and voting of the constitution of the Republic of Poland. This Act states that constitution shall be put to a vote by the National Assembly (Sejm and Senat combined) and approved by the nation by means of a referendum. A partial, preliminary referendum may be held in cases when there are some important constitutional issues to be solved by the nation before the whole text of

the new constitution is presented for approval in a final, national referendum. The said issues shall be selected and determined by the Sejm itself. This kind of referendum is not however obligatory. Methods of holding a constitutional referendum shall be established by law.

e. Since the law on referenda of 1987 cannot be implemented, the MPs have undertaken an initiative to draft the new law. The draft law on referenda is currently under discussion in Parliament. The new law is supposed to deal both with constitutional and national referenda alike. It shall not however concern local referenda. The draft law provides that along with other subjects who have the right to initiate a referendum, a referendum may be held at the request of at least 500 000 citizens, but this request may be rejected by the Sejm. Certain questions must be excluded from a referendum (e.g. amnesty, budget) and certain others may be included (e.g. consent for ratification by the President of certain international treaties).

f. The law on local referenda together with the draft law on national referenda provide for judicial review of their regularity. As far as local referenda are concerned, such review is exercised by the regional court. The judicial review of national referenda shall be exercised by the Supreme Court. The Constitutional Tribunal is not however supposed to play any kind of active role in such a case. The proposal to transfer preliminary review of the constitutionality of the questions put in a referendum to the Constitutional Tribunal has been rejected at the current stage of parliamentary discussion.

3. The exact date for a constitutional referendum in Poland is still unknown. This is due to the fact that preparatory work carried out in the Constitutional Commission of the National Assembly has not yet been completed. The coming presidential campaign and the result of this year's presidential election may have an important impact on the course of future events.

XV. The referendum and constitutional justice in the Russian Federation - Written contribution by Mr Nikolaï VITRUK, Associate Member of the European Commission for Democracy through Law, Judge at the Constitutional Court of the Russian Federation

Article 3 (3) of the Constitution of the Russian Federation, approved in a national referendum on 12 December 1993, states that referendums and free elections shall be the supreme direct manifestation of the power of the people. Article 32 (2) of chapter 2, which deals with human rights and freedoms, entitles citizens of the Russian Federation to elect and be elected to organs of State government and of local self-government and to take part in referendums. Under Article 84 paragraph c of the Constitution, the President of the Russian Federation shall call referendums under procedures established by federal constitutional law. Article 92 (3) of the Constitution provides that, should the President of the Russian

Federation be unable to exercise his functions, the acting President who replaces him shall not have the right to call a referendum. Article 130 (2) provides that local self-government shall be exercised by the citizens through referendums, elections and other forms of expression of their will, through elected bodies and other organs of local self-government.

Chapter 9, dealing with constitutional amendments and revision of the Constitution, contains provisions relating to popular votes. Article 135 establishes the procedure for revising chapters 1, 2 and 9 governing the foundations of the constitutional system, human rights and freedoms, constitutional amendments and revision of the constitution. If a proposed revision of the aforementioned chapters is supported by three-fifths of the total membership of the Federation Council and the State Duma, a constitutional assembly shall be convened in accordance with federal constitutional law. The constitutional assembly may either confirm the inviolability of the Constitution of the Russian Federation or draw up a new draft Constitution which shall be adopted by two-thirds of the total membership of the Constitutional assembly or submitted to a popular vote. In the latter case, the Constitution shall be considered adopted if more than half the participants have voted in favour, provided that more than half the electorate have taken part in the poll.

According to the spirit of the Constitution, matters relating to the calling and holding of referendums must be governed by federal constitutional law. The latter must be approved by at least three-quarters of the total membership of the Federation Council and at least two-thirds of that of the State Duma. Once adopted, the federal constitutional law shall be submitted within fourteen days to the President of the Russian Federation for signature and shall then be considered enacted. The draft federal constitutional law on referendums was drawn up and adopted at first reading by the State Duma on 22 December 1994.

The Constitution of the Russian Federation and the federal constitutional law on the Constitutional Court of the Russian Federation[138], which came into force on 23 July 1994, do not give the Constitutional Court authority to review the application of the procedures for calling and holding referendums or confirming their results, as is the case in some of the new democratic States, such as Romania and Moldova.

However, the absence of any explicit references to such powers of the Constitutional Court does not mean that these matters cannot be resolved, at least in part, through the Constitutional Court's exercise of other types of constitutional jurisdiction and its use of the corresponding review procedures. In the first place,

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[138] *Compendium of laws of the Russian Federation, 1994, No. 13, Art. 1447.*

this could involve the Constitutional Court's exercise of powers in cases concerning the constitutionality of federal legislation, decrees and other decisions of the President of the Russian Federation, the Federation Council, the State Duma and the government of the Russian Federation, the constitutions of the Republics, statutes and the legislation and other decrees and regulations of the constituent entities of the Russian Federation, particularly in relation to the protection of human rights. It could also apply to its powers to determine disputes over jurisdiction, particularly between federal organs of State, or citizens' claims that their constitutional rights and liberties have been violated, requests from courts for rulings on the constitutionality of the legislation applicable in specific cases, and its interpretation of the Constitution of the Russian Federation in the exercise of other powers granted to it under the Federation's Constitution, the federal treaty or the federal constitutional laws.

Using the types of constitutional power referred to above and the corresponding procedures would enable the Constitutional Court to exercise indirect oversight of the constitutionality of the calling and holding of referendums and the way the results were determined.

The draft federal constitutional law on referendums extends the Constitutional Court's powers to rule on the constitutionality of certain aspects of the calling and holding of referendums. For example, it is proposed to give the Court the power to review the use of the procedure, established in the legislation, that enables constituent entities to initiate referendums (there are serious objections to this proposal, which amounts to the Court's exercising constitutional rather than legal oversight of the procedure for holding referendums). Other innovations include granting the President of the Russian Federation the right to ask the constitutional court to rule on the constitutionality of draft legislation, amendments to or the repeal of existing legislation or the wording of another question. In these cases, the legal consequences of the relevant decisions of the Constitutional Court must be determined.

The same situation obtained in the past, since the Constitution of the RSFSR and the Act governing the Constitutional Court of the RSFSR, adopted by the fifth Congress of People's Deputies of the RSFSR on 12 July 1991[139], did not grant the Constitutional Court direct powers to rule on the constitutionality of referendums.

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[139] *Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 19, Art. 621.*

In independent Russia, the first national referendum, on the institution of the post of President of the RSFSR elected by universal suffrage, was held on 17 March 1991.

The decree of the seventh Congress of People's Deputies of the RSFSR on the stabilisation of the constitutional system in the RSFSR, dated 12 December 1992[140], established 11 April 1993 as the date for the second national referendum on the proposed basic provisions of the new Constitution (basic law) of the Russian Federation. At the same time, the Congress instructed the Russian Federation's Supreme Soviet to approve the wording of the proposed basic provisions of the new Constitution agreed with the President of the Russian Federation and its Constitutional Court, for submission to a referendum. However, following a charged confrontation between the President and the Congress of People's Deputies and the Supreme Soviet of the RSFSR, at a time of acute political and constitutional crisis in Russia, the referendum did not take place.

Until the 1993 Constitution of the Russian Federation came into force, the Constitutional Court exercised indirect constitutional oversight of referendums held in the Federation. Two cases considered by the court provide examples of this.

On 12 and 13 March 1992, the Constitutional Court examined the constitutionality of the Tataria SSR's declaration of State sovereignty of 1990, its legislation amending and supplementing the constitution of the Tataria SSR, its 1991 act on the Tataria SSR referendum and the 1992 decree of the Supreme Soviet of the Republic of Tatarstan on the holding of a referendum on the republic's statehood[141].

It should be noted at the outset that the Constitutional Court recognised the Republic of Tatarstan's right to call and hold referendums and to establish the grounds and procedures for such referendums, in so far as these fell within its jurisdiction. It therefore rejected the applicant's claim that in the event of conflicts between particular provisions of the Republic of Tatarstan's law regarding referendums and that of the Russian Federation, the latter should take precedence.

In its decree of 21 February 1992 on the holding of a referendum on the Republic of Tatarstan's statehood, the Republic's Supreme Soviet laid down that the

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[140] *Gazette of the Congress of People's Deputies and of the Supreme Soviet of the Russian Federation, 1992, No. 31, Art. 3016.*

[141] *Judgment of the Constitutional Court and other case documents; Bulletin of the Constitutional Court of the Russian Federation, 1993, No. 1, pp. 40-57.*

referendum should be held on 21 March 1992 and should ask the question: "Do you agree that the Republic of Tatarstan is a sovereign State and a subject of international law whose relations with the Russian Federation, the other Republics and other States are governed by treaties based on equality of rights?" (yes or no). The constitutional court of the Russian Federation ruled that the decree of the Supreme Soviet of the Republic of Tatarstan did not comply with the Constitution of the RSFSR with regard to the wording of the question concerning the Republic's status as a subject of international law whose relations with the Russian Federation, the other Republics and other States are governed by treaties based on equality of rights, since this implied a unilateral change to the Russian Federation's national and State structure and signified that the Republic of Tatarstan was not part of the Russian Federation. That this was the position of the Republic's government was confirmed by the terms and objectives of the referendum, set out in the appeal to the people of the Republic of Tatarstan issued by the Presidium of the Republic's Supreme Soviet on 6 March 1992. In the appeal and in other official government documents and declarations, the Republic of Tatarstan was presented as a sovereign State establishing relations with the countries of the Commonwealth of Independent States, including the Russian Federation, in accordance with international law.

Following the Constitutional Court's judgment, which took immediate effect, the referendum was not cancelled and the wording of the questions to be asked remained unaltered. On 16 March 1992, the Supreme Soviet of the Republic of Tatarstan adopted a decree explaining the wording of the referendum to be held on 21 March, which amounted to a restatement of the Republic's authorities' intention of holding the referendum. Thus the authorities did not implement the judgment of the Constitutional Court of the Russian Federation regarding the holding of the referendum. However, this does not mean that the Constitutional Court's judgment has no legal force. As far as the Republic of Tatarstan's status within the Russian Federation is concerned, it is still binding. This does not exclude Republics, including the Republic of Tatarstan, from having international links within the Russian Federation.

On 20 and 21 April 1993, the Constitutional Court examined the constitutionality of the decree issued by the ninth extraordinary Congress of People's Deputies of the Russian Federation on 29 March 1993 on the Russian national referendum of 25 April 1993, the procedure for determining the results and the machinery for implementing the results.

The referendum provided for in the decree, which took account of the proposals of the Federation's President for a popular vote of confidence in him, was intended to end the political crisis in the Russian Federation. It asked the following questions:

1. Do you have confidence in the President of the Russian Federation, B.N. Yeltsin?

2. Do you approve of the social and economic policy applied by the President and the government of the Russian Federation since 1992?

3. Do you consider it necessary to call an election for the presidency of the Russian Federation?

4. Do you consider it necessary to call early elections for the Congress of People's Deputies of the Russian Federation?

Under the terms of the second part of paragraph 2 of the Congress decree, to be approved, each of the propositions in the referendum would require the support of at least half the citizens entitled to be included in the electoral register.

The Constitutional Court found that with regard to determining the outcome of the first two questions, the second part of paragraph 2 of the Congress decree did not comply with sections 4 and 5 of the Act of 16 October 1990 on referendums in the RSFSR[142], according to which all State and social bodies and State officials are required to respect the Constitution and the laws, including those establishing the procedure for holding referendums.

