Referendum Uncertainty

Dominique ROUSSEAU

Although a useful instrument of representative government, a referendum is not the embodiment of direct democracy that many like to believe. It is an act of acclamation rather than real participation in state affairs, and should be restricted by legal provisions that limit its scope.

The current political trend is based on a simple equation: referendum = direct expression of the people's will = democracy. At the risk of stirring up a hornet's nest, this statement should nevertheless be questioned, or at least tested. And a specific case can be used as a background to this reflection: same-sex marriage. In Croatia in May 2013, an association known as "On Behalf of the Family" launched a petition calling for a referendum with the aim of enshrining in the constitution the principle that marriage may only be celebrated between a man and a woman. The petition attracted 750,000 signatures, representing more than one tenth of the Croatian electorate, and the parliament was therefore obligated to hold the referendum under Article 87 of the constitution; this took place on 1st December 2013 and 66% of Croat voters voted in favour of the constitutional amendment banning gay marriage[1]. During the same period in France, an association called "Demos for All", armed with a petition that had been signed by 700,000 people and submitted to the Economic, Social and Environmental Council, called for a referendum on the issue of "marriage for all"; as the French constitution does not require the public authorities to hold a referendum, the French government decided that the issue was a matter for parliament which, on 17th May 2013, passed the law allowing gay marriage. In Brazil, the National Justice Council, presided over by the president of the Supreme Federal Court of Brazil, decided, by fourteen votes to one, that Article 226 of the Brazilian constitution, which only grants state protection to marriage between a man and a woman, violated the principle of equality and, as a result, mayors were authorised to celebrate same-sex marriages.

Croatia: referendum; France: parliament; Brazil: judge. If the criterion for assessment is the preconceived idea that "a democrat cannot reject the idea of a referendum, which is the direct expression of the people's will", then the response is obvious: Croatia is the most democratic country and Brazil is the least. Banning gay marriage in Croatia was a democratic decision, whereas authorising it in Brazil was not. And yet, regardless of his personal stance on marriage for all, this response is awkward insofar as the Brazilian judge based his decision on an eminently democratic principle, that of equality, which could justify his judgment being described as "democratic", whereas the Croatian people made a discriminatory decision based on sexual orientation, which thus runs contrary to the principle of equality and is undemocratic. Is the referendum instrument therefore "less democratic" than the judicial

[1] Electoral turnout was low – only 38% of the 3.8 million Croatian voters took part – but under Croatian law this low turnout does not undermine the validity of the results.

instrument? Is the referendum the instrument of democracy or, on the contrary, the instrument of its loss?

Undoubtedly, these Croatian, French and Brazilian examples encourage us to redefine the words "referendum and democracy" or, at the very least, to put forward the notion of uncertainty as a hypothesis for reflection – referendum uncertainty.

This questioning of the meaning of a referendum is all the more important given that the use of referendums is spreading[2]. According to studies coordinated by Butler and Ranney, more than 1000 referendums have been held around the world since 1793, with a sharp rise after the Second World War as a result of the increased number of countries. Switzerland alone has held almost half of all the referendums that take place globally. For example, on 9th February 2014, following a popular initiative by the Democratic Union of the Centre (SVP), led by Christoph Blocher, Switzerland re-established control over immigration through a quota system. This decision, an example of a true democracy, was applauded by some while others saw it as a populist degeneration of democracy. However, on the same day, the Swiss held another referendum and rejected by 69% the SVP's proposal to eliminate the reimbursement of abortion through health insurance. Did those who welcomed the referendum decision to re-establish quotas show the same enthusiasm over the decision to reimburse abortion? And, conversely, did those who criticised the first vote for being a populist decision not welcome the overwhelmingly democratic decision to guarantee and safeguard women's right to have control over their bodies? Referendum uncertainty, time and again!

Other important referendums took place in 2014, in Swizerland of course, as well as in Italy, Catalonia (9 November) and Scotland (18 September). Does this worldwide progress made by referendums indicate the worldwide progress of democracy?

This question can also be applied to France. Since 1793, when the first referendum was held in order to ratify the Constitution of the Year I (1793), twenty-two referendums have taken place, nine of which during the Fifth Republic. This might convince people of the profoundly democratic nature of the current political system, particularly given that all the constitutional amendments – 1995 and 2008 – have aimed to widen the scope of the referendum and "democratise" its procedure. Does this referendum progress therefore mean democratic progress under the Fifth Republic? Except for the fact that this sentence, a kind of motto, is ever-present in the French constitutional memory: "the Republic was born with the referendum (1793) and it died by the referendum (1804 and 21 December 1851). Once again, referendum uncertainty.

