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Popular Sovereignty and the Use of the Referendum – Comparative Perspectives with Reference to France

‘Une constitution, c’est un texte, un esprit et une pratique’²

INTRODUCTION

Constitutions are bound to evolve. A constitution which cannot change or adapt does not serve effectively its purpose since the values and principles it is based upon need to be ‘brought to life’ through interpretation, application and incremental revisions: in sum, a successful ‘living constitution’ has a past, present and future.³ In this regard, it is remarkable to observe how the Irish and French Constitutions have survived through time as two of the most enduring constitutions in Europe without either becoming a mere ‘petrified object of devotion’.⁴ The 1937 Bunreacht na hÉireann is the Republican constitution which is the longest continuously in operation within the European Union (EU). The 1958 French Constitution of the Fifth Republic, just approaching its 55th year in 2013, is also noteworthy for its longevity. The Fifth Republic is after all the longest regime since the Third Republic (1875–1946) in a country known

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²‘A constitution, it is a text, a spirit and a practice’: quote by Charles de Gaulle in Bégoc, *Le Dictionnaire des Citations Politiques: Petites et Grandes Phrases de la Politique* (La Maison d’Editions, 2012). [All translations are by the author unless otherwise indicated].

³The notion of constitution encompasses formal and substantive aspects, referring to the set of written entrenched provisions contained in a formal text, as well as other unwritten rules recognized as of constitutional value; all these constitutional arrangements governing the organization and functioning of the structures of the state and the relations between society and public powers form the ‘constitution’.

⁴Fusaro and Oliver, ‘Towards a Theory of Constitutional Change’ in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), pp 405-433, 424, 433.

for its chaotic constitutional past. For a long time, France preferred changing constitutions rather than formally amending an existing one, making its modern constitutional history resemble a 'laboratory of constitutional change'.⁵ The Fifth Republic represents a turning point in this regard. A first reason is that, in reaction to past experiences, it has managed to reach a certain institutional balance with the support of a wide political consensus in favour of the current Constitution that political leaders would rather adapt than abandon, thereby averting the prospect of a Sixth Republic for the moment⁶; the second reason for this turn lies in the 'juridification' of the Constitution, and the relatively recent development of French constitutionalism pointing to the maturation of the constitutional order with an effective supreme norm at its top, that must formally be respected.⁷

One common feature of Irish and French Constitutions is the place they accord to the people. Being based on the principle of popular sovereignty, both constitutional orders accord the final say to its people in the process of constitution-making and, in principle, revision via a referendum. Like the Irish Constitution, adopted on 29 December 1937 after a referendum (1 July 1937), the French 4 October 1958 Constitution was enacted after approval by popular vote (28 September 1958).⁸ The institution of the referendum is also central in constitutional amendments and both systems make clear that the people are the ultimate authority when the supreme law of the land needs to be changed. This shared emphasis on direct democracy in parliamentary regimes can be interpreted as the manifestation of a common rejection of unqualified representative democracy marked, to some extent, by its past oppressive ways, namely

⁵Boyron, 'France' in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), pp 115-142, 116. A total of 15 fundamental texts were adopted since the fall of the *Ancien Régime*, although variants exist as to this figure depending on whether texts enacted but not applied are taken into account or not. See the position of the Constitutional Council at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/les-constitutions-de-la-france.5080.html>> (last accessed 14 June 2012).

⁶A proposal for a Sixth Republic was formally voiced at the start of the 2000s when the socialist deputy Arnaud Montebourg, current Minister of Production Recovery, established a think tank called '*Convention pour la 6ème République*' detailing proposals to overcome the drawbacks of the Fifth Republic, which therefore ought to be replaced.

⁷Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 *Yearbook of European Law* 21.

⁸Although very controversially if one looks at the procedure itself.

the obstructive force of parliamentarians in previous republics (in the case of France), and the rejection of the British tradition of parliamentary sovereignty (in the case of Ireland). The Irish Constitution can be amended only if such amendments are approved in a referendum according to Articles 46.2 and 47.1.⁹ French constitutional provisions are less straightforward, as a referendum is only one of the ways in which the Constitution can be amended. To put it another way, not every proposal for a constitutional revision has to be submitted to the decision of the people; however, relevant provisions of the 1958 Constitution on constitutional revisions provide for the possibility of a referendum.¹⁰

The referendum has been a prominent feature of the constitutional and political landscape in both jurisdictions, although it has been comparatively more frequently used in Ireland than in France. In political science terms, Ireland would be regarded as a 'frequent user', whereas France would be a 'medium-frequency user'.¹¹ Referendums are indeed

⁹Article 46.2: 'Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.' Article 47.1: 'Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.' Articles 27 and 47 of the Constitution also provide for a referendum on a proposal other than a proposal to amend the Constitution, referred to in law as an 'ordinary referendum'.

¹⁰See Articles 89 and 11. Other types of referendum are also provided. All these are discussed in the following developments.

¹¹See scale provided by Morel over the 1980-2008 period in Morel, 'Referenda', *International Encyclopedia of Political Science* (Sage Publications, 2011) <<http://sage-ereference.com/view/intlpoliticalscience/n509.xml>> (last accessed 6 June 2012). Ireland has held a total of 24 constitutional referendums over the period 1941-2012 (during the transitional period of 1937-1941, the Constitution could be amended by ordinary legislation and two Constitution Amendment Acts were enacted during that time); no ordinary referendum has ever been held.

part of the French political discourse, although more often as threats than as realities.¹² Yet, recourse to the popular vote has brought about its string of issues and criticisms in both systems. Ireland's own difficulties with the referendum are crystallised in the context of mainly (but not only) referendums on EU Treaty changes which use revolves around a three-fold critique, that is:

- (i) whether to hold a referendum,
- (ii) how to hold such referendum, and
- (iii) what to do with the outcome of a negative vote.

What is debated and challenged in discussions of Irish law is the kind of 'legal straitjacket' in which the judicial branch of Government has required recourse to the *pouvoir constituant*, and imposed it in the case of EU Treaty ratification.¹³ This has led some to radically question the suitability of popular votes as instruments of constitutional reform in view of the second referendum phenomenon which occurred in Ireland twice, for the approval of the Nice Treaty in 2001 and the Lisbon Treaty in 2007.¹⁴

The regime, as well as the actual use of the popular vote, is also a contentious matter in French law and politics, for various reasons and with a specific relevance in today's affairs. First, the institutional and constitutional arrangements of the referendum show strong peculiarities. France is one of the very few countries where the referendum is constitutionally at the initiative of the Executive alone, without the necessary approval of Parliament; it was indeed decided against the will of Parliament in 1962 when the Constitution was revised to allow the election of the President of the Republic by direct universal suffrage, arguably

France has held a total of nine referendums over the period 1958-2012, five relating to constitutional amendments, two of which were defeated (see Chart in **Appendix**).

¹²Qvortrup, 'The Three Referendums on the European Constitution Treaty in 2005' (2006) 77 (1) The Political Quarterly 89.

¹³For a critique of the Irish Supreme Court rulings which form the legal framework according to which are determined the answers to the questions of whether and how to hold a referendum on a European Union Treaty, see Barrett, 'Building a Swiss Chalet in an Irish Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence' (2009) 5 European Constitutional Law Review 32, 33.

¹⁴De Búrca, 'If at First You Don't Succeed:Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change' (2010) 33 Fordham International Law Journal 1472.

making the first revision of the 1958 Constitution a breach of the Constitution. This has to be combined with the fact that the President, when calling for a referendum, is not politically responsible. Second, the use of the referendum has attracted well-known criticisms, especially under de Gaulle's presidency. This has been analysed in political studies around the problem of its 'strategic use by the various actors of the political scene'—that is, not only the President who, as the formal initiator, would systematically seek a reinforcement of his personal position, but also parties and leaders, who would place more importance on political calculations, and finally the voters, who would generally answer a different question from the one formally asked.¹⁵ In France also, there has been a growing mistrust of this form of political decision-making, the legal framework of which is, maybe in contrast to Ireland, presented as unfinished.¹⁶ Since the controversial involvement of the French people under de Gaulle, there has been a tendency to exclude the citizens from decisions on constitutional amendments leaving the impression that the 'sovereign [has been] left speechless'.¹⁷ Like in Ireland, EU integration has, to some extent, offered the opportunity to revive recourse to the referendum on the occasion of the 1992 referendum on the Treaty of Maastricht and the 2005 referendum on the Treaty establishing a Constitution for Europe. EU-related referendums have indeed affected the constitutional order of the member states through revisions and reinterpretations of domestic constitutions in order to accommodate the integration project.¹⁸ However, following the negative result of the 2005 referendum, even this now seems to have been short-

¹⁵Morel, 'The Rise of 'Politically Obligatory' Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30 (5) *West European Politics* 1041. Note also the quote by former French Prime Minister Michel Rocard (1988-1991): 'A referendum is a national excitation when everything is put in the pot. A question is asked, people asked themselves other questions and eventually come and vote for reasons which have nothing to do with the actual question asked'.

