THE FUNCTION OF REFERENDUMS IN EUROPEAN STATES THE CASE OF HUNGARY

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For years now, the study of referendums has been in the focus of my research; how to create a balance between direct and representative democracy in a parliamentary government. Is the function of referendums to counterbalance decisions that are at the discretion of governments, as proposed by Dicey, or can the institutions of direct democracy also serve other purposes in the constitutional arrangement of countries? Are referendums and their use dependent on the form of state and/or government concerned, or is it the political culture, traditions or even the political balance of power of the day that determine the rules of referendums? The following, somewhat lengthy, paper addresses those questions. Let me first enumerate the main ideas of the essay.

Whether they are monarchies or republics, most of the countries of Europe have parliamentary government. Throughout Europe the key figures of rationalized parliamentarism are prime ministers, or less often, presidents. Executive power is vested in them and in the power centre where they are embedded: the governments that enjoy the confidence of a parliamentary majority. As the supervisory function of parliaments has been changing, typically waning, the question keeps arising: what instrument can effectively monitor the operation of the executive; are there constitutional institutions and decision-making mechanisms that can rectify and/or counterbalance individual decisions of governments?

Two hundred years after the institution of the referendum (plebiscite) was first incorporated into the French constitutional process, the final decades of the twentieth century witnessed a renaissance of referendums in the countries of Europe. This was due to both the transformation of the political map of the continent and to the paradox that the processes of integration and disintegration had accelerated in the western and eastern parts of Europe simultaneously. Such phenomena made it inevitable to come up with decisions that enjoyed new or greater legitimation. When in 1992 the states of Western Europe signed the Maastricht Treaty and thereby formed the European Union, they strengthened integration and moved towards federative forms. At the same time, the

countries of Central-Eastern Europe left the federations they had belonged to and replaced the status of member state with that of independent nation-state. That the number of referendums grew steeply can be explained by the historical changes that have taken place across Europe, the fact that numerous states assumed sovereignty for the first time [in centuries], and that in countries where a new constitution was framed, it required enhanced legitimation. It would be a mistake, however, to conclude that referendums attained wide currency, or that they have become an institution whose importance challenges that of parliaments, or that they play a crucial role in monitoring the work of governments.

Popular representation and direct democracy are two archetypal forms of state power. Their emergence in the Modern Age and their constitutional regulation are based on the principle of *popular sovereignty.* In Western-type democracies popular sovereignty is a source of legitimation for the implementing structures of power and the constitutional arrangement of the country concerned. The constitutions of various countries express this idea in a variety of ways, as for instance: the people are the source of power, all power derives from the people or, as the Hungarian constitution puts it: 'In the Republic of Hungary all power belongs to the people. The people exercise their sovereignty through elected representatives or directly.' [Article 2 (2)]

In constitutional terms, both representative democracy and direct democracy are legitimate forms of the exercise of power. They are not alternatives to each other, and neither of them may be considered as equivalent to popular sovereignty or to the exercise of all the rights that derive from popular sovereignty. Consequently, the institutions of direct democracy, including its most widespread and highly important institution, the referendum, may not be regarded as alternatives to the exercise of power by elected representatives of the people.

There is no contradiction between direct democracy and representative democracy, and it is unjustified to pitch the two against each other. The very election of Members of Parliament is a manifestation of direct democracy. It determines the composition of the representative body and it authorizes Members of Parliament to pass decisions about public affairs, at least while the parliament in question is in office.

During the term of office of a parliament a decision passed by a referendum fits into the decision-making mechanism in the following way. In compliance with the constitution and at the initiative of persons who have the right to do so, citizens make a direct decision about one or several concrete issues that belong to the competence of the National Assembly. The decision (or opinion) that has been reached as a result of a referendum may modify, augment or rectify decisions of the government or parliament. The fact that referendums may augment or rectify decisions of representative bodies takes the continuous and legitimate operation of representative democracy as granted.

Hence, it follows that not even in the case of a binding referendum is direct democracy identical with popular sovereignty as that is exercised in its 'pure form.' Neither does it mean *the unrestricted power of the people* in deciding matters that belong to parliament's competence. Certain issues are excluded from being decided by referendums by law. What is more, the provisions of the constitution, also bearing in mind the interests of the separation of powers, guarantee that the rights that derive from popular sovereignty should be vested in the voters in any referendum only inasmuch as that complies with the country's constitutional set-up (and not totally). That is how referendums become a key tool of constitutional democracy, a constitutional institution that may act as an effective counterweight to governmental power.