In order to understand this uncertainty, three questions need to be discussed: is the referendum an instrument of direct democracy? If so, then is direct democracy the ideal of democracy? And if not, then is the referendum at least a stopgap measure against the shortcomings and flaws in representative democracy?

Is the referendum the instrument of direct democracy?

If we read what the constitutionalists have to say[3], the answer is a resounding 'yes'.

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2 See, for example, Francis Hamon, Le référendum, comparative study, LGDJ, 2012, 2nd ed.

3 For a general presentation of French doctrine, see, for example, Hervé Arbousset, *Le référendum dans*

Indeed, the majority of them distinguish two main forms of democracy – representative democracy and direct democracy – which are, themselves, based respectively on two distinct principles: the principle of national sovereignty and the principle of popular sovereignty.

According to the first principle, sovereignty, in other words the supreme authority to express the general (decision-making) will, does not rest with the physical citizens but with a political being, a moral individual – the Nation – which is distinct from the physical citizens who constitute it. Article 3 of the 1789 Declaration of the Rights of Man and of the Citizen clearly states, "The principle of all sovereignty resides essentially in the nation". Therefore, since the Nation is an abstract being, it can only express itself through physical beings called "representatives of the Nation", but their appointment in no way involves elections or votes. As the only holder of sovereignty is the Nation, the citizens have no right to universal suffrage; it is up to the Nation to appoint those it considers capable of representing it. As Barnave wrote in 1791, suffrage is merely a public function "to which no one has a right".

By the same logic that makes suffrage not a right but a function, the referendum is part of the representative logic of national sovereignty. In 1947, Julien Laférrière wrote that "the acts of the representative have no need of popular ratification because the will expressed by the representative is as if issued directly from the nation"[4]. Duguit, Esmein and Vedel expressed the same idea, and the latter went back to the principles of 1789 in order to explain the French tradition of showing hostility towards the institutions of direct government: "the principles of '89 gave particularly vigorous expression to the ideas of national sovereignty and representative government to the point that they proscribe any direct exercise of sovereignty; the principle of Parliament's omnipotence thus became established, and was emphasised under the Third Republic"[5]. The reasoning used remains the same and is applied by means of two simple proposals: will is in the Nation and not in the body of citizens; it is therefore completed, fully and perfectly, when it is expressed by the Nation expressing itself through its representatives.

This logical exclusion of the referendum in a representative system is thus based on a notion of the people as a multitude that is incapable of having a will or understanding the issues at stake, and for constitutionalists that notion reflects Montesquieu and Siéyès, whom Carré de Malberg described as having expressed with a "cruelty that went beyond that of Montesquieu the public ban on any form of effective participation in the very authority of decision-making"[6] when stating in his famous speech of 7th September 1789 that "the people cannot speak or act but through their representatives"[7]. To this doctrinal argument the constitutionalists of the Third and Fourth Republics added their recollections of Bonapartist consultations. Barthélémy, for example, wrote, "in France, there is a political objection to the introduction of the referendum: people dread the *coup d'État*, they fear that the people may vote for a man who would overthrow the Republic"[8].

The representative grammar of the principle of national sovereignty thus excludes any idea of a referendum. The logic developed by the second principle, that of popular

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la pensée juridique française depuis 1875, Typed thesis, Paris 2, 1998.

4 Julien Laferrière, *Manuel de droit constitutionnel*, Montchrestien, 1947, p.399.

5 Georges Vedel, *Manuel de droit constitutionnel*, 1949, p.138.

6 Carré de Malberg, *op. cit*., p. 362.

7 Siéyès, Speech on the royal veto of 7 September 1789, Parliamentary archives, 1st series, vol. VIII.

8 Joseph Barthélémy, *Traité de droit constitutionnel*, Dalloz, 1933, p.136.

sovereignty, is quite different. Here, sovereignty belongs to the physical citizens, the universality of citizens, according to the expression retained in both the constitutions of the Year I (1793) and the Year III (1795) and, therefore, as the holder of all rights, citizens use their vote to exercise a right and not a function, which allows them to them participate directly in determining and managing the politics of their country. Given that citizens exist really and physically, there is no need for representation; rather, representation is excluded because sovereignty cannot be represented. The people-sovereign acts and requires in person, directly, with no representatives. Jean-Jacques Rousseau is, of course, the doctrinal reference for all the constitutionalists who considered this citizen of Geneva to be the father of direct democracy[9], as Capitant and Carré de Malberg wrote: "Rousseau absolutely denied any possibility of political representation; he declared the representative regime to be incompatible with popular sovereignty, and this absolute exclusion was one of the key features of the doctrine of the social contract" [10].