The Constitutional Court considered that the second and third questions in the referendum had constitutional implications and amounted to seeking approval of changes and additions to the Constitution since they effectively established new grounds for the early cessation of the powers of the President of the Russian Federation and of the entire body of people's deputies making up the Congress and the Supreme Soviet that were not provided for in the constitution of the RSFSR. In accordance with the fourth paragraph of the Act on referendums in the RSFSR, therefore, to be approved, the third and fourth questions in the referendum required the support of more than half the citizens on the electoral register for the referendum (under the third paragraph of section 27 of the Act, all citizens eligible to take part in the referendum are included on the register). The Constitutional Court therefore found that the second part of paragraph 2 of the Congress decree concerning the results of the referendum for the second and third questions complied with the Constitution of the Russian Federation.

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[142] *Gazette of the Congress of People's Deputies and the Supreme Soviet of the RSFSR, 1990, No. 21, Art. 230.*

XVI. Referendum in the constitution of the Slovak Republic and the powers of the Constitutional Court of the Slovak Republic - Contribution by Mr Ján KLU_KA, Member of the European Commission for Democracy through Law, Judge at the Constitutional Court of Košice

The regulation of referendum issues is located in Articles 93-100 of Chapter 5, Part 2 (Legislative powers) of the Constitution of the Slovak Republic (No. 460/1992). The Constitutional level of regulation covers only the most crucial issue of holding (enforcing of) a referendum and sets forth the procedures for holding a referendum by law (Article 100 of the Constitution). At the present time, the law on the procedures for holding a referendum, is set out in Law No. 564/1992, as amended by Law No. 158/1994.

I.

1. Types of referendum defined by the Constitution of the Slovak Republic

The Constitution of the Slovak Republic distinguishes two types of referendums: obligatory and facultative. According to Article 93 section 1 of the Constitution: "A constitutional statute on the formation of a Union of the Slovak Republic with other States or a secession therefrom shall be confirmed" by an obligatory referendum.

A facultative referendum may be held either upon a resolution of the National Council of the Slovak Republic, or upon a petition submitted by no less than 350 000 citizens of the Slovak Republic. According to Article 95 of the Constitution, a referendum shall be declared by the President of the Slovak Republic.

2. Constitutional regulation of issues which may be decided by a referendum

Regarding an obligatory referendum, the Constitution of the Slovak Republic unambiguously states that only the confirmation (no-confirmation) of a constitutional statute on the formation of a Union of the Slovak Republic with other States or a secession therefrom may be decided by a public referendum. Regarding a facultative referendum, the Constitution of the Slovak Republic provides partly for which issues may not be decided by a referendum, and partly (although generally formulated) for which issues may be so decided. Article 93 section 3 of the Constitution states that:

"No issue of fundamental rights, freedoms, taxes, duties or national budgetary matters may be decided by a public referendum".

Article 93 (2) of the Constitution; states that:

"A referendum may also be used to decide on other crucial issues in public matters".

3. Powers of the President of the Slovak Republic concerning the declaration of a referendum

As has already been mentioned, the President of the Slovak Republic is entitled to declare a facultative referendum:

1. Upon a resolution of the National Council of the Slovak Republic, according to Article 86 section d) of the Constitution of the Slovak Republic. The proposals of the National Council of the Slovak Republic to request the President to declare a referendum may be submitted by members of the National Council or the Government of the Slovak Republic (Article 96 section 1 of the Constitution).

2. A referendum (the declaration of a referendum) may be directly initiated in the form of a petition to the President by no less than 350 000 citizens of the Slovak Republic. The right to petition is guaranteed by Article 27 section 1 of the Constitution of the Slovak Republic whereby "every person shall have the right to address governmental authorities ... in individual or public matters...". Legal requirements for the validity of a petition are defined by Law No. 85/1990 on the right to petition in general, and for petitions to declare a referendum in the form of "lex specialis" in Law No. 158/1994, by which Law No. 564/1992 on the procedures for holding a referendum is changed and amended. A referendum shall be declared by the President of the Republic only after he recognises that constitutional and incidental legal requirements connected with his statement have been fulfilled.

In cases where the proposal for the declaration of a referendum was advanced by a resolution of the National Council of the Slovak Republic to the President, the President examines whether the requirements of Article 93 section 2 have been fulfilled, ie, whether the issue submitted to a referendum is a "crucial issue in the public interest". In doubtful cases, the President of Republic may address the Constitutional Court of the Slovak Republic, as is mentioned below.

In the case that no less than 350 000 citizens petitioned a proposal for the declaration of a referendum, the President examines whether a petition by its content fulfils constitutional criteria (Article 93 section 2 and also legal requirements on the right to petition, Law No. 85/1990 on the right to petition).

In case the President of the Republic determines that either the constitutional or legal conditions were not fulfilled in the cases mentioned above, he shall deny the declaration of a referendum. The mentioned power of the President of the Republic is important because, by its enforcement, any issues violating international obligations of the Slovak Republic are excluded from being decided by a referendum.

II.

1. Powers of the Constitutional Court concerning a referendum

The Constitutional Court of the Slovak Republic may deal (within the scope of its jurisdiction) with referendum issues in cases when a referendum was not declared and also after the holding of a referendum regardless, of whether it was or was not successful.

2. Proceedings on the interpretation of constitutional statutes in conflicting cases (Article 128 section 1 of the Constitution of the Slovak Republic)

The first kind of proceedings which can be taken into consideration in connection with a referendum are proceedings on the interpretation of constitutional statutes in conflicting cases. The National Council of the Slovak Republic and the President of the Slovak Republic are also entitled to submit such cases to the Constitutional Court. If the National Council of the Slovak Republic submits a resolution for the declaration of a referendum to the President of the Republic according to Article 93 section 2 of the Constitution, which relates to "on other crucial issues in the public interest", and if the President is of the opinion that this is not such an issue, a dispute on the determination (binding interpretation) of the term then arises between the National Council of the Slovak Republic and the President. After the submission of a proposal on the interpretation of this provision to the Constitutional Court, the Court will provide a binding interpretation of this term, and depending on this interpretation, the President will or will not declare a referendum. But until now the Constitutional Court of the Slovak Republic has not decided such a dispute in proceedings on the interpretation of constitutional statutes.

If no less than 350 000 citizens of the Slovak Republic submit a petition for the declaration of a referendum to the President, proceedings before the Constitutional Court on the interpretation of constitutional statutes in conflicting cases are out of the question. Such proceedings assume that conflicting provisions of the Constitution are interpreted by the State authorities of the Slovak Republic differently, whereas a group of citizens cannot be considered to be a State authority. The President of the Slovak Republic himself resolves the issue of

whether the subject of a referendum submitted by citizens is consistent with Article 93 section 2 of the Constitution of the Slovak Republic, because according to Article 1 section c) of Law No. 158/1994 of the National Council of the Slovak Republic: "The President of the Republic shall examine whether a petition by its content falls into the meaning of the Constitution". Depending on the decision arrived at, the President shall or shall not declare a referendum.

3. The proceedings upon a petition according to Article 130 section 3 of the Constitution of the Slovak Republic

"The right to participate in the administration of public affairs directly or by freely elected representatives" is guaranteed for the citizens of the Slovak Republic by the Constitution in Chapter 2 called "Fundamental human rights and freedoms" in Article 30 section 1. The right to participate in the administration of public affairs directly is also realised through citizens voting in a referendum. Article 94 of the Constitution of the Slovak Republic states in this connection: "Every citizen of the Slovak Republic qualified to elect the members of the National Council of the Slovak Republic shall have the right to vote in a referendum".

In the case that no less than 350 000 citizens of the Slovak Republic submit a petition for a declaration of a referendum to the President of the Slovak Republic, and the President of the Republic refuses because it does not fulfil either constitutional or legal requirements connected with its declaration, the signatories may bring a request for commencement of proceedings to the Constitutional Court of the Slovak Republic, in accordance with Article 130 section 3 of the Constitution of the Slovak Republic.

On 18 February 1994, the Constitutional Court of the Slovak Republic decided to decline one such request, concerning a petition submitted by the representative of the Petition Committee who had asked the President to declare a referendum (I. ÚS 38/94). After the President of the Republic had examined whether a petition submitted by citizens was consistent with the Constitution of the Slovak Republic (Article 93 section 1) and also with Law on the right to petition (Law No. 85/1990), he did not declare the referendum because the submitted petition had not fulfilled the requirements established by the Law on the right to petition. The Constitutional Court reviewed, in its proceedings on the petition, the decision of the President of the Republic and stated that his refusal of the declaration of a referendum had been well-founded. On that account the Court declined to grant the request of the Petition Committee, finding that the particular circumstances did not disclose a violation of their fundamental right "to participate in the administration of public affairs directly" (Article 30 section 1 of the Constitution) by the President of the Slovak Republic.

4. Proceedings on challenges to the results of a public referendum

The third kind of proceedings of the Constitutional Court arise when a referendum has been declared. Article 129 section 3 of the Constitution of the Slovak Republic states:

"The Constitutional Court shall review challenges to the results of a public referendum".

The challenge to the results of a public referendum (regardless of its success) may be brought to the Constitutional Court of the Slovak Republic by: no less than one-fifth of all members of the National Council of the Slovak Republic; the President of the Slovak Republic; the Government of the Slovak Republic; any court; the Attorney-General of the Slovak Republic; or a group of no less than 350 000 citizens of the Slovak Republic (Article 66 section 2 of Law No. 38/1993 of the National Council of the Slovak Republic on proceedings before the Constitutional Court of the Slovak Republic and the position of its judges).

In case the Constitutional Court of the Slovak Republic finds that there has been a "violation of constitutionalism which influenced or could have influenced the results of a referendum in a decisive way, the Court will pronounce that the held referendum is invalid" (Article 70 of Law No. 38/1993 of the National Council of the Slovak Republic).

There has been only one public referendum held in the Slovak Republic. It was declared by the decision of the Slovak Republic on 10 August 1994 (published in the Collection of Laws as Law No. 205/1994). The subject of the referendum was the question: "Do you agree that the law on proving the finance used in auctions and privatisation should be accepted?"

The referendum was held on 22 October 1994, but its results were not valid. Article 98 section 1 of the Constitution of the Slovak Republic provides: "The results of a referendum are valid if more than half of entitled voters participated in it and if the decision was approved by more than half of the participants of the referendum". That referendum was participated in by 26 % of entitled voters, and so its results were not valid. No entitled person has brought a challenge to the results of a referendum and so the Constitutional Court has not decided such a case up to the present time.

XVII. A priori judicial review of the validity of a referendum - Contribution by Mr Franc GRAD, Professor, University of Ljubljana

1. The possibility of a referendum was provided for in the constitutional provisions of Slovenia (which was part of the Yugoslav constitutional regulations up to 25 June 1991) in one form or another from the Second World War onwards,

but was never applied in practice. During the period following the proclamation of the last Yugoslav Constitution of 1974, referendums were held on an unusually large scale, owing to the distinctiveness of the Self-management system. However, during this period, rather than on political issues, referendums were held on issues within the framework of self-management decision-making.

2. The new Slovenian Constitution which was adopted in December 1991 regulated referendums concisely and in general terms. The Constitution envisages two types of referendum: referendums on the amendment of the Constitution (Article 170 of the Constitution) and legislative referendums (Article 90 of the Constitution). In addition, a referendum must be held prior to the establishment of a municipality with the objective of establishing the will of the people in the affected area. Such a referendum is, however, only of a consultative nature.