¹⁶Hamon, 'L'Inachèvement du Statut Juridique du Référendum' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC 2012), 89-104.

¹⁷Boyron, 'France' in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), pp 115-142, 131. See also Denquin, 'Le Déclin du Référendum Sous la Vème République' (1998) *Revue de Droit Public* 1585.

¹⁸This is the domestic aspect of a dual constitutionalisation process arguably taking place in the EU, the other aspect being the construction of transnational rules to regulate inter-state relationships at the European level (Shu, 'Referendums and the Political Constitutionalisation of the EU' (2008) 14 (4) *European Law Journal* 423).

lived. Some declared at the time that the institution of the referendum was 'dead' under the Fifth Republic.¹⁹

The referendum appears to be an institution in crisis, or at least in need of serious reflection concerning its means and ends, in both Ireland and France. It is all the more relevant (and somehow paradoxical) that findings in legal and political science studies show a growing profile and demand for referendums in general.²⁰ It is not the object of this chapter to give a detailed account of the comparison between Irish and French law on referendums. Rather the analysis will focus mainly on the use of the referendum in France with relevant comparisons to Ireland. This approach will arguably be of use to an Irish audience (the judiciary in particular) whose framework of analysis regarding instruments of direct democracy can be lacking in comparative law references.²¹ There are three sections to the chapter. The first expounds the concept of popular sovereignty from an historical and constitutional point of view, as a prelude to understanding the vision of direct democracy enshrined in the French Constitution. The second section then examines the constitutional regime of the referendum with particular focus on the ambivalence of relevant provisions and controversial use in constitutional changes. These issues are further explored in a third section which analyses proposals and reforms undertaken to improve the referendum legal framework and unlock the full potential of proper recourse to direct democracy.

POPULAR SOVEREIGNTY: AN ENTRENCHED CONSTITUTIONAL PRINCIPLE

¹⁹Robert, 'Un Gâchis Référendaire (29 mai 2005)' (2005) 4 *Revue du Droit Public* 839, 845.

²⁰This has been observed in the general comparative context of constitutional referendums (Boyron, 'France' in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), 115-142, 131, and Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012), 303), or in the context of EU referendums with the phenomenon of 'imposed' or 'politically obligatory' referendums (Morel, 'The Rise of 'Politically Obligatory' Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30 (5) *West European Politics* 1041).

²¹Barrett, 'Building a Swiss Chalet in an Irish Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence' (2009) 5 *European Constitutional Law Review* 32, 63.

Like the Irish Constitution, the 1958 French Constitution displays this linkage between the people, the nation and the state in its provisions dealing with sovereignty. Article 3 states that '[n]ational sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum'.²² Several observations need to be made, first, to clarify the approach towards the notion of sovereignty in general, and, secondly, to identify the holder of the sovereign power. Firstly, this non-original provision marks a continuity with previous republics and constitutions. In line with the French tradition of republicanism, it points to a classical understanding of sovereignty as sovereignty *of* the State (external sovereignty) and *in* the State (internal sovereignty).²³ Article 3 recalls the essential feature of indivisibility which is also attached to the Republic according to Article 1 of the 1958 Constitution: 'France shall be an indivisible, secular, democratic and social Republic'. As is well-known, this classical approach has undergone significant changes under the effect of European construction which has affected the nature of, as well as the exercise of, the sovereign power.²⁴ The European integration process has indeed been accommodated by several constitutional revisions thereby challenging the traditional notion of sovereignty which appears to be partially outdated and in the process of being redefined.

It is interesting to note in this regard that, unlike Ireland, the first time the issue of sovereignty was raised with regard to an EU Treaty in France was not in relation to the Single European Act (SEA). In Irish law, the SEA provisions on co-operation in the field of foreign policy were regarded as being outside the scope and effect of the constitutional immunities in respect of the European Communities Treaties and judicially declared as presenting implications for the sovereignty of the state therefore requiring

²²The rest of Article 3 reads: 'No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute'. See also the expression of democratic nature of the French republican regime in Article 2: 'The principle of the Republic shall be: government of the people, by the people and for the people' (English translation of the French Constitution available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>> (last accessed 6 June 2012)).

²³Haquet, *Le Concept de Souveraineté en Droit Constitutionnel Français* (PUF, 2004).

²⁴Pierré-Caps, 'La Souveraineté, Expression de la Singularité de la République' in Mathieu (ed), *1958-2008 : Cinquantième Anniversaire de la Constitution Française* (Dalloz, 2008), 164-167.

an amendment to the constitution.²⁵ In France, the SEA was ratified via the normal parliamentary procedure and did not require a revision of the constitution.²⁶ However, things took a different turn with the Maastricht Treaty since the provisions which led to the creation of the euro and the three pillar structure of the EU posed a problem for French political authorities. On this occasion, the Constitutional Council ruled that the transfer of 'competences' permitted by the constitutional revision of 25 June 1992 which had been necessitated by the Maastricht Treaty and the ratification of which had been approved by referendum on 20 September 1992, were not to be assimilated to a transfer of sovereignty.²⁷ Such a transfer was expressly prohibited by the Constitutional Council in its earlier decision of 30 December 1976 :

'if the Preamble to the 1946 Constitution, confirmed by the Preamble to the 1958 Constitution, provides that, on the condition of reciprocity, France allows limitations on sovereignty necessary to the organisation and defence of peace, no provision of a constitutional nature allows transfers of the whole or parts of the national sovereignty to any international organisation'.²⁸

Secondly, as regards the holder of the sovereign power, Article 3 of the 1958 Constitution encapsulates a consensual approach. It reconciles the two ideas of popular and national sovereignty, thus definitively assuaging the old doctrinal quarrel between the theories developed respectively by Jean-Jacques Rousseau and Emmanuel-Joseph Sieyès,²⁹ even though

²⁵Tenth Amendment to the Constitution Act (22 June 1987).

²⁶It was signed by France on 17 February 1986 and entered into force on 1 July 1987. Law No 861275 of 16 December 1986 authorised the ratification of the SEA by France.

²⁷Decision 92-308 of 9 April 1992 (Maastricht I) and 92-312 of 2 September 1992 (Maastricht II). Decisions of the Constitutional Council are available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>>. For an analysis of the various implications, see Wright, 'The Constitutional Implications in France of the Maastricht Treaty' (1994) 9 Tulane European and Civil Law Forum 35.

²⁸Decision 76-71 DC of 30 December 1976 (Decision of the Council of the European Communities on the Election of the Assembly of the Communities to Direct Universal Suffrage).

²⁹See Rousseau, *Du Contrat Social* (1762): all power stems from the people which is the ultimate and only holder of sovereignty with the corollaries of the supremacy of the law, as expressed by the general will, as well as the imperative mandate and the *right* to take part in the elections See also Sieyès, *Qu'est-ce que le Tiers Etat?* (1789): the people is politically unable and needs representatives to decide in its place embodying the nation as an abstract entity with the corollaries of the representative mandate and voting envisaged as a *function* as opposed to a right.

national sovereignty and its corollaries remains the key principle.³⁰ In French constitutional law, only the people possess national sovereignty. In Irish law also, the fundamental power of the nation lies with the people as it is expressed via a quasi-identity between ‘nation’ and ‘people’,³¹ both mentioned in the Preamble to Bunreacht na hÉireann and often used interchangeably in the main text of the 1937 Constitution. The idea of national sovereignty is in particular expressed in Article 1 according to which ‘[t]he Irish nation ... affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government’; the idea of popular sovereignty is expressed under Article 6.1 of the 1937 Constitution which states that ‘[a]ll powers of government, legislative, executive and judicial, derive, under God, from the people’; a further reference to the ‘people’ is made under Article 46 regarding the submission of a referendum for amendment of the constitution.³²

In French constitutional law, the notion of people refers to the ‘French people’ whose constitutional value has been recognised by the Constitutional Council. For example, the Council decided in relation to the proposed existence of a ‘Corsican people’ that ‘the referral by the legislature to [such a component of the French people was] ... unconstitutional, as the Constitution recognises only the French people, made up of all French citizens regardless of origin, race or religion’; indeed, ‘the principle that the French people is one, and that no section of it may claim to exercise national sovereignty, is ... of constitutional status’.³³ The Council has still recognised a number of nuances to the

This is also in line with Montesquieu’s ideas as expressed in this quote: ‘The main advantage of representatives is that they are able to discuss political affairs. The people is not fit for that, which is one of the biggest defect of democracy’ (Montesquieu, *De l’Esprit des Lois*, (1758), Livre XI, Chapitre VI ‘*De la Constitution d’Angleterre*’, Garnier Frères, 1888, p 145).