As Carré de Malberg wrote, given that the people cannot transfer or delegate their sovereignty, and given that even an individual elected by the people cannot express the general will on behalf of the people, the referendum logically appears as the instrument of direct democracy because it enables the people but not their representatives to personally determine the laws. And Duguit, Capitant and Burdeau believed that Rousseau, even if he never used the term "referendum", was its precursor insofar as it stems by logical necessity from his concept of democracy. The referendum is unthinkable within the framework of national sovereignty and the representative regime, and can only be imagined within the framework of popular sovereignty and direct democracy.

Without denying the heuristic value of this constitutional classification, the idea of the referendum as the indicator or instrument of direct democracy nonetheless deserves to be discussed and perhaps even disproved.

The first reason is that the term "referendum" encompasses several meanings whose differences have serious implications for the real impact of direct participation in producing the texts that organise community life. This scope varies according to the purpose of the referendum. It can be anticipated for all the acts of state business – constitution, laws, international treaties, decrees – or only for some. In Italy and Denmark, for example, finance laws cannot be submitted to the popular vote. In France, the 1958 constitution limited the scope of referendums to two categories of laws, those concerning the organisation of the public authorities (1962) and those authorising the ratification of international treaties that might have an impact on the functioning of institutions (1972); the constitution was amended under Jacques Chirac in 1995, to expand that scope to laws relating to the economic, social and environmental politics of the nation and the contributing public services[11]. The real scope of the direct participation of the people also varies according to the type of referendum, which may be optional or mandatory. In France, for example, a referendum to ratify a revision of the constitution is optional if the government initiates the revision but mandatory if it comes from

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[9] Others, however, like Duguit (RDP, 1918) and Hoffman ("Du contrat social, ou le mirage de la volonté générale", in *Revue internationale d'histoire politique et constitutionnelle*, 1954), believe Jean-Jacques Rousseau to be the father of state absolutism.

[10] Carré de Malberg, *op. cit*., p.203.

[11] In 1984, French President François Mitterrand, proposed a revision of the constitution with the purpose of allowing the people to vote by referendum on fundamental guarantees in the area of civil liberties. This proposal to expand the referendum scope to civil liberties was rejected by the Senate and could therefore not be adopted.

parliament (Article 89). The scope can also vary according to the referendum procedure, which might be triggered by the citizens themselves (Italy, Switzerland), by parliament (Austria, Denmark, Italy, France), by the government (France) or by a combination of actors (members of parliament-citizens-constitutional judges in France following the 2008 amendment). Finally, the scope can range according to the nature of the referendum, which may be merely consultative (Norway, Sweden, United Kingdom) or decisive (Austria, Switzerland, Italy, France). In other words, even supposing the referendum were the instrument of direct democracy, it does not guarantee the people's general, mandatory and deliberative participation in the managing of public affairs because the direct intervention of the people may be excluded from certain acts – taxation or international treaties, for example – or have no impact on decision-making.

The second reason is that the referendum takes place through the act of voting. This point may seem unimportant but is particularly significant when considered in relation to the words that are often used to talk about the purpose of the referendum, which is "to let the people speak". And yet, in a referendum, the people are not allowed to speak but to vote, and even the referendum vote is more an act of acclamation than one of participation. Except when they initiate the referendum, citizens do not participate in the choice of question or its preparation or formulation; rather, they are merely invited by other institutions – the president, parliament – to vote and ratify or reject a text they did not draw up. In addition, once they have voted, citizens are deprived of the result insofar as they are not in control of the political meaning or normative scope of the vote, which are "produced" by the institutions of representation, political parties, parliamentary assemblies and/or government. Thus, in 2005, the French people were deprived of interpreting the victory of the "no" vote in the referendum on the European constitution by the institutions of representation, which considered, despite the vote, that they could re-use the text in the form of a treaty, the Treaty of Lisbon[12], and have it ratified by parliament in 2008. On 9 February 2014, the Swiss people voted "yes" to the question "Do you accept the "Stop Mass Immigration" popular initiative, but the vote did not answer the question of how to implement this principle, and the constitution gave the Federal Council the responsibility of deciding, within three years, the rules concerning quotas of foreigners authorised to work in Switzerland and the procedures for their application. This referral to representative institutions and the long delay has led some European and Swiss leaders to think that the Federal Council will be able to find the legal means to limit the normative scope of the referendum vote.