The essence of direct democracy is that the citizens take part in legislation and administration of public affairs personally. In the case of indirect or representative democracy, people legislate and exercise state power through their elected representatives. Just as the notion of direct democracy, as based on popular sovereignty, has become inseparably associated with Rousseau's name, the importance of creating the institutions of representative democracy and of the institutional safeguards has become one with the oeuvre of *Montesquieu*. He propounds in his *L'espirit des lois* (The Spirit of the Laws) that in a free state legislative power is vested in all the people. In large states, however, direct legislation is impracticable. What the people cannot do on their own, therefore, should be done through their elected representatives. The evolution of Western-type societies has justified Montesquieu's theory: representation and the institutional safeguards cannot be annulled; the various forms of direct democracy cannot substitute them. By contrast, the various instruments of direct democracy (especially referendums and popular initiatives) can augment and rectify the activities of representative bodies.

In most democratic countries the institutions of direct democracy have been introduced with the utmost circumspection and with appropriate limitations. In part that meant the acceptance of long-standing arguments against referendums (they weaken representation and the government, they endanger minorities, they are unsuitable for establishing consensus, etc.). Another factor was the negative (especially French and German) historical experiences. Note that referendums, popular initiatives and popular vetoes restrict the powers and competence of parliament and municipalities, while they are unsuitable for substituting those decisions of the representative bodies that are complex, that demand careful consideration and as such cannot simply be reduced to yes or no options, which is customary in the case of referendums. Bearing that in mind, special care is usually taken to regulating the most important aspects – as for instance, the objects of referendums (certain matters are excluded *ex lege*), whether or not the decision passed by a referendum is legally binding, and what

are the limitations to its effect. The rest of the rules, important as they seem, are technical in nature. True, in many cases these rules can make initiating and/or organizing a referendum too easy or too difficult. (Rules that refer, for instance, to determining who may initiate a referendum, how many signatures of support are required, what is the time limit for collecting those signatures, etc.)

As borne out by the constitutional development of Western-type societies to date, the main form of exercising popular sovereignty is realized by the institutions of representative democracy. As a rule, there is no division of competence between parliaments and referendums. However, the power of the people acting as a constituent body, that is the confirmation of a constitution by referendum, is a mandatory limitation to the competence of legislative bodies in several countries. There can be other cases when that competence is limited by law and when it is obligatory to hold a referendum. The binding force of a referendum may restrict the power of representative bodies not just by limiting the sphere of objects that they may address and their competence: as for matters that have been decided by a referendum, it is usually legally forbidden for representative bodies to address them for a definite period (one or two years).

It is difficult to harmonize the classical rules of parliamentarism with the various forms of direct democracy. Even though modern constitutions base the exercise of power on the principle of popular sovereignty, they handle gingerly the instruments that enable the people (the electorate) to participate directly in legislation or approve decisions. Throughout the twentieth century (and especially since the 1970s) it was a dilemma of parliamentary systems to what extent to grant scope for forms of direct democracy, referendums and popular initiatives, without jeopardizing the ideals of representative democracy and the operation of its institutions by ‘unpredictable’ and emotionally influenced decisions, which are occasionally subject to political manipulation or demagogy. The opponents of referendums can cite numerous negative historical examples, mainly French and German ones, cases when referendums as initiated by the president bypassed the representative bodies, were subject to manipulation or were imposed on the people. Except for a number of negative historical instances, in our era it is undoubted that referendums fulfil favourable functions in parliamentary systems. A few examples: they are used to approve constitutions, resolve territorial disputes, decide the question of accession to the EU, serve as a tool for a democratic transition to multi-party democracy, etc. Referendums have become widely accepted in connection with accession to the European Communities, later on, to the European Union. That is true even of the United Kingdom, where a national referendum was held about accession to the EU in 1975, and neither before that date nor ever since has there been any other national referendum in that country.