³⁰See Article 3 (‘The principle of any sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it’) and Article 6 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 (‘The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making’) which complete Article 3 of the 1958 Constitution.

³¹Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall, 2000), 29.

³²See also Article 5: ‘Ireland is a sovereign, independent, democratic state’.

³³See respectively Decision 91-290 DC of 9 May 1991 (Act on the Statute of the Territorial Unit of Corsica) <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a91290dc.pdf> (last accessed 18 June 2012), para 13; and Decision 99-412 DC of 15 June 1999 (European Charter for Regional or Minority Languages) <http://www.conseil-constitutionnel.fr/conseil->

unitary character of the French people, especially in its manifestation as electoral body when it identified, for example, the principle of gender equality or a sub-group of citizenship within the French citizenship available to residents in New Caledonia.³⁴

The notion of sovereignty is not conceptually linked to that of the state, as sovereignty is not inherent to the state's form of government but is attached to the nation.³⁵ Sovereignty is best described as 'an aptitude to exercise certain competences originating in the expression, through the state, of the existence of a nation' or as the expression of the 'social force in relation to the nation'.³⁶ This is the same idea expressed under Irish constitutional law about the relationship between the state and the people, the former being the creation of the latter. Article 6.2 of the 1937 Constitution indicates that the powers of government 'are exercisable only by or on the authority of the organs of State established by this Constitution'; and '... the State is the creation of the people and is to be governed in accordance with the provisions of the Constitution which was enacted by the people and which can be amended by the people only ... in the last analysis the sovereign authority is the people'. This is deduced not only from the text of the Constitution but also from the wording of the preamble, 'a Preamble by the people formally adopting, enacting and giving themselves a Constitution'.³⁷

There is, however, under the Constitution of the Fifth Republic, a strong association between the notion of sovereignty and the executive power. The proclamation of the national unity embodying popular sovereignty is strongly linked with the reinforcement of the political power as envisaged

constitutionnel/root/bank_mm/anglais/a99412dc.pdf> (last accessed 18 June 2012), para 5.

³⁴See the constitutional revision of 8 July 1999 amending Article 3 Constitution, and the constitutional revision of 23 February 2007, amending Article 77 Constitution, respectively.

³⁵See the classical work of Carré de Malberg, *Contribution à la Théorie Générale de l'Etat* (Sirey, 1920).

³⁶Pierré-Caps, 'La Souveraineté, Expression de la Singularité de la République' in Mathieu (ed), *1958-2008 : Cinquantième Anniversaire de la Constitution Française* (Dalloz, 2008), 167-68.

³⁷*Byrne v Ireland* [1972] IR 241 at 262 (*per* Walsh J). This view was later reiterated by Denham J in *Hanafin v Minister for the Environment* [1996] IESC 6, [1996] 2 ILRM 61, who, distinguishing popular sovereignty from state and internal sovereignty, proposed that '[u]nderpinning the whole concept of sovereignty is what I shall call popular sovereignty meaning the power of the people. The Constitution is grounded on the will of the people'.

by de Gaulle. The Fifth Republic has established a mixed or hybrid regime, parliamentary at root but with a presidential twist. The result is an arguably 'double legitimacy route'³⁸ which separates the classical representative form of government through elected members of Parliament and the exercise of the people's sovereignty via the President of the Republic. In the words of de Gaulle, the President 'is and ... is the sole delegate and representative of the nation in its entirety';³⁹ in other words, the President of the French Republic is the 'depository' of popular sovereignty, a situation which creates a kind of competition between the two representative forms of government, namely the Parliament through its representatives and the people through its President. This is less the paradox than the originality of the regime established by the 1958 Constitution whereby a 'Republican monarch' was understood to be in charge of popular sovereignty and the general interest while also being affiliated to a specific political family. In sum, the concept of popular sovereignty in the French political and constitutional system is intrinsically linked to the executive power which explains the specific layout of the referendum provisions in the 1958 Constitution, and the possibility of calling on the people's decision at the initiative of the President under Article 11 in particular.⁴⁰

REFERENDUM REGIME: TEXTUAL AMBIVALENCE AND CONTROVERSIAL USE

A referendum is 'a device of direct democracy by which the people are asked to vote directly on an issue or policy' and, as such, participate in the elaboration of the norm, whether of constitutional or legislative nature.⁴¹ It

³⁸Jaume, 'La Souveraineté Sous la Ve République: Une Certaine Idée du Gouvernement' in Mathieu (ed), *1958-2008 – Cinquantième Anniversaire de la Constitution Française*, (Daloz, 2008), 171-180.

³⁹Quoted in Jaume, 'La Souveraineté Sous la Ve République: Une Certaine Idée du Gouvernement' in Mathieu (ed), *1958-2008 – Cinquantième Anniversaire de la Constitution Française*, (Daloz, 2008), 174.

⁴⁰Other provisions of the Constitution contribute to the reinforcement of the institution of the President such as his election by direct universal suffrage (Article 6), the right to dissolve the National Assembly (Article 12), the power of nomination (Article 13) including the power to appoint the Prime Minister (Article 8), the emergency powers (Article 16), and the power to refer a law enacted by Parliament to the Constitutional Council (Article 61).

⁴¹The expression 'referendum' appeared in Switzerland, probably around the sixteenth century, to indicate the procedure by which delegates to cantonal assemblies submitted certain issues to their constituents, literally, *ad referendum*, ie for

is, by definition, the natural expression of popular sovereignty. France is historically one of the three countries closely associated with the use of the modern referendum, the other two being Switzerland and the United States where the practice of referendum has its roots in a tradition of direct democracy by popular assemblies at the local level. The French referendum experience started with the (never applied) 1793 Constitution and turned into a plebiscitary use under Napoleon I and Napoleon III.⁴² This had the effect of stigmatising and marginalising the referendum under the Third and Fourth Republics despite it being defended by a few lawyers in the period such as Edouard Laboulaye (1811–1883) and Raymond Carré de Malberg (1861–1935). The Fifth Republic really marks the reintroduction of the referendum. Due to the personal influence of de Gaulle, it stands as one of the innovations of the 1958 Constitution. The current regime offers an interesting typology. Yet, the ambivalence of the constitutional texts referring to it and its ‘Gaullist’ use has again turned the referendum into a controversial and somehow unsatisfactory instrument of political decision-making, especially where the legitimization of constitutional changes is concerned. It is indeed in relation to Article 89 on constitutional amendment and Article 11 on the President’s power to call for a popular vote that the Gordian knot of the referendum regime for constitutional revisions has been defined under French constitutional law.

Typology of Referendums

The referendum is a polymorphic instrument which takes a variety of forms grouped into typologies, whether in a general⁴³ or national context.⁴⁴ French constitutional law provides for two main types of referendum, namely the constitutional referendum of Article 89, and the legislative referendum of Article 11. A third type of referendum at national level is

ratification (Morel, ‘Referenda’ *International Encyclopedia of Political Science* (Sage Publications, 2011) accessible at <<http://sage-reference.com/view/intlpoliticalscience/n509.xml>> (last accessed 6 June 2012).

⁴²Etymologically, the expression ‘plebiscite’ simply means ‘a law enacted by the common people’ or *plebis scitum* and bears no such personal connotation.