Finally and perhaps above all, direct democracy cannot come about through the referendum vote because its instrument is not the referendum but the physical presence of the citizens in a single place where they might propose, discuss, amend and adopt laws – in the general sense of the term. If we refer back to Athenian democracy, at least under Pericles, and the writings of Rousseau that regularly call on it in support of his reflections on democracy, it is apparent that the expression of the will of the people can only be called "direct" if, and only

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12 For Valéry Giscard d'Estaing, president of the European Convention that drafted the European Constitution, the Treaty of Lisbon was merely a "pale imitation" of which only the form had been changed, not the content: "The legal experts have made no innovations. They have based themselves on the text of the constitutional treaty, whose elements they have taken apart, one by one, and, by making amendments, referred them to the existing treaties of Rome (1957) and Maastricht (1992). The Treaty of Lisbon therefore resembles a catalogue of amendments to previous treaties. That is the form. With regard to the content, the result is that the institutional proposals of the constitutional treaty – the only ones that counted for the members of the Convention – are fully included in the Treaty of Lisbon, but in a different order, and inserted into the previous treaties", *Le Monde*, 26 October 2007.

if, all the citizens are physically present – and therefore not represented – in a public place or assembly in order to debate the laws. The closest doctrinal translation of this conception can be found in the writings of Victor Considerant[13] and Moritz Rittinghausen[14], who rejected the idea of the referendum in favour of a system under which citizens would gather in assemblies of 1000 members, discuss the alternative legislative principles for each issue and their procedures for application, choose one and make their selection known to a national committee which, after being informed of the choices of all the assemblies, would draft the definitive law. The closest constitutional translation of this conception can be found, of course, in the 1793 constitution which undertook to divide the people into primary assemblies according to cantons (Article 2), to give those assemblies the power to deliberate on laws (Article 10), to manifest their legislative will (Articles 11 to 20) and, otherwise, the power to have the final say (Articles 59 and 60).

The fact that these doctrinal and constitutional translations had no "practical" consequences is of little importance here; what matters is that the citizens' physical participation in producing the laws is confirmed as an instrument that is closer to the ideal of direct democracy than the referendum, and that the 1793 constitution is still, in the collective imagination, the text which sanctions that democracy.

Is direct democracy the democratic ideal?

The question should not need to be asked, as the issue seems clear: direct democracy, Athenian democracy under which the citizens who gathered in the *agora* debated and decided state affairs, is obviously the democratic ideal and is still the reference against which the specific forms by which democracies are established are judged, assessed, evaluated and criticised. At the top of the hierarchy of constitutional values we find direct democracy, with semi-direct democracy below it and, right at the bottom, representative democracy. The representative form is therefore, at the very worst, a degraded form of democracy and, at best, a second choice, a political form by default.

Although appealing and evident, this theory still deserves to be discussed and even refuted. Representations and the institutions of representation are not shortcomings, flaws or vices but, rather, the conditions of democracy[15]. Without them, there can be no people, no responsible government and therefore no democracy.

First of all, there can be no people without representation. This proposal may sound surprising, yet "the people" is neither an immediate element of consciousness nor a natural element; it is not an objective reality, present in itself, capable of understanding itself as such. The people is an artificial creation, very specifically created by right and even more specifically by the constitution. One must return to Cicero who, in *The Republic*, drew a distinction between and contrasted the crowd (*multitudo*), a formless gathering of individuals, and the people (*populus*), which, he wrote, "is constituted only if its coherence is maintained by an agreement on right"[16]. The "people" is not merely an association of individuals but a

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[13] Victor Considerant, *La solution ou le gouvernement direct du peuple*, Paris, Librairie phalanstérienne, 1850

[14] Moritz Rittinghausen, *La législation directe par le peuple ou la véritable démocratie*, Paris, Librairie phalanstérienne, 1851

[15] In this sense, see Ernst-Wolfgang Böckenförde*, Le droit, l'Etat et la constitution démocratique*, LGDJ, 2007; Bernard Manin, *Principes du gouvernement représentatif*, Calmann-Lévy, 1995.