The Constitution specifically states that provisions on legislative referendums are regulated by Acts that can be passed, in contrast to other laws, only with a two thirds majority of the National Assembly. The National Assembly, as the legislative body, passed the Law on referendums and public initiatives in March 1994, and this regulates all issues in connection with both principal types of referendum as well as public initiatives.

3. A referendum on the amendment of the Constitution is only of prospective effect (*post constitutionem*). It is held to approve constitutional amendments, already adopted by the National Assembly. Since there are no constitutionally defined limitations, a referendum may be held on any amendment to the Constitution. Such a referendum is not obligatory, but must be held at the demand of at least thirty Members of Parliament in the National Assembly. The Members of Parliament may file the demand after the constitutional provisions have been adopted in the National Assembly, but before they are promulgated in the National Assembly. The National Assembly is obliged to call a referendum within seven days after the demand has been filed. The constitutional amendment is adopted by referendum on a majority vote, provided that the turnout exceeded fifty percent of registered voters.

The National Assembly is bound by the result of the referendum and cannot, within the next two years, pass an Act to amend the Constitution which would be contrary to the outcome of the referendum.

4. A legislative referendum is defined in the Constitution quite generally. The Constitution does not specifically state whether a legislative referendum should precede or come after a referendum. This issue was settled by statute, the relevant law allowing for both types of referendums: ante legem and post-legem. The National Assembly calls a referendum on statutory issues and is bound by the outcome of the referendum. The Constitution does not limit the scope of issues on

which a referendum may be held. However, the Law on referendums provides that the following shall not be subject to referendum decisions: Acts which were passed without undergoing the entire normal procedures (for example for extraordinary needs of State, in the interests of defence and during natural disasters); Finance Acts on which the implementation of a passed State budget are dependent; and Acts passed in order to respect ratified international obligations. These provisions were impugned and abrogated by the Constitutional Court. The stance of the Court was that such limitations should have been already specified in the Constitution, since this is a case of limiting the voters' right to decision-making by referendum. The Act therefore cannot create limitations not having a constitutional basis. The National Assembly may call a referendum on its own initiative or by its own ruling. It is obliged to put any issue to a referendum in cases of a one third resolution passed by the Members of Parliament in the National Assembly (to protect the minorities in the National Assembly), a National Council ruling or a petition of at least forty thousand registered voters. Thus a motion to call a referendum may originate from the National Assembly, as the representative body of the people, the National Council, as a representative body of special social interests (economic, social, professional and local interests) or directly from the people themselves. A demand for a referendum must explicitly state the question to be subjected to referendum. The demand must be substantiated. If the proposer fails to meet all these requirements, the National Assembly may decide not to call the referendum. If the National Assembly rules that the substance of the referendum is unconstitutional, the issue is finally resolved within thirty days by the Constitutional Court.

The Constitutional Court considered the Law on referendums and public initiatives and decided that the above-mentioned statutory provisions, by which the National Assembly could reject a demand to hold a referendum on the grounds that it does not meet statutory demands, should also be abrogated on the grounds that the proposer should, in such a case, have the chance to turn to the Constitutional Court, which would then make a final decision on the rejection of his proposal for a referedum, thus giving the proposer some legal protection. All registered voters have a right to vote at a referendum. The proposal is approved by a majority vote.

5. Ante legem and post legem referendums do not differ in respect of questions concerning the right to make a decision by referendum, the voting procedure and the validity of the referendum. However, they differ in respect of the substance and the procedures for filing demands for calling a referendum.

An ante legem referendum can only be called in connection with a Bill already the subject of legislative proceedings. Registered voters first file an initiative for calling the referendum, so as to allow themselves time to collect the necessary signatures. The demand or initiative for an ante legem referendum may be filed

from the day the Bill is submitted to the National Assembly to the first day of the third and final proceedings of the Bill. If the initiative is submitted before the preliminary proceedings of the Bill, the time limit for collecting signatures should not be shorter than 45 days and not longer than 60 days. If the initiative is submitted after the first proceedings, then the time limit should not be shorter than 30 days and not longer than 45 days. During these terms, the registered voters have to submit a demand to call a referendum. The National Assembly has to call the referendum not later than 30 days after the demand has been submitted. A demand for a post legem referendum may be submitted at most seven days after an Act has been passed in the National Assembly. This term is extraordinarily short for all potential proposers, but is a result of a constitutional provision which obliges the President of the Republic of Slovenia to promulgate an Act within eight days after it has been passed. This term is absolutely too short in cases where the referendum is demanded by registered voters. The Act thus specified that the President of the National Assembly should be informed of the initiative within seven days after the Act has been passed, the demand itself being submitted within 30 days after the Act has been passed. In such a case, the National Assembly postpones the publication of the Act to the end of this term, that is, for 30 days.

An ante legem referendum may include a wider range of decisions to be taken than a post legem referendum. The issue to be decided by referendum might for instance be whether a particular issue may in principle be subjected to statutory provisions or whether it should be dealt with as proposed or even differently, and if so, how.

A post legem referendum can only approve or reject as a whole an Act already passed by the National Assembly. By statute, a referendum may not be held on an Act that is already in force, that is, a nullification referendum cannot be held. Even this last provision also came under fire in the Constitutional Court, which, however, ruled that it was not unconstitutional.

The National Assembly is, in any case, bound by the outcome of a legislative referendum, but this binding varies in substance, depending on whether the referendum in question is ante legem or post legem. In the former case, the National Assembly is obliged to consider the outcome of a prior referendum in passing a law. In the latter case, the National Assembly may not, within one year after the referendum has been held, either pass an Act contrary to the outcome of the referendum or call another referendum on the same Act. Regardless of which type of referendum is in question, it follows that an Act that was either passed on the basis of a referendum or was approved at a referendum is as valid as all other Acts. This means that it is also subject to judicial review by the Constitutional Court.

XVIII. Constitutional justice and democracy by referendum in Spain.Contribution by Mr Luis AGUIAR DE LUQUE, Member of the European Commission for Democracy through Law, Director of the Centre of Constitutional Studies, Madrid

1. Introduction

Of the constitutional institutions of the inter-war period, two can probably be said to have become more prominent in constitutional texts after the Second World War, namely, centralised control of constitutionality and popular consultation by referendum. It is hardly surprising, therefore, that the Spanish Constitution of 1978, very belatedly introducing the liberal democratic constitutionalism characteristic of Europe in the second half of the century into the Spanish system, should have incorporated these two institutions. This was in spite of a certain incompatibility on the theoretical level, in classical terms, and, probably, the fact that they are deeply rooted in traditional approaches to political organisation.

In this light, constitutional justice is the culmination of the most accomplished model of rationalisation of power, ie the constitutional State of Law that places the Constitution at the hub of the wheel of public authority, a text considered as a rational and rationalising norm, at the basis of the very functioning of the political system; as the highest-ranking norm in the legal order it tolerates no authority situated above or outside it. The referendum, on the other hand, in principle represents the materialisation at the constitutional level of the democratic radicalism favoured by Rousseau, which makes the popular will, embodied in the sum total of the individual wills expressed in a referendum, the basis of all power (and, of course, of sovereign power). Needless to say, both ideas are conceptually and theoretically much more complex, but we shall not go into that now. Note simply that there is a certain incompatibility in principle that constitutional and political practice has had to overcome, and that the problems experienced in slotting the two institutions together justify the organisation of this seminar in the framework of UniDem.

This is the perspective in which the Spanish Constitution of 1978 was drawn up, even in its principles in respect of the above two positions. Along similar lines to the Basic Act of Bonn, Article 1 of the Spanish Constitution states that Spain is a social and democratic State governed by the Rule of Law, where sovereignty resides in the Spanish people, from which all the powers of the State emanate. This notion of the Rule of Law is further developed in Article 9.1, which states that "citizens and public authorities shall be subject to the Constitution and to the other laws of the land".

For the purposes of today's debate, the notion of the democratic State is reflected in the broad recognition of means of popular participation, including various forms of referendum. On the other hand, the special inalienable power of the

Constitution probably finds its principal legal guarantee in Part IX of the Grand Charter institutionalising a Constitutional Court with far-reaching powers. No link between the two, no relation between democracy by referendum and constitutional justice was established, however, especially insofar as the broad powers of the Spanish Constitutional Court, unlike in other countries such as France, did not include supreme jurisdiction over popular consultations as such. This was so even though the Constitutional Court is the supreme guarantor of fundamental rights, including the right to vote.

On this basis, therefore, we shall examine the different types of referendum provided for in the Spanish legal system, the general characteristics and functions of the Constitutional Court and also the inextricable relations that exist between the two.

2. The referendum in the Spanish constitutional system

The Spanish Constitution (SC) provides, as I said, for various forms of referendum that can be broken down into four main groups: constitutional referendums (SC Articles 167.3 and 168.3), consultative referendums on particularly important decisions (SC Article 92), Autonomous Community referendums (SC Articles 149.1.32 and 151.2) and municipal referendums. The legislative development of these different types of referendum is regulated by Implementing Act L.O. 2/1980, of 18 January, as updated by L.O. 12/1980 of 16 December, and in the last resort by Article 71 of the Basic Local Government Law. Several Autonomous Community statutes and laws relating to local government complete the legislation governing referendums at the municipal level.

Let us look at the different kinds of referendum one by one:

a. *Constitutional referendum*

The referendum as an institution of constitutional reform is the type of referendum least challenged by the theorists and the most widely found in comparative law. Note also that the Spanish Constitution itself was adopted by referendum on 6 December 1978 (Electorate: 26 632 180; voters: 17 873 301; for: 15 706 078; against: 1 400 505; abstentions: 632 902; spoilt ballots: 133 786. Spanish official gazette, 22.12.78). At the same time, Part X of the Constitution, on constitutional reform, provides for two types of referendum.

In the event of ordinary constitutional reform, a referendum is organised if so requested by one tenth of the members of either House; the purpose of this provision is evidently to protect minorities in the event of constitutional reforms pushed through Parliament by a majority, large or small. One author nevertheless

points out that in practice the low percentage (1/10) required for a referendum to be called virtually turns this optional instrument into a compulsory formality for any reform, other than those of a strictly technical nature. Although probably à propos, this opinion should not be taken as a criticism of the constitutional lawmaker's work, for the lawmaker was merely pursuing the Constitution/popular will duality at the origin of the text of 1978.

In the event of deeper or more sweeping constitutional reforms SC Article 168 makes a referendum compulsory for the ratification of reform projects, laying down no specific requirement regarding the majority required for the reform to be adopted.

In both cases the King is formally responsible for calling the referendum, by Royal Decree issued to the Council of Ministers and countersigned by the President of the Government; in practice, however, the initiative originates in Parliament. The President of the Government then has 30 days to submit the decree announcing the referendum to the King.

b. *Consultative referendums on decisions of particular importance*

This is the most characteristic and most significant of the forms of referendum provided for in the Spanish Constitution. They are nation-wide consultations of an exceptional character, and purely consultative in nature. The regulations are rather ambiguous and contradictory.

They are exceptional because they concern only decisions of special importance and because they involve the main political organs of the State (Government, Congress and King); note, however, that a referendum was held on 12 March 1986, under Article 92 of the Constitution, to decide whether Spain should remain in NATO; out of a total electorate of 22 024 494 people 17 246 880 voted, 9 054 509 in favour and 6 872 421 against (official gazette of 02.04.1986).

The initiative lies with the Government, but the referendum cannot be held without the prior express consent of the Congress, and it must be formally announced by Royal Decree.

These referendums are ambiguous because of their purely consultative nature (the results of a constitutional referendum, a more important decision on the formal level, are binding), and because of their subject, viz. "political decisions of special importance". The experts seem to agree that regulatory texts should not be submitted to the popular vote, and there is not much more one can say with any certainty to define this notion.