⁴³ See the typologies proposed in Morel, ‘Referenda’ *International Encyclopedia of Political Science* (Sage Publications, 2011) accessible at <<http://sage-reference.com/view/intlpoliticalscience/n509.xml>> (last accessed 6 June 2012).

⁴⁴There is also a typology at European level as suggested by Min Shu who distinguishes three types of EU referendums, namely membership referendums (to approve membership), policy referendums (to legitimise certain integration policies) and treaty referendums (to ratify the different amending Treaties starting with the SEA in Denmark and Ireland). See Shu, ‘Referendums and the Political Constitutionalisation of the EU’ (2008) 14 (4) *European Law Journal* 423.

provided for by Article 88–5 which stipulates that the accession of a state to the EU be submitted to the people’s approval. It was introduced in 2005 after the controversy surrounding the possible entry of Turkey. It stands as an ‘obligatory’ referendum at the initiative of the President who has no discretionary power in the matter. The provision was later revised after the demise of the Treaty establishing a Constitution for Europe and now provides for a parliamentary escape allowing both houses to approve the accession with a qualified majority.⁴⁵ These procedures are to be distinguished from other forms of popular votes that do not express the ‘sovereignty of the French people’ at national level. Rather they are referendums of the local type such as the one provided for under Article 53 (2) on the integrity of the French territory, and more specifically the ones concerning the consultations of territorial communities and the self-determination of overseas populations under Articles 72–3, 73 and 76 of the Constitution.⁴⁶

As is now well-documented, the overall framework of recourse to the referendum in constitutional change was shattered when Article 11, allowing recourse to the people’s decision when major institutional questions are in issue, was used on two occasions to bypass Article 89 on amendments to the Constitution. The following developments will focus on the main features of these two provisions, as well as on the key legal issues involved.

⁴⁵Article 88-5 reads: ‘Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the president of the republic [2005 revision]. Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the bill according to the procedure provided for in paragraph three of article 89 [2008 revision]’.

⁴⁶Article 53 reads: ‘No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned’. This was the basis for a local vote in different referendums organized in the 1960s, 1970s and 1980s in Djibouti (19 March 1967 and 8 May 1977), the Comores (22 December 1974), Mayotte (8 February 1976), and New Caledonia (13 September 1987). For the other provisions, see the English version of the 1958 Constitution <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>> (last accessed 20 June 2012).

Constitutional Revision via Referendum : Article 89 v Article 11

The 1958 Constitution defines the rules for amending itself in its last article forming Title XVI 'On Amendments to the Constitution'. In a rather long provision, Article 89 details the different stages of the procedure as well as the temporal and substantive limitations to revision:

'The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution.

A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of Article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.

However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.

No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy.

The republican form of government shall not be the object of any amendment'.⁴⁷

⁴⁷The limitations to constitutional revisions concern respectively: the prohibition to amend the constitution in troubled circumstances such as where the integrity of national territory is placed in jeopardy (para 4), and the prohibition on altering the republican form of government (para 5); other limitations include the impossibility to revise the constitution in the case of vacancy or declared permanent incapacity of the President (Article 7) and during the implementation of the emergency powers of Article 16 (Decision 92-312 DC of 2 September 1992 Maastricht II). Overall these limitations have not given rise to any particular issues and have been specified by the case law of the Constitutional Council. A closer analysis of their actual implementation might lead to more constitutional intricacies however; for example, given that the Constitutional Council cannot review the constitutionality of amending texts, one might wonder how the substantial limitation on the republican form of government can be guaranteed.

In theory, this constitutional basis for amendment is not in the hands of a particular political actor; it is a right of initiative conjointly shared between the legislative branch (Members of Parliament) and executive branch (the President of the Republic on a request from the Prime Minister) of government. In practice however, political reality renders the parliamentary initiative quite limited; either instigators are in the majority, in which case the proposal is more aptly taken over by the Executive, or are in the opposition, in which case the proposal is unlikely to progress further given the control of the parliamentary agenda by the government. Besides, except in times of 'cohabitation', the request by the Prime Minister is quite formal and the procedure is really initiated by the President.⁴⁸ What is also striking is the control of the President in the last stage of the process: once the revision has been approved in identical terms by both houses of Parliament, the President has the discretion to choose between popular or parliamentary approval of the constitutional bill. The provision significantly mentions the referendum route as the principle route (compulsory if the revision originates in a Private Member's Bill), and the parliamentary route as the second branch of the alternative. Even in this case, the procedure is stricter and more formal since both houses convene together in a single representative body of the *pouvoir constituant* called the Congress (symbolically transported to Versailles to carry out the vote), and the constitutional bill has to be approved by a qualified three-fifths majority. The fact that recourse to the referendum is the principle and the parliamentary option the exception is after all in line with the spirit of the French institutions and principles underlying the sovereign power. Just as in Irish constitutional law, since the constitution is the creation of the people, only the people can modify its work.

What is more striking is the sense of underuse of the possibilities offered by Article 89 in relation to the referendum. It is a fact that the Congress route has been consistently preferred to amend the constitution, with the exception of the 2000 referendum on the reduction of the presidential mandate.⁴⁹ This was the case even for the last and most comprehensive revision of 23 July 2008 where roughly more than one third of the provisions of the 1958 Constitution were changed and nine entirely new

⁴⁸The 2000 constitutional revision, which took place under the Chirac-Jospin 'cohabitation' (1997-2002), stands apart in this regard as the former was urged by the latter to trigger the revision on the reduction of the presidential mandate from seven to five years.

⁴⁹See Chart in **Appendix**.

provisions were introduced.⁵⁰ One reason lies in the provision itself: since Article 89 requires the constitutional bill to be approved by each house of Parliament, this arguably renders otiose the stake of a referendum for the instigator and the people – if representative democracy has approved, what is left to decide for direct democracy – unless it is an explicit call to disown representative democracy via direct democracy? This is a debatable idea but this was one argument put forward to explain the very strong abstention of the only referendum held under Article 89. The other main reason for the underuse of the regular amendment procedure is of course the existence of a ‘competitive’ route to referendum which was used for the first, and arguably, most important revision of the 1958 Constitution.

In this regard, Article 11 appears a little bit like the ‘cat among the pigeons’ in terms of introducing the institution of the referendum in the 1958 Constitution. Its very ‘Gaullist genesis’ produced a rather vague but empowering text on the legislative referendum, which allowed de Gaulle to resort to it in constitutional matters on two occasions, successfully in 1962, and unsuccessfully in 1969. The current version of Article 11 reads as follows:

‘The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the Journal Officiel, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.’⁵¹

Where the referendum is held on the recommendation of the Government, the latter shall make a statement before each House and the same shall be followed by a debate.

⁵⁰See Paris, ‘Taking the Constitution Seriously: A Question of Priority under the New French Constitutional Review’ (inverted comma here), British Association of Comparative Lawyers Annual Conference, University of Southampton, 13 September 2010, (on file with the author).

⁵¹This bit was added in order to avoid the unfortunate parliamentary debates and blockings experienced on the occasion of the adoption of the European Defence Community Treaty signed on 27 May 1952 eventually defeated by the French National Assembly in 1954.

A referendum concerning a subject mentioned in the first paragraph may be held upon the initiative of one fifth of the members of Parliament, supported by one tenth of the voters enrolled on the electoral lists. This initiative shall take the form of a Private Members' Bill and may not be applied to the repeal of a legislative provision promulgated for less than one year.

The conditions by which it is introduced and those according to which the Constitutional Council monitors the respect of the provisions of the previous paragraph, are set down by an Institutional Act.

If the Private Members' Bill has not been considered by the two Houses within a period set by the Institutional Act, the President of the Republic may submit it to a referendum.

Where the Private Members' Bill is not passed by the French people, no new referendum proposal on the same subject may be submitted before the end of a period of two years following the date of the vote.

Where the outcome of the referendum is favourable to the Government Bill or to the Private Members' Bill, the President of the Republic shall promulgate the resulting statute within fifteen days following the proclamation of the results of the vote'.