[16] Cicero, *La République*, Gallimard, p.45. Translator's note: quotation translated into English from the

political association, and therein lies the genius of a constitution in transforming a primitive association of individuals into a political association of citizens. The unique strength of the law and the institutions of representation enables individuals and groups that were initially alien to one another and often in conflict to find themselves connected by shared issues that are debated and resolved through common rules and services which, in turn, foster a feeling of solidarity, which is what constitutes – in the strict sense of the word – a political people. The unique strength of the law, all too often forgotten but opportunely recalled by Pierre Bourdieu, is to institute, in other words to bring into existence and give life to the things it names. When, for example, Mirabeau wanted to describe the state of France on the eve of the Revolution, he spoke of a "myriad of peoples"; later, after 1789, this "myriad" became "the French people", again described by Mirabeau. To return to Rousseau's questioning, the thing that transformed this multitude into a people was the 1789 Declaration, which, in making the members of parliament "representatives of the people", simultaneously created representation and the people, thus linking them together: the members of parliament could not claim to be "representatives of the people" if they did not construct the political body they wished to represent and, therefore, reciprocally, "the people" cannot exist unless the representatives construct it in order to exist themselves.

By naming the people, the constitution thus brought about what it pronounced; it precipitated – in the chemical sense – a solid body, the people, from the fluid liquid of the multitude of individuals. It was the stage on which the figure of the citizen was constructed, which was one of the conditions of possibility for democracy. Indeed, in the primary space, men are taken in their social determinations and their situated social being, which necessarily brings out the differences between men and the de facto inequalities in the distribution of economic, cultural and symbolic capital. If societies remained at that point in time, they would produce a representation of themselves in which the unequal conditions would play a key role in what it established and in the principle of uniting men and the legitimate establishment of rules. In other words, this point in time is that of communitarianism, where each social group defends its particular identity because the stage on which political equality can be thought of is lacking. The institutions of representation are, specifically, this stage that gives men the chance to "emerge" from their social determinations, to stop seeing themselves in terms of their social differences but instead to picture themselves as beings of equal rights. And this abstraction and objectification of social figures is the origin of political equality. While men are unequal in the primary space, in the institutional space they are equal. In the construction of a democracy, the constitutional moment is therefore the moment that allows men to emerge from their basic communities and enter the political association as democratic individuals.

This constitutional representation of the people is sometimes understood as a fear, or even, to quote the title of Jacques Rancière's work, a hatred of democracy in that it denies any place to the "people of all and any"[17]. In history and in political philosophies, however, this a-judicial, if not anti-judicial understanding of the people has never opened the doors to democracy. For if the people does not construct itself through "agreement on law", as Cicero said, it recognises itself through other connections, other "agreements" on blood, race or the figure of the leader-embodiment-of-the-people. Schmitt's critique of representation[18] ends

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French.

[17] Jacques Rancière, *La haine de la démocratie*, La Fabrique, 2005.

[18] See for example, Carl Schmitt, *Parlementarisme et démocratie*, Seuil, 1988; *Théorie de la constitution*, PUF, 1993.

with a "democracy" in which the people, in order to exist, must be absorbed into the figure of the Leader. The identity of the people is brought about through the fusion-disappearance of the people in the body of the Prince, who *is* the people. On the other hand, the constitutional production of the people implies a gap between the body of representatives and the body of people, a gap in which the possibility of a democratic relationship is decided by the need for a deliberative procedure to develop the general will: given that it is not inside the body of the Prince-people, it must be constructed through an exchange between the two bodies[19], in other words, through politics.

Secondly, there can be no political responsibility without representation. Answering for one's decisions and recognising them is generally and rightly considered to be a criteria of distinction for democratic systems in comparison with regimes in which an unmonitored, unaccountable political free will is employed. However, in order to have control over decision-making and political responsibility, by logical necessity there must be two bodies, that of the representatives, which makes decisions, and that of the people, before which and through which control and responsibility are exercised. Conversely, in the context of direct democracy in which all functions are carried out by the body of citizens, the body before which the people can take account of its decisions is lacking. And it is lacking not because of a failure to construct it but because it is logically unthinkable. This was recognised by the Constitutional Council of France which, in its ruling of 6 November 1962[20], distinguished between the laws that are voted for by the representatives of the people and which may be brought under its control, and the laws "adopted by the people following a referendum and which may not be because they are the direct expression of the national sovereignty". The direct-people-legislator cannot be monitored, nor can its responsibility be engaged because there can be no body before which it should submit its laws (to which body would it be accountable and which body could monitor it?) If one existed, it would be monitored; it would therefore no longer be sovereign and democracy would no longer be direct. On the other hand, representation, because of the gap it introduces between the body of representatives and the body of citizens, enables the legislative work of the former to be subjected to the political and judicial monitoring of the latter.