If we combine these two main features of the consultative referendum, governed by Article 92 of the Constitution, it follows that the subject of the consultation must be a governmental decision (since the initiative lies in practice with the Government) of special importance and of a fundamental nature (ie its implementation may involve legislative policy development as well as concrete Government measures, but not legislative projects already at an advanced stage of development), so that the Government can consider the results of the referendum (which in legal terms are purely consultative, but are nevertheless of great political importance) and act accordingly.

c. *The Autonomous Community referendum*

The referendum limited to the territory of an Autonomous Community is no doubt that which is given most mention in the Spanish Constitution, which refers to it repeatedly throughout the provisions concerning the institution of an Autonomous Community. Those autonomous or autonomy-seeking territories which did not organise referendums in the past are required by the Constitution to organise (and win) referendums to achieve self-government under Article 151 and thereby move directly on to a greater degree of autonomy. This method was used by what is now the Autonomous Community of Andalusia, in a referendum on 28 February 1980. The Constitution also requires the Autonomous Community Statutes provided for in Article 151 to be adopted by referendum, in the case of both historically distinct national groups and populations that achieved autonomy by the process described above. The Basque Country (25.10.1979), Catalonia (25.10.1979), Galicia (21.12.1980) and Andalusia (20.10.1981) all put their current Statutes to the popular vote in this way. Thirdly, Article 152.2 of the Constitution stipulates that any reforms to the Statutes thus adopted by the Autonomous Communities must also be ratified by referendum, a requirement confirmed and developed by the Autonomous Community Statutes themselves (Article 46 of the Basque Country statutes, Article 56 of the Catalonian statutes and Articles 74 and 75 of those of

Andalusia). Finally, Interim Provision No. 4 also calls for popular ratification for the incorporation of Navarra into the Autonomous Community of the Basque Country, a possibility that was not developed in Implementing Act L.O. 2/1980 or in the Implementing Act on the legal status of Navarra.

In spite of these broad provisions for referendums to implement or reform the institutions of self-government in the Autonomous Communities, little reference is made to them when it comes to the everyday functioning of the communities. Considering the potential centrifugal influence this institution can have in the Autonomous Community sphere, the Constitution attributes the right to call referendums to the State alone (Article 149.1.32). The consolidation of the Spanish system as a multi-party democracy, however, has left a total lack of

reference to referendums at Autonomous Community level, both in Implementing Act L.O. 2/1980 and in a large majority of the Autonomous Community Statutes that have been adopted, which often mention referendums at the municipal level, but not at the Autonomous Community level. The Autonomous Statutes of Asturias, Extremadura and Murcia are an exception in this respect, since they list a number of possible areas in which their power could be extended after the first five years of autonomy, and one of these is popular consultation by referendum. So there is every possibility that we shall see referendums at the full Autonomous Community level in the foreseeable future.

d. *The municipal referendum*

The fourth and last type of referendum provided for in Spanish law is the municipal referendum. The Spanish Constitution does not mention this type of direct participation in so many words, but in view of the way in which Article 149.1.32 of the Constitution has generally been interpreted, subsequent legislation developed the notion more distinctly. L.O. 2/1980 reiterated the exclusive power of the State to authorise referendums, and otherwise referred the matter to local legislation; several Autonomous Community Statutes also provide for referendums, and Article 71 of the Basic Local Government Act laid down the procedure for calling a referendum (at the initiative of the Mayor, with the approval of an absolute majority of the municipal Council meeting in plenary session and subject to Central Government authorisation, formal organisation of the referendum being the responsibility of the Mayor), except in matters concerning local finance.

3. Constitutional Justice in Spain

The fathers of the Spanish Constitution, following the example of the Basic Act of Bonn and, more remote in time, of the Spanish Constitution of 1931, opted for a system of centralised constitutional justice embodied in the Constitutional Court, which is regulated by Part IX of the Constitution.

The Constitutional Court, a fully-fledged court in terms of its *modus operandi* and procedural criteria, with jurisdiction throughout the nation, is made up of twelve judges, appointed by the King for nine years, four at the suggestion of the Congress (by a three-fifths majority), four at that of the Senate (by the same majority), two at the suggestion of the Government and two at the suggestion of the General Council of the Judiciary. The Royal Appointment Decree is countersigned by the President of the Government.

The most interesting aspect of the Constitutional Court, the functions it fulfils, make it a model and an example, because the supreme constitutional organ fully exercises the most important powers within the Spanish legal system (monitoring

of constitutionality, settlement of jurisdictional conflicts, protection of fundamental rights), but has none of the ancillary functions that seem to be reserved for this type of body in other countries (such as hearing claims against State institutions or concerning the fairness of elections). This lack of power in the electoral sphere means that the Constitutional Court cannot be formally considered as the supreme organ of control in this field. Consequently, control over referendum procedures may be said to be indirectly exercised through the normal legal channels. Let us briefly examine these instruments in general terms before considering how well equipped they are to ensure that the different forms of referendum are properly organised.

The Constitutional Court controls constitutionality through an appeal process which can be initiated by the President of the Government, the Ombudsman, fifty Senators or fifty Deputies, or by the high authorities of the Autonomous Communities, as well as through the consideration of questions on constitutionality submitted by ordinary judges to the Constitutional Court when applying the law. All laws are subject to this control (by appeal and by question), and the model of constitutionality to be followed is the Constitution as a whole; this means that even individual provisions of the Constitution, as well as actual laws, may be declared unconstitutional.

In brief, therefore, it can be said that the Spanish model for controlling constitutionality is one of control *a posteriori*, or after the event, especially since the suppression of the *a priori* appeal against Autonomous Community Statutes or Implementing laws that existed during the early years of the Constitution, under an initial version of the Constitutional Tribunal Implementing Act (LOTC) that was in force until June 1985. International treaties are an exception to this rule, their constitutionality still being subject to *a priori* control.

The second major group of functions the Constitution bestows upon the Constitutional Court is the settlement of disputes over jurisdiction between the State and the Autonomous Communities or between two or more Autonomous Communities (SC Article 161.1.c) in the event of appeals lodged by the State or the Autonomous Community authorities concerned against measures or provisions they consider violate the constitutional or statutory division of powers. To this we must add "conflicts of powers" between organs of the State having constitutional rank, through a procedure established by Chapter III, Part IV of the LOTC (to date only one case has arisen, between the General Council of the Judiciary and the Cortes). The relevance of this to the matter in hand is minimal in either case, as we shall see later.

Finally, the Constitutional Court guarantees fundamental rights through the *recurso de amparo* (or right to protection), a procedure whereby the Court is the

supreme guarantor of legal positions on individual rights of a fundamental nature enshrined in Articles 14 to 30 of the Constitution (including the right to vote).

The *recurso de amparo* may be used by any natural person or legal entity claiming that any of their fundamental rights enshrined in Articles 14 to 30 of the Constitution have been violated (this part of the Constitution enjoys special protection), or by the Ombudsman or the Department of the Public Prosecutor. Given the final and subsidiary nature of this remedy, however, it may only be used in the last resort, when the normal legal channels have been exhausted.

The purpose of this channel of appeal is to protect citizens against the violation of their rights by laws and regulations or by illegal actions by the public authorities (Legislature, Executive or Judiciary), the State or the Autonomous Communities (Article 41.2 of the LOTC). Under certain circumstances, however, violations by individuals may also be referred to the Constitutional Court, providing effective protection of fundamental rights in relations between people.

4. Referendum and Constitutional Justice: where the two meet

From what we have said so far, it appears that there are few points of contact between constitutional justice and the referendum in the Spanish legal system. This is confirmed in practice, for in the fifteen years since the Constitutional Court became operational, none of the cases brought before it have concerned referendums, and no mention has been made of them in any judgment. Nevertheless, in view of the various forms of referendum provided for in the Constitution, and of the broad powers vested in the Constitutional Court, it is likely that some kind of interaction will take place in the future. Let me explain.

In this connection, there are three moments in the referendum process at which the Constitutional Court could exercise its supervisory powers:

a. By supervising the entire process prior to the adoption of the decision to call a referendum.

b. By supervising the referendum proper, including every step from the formal announcement of the referendum to the announcement of the results.

c. By subsequently supervising the decision formally adopted by referendum.

Let us take them one at a time.

a. From what has already been said, it is evident that in the process of organising a referendum, of whatever type, it is impossible for the Constitutional Court to examine the constitutionality of the different instruments and

sub-instruments produced, for two reasons. Firstly, because the decision to call the referendum, the instruments produced prior to that decision and the formal instrument submitted to popular consultation (whatever the type of referendum) do not have the status of laws, which are the only kind of legal instrument the constitutionality of which may be verified by the Constitutional Court. And secondly, as we have already established, constitutionality is verified *a posteriori* in Spain, except in the case of international treaties, and this precludes verification of the referendum process before the event, which is what interests us here.

However, in the case of constitutional referendums, and especially what we call consultative referendums, and also in the case of the Autonomous Community referendum, in view of the number of public bodies and authorities involved in calling the referendum, it is not impossible for disputes to arise over the spheres of competence of different constitutional organs or over the scope of the powers of the State in relation to the Autonomous Community authorities. Imagine, for example, that a referendum is called by the government of an Autonomous Community without the prior authorisation of the State required under Article 149.1.32 of the Constitution. Or, say, that the State refuses to authorise a referendum on political grounds that the Autonomous Community government considers unfounded. In this latter case the problem is just how far the State's power to authorise or refuse to authorise a referendum goes, and whether the decision should be based on convenience. But that is another debate, and a highly complex one, on the distribution of power between the State and the Autonomous Communities in Spain, which is not the subject of this paper.

Finally, considering the substantial space constitutional case law in Spain devotes to the right to political participation, it is possible that the run-up phase to a referendum might give rise to a *recurso de amparo*, particularly in the case of a constitutional referendum of an optional nature. The Constitutional Court has constantly ruled that the right to political participation enshrined in Article 23 includes not only the right to vote and to free access to public office, but also the right to the free and equal exercise of the rights attached to public office; so restricting the right of MPs to amend legislation above and beyond the provisions made in the regulations, or restricting their right to obtain information from the Government or Government departments (SC article 109), have been considered by the Constitutional Court to be violations of the rights enshrined in the aforesaid SC Article 23. Consequently, one cannot, in principle, exclude the possibility of a restriction of parliamentary powers or an obstacle to the calling of a referendum giving rise to a *recurso de amparo*.

b. Monitoring the referendum process itself is altogether a less complex matter, especially insofar as there is no question here of verifying constitutionality, or of conflicting powers and spheres of influence. Here the *recurso de amparo* plays a very special role in guaranteeing individual rights

which are those mainly concerned by the whole referendum process - freedom of expression or of assembly, for example, and the right to vote freely, fairly and in secret. Note that in the case of elections in general, the legislation specifically considers the *recurso de amparo* as the course of appeal against ordinary court decisions concerning election procedures (article 114.2 of the Election Law), and there is no reason why this should not also apply to referendums. In any event, it is a guarantee against violations of individual rights.

c. As for rejecting not the results of the referendum but the decision finally adopted, considering the "political" consequences for the Constitutional Court of overriding a decision reached by a majority of the electorate (cf the example of France in 1962), this eventuality appears impossible to envisage in strictly technical terms, with the exception of one concrete case I shall mention later.

