Delimitation of the Referendum from other Politico-Legal Concepts

Ştefan Alexandru BĂIŞANU, *Associate Professor,*
Department of Philosophy and Social and Political Sciences
Faculty of History and Geography, "Ştefan cel Mare"
University of Suceava, Romania
baisanu@yahoo.com

Abstract

The present article sketches a delimitation of the referendum from the other political-legal concepts. The popular veto is a procedure of semi-direct democracy. The popular initiative does not imply an existing decision on which to pronounce, but hence to suggest even a new law. The recall or revocation is an application of the semi-direct democratic regime when exercising the judicial function. The plebiscite becomes however the main decisional procedure with normative.

Keywords: *semi-direct democracy, popular veto, citizens, law, popular initiative, Constitution, Parliament, the option, the recall, the plebiscite, popular revocation.*

1. Delimitation of popular veto

The popular veto is a procedure of semi-direct democracy. This used to consist of "the procedure by which a law voted by the parliament is implemented can be taken out from vigor if, in a term of its application, a previously established number of citizens asks that the law be subject to popular vote, and the elective body do not approve it.[1] The difference mentioned by Tudor Draganu is of temporal nature, the popular veto would be acting after the law entered into force and it was already applied, while the referendum acts so that the law stays in force.

The difference however lies under the normative power of the two enactment instruments. Therefore if the referendum blocks the entry into force of a normative act, the popular veto has a greater power, abrogating in fact a normative act which has already effects as a consequence of its application.

[1] Tudor Draganu, *Drept constituţional şi instituţii politice, Tratat elementar*, vol. I, Lumina Lex, Bucharest, 1998, p. 244.

Paul Negulescu defines the popular vote as a right to cancel which the people holds upon the law voted by the parliament, right which the people can use only in a certain term and after its expiration the law is supposed to be approved by the people and therefore it produces all its effects.[2] By the author's description, the popular veto appears as a resolutely condition of the civil part which affects the law approved by the legislative authority. This procedure is found in the Swiss cantons Lucerne, Geneve, Neuchatel.

Therefore, this procedure does not block the improvement or judicial development of a law, but only its application. The law is accomplished in a legal point of view, unlike the case when the referendum is mentioned, when it is improved from a legal point of view only by popular ratification.

2. Popular initiative

Regarding the description made by Tudor Draganu, this procedure represents a measure which should be applied in two stages. Therefore, on the first hand, we have an initiative of legislative project which is suggested by a certain number of citizens, in order to be approved by the legislative authority. If the parliament refuses to approve the mentioned initiative, the electorate can organize a new voting tour and thus forces the parliament to enact according to the obtained result which represents the popular will.

The popular initiative does not imply an existing decision on which to pronounce, but hence to suggest even a new law.

Ion Deleanu considers the popular initiative as a technique of semi-direct democracy which is appointed by the Constitution by the phrase "legislative proposal". The legislative initiative is the process to obtain the law at the direct citizens' proposal. The author describes two types of initiative: the proposal that the Parliament should decide upon the opportunity of its legislative intervention in a certain filed or the collective application so that the Parliament should act upon a legislative project already formed, "the formulated legislative". The Parliament is bound to act, even if it does endorse the initiative.[3]

The popular initiative is defined by Ioan Muraru and Elena Simina Tanasescu as "the procedure by which the people of a state give the impulse (initiate) a decision process; this decision beginning can be completed also by people's intervention (referendum) or by a decision adopted by the authorities

[2] Paul Negulescu, *Curs de drept roman constituțional*, Bucharest, 1928, p. 286.
[3] Ion Deleanu, *Instituțiile și procedurile constituționale,* vol. II, Servo-Sat, Arad, 1998, p. 454.

legally named by the people (law approved by the Parliament)."[4] Results that the popular initiative has no decisional nature, being a participation modality for the exercise of power, not for the exercise of sovereignty.