The 'genetic code or spirit' of the referendum under the Fifth Republic is definitely Gaullist.⁵² Although French legal scholars are not clear where de Gaulle got his inspiration from concerning the institution of the referendum and, more generally, his 'legal culture' and constitutional ideas, many of his objectives and views can be found in his pre-1958 Constitution addresses, as well as in the drafts of the 1958 Constitution. Two observations can be made in this regard. First, although de Gaulle believed that calling on popular sovereignty was good in relation to any significant political enterprise requiring by definition the input of democracy, the referendum was actually not one of his primary concerns and certainly not central to his political and institutional project for France; he sparingly invoked it before 1958.⁵³ Second, he systematically,

⁵²Denquin, 'L'Esprit des Référendums sous la Vème République' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 79-88.

⁵³It is significant that he referred several times to the necessity of holding a referendum in relation to the European project, in particular concerning the proposed European army in the context of the European Defence Community Treaty under

and somewhat curiously, linked the question of the referendum to the dissolution of the National Assembly. The referendum and dissolution powers have now evolved distinctively in terms of modalities, objectives and use. Yet, at the time the association between the two could have arguably been interpreted as two facets of the same concern, ie that is managing and overcoming absolute parliamentarism regarded as the unfortunate trait of the previous republics.⁵⁴ Overall, the referendum was not envisaged in its legal specificity but only as a component of an overall system of government. This neglect of the technical dimension of the referendum, as opposed to the consideration of its political aims, explains the relative looseness surrounding the notion of *arbitre national*, referring alternatively to the people or the President, or the President via the people.⁵⁵ This vagueness transpires in the drafting of Article 11 the original version of which only referred to the 'organization of the public authorities'. This could be interpreted restrictively (eg electoral law) or broadly (eg constitutional law). It is common knowledge that de Gaulle went for the second approach.

Without delving into the details of the two controversial referendums of 1962 and 1969, the main legal issues on the matter, namely the reasons for recourse to the referendum under Article 11, the ensuing legal controversy, and the implications for use of the constitutional referendum by subsequent Presidents, are analyzed below. Generally speaking, despite his personal aura and political (and military) legitimacy, de Gaulle resorted to referendums with a view to establishing a firm basis to his power. The original constitutional arrangements encouraged this: the President was provided with extended powers and, at the time, quite a long mandate (seven years); but not being responsible to his electorate, he needed to go

discussion in 1952 but which was later rejected by the French National Assembly in 1954 (Denquin, 'L'Esprit des Référendums sous la Vème République' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 82). It is also significant that his seminal address of Bayeux in 1946 does not mention the referendum.

⁵⁴Denquin, 'L'Esprit des Référendums sous la Vème République' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 83.

⁵⁵Denquin, 'L'Esprit des Référendums sous la Vème République' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), p 84. It is a fact that, written hastily under unfavourable political circumstances (ie the unfolding of the Algerian war and a deep political crisis), the 1958 Constitution was not a very well drafted document, arguably the worst drafted document of the whole French constitutional history according to famous legal scholar, René Capitant. See Hamon, *De Gaulle dans la République* (Plon, 1958), foreword.

back to it at regular intervals to re-establish his fading legitimacy.⁵⁶ In the case of the 1962 referendum, there were reasons for the revision, and reasons to use Article 11 to carry it out. De Gaulle wanted a constitutional change in order to complete a vast re-organisation of the State and regime, not only with regard to the resolution of the Algerian crisis but also in an effort to cement national unity around the Head of State.⁵⁷ The most simple and emblematic means was to link the people to their President through his election by direct universal suffrage. By using Article 11, de Gaulle sought to avoid the Article 89 requirement of the pre-requisite vote of both houses of Parliament. He knew Parliament was hostile to his project to create another source of legitimacy for the benefit of the Executive, competing with the legitimacy of elected representatives. He was aware of the hostility of the Senate in particular, where some of his prominent opponents (such as Gaston Monnerville) sat, and of the fragile majority in the National Assembly. On the other hand, he knew of the popularity among the French people of the proposed reform which, if approved, would be difficult for anyone to challenge as the direct expression of the will of the nation.⁵⁸ In the case of the 1969 referendum, the open hostility of the Senate after the successful 1962 referendum pushed de Gaulle to take further steps to weaken it, by proposing to transform it into a socio-economic house of Parliament representing regional and sectoral interests with no real powers; the proposal had also planned to create new administrative regions. This repeated use of Article 11 prompted commentators at the time to wonder about the emergence of a new constitutional convention. An end was put to this very Gaullist and unorthodox practice by the negative outcome of the 1969 referendum and the subsequent departure of de Gaulle from office as he had promised.⁵⁹

⁵⁶Morel, 'The Rise of 'Politically Obligatory' Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30 (5) *West European Politics* 1041, 1052-53. In fact, four referendums were organised under de Gaulle's two presidential mandates, the first two concerning the independence of Algeria. See Chart in **Appendix**.

⁵⁷De Gaulle had just been the victim of an attempted assassination on 22 August 1962 near Paris.

⁵⁸This was astute political manoeuvring by de Gaulle: on 2 October 1962, he announced his intention to modify Articles 6 and 7 of the Constitution; on 5 October, a motion of no confidence was passed by the National Assembly; on 9 October, the President then dissolved the Assembly, the result being a new elected majority clearly in his favour providing the necessary support to the Government in office; on 28 October, the French people approved the proposed revision.

⁵⁹The negative outcome can be blamed on the complexity of the proposal as it contained two reforms of different nature, one of constitutional nature (reform of the Senate) and the other of legislative nature (creation of the regions). It shows that de Gaulle could 'pack' whatever reform he judged necessary under his

The situation created in the aftermath of the two Article 11 referendums presents an interesting paradox. It sparked a well-known politico-legal controversy about the constitutionality of recourse to Article 11 which now seems to have subsided. In practice, however, it has made the prominent use of referendum under the Fifth Republic fade. It is appropriate at this stage to briefly recall the legal arguments in favour of and against the constitutionality of Article 11⁶⁰. In support of constitutionality, de Gaulle himself invoked Article 3 which refers to national sovereignty as exercised indifferently through referendum or representatives; he also submitted that the possibility offered by Article 11 on ‘any Government bill which deals with the organisation of the public authorities’ could encompass not only those bills of legislative nature but also of institutional or constitutional nature. Eminent French constitutionalists put forward the legitimacy argument, in order to have recourse to the *pouvoir constituant* in any case; a more technical argument contended that, since Article 11 could be substituted to the normal procedure of decision-making for legislative (Article 45) and institutional bills (Article 46), it could also be an alternative for approval and adoption of constitutional bills. In support of unconstitutionality, it was submitted that a strict literal interpretation of the constitution imposes the use of one provision regarding its revision, and that is Article 89. It is a clear and self-sufficient provision which does not mention the existence of an exceptional or concurrent procedure.⁶¹ It is also interesting from a French constitutional point of view to observe that the concept of a constitutional convention was evoked to justify *a posteriori* de Gaulle’s interpretation of the constitution—this was never convincing after the failure of the second referendum though, as the elements of a constitutional convention were never deemed fulfilled.⁶²

interpretation of Article 11; more generally, it confirms the inadaptability of this form of popular consultation for complex questions, confirmed by what has been observed lately in the context of EU Treaties.

⁶⁰The controversy of Article 11 in constitutional matters is a classic of French constitutional law and, despite its outdated relevance, is still systematically recalled in almost all relevant textbooks. See, for example, Hamon and Troper (eds), *Droit Constitutionnel* (LGDJ, 2011), or Favoreu, Gaïa, Ghevontian and Mestre (eds), *Droit Constitutionnel* (Daloz, 2011), or Chantebout (ed) *Droit Constitutionnel* (Sirey, 2011).

⁶¹Other technical textual arguments were invoked in support of the unconstitutionality thesis.

⁶²In domestic law, the *coutume* is regarded as one of the sources of law and derives from a general and repetitive use, the authority and validity of which are recognized by all, as long as it does not infringe enacted laws.