In constitutional referendums, the Constitutional Court cannot be expected to challenge a reform adopted by popular vote, since although the Spanish Constitution enshrines various reform procedures, it establishes no particular hierarchy in the different constitutional precepts. As there is no difference of rank between constitutional precepts, and since no constitutional precepts can be considered unconstitutional (Article 27.2 of the LOTC, for example, which determines which instruments can be examined for constitutionality, does not include reforms of the Constitution, a lacuna that has been criticised by one author), there is no provision for verifying the constitutionality of reforms of the Constitution adopted by referendum.

Although for different reasons, it is also impossible to envisage verification of the constitutionality of decisions adopted by popular vote in consultative referendums. When one considers the formal nature of the object of the referendum ("political decisions of special importance") and the "consultative" status of the results obtained, the decision of the people cannot be considered to fulfil the required criteria for the Constitutional Court to examine its constitutionality, for as we have already established, this channel is restricted to instruments that have the force of law. The same applies to municipal referendums.

What about verification of the constitutionality of decisions reached by Autonomous Community referendums? The lack of regulations on referendums in the Autonomous Community Statutes has reduced the possibilities of the introduction in this field of reforms to the Statutes themselves, a possibility envisaged in the basic institutional instruments of several Autonomous Communities (Andalusia, Aragon, Catalonia, Galicia and the Basque Country). This is therefore the only case in which any verification of decisions reached by referendum could possibly be verified for constitutionality after the event. Moreover, in such statutory reforms, the popular ballot is the culmination of the legislative process; the reform has to be adopted in the legislative Assembly of the

Autonomous Community concerned, and subsequently as an implementing law in the Cortes. Considering the wide scope of this legislative process and the very different bodies involved, it is difficult to imagine bringing the matter in the last instance before the Constitutional Court. Although this possibility may be qualified as purely academic, therefore, it was my duty to mention it in an exhaustive analysis of the possible interventions of the Constitutional Court in the institutions of democracy by referendum.

XIX. Constitutionality of referendums in Ukraine Contribution by Mr Petro MARTINENKO, Professor, Ukrainian Institute for International Relations

1. The law of independent Ukraine offers different forms of direct democracy (public initiative, imperative mandate, referendum, plebiscite, etc). Ukraine inherited its present Constitution from the former Ukrainian SSR. According to the Constitution, elections and representative bodies (the Councils of People's Deputies) are deemed to be the only form through which the people may express their power to govern (Article 2 of the Constitution), whereas resort to the referendum is provided for as only an optional instrument of these bodies (Article 5 of the Constitution). However, the law on National and Local Referenda adopted on 3 July 1991 (the "RLU") defines the referendum as an absolutely independent form of legislative power from that exercised by national authorities and that deriving from the decision-making power of local authorities (Article 1 of the RLU). Various drafts of the new Constitution go even further. They define the referendum as virtually the only form of expression of "the sovereign will of the people" or "the power of the people" in Ukraine (as opposed to its traditional role as an ancillary element to representative democracy).

This tendency in contemporary Ukraine may be explained, on the one hand, by the inadequate effectiveness of the representative bodies in which deputies work on a non-professional basis and, on the other hand, by the remnants of the totalitarian past, by populist tendencies which equate an understanding of democracy with the "power of the people" and "people's sovereignty".

2. Applicable Ukrainian legislation provides for the following three types of referenda:

a. national,
b. Crimean,
c. local.

Each of these referenda may be of a rule-making nature (i.e., it may create a rule of law or regulation which does not require any additional approval) or of a consultative nature. National referenda are called by the Supreme Rada of Ukraine; Crimean referenda by the Supreme Rada of the Autonomous Republic

of Crimea (the "ARC"); and local referenda by respective local Councils (regional, district, city, town and village). All types of referenda have similar qualifying requirements. Laws and other documents enacted by national referenda have superior legal force to legislative acts of the Supreme Rada of Ukraine (the Ukrainian Parliament). Laws passed by the Crimean referenda and decisions passed by local referenda have the same relative superiority when compared, respectively, to the acts of the Supreme Rada of the ARC and to the decisions of local Councils.

Acts which are included in referenda are to be passed in the form of a resolution of the respective representative bodies (the Supreme Rada of Ukraine, the Supreme Rada of the ARC, local Councils). The applicable laws of Ukraine do not grant the status of laws to such resolutions; nor do they define the nature of resolutions at all. Ukrainian constitutional thinking and practice interpret them as acts of a non-legislative nature, which are adopted by the representative bodies on procedural and other issues and which are related to their non-legislative authority. Due to the fact that the definitive division of powers has not yet been introduced in Ukraine, the Supreme Rada of Ukraine has *de facto* broadened the adoption of its resolutions to the sphere of implementation of legislation (e.g., resolutions on the implementation of adopted laws). However, in all cases, such resolutions are adopted by a majority of the actual composition of the relevant representative body.

3. A resolution of the Supreme Rada of Ukraine is the exclusive form by which a proposition may be placed on the agenda of the following national referendum, and may be:

a. a law-making referendum (with regard to the adoption, amendment and cancellation of the laws of Ukraine);

b. a referendum on ratification (with regard to the approval of an international treaty to which Ukraine is a signatory); or

c. a consultative referendum.

Due to the fact that the legislative system of Ukraine (by virtue of traditions inherited from the former totalitarian regime) does not provide for the foundation of powers and is based on the phenomenon of so-called functional duplication, it regards the adoption of the Constitution as within the natural legislative authority of the Supreme Rada of Ukraine. As a result, using the form of a resolution, the Supreme Rada of Ukraine adopts those acts which are included in the basic referendum (e.g. adoption and amendment of the Constitution).

In general, national referenda are optional. The only exceptions when such national referenda are deemed mandatory are as follows:

a. self-determination of the people of Ukraine;

b. Ukraine's adherence to federal or confederate types of international unions (Article 5 of the RLU); and

c. changes to the national territory and borders (Article 70 of the Constitution).

4. According to the law on the Constitutional Court of Ukraine, adopted on 3 June 1992 (the "CCL"), the issue of the constitutionality of referendums is subject to constitutional jurisdiction. The following issues are subject to such constitutional jurisdiction:

a. formal validity of the referendum (Article 14, point 3 of the CCL) — i.e., the constitutionality of the procedure for adoption of the referendum (it should be adopted by the appropriate body, in due course and within the constitutional limits of the authority of such a body); and

b. material validity of the elements included in the referendum (including potential Constitutional amendments) — i.e., their conformity to the Constitution of Ukraine and its fundamental provisions, irrespective of the formal requirements for their adoption.

In carrying out its constitutional jurisdiction, the Constitutional Court may apply its power of preliminary review which it enjoys under Article 14, point 1 of the CCL and cancel a resolution adopted by the Supreme Rada of Ukraine or other representative body which has not yet been put into effect.

However, the Supreme Rada of Ukraine has yet to define the composition of the Constitutional Court of Ukraine. As a result, constitutional review in Ukraine takes a somewhat different form at this point in time.

5. Presently, the constitutionality of those acts of the Supreme Rada of Ukraine which are placed on the national referendum is controlled by out-of-court means by (i) the Supreme Rada of Ukraine itself and (ii) the Presidium of the Supreme Rada of Ukraine. On the one hand, according to Article 3.2.6. of the Reglament (the internal by-laws) of the Supreme Rada of Ukraine, the latter is not authorised to adopt any decision aimed at the implementation of any of its resolutions until appropriate amendments are introduced to the text of the Constitution. On the other hand, due to the absence of any constitutional jurisdiction in the former USSR, the Presidium of the Supreme Soviet of the

USSR was authorised to carry out the functions of non-juridical constitutional review. The same principle is implemented in the present Constitution of Ukraine. According to Article 106, point 6 of the Constitution, the Presidium of the Supreme Rada of Ukraine is authorised to ensure compliance with the Constitution of Ukraine. However, the procedural side of such review and its practical implications are still unclear pending a definitive resolution of such issues by way of legislation. Prohibition of the Communist Party of Ukraine in 1991 (which is still quite a controversial issue in Ukraine) is almost the only example when the Presidium of the Supreme Rada of Ukraine has effectively exercised its review functions. The present Ukrainian system of non-judicial constitutional review is not effective and cannot serve as a substitute for constitutional jurisdiction.

6. In situations where effective judicial constitutional review is absent, the Prosecutor-General of Ukraine is authorised to monitor the conformity with the Constitution of Ukraine of (i) those acts of the Supreme Rada of the ARC which are placed on Crimean referenda and (ii) those acts of local Councils which are placed on local referenda. The Prosecutor-General of Ukraine may challenge the relevant resolution of a representative body on the basis of (i) its formal invalidity or (ii) its material invalidity. However, the Prosecutor-General's challenge does not itself operate to cancel the act which allegedly does not conform to the Constitution. In more complicated circumstances, the Supreme Rada of Ukraine will be required to actively intervene in the situation.

The following situation with Crimea serves as a useful example. The governing group of the Supreme Rada of the ARC has effectively fallen under the control of nationalist parties of local ethnic Russians. On 25 April 1995, this governing group managed to force the Supreme Rada of the ARC to pass a resolution calling for a Crimean referendum on the issue of the approval of the Crimean Constitution of 6 May 1992 which had been cancelled earlier by the Supreme Rada of Ukraine. The Crimean Constitution was cancelled due to the fact that the Supreme Rada of the ARC ignored numerous appeals of the Supreme Rada of Ukraine and failed to ensure that the Crimean Constitution conformed to the Constitution and laws of Ukraine, thus putting itself beyond the legal framework of Ukraine. The Supreme Rada of the ARC was assigned with the duty of drafting a new Constitution of the ARC and submiting it to the Supreme Rada of Ukraine for approval by 15 May 1995. The Supreme Rada of the ARC ignored this task and appealed to the "arbitration" of the "people of the Crimea". The Office of the Prosecutor-General of Ukraine issued a challenge to this act of the Supreme Rada of the ARC on the grounds that it directly contradicted the Constitution and laws of Ukraine. The latter provides for a completely different procedure for the adoption of the Crimean Constitution: it should be adopted by the Supreme Rada of the ARC itself and subsequently approved by the Supreme Rada of Ukraine.

Resolution of this constitutional collision is pending. In the meantime it becomes an issue of a more and more politicised nature.

XX. Constitutional justice direct democracy - Consolidated report by Mr Andreas AUER, Professor of Law, University of Geneva, Director of the Research and Documentation Centre on Direct Democracy (C2D)

Introduction

1. A comparative view is not necessarily a clear view, and the subject chosen for this UniDem seminar may seem a surprising one. Taking a handful of countries and comparing the way in which the constitutional courts operate and interact with the workings of those countries' institutions of direct democracy would seem to be both a bold and a frustrating enterprise. Bold, because not only are there well-known differences between the relevant countries' systems of constitutional justice, their national structures and legal traditions; there are also enormous differences in their institutions of direct democracy and the actual forms they take, so that it is hard to see what there is to compare in structures and practices which appear to have little or nothing in common. And a frustrating enterprise above all because constitutional justice and direct democracy are each individually so much broader and more complex than this small area of interface between the two that one suspects the essence of each must lie elsewhere than in the comparison we are attempting today.

2. So we must not be over-ambitious. There will be no spectacular, earth-shattering conclusions. No question of any concrete proposals. We are looking at just five countries, France, Switzerland, Ireland, Italy and the USA, on the basis of the reports by Professors Jacques Robert (Paris), Ulrich Häfelin (Zurich), James Casey (Dublin), Sergio Bartole (Trieste) and J N Eule (Los Angeles). I should like, at this point, to express my gratitude to these distinguished colleagues for their valued contributions to our seminar. I must also thank the organisers, the Council of Europe's Venice Commission and its Secretary, Gianni Buquicchio, Professor Jean-François Flauss (Strasbourg) and the European Union for initiating this meeting and doing me the honour of asking me to prepare this consolidated report.