3. The option

In Tudor Drăganu's opinion, there are significant differences between the referendum and the opinion, this is just a form of referendum. The option requires that the parliament propose for approval by the electorate, two or more variants, and the people should make a choice, instead of expressing by yes or no, in case of referendum.

Such a procedure was applied in France, when at the referendum on 21st of October 1945 the electorate has to choose among:

a) Restoring into force the Constitution from 1875.

b) Organizing a Constituent with unlimited power.[5]

4. Recall the judicial decisions

The recall or revocation is an application of the semi-direct democratic regime when exercising the judicial function. It is applied in United States of America, its purpose being to prevent judges from abusive of their right which is recognized to control the constitutionality of the laws.

The scope is obviously different from that of the referendum, here the recall interferes because of the judicial decisions.

5. The plebiscite

The word plebiscite also derives from Latin language, where from the combination of the words *plebs* and *scire* appeared the name of a juridical institution different from that of referendum, which consisted in addressing a question (*scrire*) *plebei* (voting citizens named by the authorities only with the goal to discover their opinion, so only with advisory nature, because the opinion expressed so could be ignored by the Patricians and solders' forum.[6]

As we mentioned before, the plebiscite becomes however the main decisional procedure with normative character, being compared with the law by Gaius. Moreover, during the empire, when the difference between the populace

[4] Ioan Muraru and Elena Simina Tănăsescu, *Dreptul constituțional şi instituțiile politice,* vol II, C. H. Beck, Bucharest, 2006, p. 134.

[5] M. Duverger, *Dreptul constituțional si institutiile politice,* Paris, 1973, pp. 93-96, quote by Tudor Draganu in the mentioned work, p. 245.

and people has no longer the same importance, and the difference between the law and plebiscite is diminished to extinction, so that between the most of the laws adopted during that period were in fact the result of the plebiscite.

The authors consider that in our times, "between the two juridical institutions the differences are only of nuance and connotation. Only at terminology level the term referendum has a positive connotation, in order to favour a real democracy, ant it risks of transformation into a plebiscite are not to be ignored. The negative connotation of the term plebiscite would be due to its wrong or abusive use, because they sought the legal approval of the authority which had initiated it, than a real verification of all the society layers. Since this separation, it is obvious that two different institutions, beginning with the authority which organizes the voting method, the scope and objective of the vote are arte other than the referendum. Even the authors make other distinction, starting from the original sense of the plebiscite that it derivates towards a "populist instrument and of demagogical nature"[7]. The sub layer of this fine delimitation would be that the ancient difference between the populace and people as a subject of popular referendum, is still producing juridical consequences "at the level of language latent meanings can still be found". The difference is based on the ancient distinction between the people and populace, but in our days, to organize a referendum requires an informed electorate, politically responsible, that vote aware of the consequences of consultation, and the plebiscite is addressed to a group of people that vote aware of the consequences of consultation, the plebiscite is addressed to a group of persons who vote as they are told, or by deceptive means and intimidation.

The plebiscite represents the alteration, in caesarian sense, of the referendum, so that the popular sovereignty is no longer active, but passive, it accepts and does not decides[8]. It represents a classic procedure of adopting the totalitarian constitutions under an apparent democracy. The theoretical possibility to reject a proposal really exists, but the consultation is practically organized in such a way that the success is certified: only one constituent alternative, open vote, separate lists for the opponents…The motivation to organize is to obtain an apparent legitimacy for the authorities appeared after a coup d'état.

In Romania this procedure was used twice by: Al.I.Cuza for the ratification of the Developed State in Convention of Paris, and by Charles the 2nd for the

[7] Ioan Muraru, Elena Simina Tănăasescu, *op. cit*., p. 135.
[7] *Ibidem*, p. 135.
[8] Dan Claudiu Dănişor, *Dreptul constituţional şi instituţiile politice,* Basic course, Universitaria, Craiova, 1999, p. 187.

ratification of the conceded [9] constitution in 1938. Every time they used an open vote and separate lists for the opponents.