Despite the fact that '[c]learly, the sovereignty of the people settled beyond doubt the procedural 'constitutionality' of the reform',⁶³ unease has still been perceptible among lawyers and politicians. For some constitutionalists, it is difficult to assert without reserve the legitimacy of recourse to Article 11 for constitutional amendments, as it would mean that a President could read and re-interpret the Constitution at his own convenience in a way quite incompatible with the rule of law (*Etat de droit*); for others, the controversy is not completely settled and could be revived.⁶⁴ As for politicians, there appears to be a consensual approach in favour of the constitutionality thesis (though how could it be otherwise coming from people in power or aspiring to the supreme function?). A prominent U-turn in this regard came from François Mitterrand who, despite fiercely opposing de Gaulle on this matter at the time, came round when he became President himself (it is true that he was an expert in turning around): '[A]ccording to an established use approved by the people, Article 11 can now be regarded as one of the routes of constitutional revision, concurrently with that of Article 89'. He expressed caution, however, about the circumstances of recourse to this 'presidential' referendum: 'Article 11 must be used with caution, sparingly and in relation to simply drafted texts. Otherwise it would be preferable that the vote of the French people be enlightened by a wide parliamentary debate'.⁶⁵

Subsequent politicians arguably learnt the lesson from the de Gaulle experience (and its bad ending) and their approach to both referendum practice *and* constitutional revisions has been determined by a different rationale, although the adherence to the Gaullist interpretation has not been absent. Firstly, as regards referendum practice, whereas de Gaulle had attached the vote of confidence to all his referendums, recourse to the popular vote 'became a more subtle tactic for his successors, who indeed carefully avoided calling for a vote of confidence, seeking rather to strengthen their position through popular endorsement of policies promoted by them'.⁶⁶ Typical examples of this trend are the referendums

⁶³Boyron, 'France' in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), 126.

⁶⁴Hamon, 'L'Inachèvement du Statut Juridique du Référendum' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 92.

⁶⁵Mitterrand, 'Entretien avec François Duhamel' (1988) 45 *Pouvoirs* 131.

⁶⁶Morel, 'The Rise of 'Politically Obligatory' Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30 (5) *West European Politics* 1041, 1051.

on the European Treaties. With the 1972 referendum on accession, Georges Pompidou sought to divide the opposition and break the ongoing alliance process between Communists and Socialists; the same is true of the 1992 referendum on the Maastricht Treaty which had the function of fracturing the unity of the right, as with the 2005 referendum on the Treaty establishing a Constitution for Europe.⁶⁷ Article 11 has been used sparingly since, and always at the instigation of the President, with the exception of the 1988 referendum on the status of New Caledonia, which was initiated by the government.

Secondly, recourse to the referendum became somehow disconnected from constitutional revisions. With the *fait majoritaire* appearing as another trait of French political life, there have been fewer reasons to be wary of the parliamentarians' verdict; if the President wanted to amend the constitution, he would choose the parliamentary route. Since 1969, all constitutional revisions (bar the 2000 referendum on the presidential mandate) were decided upon exclusively by Parliament, a move which has arguably 'resulted in the emergence of a constitutional convention'.⁶⁸ Overall, these specific constitutional arrangements, and the practice of the referendum in France, merit further reflection on its relevance and improvement.

UNLOCKING THE POTENTIAL OF THE REFERENDUM

Referendums are regularly proposed in French political debate. Some are calls coming from certain political parties with a view to attracting attention to key issues of the political and societal debate; one example would be the call made in 2003 by the UDF (*Union Pour La Démocratie Française*), the smaller of the two parties in the coalition Government, for a referendum on Prime Minister Jean-Pierre Raffarin's proposal for a change of the pension system. Others are mere calls to attract attention *per se*! One illustration is the referendum proposed in February 2012 by François Bayrou, candidate in the presidential election for the MoDem

⁶⁷Paris-Dobozy, 'The Implications of the 'No' Vote in France: Making the Most of a Wasted Opportunity' in Laursen (ed) *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff/Brill, 2008), 497-523.

⁶⁸Boyron, 'France' in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart, 2011), 131.

(*Mouvement Démocrate*), on the moralisation of public life. Appearing as a reaction to Nicolas Sarkozy's proposal of a referendum on unemployment, it was in fact a way to give new impetus to his campaign, which had run out of steam. Other referendum proposals have actually been concretised but, apart from the referendums on EU Treaties, the (defeated) local referendum on Corsica on 6 July 2003 is the only recent example leading to a constitutional change.⁶⁹

What is striking is the unease and wariness of French politicians towards the referendum. On the one hand, they have been trying to defend its place in the institutional framework, as de Gaulle's heritage, and, on the other hand, they have acted somewhat awkwardly when considering the choice of a referendum topic, arguably bordering on a populist approach in this regard. An example is the position of Nicolas Sarkozy, who called for referendums on issues such as illegal immigration and unemployment while refusing to put the European Stability Treaty to his people, arguing that the Treaty was too complex (declaration of 27 February 2012),⁷⁰ interestingly leading to a diametrically opposed stance to the one in Ireland where the Taoiseach Enda Kenny expressed his commitment to asking the Irish people their authorisation to ratify it (statement of 28 February 2012).⁷¹ The use of the referendum is entirely political, and it is doubtful whether the concern shown by French political leaders is for the actual expression of the popular sovereignty or for the effect such a popular vote would have on the political scene (ie legitimising a policy, provoking and dividing the opposition, gaining a portion of the electorate, since the issues proposed often do not strictly correspond to political parties divides, etc). The terminology used to talk about the referendum, such as 'threat' or 'weapon', is revealing in this regard; the referendum is seen as an instrument of political calculation, while the actual value of the democratic process in itself (campaign, participation/vote, result) is

⁶⁹The referendum was about the change of the legal status of the island, proposing to merge the two territorial communities (*Haute Corse* and *Corse du Sud*) into a single entity. The referendum was negative with 50.98 per cent 'No'.

⁷⁰The position of François Hollande during the presidential election campaign was quite ambivalent as well. He suggested that '[r]epresentative democracy ought to be respected. Why elect deputies, senators, if all questions can be asked to the French people?' (Interview, Marianne, 24 February 2012, 20-1). He was however in favour of holding a referendum on the right to vote of non-EU residents in local elections (TV Debate, 2 May 2012).

⁷¹He made his commitment only after the Attorney General had given her advice that the ratification of the Treaty would require a constitutional amendment. The EU Stability Treaty was eventually approved on 31 May 2012 with 60.3 per cent 'Yes'.

completely set aside. The referendum finds itself in France in a political impasse which makes it extremely difficult to renew and improve.

Reflection on its modernisation has nevertheless been underway, in fact ever since the Article 11 controversy. Major works were produced, namely the Vedel Committee Report (1993) and the Balladur Committee Report (2007).⁷² These sought to adapt the triggering initiative as well as to broaden the scope of the referendum in order to make it a more democratic process. Reforms were proposed in relation to both Articles 89 and 11. Regarding Article 89, the core of the criticism was that an important constitutional reform could be blocked, either by the President (who is not constitutionally obliged to proceed with the revision, whether by referendum or Congress vote), or by one of the houses of Parliament (despite being approved by the other). The combination of two proposals sought to avoid such blockage of the intervention of the *pouvoir constituant* and make the recourse to referendum more automatic and common—in other words, to democratise the constitutional amendment procedure.⁷³ Neither of the two proposals was taken further, however.⁷⁴

⁷²The Vedel Committee Report proposed three improvements to the referendum of Article 11, namely the broadening of the subjects susceptible to be submitted to popular vote, the judicial review by the Constitutional Council of the text submitted to referendum (with the significant implication that Article 11 could not be used any more in order to amend the Constitution), and the novelty of the referendum of popular initiative (*Rapport Remis au Président de la République le 15 février 1993 par le Comité Consultatif pour la Révision de la Constitution*, JO 16 February 1993, points 37-38). See below for the Balladur Committee Report (*Une Ve République Plus Démocratique*). Some of the changes are discussed below.

⁷³See Balladur Committee Report in Chapter III New Rights for the Citizens, Part A, A Public Life More Open to the Civil Society: 'If the Government or Private Member's constitutional bill has been approved by the two houses in identical terms, the revision is deemed definitive after having been approved by referendum organised within six months by the President of the Republic' (Proposal No 12); 'In case the Government or Private Member's constitutional amendment has not been voted in identical terms after two readings in each house of Parliament, the President of the Republic may submit to the referendum the text adopted with a three-fifths majority of the votes cast in either house' (Proposal No 68).

⁷⁴After the narrow success in the Maastricht referendum, President Mitterrand did not follow up with the Vedel proposals.