The theoretical and practical impossibility of maintaining control and responsibility in a direct democracy inevitably leads the political system towards a tyranny of the majority which, Cicero wrote, "was even more monstrous that the tyranny of a single individual because it takes on the appearance and name of the people"[21]. This explains the doctrinal controversy between Capitant[22], who claimed Rousseau was "the father of direct democracy" and Duguit[23], for whom he was "the father of absolutism". For Rousseau, as soon as the general will is deliberated by the people's assemblies, it becomes fair, because the people "cannot be unfair to itself" and therefore "whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free"; and, "when in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that

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19 Please refer to my seminar "Constitution et démocratie", part of the course led by Pierre Rosanvallon, Collège de France, April 2008.

20 CC 62-20 DC, 6 November 1962, R. p.27.

21 Cicero, *op.cit.*, p.45.

22 Henri Capitant, *Principes du droit public*, p.115.

23 Léon Duguit, *op. cit.*, p.310

point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so[24]. In 1981, a Socialist member of parliament famously translated this as "you are legally wrong because you are in the political minority"!

And yet, while the majority has the power, it does not make the law. What makes the will general is the possibility that it can be related to a general object, and the object that expresses that generality today is the constitution. Adding up votes is not enough to make the law; a text, even if it is voted by the majority – or, because it is voted by the majority, it is therefore "particular" to that majority – is deemed to be law if and only if it is not contrary to the constitution. As it so happens, the constitutional definition of the law has changed; it is no longer that of Article 6 of the 1789 Declaration, which states that "the law is the expression of the general will". Since the Constitutional Council's decision of 23 August 1985[25], it is as follows: "enacted law does not express the general will except insofar as it respects the Constitution". Representative democracy is therefore based on two structures, an institution that allows representatives to vote on the law – parliament – and an institution that allows citizens to protest the law on the basis of the constitution – the constitutional jurisdiction. It realises the political project of the men of 1789, who clearly explained that they had drafted the Declaration of the Rights of Men and of Citizens in order that the acts of the legislative authority should be compared with it, and that, "the *protests of citizens*, based on simple and unquestionable principles, shall always tend to the upholding of the constitution and the welfare of all". This framework for protest is inevitably lacking in direct democracy, for the sovereign people cannot protest against itself; unlike parliamentary laws, referendum laws are therefore logically exempt from control and cannot comply with the constitution[26]. Better still, or perhaps worse still, the question of complying with the constitution does not even arise, because the hierarchical distinction between ordinary laws and constitutional laws vanishes under the figure of the sovereign people: when it expresses itself directly, it is the sovereign legislator, both constituent and ordinary, capable of revoking, modifying, completing or introducing provisions that contravene the constitutional principles.

Is the democratic ideal a democracy that combines all the authorities into a single body, the deliberating assembly of the people?

Is the referendum a useful instrument for representative democracy?

While the logic of direct democracy is realised in the sovereign omnipotence of the assembled people, the logic of representative democracy is the omnipotence of the institution where the representatives reside: parliament. Representation is, indeed, the tragedy of democracy because it is the thing that both enables it and suffocates it. It enables it because it sets the stage on which the figure of the citizen is constructed, which is one of the conditions of possibility for democracy; and it suffocates it because representation, a particular moment, tends to become a total moment. As a political form and a set of institutions, it has a tendency to develop its own logic of form, to go beyond its "function" of constructing the figure of the citizen and increase its space for intervention, gradually invading all the spheres of social

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[24] Jean-Jacques Rousseau, op. cit., Book I, chap. VII, Book II, chap.VI, Book IV, chap. II.

[25] CC 85-197 DC, 23 August 1985, R., p.70.

[26] This exemption from constitutional control has led some political leaders to try to "put through" their reforms by means of referendum laws in order to get round the "constitutional obstacle".

activity. It thus becomes the organising and totalising form of society, and shifts from an instrument of political objectification to an instrument of political alienation.

Carré de Malberg was without doubt the jurist who best described the parliamentary drift of representative democracy[27]. While all constitutions value the figure of the citizen and assert the principle of the "government of the people by the people for the people", they devote the majority of their provisions to depriving citizens of their powers by organising and legitimising the existence and words of the representatives and, therefore, the absence and the silence of the citizen-representatives. Given that national sovereignty is binding, the Nation is an abstract being and can only be expressed through physical persons authorised to represent it; gradually, there is a (con)fusion between the Nation and its representatives and, in the end, it is asserted that the only possible expression of the will of the Nation is that expressed by its representatives and the institution where they sit – parliament – which becomes the sovereign's equal, or worse still, writes Carré de Malberg, the sovereign in person. For him, the principle that creates this absolute parliamentarianism is fully contained within the definitive statement made by Siéyès on 7 September 1789: "the people cannot speak or act but through their representatives". This statement was revived by Paul Raynaud in 1962 who, condemning Charles de Gaulle's plans to have the French president elected by the people, wrote, "France is here and nowhere else" in reference to the National Assembly.