The author concludes as follows "the significant difference of the referendum is that in case of referendum the people are asked to choose, while in case of plebiscite the people are asked to quit. "[10]

In French literature, the plebiscite means a popular vote whish has as object the manifestation of trust in a certain person or an act of his/her. [11] The difference consists in the fact that the plebiscite has as object only a manifestation of trust. Nor, it is not governed by the Constitution, but it appears as a, extra-constitutional procedure, by which tries to present the appearance that the nation adheres to certain acts of some autocrat governors.

On a closer analysis, the plebiscite is not a democratic procedure, because the people cannot choose among several candidates, but mostly to refuse to trust in a single candidate. History shows us that the plebiscites have overwhelming majorities.

Tudor Drăganu considers that the meaning of the plebiscite is even larger in our country, by this procedure it is understood any popular vote.

Pierre Pactet mentions that the referendum procedure may decline and become plebiscite. The theory clearly differentiate the two concepts: referendum is when the vote is given according to personality of the question author.[12] In fact, the author warns about that the transformation is almost undetectable because it is difficult to detach the question from the author, even if the author is the President himself/herself, and not a collegial authority or a forum.

Generally, it may be considered that the transformation would be easy if it meets some characteristic elements, the most important is the blackmail from the starting point: if the question author transforms the positive vote in a condition of keeping his/her position is plebiscite because the author himself/ herself invites the electorate to vote in his/ her favor and not considering the question. Other characteristic elements are the concentration and personalization of the power in author's favor, high complexity of the question, the necessity of a single answer,

[9] The conceded constitution is a constitution that which makes the transition from the absolute monarchy to a constitutional monarchy, being approved only by the king, as a concession for the people. The sovereign limits his/her powers, limits his/her exercise of power. His/ her own will is in fact an euphemism, even if the king is the one who approved it, ell the people are the constituent true power, even if meditated.

[10] *Idem*, p. 187.

[11] Tudor Drăganu, *Dreptul constituțional şi instituțiile politice, Elementary essay,* vol. I, Lumina Lex, Bucharest, 1998, p. 245.

[12] Pierre Pactet, *Institutions politiques, Droit constitutionnel*, Masson, Paris, 1985, p. 92.

while in fact there would be two questions and the manipulation of the public opinion through official propaganda. The plebiscite represents a shocking pressure for the citizens of a democratic state.

6. Popular revocation

Dan Claudiu Dănişor defines the popular revocation as "the procedure by which a certain number of electors may cause a pre-term termination of a representative's mandate or the whole unit." [13] This procedure is used when the petitions of the electorate are not longer satisfied by the chosen one. In case of individual revocation, if the percentage of those who solicits is sufficient, the representative is in minority and he/she has to give up, and in case of collective revocation, the result is the actual dissolution of the legislature.

Bibliography:

1. Dănişor, Dan Claudiu, *Dreptul constituţional şi instituţiile politice*, *Basic course*, Craiova, 1999.
2. Deleanu, Ion, *Instituţiile şi procedurile constituţionale*, vol. II, Servo-Sat, Arad, 1998.
3. Drăganu, Tudor, *Drept constituţional şi instituţii politice, Tratat elementar*, vol. I, Lumina Lex, Bucharest, 1998.
4. Duverger, M., *Dreptul constituţional şi instituţiile politice*, Paris, 1973.
5. Muraru, Ioan, Tănăsescu, Elena Simina, *Dreptul constituţional şi instituţiile politice*, vol II, C. H. Beck, Bucharest, 2006.
6. Negulescu, Paul, *Curs de drept român constituţional*, Bucharest, 1928.
7. Pactet, Pierre, *Institutions politiques, Droit constitutionnel*, Masson, Paris, 1985.

[13] Dan Claudiu Danisor, *op. cit.*, p. 263.