In the various political systems, referendums (and other forms of direct democracy) are held according to different rules, which means they vary in ways of their adjustment to other key components of the system concerned. As for the Hungarian parliamentary system, in compliance with the Hungarian constitution, it is based on the supremacy of exercising power by way of popular representation. In a similar manner to the constitutional arrangements of other parliamentary states, the referendum is an institution meant to augment the exercise of power by parliament and to influence parliament's work.

The referendum is a basic institution of direct democracy and civic participation that is used in the course of accepting national or local public matters. The notion of referendum can be used in a broader and a narrower sense. *In a broader sense* the *referendum* is an umbrella term that covers the entire gamut of the various types of referendums and plebiscites as initiated either by legislature or government, as well as popular vetoes and popular initiatives. *The referendum is a complex notion also in a narrower sense,* as it can be classified according to the group of its initiators, its object and legal binding force. In that sense, however, the referendum must be demarcated from the institution of popular initiative. In the case of a popular initiative, citizens put forward a recommendation or a legislative initiative to a representative body and they expect that body to pass a decision about the question they raised. By contrast, in a referendum citizens express their opinion prior to a governmental decision or they pass a decision themselves about an issue that belongs to the competence of the representative body concerned. In exceptional cases the two institutions may be interconnected, as for instance, when a referendum is held about a popular initiative.

In constitutional systems the referendum, which is a special instrument of direct democracy, is suitable for discharging various functions. Before enumerating those functions, let me refer to the abovementioned referendums about the independence of a country or those laying the foundation for the sovereignty of a country. Such referendums create the conditions for establishing a novel constitutional arrangement. Such referendums (plebiscites) do not come under the heading of constitutional referendums. They, just like plebiscites on redrawing the boundaries of states, belong to the domain of international law.

- One of the most important functions of referendums is, supposing that it is prescribed by the constitution of the country concerned, the *confirmation* of the *constitution* itself by a referendum. In such cases the body entitled to prepare the constitution, typically parliament, but occasionally some other body with such power, frames the final text, which is then submitted for approval by a referendum. The constitution of the country concerned may also prescribe that a referendum should be held not just about the approval of a

new constitution but about its major amendments or augmentations. As a result of the referendum, the constitution, or its amendments, may be approved or rejected. In case the nay votes are in the majority, the approval of the new constitution, or of its proposed amendment, does not take place. Consequently, in such a case the referendum precludes change, which means it acts as a conservative instrument.

– Under certain conditions referendums may assume the function of *consolidating government.* That can happen if a government may decide on its own in advance about questions that are to be submitted to a referendum. The government employs a referendum as a 'tactical weapon' if it serves to strengthen its position.

– Referendums can also be used to *strengthen the position* not just of a government, but also of a *president* if a president, citing the service of the interests of the nation, initiates a referendum about an issue that causes a broad split in society. In an extreme case a referendum can become a tool for the president to bypass parliament and consolidate his/her position vis-à-vis parliament.

– We know of a country where referendums may be employed as an '*arbiter'* to decide a debate between two houses of the legislature. In Ireland, when a bill is adopted by the House of Representatives (Dáil Éireann) but turned down by the Senate (Seanad Éireann), in ten days' time the president of the republic may initiate a referendum if he/she finds that justified for the good of the nation.

– Referendums can also become an instrument in the hands of a *parliamentary minority*. In the case the constitution entitles a certain number of Members of Parliament to initiate a referendum, then MPs who are in the minority in a legislature may also influence legislative work through a referendum.

– Finally, the directly democratic component of referendums: the popular decision itself may manifest itself tangibly in *referendums initiated by the electorate.* Numerous observers are of the view that this is the purest and most genuine form of referendums. In such cases the question concerned is both raised and decided by the people. Fairness prompts us to add that in most of those cases there is some social or civic organization, typically a party or several parties, behind such popular initiatives, which in pluralist, multi-party states should be seen as the natural state of affairs.

The various types of referendums are defined depending on whether holding a referendum is mandatory under the law or it is based on deliberation following the initiative of persons who are entitled to propose one. Both mandatory and optional referendums may be of a binding force, which oblige the state agencies concerned, or may be non-binding (consultative), which give orientation but, in a legal sense, do not oblige the agencies concerned.

Based on the above criteria, considering those persons who may initiate them, as well as the legal foundations of referendums and whether or not they are of a binding nature, referendums can be classified according to the following types:

- Constitutional referendum
- Optional referendum as initiated by the government
- Referendum initiated by the electorate.