Furthermore, in the 1930s a reaction movement emerged against parliamentary absolutism, mirroring that which had once risen up against monarchical absolutism: the aim was not to destroy representative democracy or establish direct democracy according to the 1793 model, but to reduce, limit and contain parliamentary supremacy by allowing the people a place, a role and direct participation in public decision-making. And the effective method suggested by Carré de Malberg – as well as Barthélemy, Burdeau, Tardieu et al. – in order to halt parliamentary power was the referendum.

According to these authors, the referendum, far from being incompatible with the parliamentary regime[28], gave representative democracy added legitimacy because, by opening itself up to the direct participation of citizens it helped to strengthen the people's support for the institutions of representation. As part of the representative system, the referendum would thus perform several positive functions. Firstly, a civic function[29], insofar as it would make citizens aware of their responsibility in shaping the politics of their country. This function could have been fulfilled by a number of referendums: the referendum of 8 January 1961 on Algerian self-governance, in which Charles de Gaulle asked the French people to accept or reject a radical change of policy with regard to Algeria; the referendum of 8 April 1962 in which he asked the people to approve or reject the Evian Accords which led to the independence of Algeria; and the referendum of 20 September 1992, in which François Mitterrand asked the citizens to decide whether or not to give up the franc in favour of the euro. Related to this primary function, these authors believed the referendum could also have played an educational role insofar as the referendum campaign provoked debates, exchanges

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[27] See for example, Carré de Malberg, *La loi, expression de la volonté générale*, Economica, 1984; *Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme*, RDP, 1931, p. 225.

[28] This position is defended by Esmein, for example, in *Les deux formes de gouvernement*, RDP, 1894, p.49.

[29] See for example., Albert Sarraut, *Le gouvernement direct en France,* thesis, Librairie nouvelle de droit et de jurisprudence, 1899; Eugène Duthoit, *Le suffrage de demain*, Librairie académique Perrin, 1901; Georges Burdeau, *op. cit*.; Georges Vedel, *op. cit.*

and discussions, fostering public interest in public affairs and enhancing their understanding of political issues. In addition to the aforementioned referendums, which enabled a great "popular" debate on the colonial politics of France (1961 and 1962) and on its European politics (1992), this educational role could have been fulfilled by the referendum of 28 October 1962 on the election of the French president by universal suffrage and therefore on the balance of power, and, in particular, the referendum of 29 May 2005 on the draft European constitution, which served as an accelerated training course on the state and future of Europe and captivated the French public. The referendum can also play a strictly political role insofar it is a useful tool if the representative system is in crisis or blocked. This was Charles de Gaulle's idea when, in order to find a way out of the political crisis of May 1968, he suggested holding a referendum[30], much like Nicolas Sarkozy in February 2012, who promised to promote direct democracy, if he was re-elected, by holding referendums every time the institutions of representative democracy – parliament, trade unions, associations – "blocked" reforms. Finally, the mere presence of the referendum in the representative constitutional framework plays a moderating role insofar as representatives pre-emptively endeavour to incorporate into their legislative politics the requests, expectations and demands of the citizens in order to avoid organising a referendum or being rejected by the people if one does take place.

In short, through these functions, the referendum "democratises" representative democracy. This idea was clearly at the origin of the 1995 revision of the constitution, which broadened the possibility of directly consulting the people on matters regarding the country's economic, social and environmental politics and, even more so, the revision of July 2008. Indeed, the Balladur Committee put forward its proposal to include the citizens in the referendum process with the explicit aim of bringing about "the democratisation of institutions which implies a broadening of the field of democracy"[31].

However, and here we encounter the uncertain nature of the referendum once again, the Committee also immediately noted the "drawbacks to referendum consultations that might arise from the choice of certain social issues or be disrupted by the circumstances of the moment, which sometimes overshadow the question being raised and often have unsatisfactory results"[32]. Above all, following Esmein's argument regarding the unlikely compatibility between the representative regime and the referendum, it noted the "contradiction that would exist" if it recommended increasing parliament's legislative role and, at the same time, "excessively expanding the field of direct democracy". Hence its refusal to grant citizens the right to initiate a referendum, favouring a mixed procedure that included citizens and members of parliament, with the latter having the advantage.