Instead, changes were brought about with regards to Article 11, which have yet to reach their full potential.⁷⁵ As regards the scope of the referendum, the defects of Article 11 are still there. The controversial expression '*tout projet de loi portant sur l'organisation des pouvoirs publics*' has not been deleted or expressly excluded in constitutional matters. It was completed by 'reforms relating to the economic, social [1995 revision] or environmental [2008 revision] policy of the Nation', thereby broadening the scope of the referendum topics. Yet, in contrast to the referendums regarding European integration, reforms on the economic or social policy of the nation, which could encompass, for example, reforms on primary and secondary education, housing, or pensions, are by nature a battlefield between the majority and the opposition. In this context, it would be difficult, if not suicidal, for the President to risk a popular vote on such polarised issues when he cannot count on the more neutral stance and co-operation of part of the opposition.⁷⁶ As regards the triggering initiative of the referendum, the 2008 constitutional revision introduced the referendum on popular initiative.⁷⁷ However, the reluctance of its drafters is reflected by the fact that it is unduly complicated providing for different stages and requirements (ie four stages, qualified parliamentary majority combined with a particularly high threshold of voters) which arguably stand as hindrances to its implementation. The result is a hybrid *sui generis* referendum which does not compare to anything in comparative law and is much less 'popular' than advocated.⁷⁸

Furthermore, the original text of Article 11 did not envisage any modalities governing the referendum process. Instead, it has been regulated by *ad hoc* secondary legislation for each referendum campaign. In political terms, this might be in line with the spirit of the 1958

⁷⁵ Apart from changes in 1995 and 2008, the other reforms concerning the referendum were in 2003, with the introduction of the local referendum (Article 72-1 in particular), and in 2005 on the accession of a new member state to the EU (Article 88-5).

⁷⁶ Hamon, 'L'Inachèvement du Statut Juridique du Référendum' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 100.

⁷⁷ Article 11 para 3: 'A referendum concerning a subject mentioned in the first paragraph may be held upon the initiative of one fifth of the members of Parliament, supported by one tenth of the voters enrolled on the electoral lists. This initiative shall take the form of a Private Members' Bill and may not be applied to the repeal of a legislative provision promulgated for less than one year' (adapted from Proposal No 67 of the Balladur Committee Report, itself inspired by the Vedel Committee Report).

⁷⁸ Hamon, 'L'Inachèvement du Statut Juridique du Référendum' in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 101-3.

referendum, which is almost completely in the hands of the President of the Republic, including in its practical modalities. It is, however, less defensible in terms of constitutional law, and the Constitutional Council has shown growing concern about the adoption of formal legislative provisions in this regard.⁷⁹ An interesting point of comparison with other jurisdictions and Ireland in particular is the suggestion of introducing new rules on the broadcasting of referendums ‘in order to make them more attractive’ to the public.⁸⁰ Contrary to the British Political Parties, Elections and Referendums Act 2000 and the Irish system where there is a 50/50 split between the two groups in favour of the ‘Yes’ and ‘No’ sides in terms of budget and time allocated to media appearance (a mathematical 50/50 approach), in France, the principle refers to a ‘*place équitable*’ with no mathematical benchmarks. It is based on an estimate of the representativity of the main political parties, estimations drawn from their representativity in general elections.⁸¹ This leads in practice to an imbalance in favour of the ‘Yes’ side because the President initiating the referendum and benefiting from the majority faces an opposition that is, by definition, politically weaker!

Lastly, it is to be noted that because direct democracy is fundamentally put on the same plane as representative democracy in Article 3, there is no particular enshrined protection of popular sovereignty when expressed via referendum. The Constitutional Council ruled that it had no jurisdiction to review the *loi référendaire* since ‘laws adopted by the people ... are the direct expression of national sovereignty’.⁸² However, the Council qualified this by deciding that the legislature could repeal legislative provisions whether enacted after parliamentary vote or referendum approval. Technically, this means that the outcome of a legislative referendum under Article 11 could be repealed by a subsequent act of Parliament, and that a constitutional amendment under Article 89 by way of a referendum could be later revised by a constitutional law via the Congress route.⁸³ This has been done, for example, regarding the

⁷⁹Hamon, ‘L’Inachèvement du Statut Juridique du Référendum’ in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 95.

⁸⁰Constitutional Council, Observations 27 September 2000.

⁸¹Only political parties represented in Parliament can participate in the campaign and be broadcast on radio and TV; political parties with a special interest in the referendum at stake can also take part, as happened for New Caledonian local parties in the 1988 referendum.

⁸²Decision 62-20 DC of 6 November 1962 (Referendum Law), confirmed by Decision 92-313 DC of 23 September 1992 (Maastricht III).

⁸³For example, see Decision 89-265 DC of 9 January 1990 (Amnesty Law in relation to Certain Events in New Caledonia, point 8).

establishment of the regions which, despite being first rejected by the people in the 1969 referendum, were introduced under the Decentralisation Act of 2 March 1982 and further ‘constitutionalised’ under Article 72 of the 1958 Constitution by the constitutional amendment of 28 March 2003.

Overall, the referendum regulatory framework and practice appear unsatisfactory in France. The referendum is not only seldom used, but also struggles to be modernised. Article 89 has been used only once. Generally speaking, it is a fact that the French people have not been as ‘connected’ to their constitution as the Irish people, either in terms of amending it or using it in judicial proceedings. The introduction of the preliminary ruling on the issue of constitutionality in 2008 has arguably changed that.⁸⁴ Other referendums under Article 11 are said to have lost part of their relevance, when one considers their legitimising function of presidential power, for constitutional reasons (reduction of the presidential mandate), political reasons (alignment between presidential and parliamentary majorities) and even sociological reasons (less credulity of the French people towards the providential leader, but rather a vote of contestation).⁸⁵ Reflections undertaken and reforms passed in order to give new impetus to the referendum have always been torn between two competing visions of democracy, ie representative democracy and direct democracy. The worrying factor in all this is that the right balance has not been found. French constitutional law and politics have not managed to ingrain recourse to popular sovereignty as a dispassionate instrument of political decision-making.⁸⁶ The result is that the French people have been deprived of their sovereign say on many occasions. While associated with major political and institutional changes such as decolonisation (the referendums of 1961, 1962, and 1988) and European integration (the referendums of 1972, 1992, and 2005), the people was absent for other significant constitutional revisions (the amendments adopted via the Congress route) and reforms of French society (the laws enacted through the parliamentary

⁸⁴See Paris, ‘New Constitutional Review in France: How Does the French Constitution Finally Speak to its People—or Does It?’, Public Lecture, ANU Centre for European Studies & Centre for International and Public Law, Australian National University, Canberra, 1 April 2011 (on file with the author).

⁸⁵Hamon, ‘L’Inachèvement du Statut Juridique du Référendum’ in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 104.

⁸⁶This is no coincidence either that Article 11 has never been used at the initiative of members of Parliament, reluctant to resort to direct democracy instead of representative democracy.

decision-making process).⁸⁷ Without going to the other extreme of ‘building a Swiss Chalet’⁸⁸ in French constitutional law, the referendum would arguably find further relevance if it was properly aimed at ‘*questions de société*’ and important institutional changes, including European issues. In that case, it should be envisaged as ‘a real counter-power to the President and parliamentary majority in place’ which would mean an overhaul of the whole institution to sever the link between the presidential initiative and expression of the people, thereby establishing a genuinely popular initiative, such as in Italy and Switzerland, or at least a referendum arising from a minority in Parliament, such as in Denmark.⁸⁹

CONCLUSION

The regime and use of the referendum is very different in France and Ireland. An incomplete constitutional and regulatory framework (with nevertheless an increasing role of the Constitutional Council) contrasts with a rather well-developed and mature tradition in Ireland, guided by judicial intervention⁹⁰. The extreme politicization of the referendum in France, in the hands of the executive power and the President in particular, is different from the situation in Ireland where it is claimed that the government has been ousted from its leadership role concerning the

⁸⁷Another illustration of this move away from a more systematic recourse to the referendum procedure is the successive changes relating to provisions on EU accession contained in Article 88-5; in the first place, Article 88-5 was added after the controversy surrounding the possible entry of Turkey in the EU as an ‘obligatory’ referendum at the initiative of the President, to be later amended in 2008 to provide for a parliamentary escape if both houses approve it at a qualified majority (see above).

⁸⁸By reference to Barrett, ‘Building a Swiss Chalet in an Irish Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence’ (2009) 5 *European Constitutional Law Review* 32.