In the Hungarian constitutional system national referendums were recodified in 1997-98 after several referendum initiatives were rejected, which in turn provoked debates in the field of public law. Since 1997, national referendums and popular initiatives have been regulated in Hungary's legislation at several levels. In 1997, two laws that modified the constitution (Act LIX of 1997 and Act XCVIII of 1997) incorporated the basic rules of referendums in the constitution. As for the rest of the related norms in substantive law, they can be found in Act III of 1998 on Referendums and Popular Initiatives; and norms in procedural law can be found in Act C of 1997 on Election Procedure.

In 1989 the constitution stipulated that parliament had exclusive powers to regulate the institution of referendums, and any law affecting referendums needed the affirmative vote of two thirds of the Members of Parliament present. Consequently, parliament was entrusted to decide to what extent referendums would be used for exercising power. In the same vein, the constitution provided that it is within parliament's competence to call a national referendum.

Except for those mentioned above, until the constitutional amendment of 1997, the constitution did not carry any prohibitive provisions or limitations of authority in connection with referendums. Even though the constitution allowed a relatively broad room of manoeuvre for parliament, for several years it did not pass any laws in relation to referendums. Note that *Act XVII of 1989* on Referendums and Popular Initiatives was enacted before the watershed revision of the constitution (by Act XXXI of 1989), and on several issues it collided with the new constitutional provisions, which were based on the separation of powers. The Constitutional Court then resolved that parliament acted in contravention of the constitution by default, so it requested that parliament align the law on referendums with the constitution by 31 December 1993. Parliament failed to observe that time limit and only adopted the new law at the end of the subse-

quent parliamentary period: on 17 February 1998. It passed Act III of 1998 on National Referendums and Popular Initiatives more than six months after the main rules of referendums were redefined in an amendment of the constitution. The move came amid heated debates among politicians and experts on public law.

The public law controversy largely derived from the fact that parliament failed to adopt a new law on referendums simultaneously with the amendment of the constitution in 1997. The discrepancy between the constitution and the unamended law of 1989 on referendums increased when the constitutional provisions on national referendums entered into force. Consequently, those responsible for enforcing the law found it extremely difficult to find a *modus vivendi* in connection with a referendum then underway. The Constitutional Court identified those provisions of the law on referendums that were in contravention of the constitution and instructed parliament to thoroughly revise the regulations on national referendums and popular initiatives.

The 1989 law on referendums had serious conceptional shortcomings. To start with, it failed to differentiate between various forms of referendums and popular initiatives. Moreover, the law defined the object of referendums and popular initiatives so broadly and imprecisely that it was impossible to decide clearly whether calling a referendum in one particular case or another complied with the constitution. The problem was rooted in the contradiction between the institutional system of parliamentary democracy and the widely applied instruments of direct democracy. The Hungarian referendum law of 1989 outdid all its Western European counterparts in liberalism. To understand that peculiarity, it is worth recalling that in that year, parliament's legitimacy was publicly questioned more than once, and that is why referendums began to be seen as an institution to grant legitimation.

After parliament amended the constitution in 1997 and the Constitutional Court abrogated the 1989 law on referendums, the stage was set for enacting a new law on national referendums and popular initiatives. The adoption of *Act III of 1998* was overdue by years, and the circumstances of its framing merit the description of a legislative 'state of emergency.' Both its content and structure bear witness of the tumultuousness of the months when it was prepared. The provisions of substantive law that define the institution of referendum are contained in the constitution; consequently, the law on referendums did not deal with them. The framers of Act III of 1998 left out from the law certain key provisions about referendums because they thought, mistakenly, that stipulations that form part of the constitution must not reappear in laws. Thence the absurd situation that Hungary's law on referendums fails to describe the institution of referendum, its various types, the issues that must not be decided by

referendum and various other matters. Even though the relevant provisions of the constitution are excessively detailed, it is unjustified that the law concerned remains silent about the most essential legal aspects of referendums. Most of the related questions of procedure, the way referendums must be organized and the legal remedies are covered by Act C of 1997 on Election Procedure. Act III of 1998 is but a torso and can only be applied alongside the constitution and the law on election procedure.