3. I shall start, in Part I, with a brief resume of the principal institutions of direct democracy and the specific features of direct democracy. This may seem tedious, but it is necessary. I am, however, taking for granted a knowledge of the specific way in which direct democracy is organised in the five countries in question, and of their systems of constitutional justice. This may seem a rather cavalier assumption, but it too is necessary. I shall then endeavour to show that whilst there are inevitably points of contact between constitutional justice and direct democracy, the two may pursue objectives and produce effects which are

different and even conflicting (Part II). I shall then take a number of the common features mentioned in the various national reports and try to compare the various bodies of constitutional case-law, some of which are similar, others very different (Part III).

I. Direct democracy

4. For the purposes of this seminar I think the term "direct democracy" is preferable to that of "democracy by referendum". Generally speaking, a democratic system may be regarded as direct democracy when the people, as an organ of the State, enjoy powers which go beyond periodically electing their representatives and/or the head of State. These other powers may, on the one hand, consist in the approval by popular vote of a State measure adopted by another organ of the State: this is the referendum, which may be mandatory if popular assent is required before the text in question can come into force, or optional where popular assent is merely sought, at the initiative either of another organ of the State, ie Parliament, a minority of the members of Parliament, the government or Head of State, or of a section of the electorate itself. In both cases the referendum, depending on the legal nature of the measure to be voted on, may be a constitutional, legislative, financial, treaty or administrative referendum. A referendum is constituent when the result of the popular vote has force of law vis-à-vis all other authorities; it is advisory when the opinion of the people is not legally binding on other organs. An optional referendum is suspensory where the outcome of a request for a referendum causes the coming into effect of the measure at issue to be suspended; it is abrogative or rescissory where the popular vote causes the measure in question to be no longer valid. The other power which the people may have, over and above the election of their representatives, is the ability to initiate the process which may possibly lead to the adoption of a measure by the State: this is the "popular initiative", which can also be constitutional, legislative, financial or administrative.

5. In direct democracy, then, the people are an organ of the State and in addition to their traditional electoral rights they have specific powers in constitutional, treaty, legislative or administrative matters. Direct democracy is dependent or "subordinate" where the exercise of these powers depends on the action or wishes of another organ of the State, Parliament or the Head of State. It is independent or "sovereign" if the question of when and on what the people will take action is decided solely by the people themselves, or by an objective criterion over which other organs of the State have no influence.

6. According to the above definitions, direct democracy does not conflict with, but complements representative democracy. In other words, in direct democracy there must still be the traditional relationship between the people and the parliamentarians who represent them, but that relationship is enhanced by further

opportunities for representation, namely that between a section of the people which can call for a referendum or launch an initiative, and the electorate as a whole. So whilst representative democracy can exist without any instruments of direct democracy though the election of members of Parliament or the Head of State is in most cases a "direct" power of the people the converse is not true: direct democracy is neither conceivable nor feasible without a sound basic relationship between the people and their parliamentary representatives. This being the case, the existence of institutions of direct democracy undoubtedly affects and modifies the traditional relationship of representation, since Parliament is obliged to share the exercise of its constituent, legislative, financial or administrative functions with the people. Hence the suspicion, even hostility, with which those institutions are frequently, and indeed habitually, viewed by parliamentarians.

II. Points of contact between constitutional justice and direct democracy

7. On the one hand, then, we have the direct expression of the will of the people in the form of a referendum or popular initiative, and on the other hand we have the Constitutional Court, supreme arbiter of the balance of powers, guarantor of the hierarchy of legal rules and upholder of freedoms. When these two pillars of the constitutional order come into contact, the sparks fly. One of them must yield to the other, but it is also possible that each may strengthen the other.

1. Direct democracy as a constraint on constitutional justice

8. In Switzerland, federal laws and treaties approved by Parliament are not subject to any review of their constitutionality (Article 113, paragraph 3 of the Constitution; *supra* p. 71). This immunity is often interpreted as a victory of democracy over liberalism. The authors of this rule supposedly wanted to stop a handful of judges from overturning the stated wish of the people after the latter had expressly approved a law against which a referendum had been requested. It is not certain that this interpretation is historically correct, in that the existence of the optional legislative referendum was not originally invoked in support of the constitutional rule on immunity. Rather, that rule seemed self-evident in the context of the second half of the last century when one party the Radical Party and its allies unquestionably dominated all the federal institutions. Nevertheless, during subsequent attempts to amend the aforementioned constitutional rule, the existence and importance of the legislative referendum have often been seen as a major obstacle to the introduction of review of the constitutionality of laws at federal level.

9. In the same context it is worth mentioning the people's sanctions, for failure to uphold the State constitution, which State judges in the USA may suffer if they

thwart proposals put forward by the people (*supra* p. 84). Since they are subject to either periodic re-election (retention) or recall, judges in the Supreme State Courts may thus lose their jobs precisely as a result of doing them scrupulously and by the book. Hardly surprising, then, that they observe a degree of reticence which smacks of real bias. In this case, the fact that judges are elected by the people, for a limited period, plus the practice of recall, means that a judge faced with initiatives of dubious constitutionality has to keep a tight rein on his feelings.

10. Still in the USA, popular initiatives seeking a revision of the State constitution may serve as a weapon against judicial decisions which are excessively liberal in their interpretation of that constitution (*supra* p. 86). Thus in California, Massachusetts and Oregon, as a result of a constitutional initiative, the electorate reintroduced the death penalty which the courts had declared unconstitutional. Likewise, over the racial integration of schools, constitutional initiatives succeeded in limiting and even reversing the sometimes radical measures (busing) which the courts had imposed on reluctant education authorities. The same thing has happened with anti-discrimination legislation and case-law (*supra* p. 92). Typically in this case, an instrument of direct democracy, ie a popular initiative seeking revision of the State constitution, is serving as a corrective to constitutional justice. But constitutional justice sometimes finds itself correcting this corrective, since it bears the responsibility for interpreting and giving concrete effect to the State constitutional rules created by popular initiatives of this kind.

11. In France too, democracy by referendum is an impediment to constitutional justice. Under a legal precedent established in 1962 and upheld thirty years later in the "Maastricht III" decision, measures which the President of the Republic puts to the people for approval may not be referred to the Constitutional Council because they are in the latter's view "the direct expression of national sovereignty" (*supra* pp. 48-49). This restrictive interpretation which, since it cannot base itself on the letter of Article 61, paragraph 2 of the Constitution, expressly invokes the "spirit of the Constitution", thus makes a generic distinction between laws voted by Parliament and those adopted by the people, even though Article 3, paragraph 1 of the Constitution explicitly places the sovereignty exercised by the elected representatives of the people and that which the people exercise through a referendum on an equal footing. Given that a law adopted by referendum under the procedure provided for in Article 11 of the Constitution can be amended by an Act of Parliament (the "New Caledonia" decision of 1985), the reticence of the French Constitutional Court may appear somewhat contradictory. Whilst admittedly "the law expresses the general will only within the limits of respect for the Constitution" it is hard to see why the Constitutional Court should refuse to impose that obligation on the framer of a law passed by referendum, whose "sovereignty" can in any case be challenged subsequently not only by the parliamentary legislator but also by the ordinary courts, in the name of the rights

and freedoms guaranteed by the ECHR (Nicolo ruling of 1992). In short, the case-law of the Constitutional Council on the review of laws passed by referendum amounts to an abdication of responsibility which is hard to reconcile with the nature of direct democracy, let alone the demands of a State founded on the rule of law.

2. Constitutional justice as a constraint on direct democracy

12. The purpose of direct democracy is to enable the people to initiate and/or complete a procedure for enacting legal rules. The essential job of constitutional justice, however, is to examine legal rules to ensure that they are consistent with the corpus of national or international law. Not surprisingly, in most of the countries compared in our present exercise it is the constitutional court which has the task of checking the conformity of texts initiated and/or adopted by the people. The methods, object and limits of this review may, of course, vary considerably from one country to the next. But it seems that the more developed and widely used direct democracy is, the more the constitutional court has to remind the people of the limits of their power as if, above a certain level, direct democracy needed constitutional justice. The issue is indeed a major one: it raises questions concerning the need to respect the division of powers within the State, the superior rank of federal law over the law of constituent States, the guaranteeing of fundamental rights, respect for the rules and conventions of international law and, in the last analysis, the coherence of the legal order as a whole.

13. The supervision which the constitutional court exercises over the instruments of direct democracy may cover first of all the formal requirements for their deployment: compliance with time limits, number, validity and geographical breakdown of signatures supporting a request for referendum or popular initiative; coherence of the request as to form, title and wording, etc. However, the job of reviewing the conformity of initiatives and referenda is often given to the administrative authorities, the court intervening only on appeal. This is the case in Switzerland, where decisions of the Federal Chancellery on the outcome of initiatives and requests for referenda can be appealed under administrative law before the Federal Tribunal (*supra* pp. 72-73), with similar rules at cantonal level. The same thing happens in Italy, where compliance with the formal requirements of the procedure for an abrogative referendum under Article 75 of the Constitution is overseen by the Referendum Office attached to the Court of Cassation (*supra* p. 55). In the USA, however, the State courts play more of a part in checking the formal requirements for the admissibility of popular initiatives (*supra* pp. 81-82).

14. When it comes to reviewing the material validity of initiatives and laws passed by referendum, the role of the constitutional court is crucial. Its job is to examine these texts against the backdrop of the constitution, which is binding on everyone, the electorate included. It is this court which often has the delicate but

essential task of reminding the people that they must at all times respect the constitution and that, sovereign though they may be, they cannot curtail or infringe fundamental rights at whim. They may have legislative powers, but the people are merely an organ of the State and draw their powers from the constitution. Consequently they cannot take unto themselves the powers which that same constitution grants to other organs of the State, nor can they violate citizens' rights and freedoms. In Italy the Constitutional Court carries out an *ex officio* review of compliance with the material limits imposed on legislative referenda under Article 75 of the Constitution. In so doing it has gone well beyond the letter of the Constitution and derived from the constitutional system as a whole a number of implicit limits on the admissibility of referenda: the requirement that they should be homogeneous and rational, the banning of referenda against laws revising the Constitution and other constitutional laws, and against other legislation the content of which is imposed directly by the Constitution (*supra* pp. 55-61). In Switzerland the Federal Constitutional Court has no say in positive law on popular initiatives at federal level, but the federal parliament has a duty to monitor compliance with the single-subject rule and, in accordance with recent practice, to ensure that popular initiatives at federal level are consistent with the obligations imperative under international law (*ius cogens*); otherwise they are invalid. As for the Federal Tribunal, its duty of preventive supervision of the material validity of popular initiatives at cantonal level is additional to that carried out in virtually all the cantons by their parliaments, and it is vitally important (*supra* pp. 75-76). It is further strengthened by a free review of the abstract or concrete constitutionality of cantonal legislation initiated or adopted by the people. In the USA the courts carry out, after the vote, a full and thorough review of measures initiated or adopted by the people, and there are some who would like this review to be even more rigorous precisely because these measures originate with the people (*supra* pp. 89 *et seq*. cf. also 34 below). In Ireland, if ever the people adopt a law by process of referendum, as they could under Article 47 of the Constitution, it would be subject to judicial review to ensure its conformity with customary international law (*supra* pp. 116-117).