This proposal to establish a shared referendum initiative (and not a popular initiative, as is often said) was retained by the framers of the July 2008 revision and finalised in the organic law of 6 December 2013. It was the perfect, "pure" expression of referendum uncertainty. In order for it to be admissible, the initiative was subjected to a long "Chinese ceremony"[33]. It was not to come from the citizens but from the parliamentarians, specifically

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30 He had to abandon this proposal due to opposition from his prime minister, Georges Pompidou, who preferred another instrument of popular consultation as a way out of the crisis: dissolution.

31 *Une Vème République plus démocratique*, Doc. Fr., 2007, p.74.

32 *Ibid.*, p.74.

33 In reference to the Broglie Act of 13 March 1873, which showed such precision in codifying the speeches made by the French President, the brilliant orator Adolph Thiers, to the National Assembly, that these had become impossible.

from one fifth of the members of parliament – 185 to be exact – who had to draw up a draft law; it then had to receive the support of one tenth of the electorate, in other words 4.5 million French citizens within a period of nine months – a rate of 16,000 signatures per day. It then had to come before the Constitutional Council which checked not only its numerical accuracy and the authenticity of the signatures, but also the conformity of the proposed subject of the referendum with the referendum scope defined in Article 11 of the constitution. In order to measure the political importance of this test of constitutionality, reference should be made to the recent debate on the issue of same-sex marriage. If the shared initiative procedure had existed, the Council would have had to state – after the first stage and therefore before the process of garnering popular support had begun – whether or not this issue fell within the scope of Article 11, a question that was bitterly debated between those who considered marriage to be a social institution that was part of the social politics of the Nation, and therefore could be the subject of a referendum, and those who considered marriage to be the exercising of a fundamental freedom, which would exclude it from the scope of a referendum. The fate of the popular vote was not in the citizens' hands but in those of the constitutional judges!

And the "Chinese ceremony" was not over yet. Even though the Constitutional Council had approved the initiative, the parliamentary assemblies could oppose the referendum if, during the six months following the Council's decision to approve it, they took on the proposal and "examined" it. In legal terms, "examine" is the weakest verb there is: the National Assembly or the Senate merely need to add the referendum proposal to their agenda and adopt a simple procedural motion in order for it to be considered *de jure* that the "examination" has begun and the referendum process has been blocked. At best, this examination may conclude when parliament adopts the referendum proposal with wording amended by members; at worst, it might be rejected by the assemblies, which, in the silence of the law but on reading parliamentary debates, would appear to be tantamount to a ban on circumventing that rejection by holding a referendum. Finally, in the event that the proposal approved by the Council has not been "examined" by the assemblies within six months, the French president is obligated to hold a referendum, but the organic law sets no time limit in which to do so...

Overall, the framers of 2008, under the guise of a speech on the democratisation of representative democracy, established a referendum procedure that was both controlled by the representatives who were given the right to initiate the proposal, responsibility for its wording, and a right of veto[34] over its organisation, and controlled in terms of its subject by the constitutional judges. All in all, even if all the obstacles are overcome, the referendum "launched" by the members of parliament on 26 February 2014 cannot be held before 26 September 2015 (one month for the Council's examination of the constitutionality of the referendum proposal, nine months in which to collect signatures, around two months for the Council to approve the regularity of support and six months waiting for a possible examination of the proposition by the parliamentary assemblies).

If Carré de Malberg was right, in other words if the referendum can be a useful tool for preventing representative democracy from drifting towards absolutism, then the referendum organisation retained in the French constitution seems more like a minor detail in the political decor than a key pawn in the representative game. What is more, it is possible that things may never be any different. The referendum idea in itself is an unsustainable idea – according to

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[34] Marine Haulbert, *Commentary on the organic law of 6 December 2013* (forthcoming)

the meaning Kundera gave the word – that could be expressed by the aphorism "the referendum: we want it, we fear it, we restrict it". For the referendum is "restricted" if, for example, the legal framework prevents the public from voting on laws related to finance, fundamental rights or "matters of society". If the legal framework prevents the people from initiating a public consultation and choosing the question then the referendum ceases to be not only an instrument of direct democracy but also a potentially useful instrument for the "proper" functioning of representative democracy. And this twofold loss means that the referendum uncertainty is resolved: the referendum is not the "democratisation" procedure of representative democracy. One must therefore – because representative absolutism and the distrust of current institutions of representation do exist[35] – envisage other procedures as the institutionalisation of a legal means of protesting the laws of representation.

Books&Ideas.net, 9 April 2015.

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[35] See, for example, the political trust barometre published by the Centre de recherches politiques de Sciences Po (CEVIPOF), 13 January 2014.