The elevation to constitutional level of key provisions on national referendums and popular initiatives has considerably altered the relationship between referendums and parliament's exercise of power. Though the basic philosophy of the regulation of referendums has remained unchanged as the relevant constitutional provisions follow the logic of the previous law on referendums, the stipulation that when 200,000 citizens support an initiative parliament must call a binding referendum has opened the way to a new constitutional interpretation of the role of referendums. The Constitutional Court made it clear in several previous resolutions that in the exercise of popular sovereignty parliament has precedence over referendums. As a rule, power is exercised by parliament and when a decision depends on the outcome of a referendum, it is an exception. In the wake of the amendment of the constitution in 1997, which amendment affected referendums, the Constitutional Court, bearing in mind its earlier resolutions, made the following conclusion. 'Although the direct exercise of power is an exceptional form of the exercise of popular sovereignty, at instances when such exceptional cases occur, it is superior to the exercise of power by representatives of the people: in such cases parliament assumes the rule of an executive.'

Since 1989, referendums were held in Hungary based on the two laws on referendum on four occasions. *In addition to those four referendums, there were numerous referendum initiatives that failed.* That is due partly to the absence of appropriate rules and, on certain occasions, the failure to collect the required number of signatures. The majority of those referendum initiatives are related to resolutions of the Constitutional Court that either referred to the interpretation of the constitution or rejected initiatives. Right from the beginning, the *Constitutional Court has exerted a major influence on shaping the institution of referendums*. Petitions seeking interpretation of the constitution, which expected an answer if a referendum may be held about one issue or another, offered opportunities for the Constitutional Court to decide major questions of principle, such as, for example, demarcating direct democracy from representative democracy, the issue of amending the constitution by referendum, and so on.

The year 1997 is a milestone in the history of referendums in Hungary. The essential rules of referendums were elevated to a constitutional level; the Constitutional Court granted precedence to referendums that must be called at the initiative of citizens, vis-à-vis all other initiatives. That year the number of rejected initiative increased and, on 16 November 1997 *a consultative referendum was held on Hungary's accession to NATO*. Turnout was 49.24% and 85.33% of the votes valid and affirmative. Note that the government initiated that referendum, and it enjoyed the support of practically all of the parties in parliament. Some parties outside parliament were strongly opposed to it (the Workers' Party, for example, which had initiated a referendum about the question two years earlier). Most recently, a referendum was held in Hungary on 12 April 2003 in compliance with a relevant provision of the constitution on Hungary's accession to the European Union. Turnout was at 45.62% and the valid affirmative votes accounted for 83.76%.

Act III of 1998, which was meant to 'finalize' the codification of referendums, provides that the *forum of legal remedy for the preventive review of related legal norms is the Constitutional Court*. Article 22 of Act III of 1998 codified the legal remedy of that type, and it was incorporated in Article 130 of Act C of 1997 on Election Procedure. In the meantime, the Constitutional Court resolved (24/1999, 30 June) that paragraph 2 of Article 130 of that law ran against the constitution and abrogated it as of 31 March 2000. The Constitutional Court also declared that the time limits set for legal remedy did not comply with the requirements of a well-established legal system, which was contrary to the constitution. As the time limit was set at three days, complaints came in late, and there was not enough time to assess them sufficiently. Act XXII of 2000 remedied that situation. It amended Article 130 of Act C of 1997 in the following way: complaints against decisions of the National Election Committee (NEC) may be submitted within 15 days. Complaints against parliament's resolution on a referendum may be submitted to the NEC within eight days of the promulgation of that resolution. Both types of complaint must be addressed to the Constitutional Court. Ever since Act XXII of 2000 was enacted, related matters have been kept under strict constitutional control. The analyst, therefore, has every reason to predict that the period of failed referendum initiatives is over and in the future referendums can become an effective institution of the constitutional control of the work of government.

Research on institutions of direct democracy has in the recent decade become popular among political scientists in Western Europe and the United States. By contrast, the Hungarian researchers on issues of public law have all but ignored this intriguing topic. The last monograph of considerable value covering this question was written by István Szentpéteri decades ago. I am now embarking on a comprehensive analysis of the numerous domestic aspects of this issue, and in that work I will rely on my earlier articles written on this subject.