15. The reader will have noticed that this material judicial review of proposals originating with the people, or ratified by them, is automatic when the proposal addresses a level of structures or legal rules bounded by substantive and procedural regulations imposed by "superior" law, and above all the constitution. It is because the abrogative referendum in Italy can only address laws already enacted that the Constitutional Court checks its compliance with the material limits set expressly or implicitly by the Constitution. It is because, in a federal State, the decentralised legal order has to be consistent with the federal law that the Federal Tribunal in Switzerland and the US Supreme Court check to make sure that initiatives and Swiss cantonal and US State referenda are consistent with federal law and the law of the Union respectively. But when direct democracy influences the wishes of the constituent body, the constitutional courts must in

principle remain silent, since the question of whether a proposal to revise the constitution is consistent with that same constitution does not arise. Thus we find the Irish judge saying that "a proposal to amend the Constitution cannot, *per se*, be unconstitutional" (*supra* pp. 117-118) and the Massachusetts Supreme Court admitting that it is difficult to comprehend how and why "a constitutional amendment can be unconstitutional" (*supra* p. 93).

16. It is precisely the directly democratic nature of the process of constitutional revision which provides a forceful argument against the theory of a generic difference between the primary constituent and secondary constituent power and against the abstract construction which insists that the latter must be bound by the former at least where there are no material limits on the revisability of the constitution. This is the case in Switzerland, where the people not only have the initiative over constitutional matters but are also, together with the cantons, a constituent organ: what other organ of the State could prevent the people from proposing, and the people and the cantons from approving, a revision of the constitution (however major or minor), and in the name of what principle or criterion?

17. On the matter of laws passed by referendum and measures resulting from popular initiatives and their consistency with human rights, any shortcomings on the part of national constitutional justice are sometimes rectified by international constitutional justice, especially at regional level. For example, there is nothing to prevent the European Court of Human Rights ruling that a (Swiss) federal law expressly approved by the people, or a French law passed by referendum neither of them subject to review at national level infringes a freedom guaranteed by the ECHR. The Court has in fact condemned, as a denial of freedom of expression, one judicial interpretation of a provision of the Irish Constitution which was approved by the people and unquestionably reflects the country's predominant moral views on abortion (Open Door judgment of 1992).

3. Constitutional justice as an enhancement of direct democracy

18. Constitutional courts do not act solely to limit the people's exercise of their constitutional, legislative or administrative powers. They also, on occasion, defend direct democracy against measures by the State which would improperly curtail it. Just as the people may be tempted to exceed the limits placed on their powers by the constitution or by international law, other organs of the State or collective public bodies at a lower level may be tempted to curtail the rights which the people are expressly granted by the constitution. In both cases it is the job of the constitutional court, on appeal, to restore the situation to one which is constitutionally correct.

19. For example, in Switzerland citizens may appeal to the Federal Tribunal if they think that a cantonal measure a law, ruling by the executive, administrative decision or judgment infringes the political rights conferred on the electorate by the canton's constitution. Whenever a cantonal authority declines to allow a popular initiative to be put to the vote on grounds of non-compliance with the requirements of superior law, whenever it votes through an item of expenditure which requires approval in a financial referendum, impedes a free vote by improperly interfering in the referendum or election campaign or by misinterpreting the single-subject principle, breaches a rule of incompatibility, etc, the Federal Tribunal is there to defend the institutions of direct democracy and remind the cantonal or municipal authorities that they cannot ignore the prerogatives of the electorate. When so requested by the citizen, the Tribunal thus acts as a specific and effective watchdog over the way in which cantonal authorities deal with the institutions of direct democracy, which are pillars of the constitutional order at cantonal level.

20. In the USA this responsibility for the safeguarding of democratic rights rests primarily with the State courts; they ensure that proposals put forward by the people respect the limits placed on them by the State constitution, but they also protect the democratic institutions against any abuse by the executive and legislature. The main beneficiary of this enhanced judicial protection is the right of initiative, pride of the Progressive movement. As the California Supreme Court never tires of saying, "It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled". But when it comes to the individual restrictions placed on the right to a referendum by State constitutions the inadmissibility of referenda on laws dealing with financial matters, the police, emergency laws, etc restrictions which the political authorities are wont to interpret rather liberally, the State courts usually refuse to entertain these, on the grounds that the issues involved are not matters for the judiciary. Since there is no federal guarantee of the institutions of direct democracy at State level, when the federal courts and the Supreme Court in Washington intervene it is solely to limit the rights attaching to referenda and popular initiatives, primarily under the supremacy clause of Article VI of the Constitution, and not to safeguard them.

21. Whilst the essential remit of the Italian Constitutional Court is to check *ex officio* that referenda comply with the strict limits imposed on them by Article 75, paragraph 2 of the Constitution, it has built up an interesting body of case-law which effectively safeguards this right. For example, it ruled that Parliament could not avoid the result of an abrogative referendum by formally repealing the law in question and replacing it with a new, substantially identical one (*supra* pp. 60-61). In this way Parliament was prevented from abusing its right under the law to accommodate the authors of the referendum by removing, by a qualified majority, the legal provisions whose repeal was demanded in the referendum. Similarly, the

Court opened up wider horizons for the abrogative referendum when it ruled that such a referendum is admissible even on a law implementing an international treaty if the legislator has a certain margin for discretion (*supra* p. 57).

4. Direct democracy as an enhancement of constitutional justice?

22. Purely for the sake of completeness, we shall mention the view that the use of a legislative referendum is a means for the people to condemn a law which is contrary to the constitution, and therefore that this instrument of direct democracy is part of and completes the system of constitutional justice. It is a view sometimes heard in Switzerland to explain and justify the rule on the exemption of federal laws from review (cf. 8 above): the courts' inability to verify the constitutionality of federal laws is thus supposedly balanced by the people's power to challenge and reject laws which are unconstitutional. This view has no validity, either in law or in constitutional practice. The constitutional rules governing the legislative referendum make no mention of unconstitutionality as a possible or necessary reason for initiating the referendum procedure. Admittedly, the argument of unconstitutionality is sometimes invoked in the referendum campaign against laws whose constitutionality is dubious, and there is no dearth of those! But it is never the deciding argument, given that the citizen who votes is interested in whether a measure is politically, economically or socially expedient and not in its conformity or otherwise with the constitution or a requirement of international law. That may be a matter for impassioned debate by lawyers though they will rarely agree but certainly not by the people.

III. Selected aspects of constitutional case-law as it affects direct democracy

23. The various bodies of constitutional case-law on direct democracy offer a number of specific points which it is interesting to compare. I shall pick out three of these: the time at which popular measures are subjected to formal or material review; whether and how closely the courts are able to review measures adopted by the people; and the rule on the homogeneity of proposals put forward by the people.

1. Timing of review

When a legal system allows a section of the populace to call for a given measure to be adopted or revised (popular initiative or abrogative referendum), subject to a set of conditions which are both formal (number of signatures, time limits, etc) and material (conformity with superior law) and which the constitutional court must review, the question arises as to when exactly that review is to take place. There are three possible stages in the procedure: before signatures are collected, before the popular vote is held, and after the popular vote is held. In the first case

the outcome of the request has not yet been decided; in the second case it has been granted but the people have not yet pronounced on the measure in question; in the third case the people have approved the measure and consequently it has come into effect.

25. None of the legal systems compared here provides for full review before the outcome of the request has been decided. That is hardly surprising, since at this stage the initiative or referendum has not yet been sanctioned and so cannot claim the popular legitimacy which constitutes its authority, and it has no legal effect other than to begin the phase of signature collection. It is true that in Italy, where verification is carried out in the second phase, it has been suggested that the validity of a referendum request should be reviewed before signatures are collected (*supra* p. 55); in Switzerland too, the desirability of reviewing popular initiatives a priori is sometimes raised, usually by disappointed sponsors whose requests have been dismissed. But to no avail. The drawbacks of this solution – mobilisation of the machinery of justice whenever a popular request is merely drafted, deployment of constitutional justice on matters of arguable importance – in fact outweigh its advantages, namely the avoidance of collecting signatures unnecessarily.

26. Between the time when a request is formally lodged with the appropriate authority and the time when it is put to the people, its formal validity is usually reviewed first by the administrative and then by the judicial authority. Bearing as it does the requisite number of signatures, the request now carries partial democratic legitimacy thanks to the work put in by its sponsors to persuade the citizenry to support their venture. Failure to meet any one of the formal conditions required under the relevant law renders the request invalid, and it is not then put to a popular vote.

27. Is there also a need, at this stage, to check whether the request is materially consistent with the requirements of superior law? The answers to this question given by Swiss, US and Irish law are in principle radically different. According to the case-law of the Swiss Federal Tribunal on the right of initiative in the cantons, it is cantonal law alone which decides whether this review is necessary or possible: federal law permits the appropriate cantonal authority – usually parliament – to check whether the initiative is consistent with federal law, but does not require it to do so. If cantonal law imposes such a requirement, the parliament's decision – for or against – may be referred on appeal to the Federal Tribunal which has the last word and can thus disallow or order a popular vote on the initiative concerned. In other words, cantonal law alone can give the citizen the right to have put to him for his approval only such initiatives as are consistent with superior law. But where cantonal law says nothing on the subject and does not require this material review, everything depends on the decision of the

cantonal parliament: if it decides to carry out this review and not to allow a popular vote on an initiative, appeal to the Federal Tribunal is possible. But if it declines to carry out this review or subsequently decides to hold a vote on an initiative notwithstanding that initiative's inconsistency with superior law, there can be no appeal to the Federal Tribunal because the principle of the precedence of federal law does not mean that the people cannot where appropriate pronounce on an initiative which is not consistent with superior law. This case-law, which is complex and much criticised, is motivated by the near-total autonomy of the cantons in the establishment and organisation of the institutions of direct democracy and also by the fact that legal rules adopted by the people are subsequently subjected to full and thorough review of their conformity with superior law. In practice, however, most of the cantons' constitutions require a priori review of the material validity of popular initiatives, which means that the federal constitutional court is competent to deal with them.

28. In the USA, however, the response of the courts and actual practice are different. With rare exceptions, the courts will not pronounce on the consistency of popular initiatives with superior law before the people have made their wishes known (*supra* p. 82), and this refusal is not offset, as it is in Switzerland, by the intervention of an other organ. The few exceptions seen in a number of States where there is clear violation of a superior rule or where the State constitution places specific material limits on legislative initiatives by the people merely confirm the rule that the judiciary does not intervene during the pre-referendum phase, and this is one of the features of American constitutional justice as it affects direct democracy. The basic idea is, on the one hand, that it is not the business of the courts to curtail the free exercise by the people of their autonomous legislative power and, on the other hand, that the conflict with superior law only exists once the initiative has been adopted and has come into effect. Thus North American constitutional justice and practice do not prevent the citizen from pronouncing, where appropriate, on an initiative which is not constitutional.

29. The attitude of the Irish judiciary is in all respects the same as that of its US counterpart. On each of the several occasions when they were asked to block a referendum aimed at revising the Constitution, supposedly on the grounds that the constitutional ban on abortion was constitutionally inalterable, the Irish courts have refused to do so, claiming that it was not their place to hamper the process of constitutional reform (*supra* pp. 114-115).

30. Whether or not a review is conducted after a referendum depends again on the peculiar features of the system of constitutional justice in relation to direct democracy. In both the USA and Switzerland the constitutional court or equivalent court freely reviews the material validity of laws adopted by the people in a referendum (*supra* pp. 70, 84 *et seq.*). In Switzerland the material validity of popular initiatives at cantonal level may thus be subjected to a threefold review:

that of the political and possibly judicial authority prior to the vote, an abstract review, and the specific review which the Federal Tribunal may conduct after the vote. In Italy and Ireland it is also doctrinally possible for the constitutional judge to censure a law which follows from a referendum although there does not, in practice, appear to be any precedent for this (*supra* pp. 61, 116-117). Only in France does the Constitutional Council refuse outright to carry out such a review, whether of a law passed by referendum or a law to revise the Constitution (cf. 11 above; *supra* pp. 48-49).

2. Judicial censure of measures adopted by the people

31. The attitude of the constitutional courts towards laws adopted by the people in a referendum ranges from total acceptance through total indifference to complete mistrust.

32. Total acceptance of a popular vote is typical in France where the constitutional judge unlike the ordinary judge regards himself as bound by "the direct expression of the sovereignty of the people" as reflected in a law passed by referendum. This deference of the Constitutional Council to the will of the people is all the more paradoxical in that the popular voice in the legislative procedure and process of revising the Constitution is never direct and spontaneous in France but always subject to the will of another organ of the State, notably the President of the Republic. It can be argued that the President of the Republic's control over the institution of the referendum has made the issue of judicial review of laws passed by referendum a veritable hot potato for the Constitutional Council. Review of a law passed by referendum would mean censuring the initiator of that law, ie the President of the Republic. The diffidence of the constitutional judge is thus attributable more to an implied reference to the doctrine of a government measure than to any desire to safeguard the supposed sovereignty of the people.

33. Indifference is the hallmark of the Swiss, US and Irish courts here. It is quite common for the Swiss Federal Tribunal to invalidate or refuse to implement a cantonal law on grounds of non-conformity with superior law. The fact that this law may have been expressly accepted by the people or initiated by them is in no case an argument which the courts have to take into consideration. The reticence they observe in such circumstances, in trying to give the law a meaning which renders it consistent with superior law (the principle of interpretation consistent with the constitution) is attributable to the peculiarities of the procedure for the abstract review of legal rules and not to submission to the directly expressed wishes of the people. The proof of this is that regulatory measures never the subject of a referendum enjoy the same favoured treatment. It is significant that in the country where direct democracy occupies a privileged or even sacrosanct position at every level of State structures, constitutional justice operates without

deferring to the will of the people. In other words, direct democracy does not act as a brake on liberalism. In the USA too, it is relatively common for the courts, and in the last instance the Supreme Court, to refuse to implement State laws adopted or proposed by the people because they infringe the Constitution. The fact that these laws originate with the people in no way affects the efficacy with which their constitutionality is reviewed. Chief Justice Burger laconically quotes his predecessor Earl Warren Burger who said in 1981 (*supra* p. 88) that "the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation", and this ties in with an idea voiced earlier in 1964 that the constitutional rights of citizens cannot be violated simply to please a majority of the people. So once again, the frequency and degree of direct democracy in a good half of the American States does not limit the efficacy with which the constitutionality of laws is reviewed by the judiciary. And if the Irish courts refuse to verify the material validity of constitutional revisions approved by the people (*supra* pp. 117-118), this is not because of the existence of an obligatory constitutional referendum, but because there is no material limit on the susceptibility of the Constitution to revision.

34. Mistrust, however, is typically behind the American doctrine which advocates that laws originating with the people should be subjected to particularly rigorous review by the constitutional judges (*supra* p. 89). This mistrust is backed here by an absolute faith in the virtues of representative democracy. Not only are popular initiatives by definition a threat to freedoms and minorities: the structural guarantees of the ordinary legislative process also eliminate this threat totally in the case of parliamentary laws. This traditional approach, typically that of the "founding fathers", thus believes that direct democracy requires a system of constitutional justice which is particularly rigorous and strict. It is true that there has been no dearth recently of examples of popularly initiated laws which in some cases pose a serious threat to the freedoms and rights of minorities. In the USA there has for some years now been an ongoing process of redefining the role and responsibility of the State in race relations and the enforcement of freedoms. And the legislators and courts do not always manage to withstand this spectacular rise of the "single idea", which advocates simple solutions to the extremely complex problems created for the State by a society which is both extremely individualistic and intrinsically pluralist and heterogeneous. But to demand greater powers of review for judges over popular initiatives would weaken rather than strengthen their position and their prestige in this distressing debate, because if they started to assume this role as strict censors they would inevitably attract opprobrium from those of an anti-egalitarian and anti-libertarian turn of mind (*supra* pp. 92-93). It is probably no coincidence that the American courts have never, unless I am mistaken, accepted this abstract doctrinal perception which would have the effect of curtailing the exercise of direct democracy and simultaneously undermining the legitimacy of constitutional justice.

3. The homogeneity of popular proposals

35. The rule on single subject-matter (Switzerland), known as the *single-subject rule* in the USA and *univocità* in Italy, both limits and guarantees the exercise of direct democracy. It is a consequence of a constitutional right wholly specific to this form of democracy, namely the right of every citizen that his vote for or against a law should be the correct expression of his own free will. But when a law contains several proposals which are unrelated, so that the citizen may approve one without approving the other, and *vice versa*, his freely expressed wishes are likely to be distorted, and this sits uneasily with the demands of direct democracy. Hence this requirement for popular proposals to be homogeneous, which is often explicitly framed by the legal system (in Switzerland at federal level and in most of the cantons; and in the USA), but may also sometimes be inferred by the constitutional courts (in Switzerland, for those cantons which do not have the rule; and in Italy). It aptly demonstrates that if direct democracy is to be safeguarded it must sometimes be limited. The requirement is special on a number of counts:

36. It is special because it is both a formal precondition of the admissibility of popular initiatives and a requirement as to the relationship between the material proposals which these initiatives may contain. As it forms part of the formal conditions, compliance with it must typically be verified during the pre-referendum phase, because if the rule on homogeneity is broken, the upshot is not that a law is accepted which, in theory, does not meet that rule, but that a referendum is held on an initiative which is heterogeneous in nature. Its purpose in principle is thus not to censure a legal rule but to block a referendum vote. It is true that in the USA the courts prefer to consider this question after the vote (*supra* p. 83), and this sometimes happens in Switzerland too. However, in order to carry out this review the constitutional court must examine the content of the people's proposal, not in order to assess its conformity with superior material law, but to check whether the various parts of the proposal address one and the same objective and are logically germane in such a way that the voter can cast a consistent vote. No other constitutional requirement on popular initiatives mixes form and substance to this same degree.

37. It is special because the path which the constitutional court has to tread is a narrow and perilous one. If it interprets the requirements of the single-subject rule too broadly, it may distort the democratic process by preventing the citizen from expressing his wishes correctly. By contrast, if it interprets it too strictly, it may improperly restrict the right of popular initiative by disallowing a referendum on a proposal to which thousands of citizens have put their names. So it is not surprising that the single-subject rule is prone to widely differing interpretations, depending on background and political context, all claiming to be consistent with direct democracy. It is very much in the interest of an initiative's opponents to

make non-homogeneity a knock-down argument which presents them as guardians of the will of the people; proponents of the initiative will rightly raise the spectre of democracy gagged by the courts. Whatever the court does and whatever its decision, it will be accused of undermining direct democracy.

38. The requirement is special because, whilst it may be rooted in the people's right to express their will freely, logically it must apply not only to proposals originating with the people but also to bills tabled in Parliament which are subject to a referendum. There is no reason to deny the people what is permitted to the authorities: a heterogeneous law is no less an impediment to a free vote just because it was drafted and put forward by the authorities. In principle, then, all legal rules subject to a referendum must comply with the principle of homogeneity. But constitutions only require this of proposals originating with the people. The Swiss Federal Tribunal requires it in principle of authorities too when they draft bills which will be put to a popular vote. But what about a law comprising hundreds of sections and subsections? Or a civil code? Or a detailed provision of the constitution or even a full revision of the constitution? It is impossible to empower the people to vote separately on every last provision of these legal rules. Consequently, in practice and despite solemn claims to the contrary, it is a fact that the homogeneity rule often works to the detriment of direct democracy. It is accused of applying double standards, depending on whether proposals originate with the people or the authorities.

39. Despite, or perhaps because of, these peculiarities the requirement of homogeneity undoubtedly remains current and relevant. In Switzerland, where the federal Parliament is responsible for ensuring that popular initiatives at federal level comply with the single-subject rule, the Federal Assembly recently dismissed, in June 1995, a popular initiative which sought to halve military spending and channel the money saved into social needs and peace studies. Not so long ago the Constitutional Court in Italy discovered the virtues, and the dangers, of the principle of homogeneity (*supra* pp. 59-60). In the USA the trend also seems to be towards a more rigorous interpretation of the single-subject rule by the judiciary (*supra* p. 83).

40. Where the principle of homogeneity is infringed, however, there is an alternative to dismissing the initiative. There is nothing to stop the constitutional system from allowing the authority responsible for checking compliance to deal automatically with any infringement by splitting an excessively heterogeneous initiative into two or more parts, each of which is then voted on separately. A number of Swiss cantons (St Gallen, Geneva) expressly provide for this solution, offering a simple and neat way round this thorny problem of homogeneity which lawyers may find exciting but which profoundly irritates ordinary people. The rule's main objective, namely to allow a free vote by the citizen, will in any event be met since the citizen will be able to pronounce freely on as many different

questions as there are independent parts to the initiative. And the right of initiative will emerge all the stronger for having avoided the unpleasant situation where the court must, for a purely formal reason, disallow a popular vote on an initiative which may enjoy considerable popular support.

Conclusion

41. The fears I expressed at the start of this consolidated report have proved to be well founded. Rather like the diner who sits down to some "nouvelle cuisine", the investigator who examines and compares constitutional justice and its effects on direct democracy finds that there is not all that much on his plate. There are very few countries which recognise and practise direct democracy consistently enough for the constitutional court to take an interest in it and actually build up a system of case-law which is anything more than *ad hoc*. More, perhaps, than in other areas it takes time and practical experience before constitutional justice can address the institutions of direct democracy seriously with a view not only to containing them but also to safeguarding them. Because one would like to think that the antagonism between constitutional justice and direct democracy will gradually be transformed into at least a measure of complementarity. American, Swiss and Italian experience certainly suggests that they are capable of peaceful coexistence rather than mutual strife.

42. That is not to say that the subject of this comparison is of interest only to a small number of older democracies where direct democracy has developed in tandem with constitutional justice. In quite a number of countries which have discovered or rediscovered democracy and the constitutional State, there is a growing trend towards the formal adoption of certain elements of direct democracy in conjunction with a system of constitutional justice. This trend is still new, admittedly, and in the case of the referendum it exists in theory more than in practice. But it exists, and it is not a chance phenomenon. In these countries where civil society was until recently crushed by a totalitarian State, or party, the legitimacy of new institutions is a major issue. And when it comes to securing legitimacy, what better way than the referendum, by which the people directly sanction new political and legal policies? At the same time, constitutional justice has already begun, in these countries, to play an essential role and it would be very surprising if direct expressions of the will of the people were barred from sharing in that role. So it is the new democracies which are likely to give a fresh impetus to the institutions of direct democracy and place a crucial responsibility on constitutional justice.

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Constitutional justice and democracy by referendum are two aspects of constitutional law which have undergone important developments in recent decades, and particularly since the fall of the Berlin wall. Through the presentation of sixteen national reports, the present publication aims to show the links - and also the points of conflict - between the popular vote and constitutional review.

The European Commission for Democracy through Law (Venice Commission) is a consultative body on questions of constitutional law, created within the Council of Europe. It is made up of independent lawyers from member states of the Council of Europe, as well as from non-member states. Almost fifty states participate in the work of the Commission.

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