⁸⁹Hamon, ‘L’Inachèvement du Statut Juridique du Référendum’ in Société de Législation Comparée, *Théories et Pratiques du Référendum* (SLC, 2012), 104.

⁹⁰The law relating to the referendum is contained in Articles 27, 46 and 47 of the Constitution of Ireland but also in a certain number of acts, namely the Electoral Act 1992; the Referendum Act 1994; the Electoral (Amendment) Act 1996; the Electoral Act 1997; the Referendum Act 1998; the Referendum Act 2001; the Electoral (Amendment) Act 2001; the Electoral (Amendment) Act 2004, the Electoral (Amendment) Act 2006; and the Ministers and Secretaries (Amendment) Act 2011. See referendum law in Hogan and Whyte (eds), *JM Kelly: The Irish Constitution* (4th ed, Tottel, 2003), 2101-08.

holding of a referendum.⁹¹ Overall, there has been, in terms of use, a continuous decline of the referendum in France, as opposed to an unusual deployment of direct democracy in the place of representative democracy in Ireland, especially with regard to EU Treaties. Despite these positive points concerning Irish law, the latter is not without its critics and the field of referendums is a matter for improvement in Ireland also.⁹²

The point is that one should remain optimistic and open about this form of direct democracy as pressure to resort to national referendums can be observed in Europe and around the world.⁹³ If the contemporary uses of referendums are well integrated into the decision-making process of representative liberal democracy, modern constitutional laws should still strive to find the right balance of semi-direct democracy. Further constitutional comparative perspectives are certainly needed in the area to open new possibilities and advance better practices. Indeed, this will

⁹¹See, for example, Barrett, 'Building a Swiss Chalet in an Irish Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence' (2009) 5 *European Constitutional Law Review* 32, 55.

⁹²For a very optimistic view of the referendum tradition in Ireland, see Cercle de Européens, 'L'Irlande et le Référendum sur le 'Stability Treaty'', Interview with Paul Kavanagh, Ambassador of Ireland to France (Paris, 23 May 2012): '*Nous avons fait beaucoup de référendums ces dernières années. Les gens sont habitués à ce genre de dialogue. Ils voient bien quels sont les arguments et la rhétorique de chaque camp. Ils ont l'expérience. En plus, la tradition de suffrage direct est tellement forte que les débats sont bien gérés. Les instances gouvernementales sont interdites de faire campagne pour un côté ou l'autre. Elles doivent rester indépendantes et neutres. Cela est très clair depuis une décision de justice datant de plus de vingt ans sur cet aspect dans un autre contexte. C'est notre socle, la tradition. Il y a une offre d'information assez approfondie livrée à chaque foyer dans le pays en anglais et en irlandais. On a la chance dans notre pays d'avoir une commission publique qui se penche sur chaque question posée au peuple. Cette commission des référendums est chargée de préparer l'information de manière objective, claire et lucide*' <<http://www.ceuropeens.org/interview/sem-paul-kavanagh-ambassadeur-d039irlande/lirlande-et-le-referendum-sur-le-stability-treat>> (last accessed 21 June 2012). Conversely, the critique is about the necessity to reflect with other branches of government (legislative and executive) on the appropriateness of referendums on the ratification of EU Treaties rather than passively accepting debatable rulings by the judiciary which have defined the matter. See Barrett, 'Building a Swiss Chalet in an Irish Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence' (2009) 5 *European Constitutional Law Review* 32.

⁹³In the European context, see Shu, 'Referendums and the Political Constitutionalisation of the EU' (2008) 14 (4) *European Law Journal* 423, p 429; in a general context, see Morel, 'Referenda', *International Encyclopedia of Political Science* (Sage Publications, 2011) <<http://sage-reference.com/view/intlpoliticalscience/n509.xml>> (last accessed 6 June 2012).

contribute to the broader reflection on the advancement of the democratic quality of the regime since the ‘correctness of referendum practice is to a large extent a matter of rules and of the democratic quality of the regime in which it occurs’.⁹⁴ These reflections are clearly encouraged in the literature in political sciences⁹⁵ and comparative constitutional law.⁹⁶ For constitutional regimes with popular sovereignty at their core, the referendum is a necessary but perfectible instrument.

⁹⁴Morel, ‘The Rise of ‘Politically Obligatory’ Referendums: The 2005 French Referendum in Comparative Perspective’ (2007) 30 (5) *West European Politics* 1041.

⁹⁵Morel, ‘Referenda’, *International Encyclopedia of Political Science* (Sage Publications, 2011) <<http://sage-ereference.com/view/intlpoliticalscience/n509.xml>> (last accessed 6 June 2012).

⁹⁶Tierney, *Constitutional Referendums : The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012).

Appendix
Chart of Constitutional Revisions and Referendums in France 1958–2012

<i>Year</i>	<i>Constitutional Revision⁹⁸</i>	<i>Referendum⁹⁹</i>	<i>Comments</i>
1958	–	Adoption of the Fifth Republic Constitution enacted on 4 October 1958 (28 September 1958) 82.6 per cent ‘Yes’	

⁹⁸ For a concise thematic analysis of the formal amendments to the French Constitution, see Boyron, ‘France’ in Oliver and Fusaro (eds), *How Constitutions Change : A Comparative Study* (Hart, 2011), 132–37. The author distinguishes the amendments (i) confirming more creative interpretations of the constitutione the 1962 revision on the election of the President by direct universal suffrage, and the 2000 revision on the alignment of the presidential and parliamentary mandates by reduction of the President term of office from seven to five years, both confirming the presidential reading of the constitution; the 1974 revision on the Constitutional Council coupled with the 2008 revision which strengthened further the role of the Constitutional Council, (ii) strengthening parliamentary democracy, ie the 1995 and 2008 revisions, (iii) holding the executive power to account, ie the 1993 revision on the creation of the Court of Justice of the Republic as part of an overhaul of the criminal liability of members of the government, and the 2007 revision on the criminal liability status of the President of the Republic, (iv) allowing the ratification of international treaties, ie revisions required by EU Treaty changes in 1992, 1997, 2007, and other international instruments and (v) amendments reflecting new trends in constitutional thoughts and ideals in the general move towards the development of constitutionalism, whether concerning the demands for territorial autonomy, either within the metropole, ie the 2003 revision on new foundations regarding central-local relations and the recognition of the principle of decentralisation, or in the overseas territories, ie the 1998 and 2007 revisions on New Caledonia in order to facilitate the transition towards independence, or the development of the discourse on the protection of rights and freedoms, ie the 1999 revision on the introduction of a principle of gender equality to elective offices and posts, expanded in 2008 to professional and social positions, and the 2005 revision on the incorporation of Charter for the Environment

⁹⁹ National referendums and not local.

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1960	Constitutional Amendment 60–525 of 4 June 1960 (States of the Community)	–	The Community refers to France’s overseas territories, known collectively as the French Community. The relevant constitutional provisions were repealed in 1995.
1961	–	Self-determination of populations in Algeria (8 January 1961) 74.99 per cent ‘Yes’	Article 11 Vote of confidence
1962		Approval of the Evian Agreements: Independence of Algeria (8 April 1962) 90.81 per cent ‘Yes’	Article 11 Vote of confidence
	Constitutional Amendment 62–1292 of 6 November 1962 (Election of the President of the Republic to direct universal suffrage)	Election of the President of the Republic to direct universal suffrage (28 October 1962) 62.25 per cent ‘Yes’	Article 11 Vote of confidence The constitutional reform purported to revise the status of the President, not only his mode of election
1963	Constitutional Amendment 63–1327 of 30 December (Parliamentary Sessions)	–	
1969	–	Proposal to limit the second chamber to consultative powers and creation of regions (27 April 1969) 52.41 per cent ‘No’	Article 11 Vote of confidence Resignation of de Gaulle 19.87 per cent abstention Rejected

1972	–	On EEC Enlargement to UK, Ireland, Denmark and Norway (23 April 1972) 68.31 per cent ‘Yes’	Article 11 No vote of confidence Norway refused membership 39.76 per cent abstention
1974	Constitutional Amendment 74–904 of 29 October 1974 (Possibility for 60 deputies or 60 senators to refer a law to the Constitutional Council)	–	Article 89 para 3
1976	Constitutional Amendment 76–527 of 18 June 1976 (Provisions on the Acting President of the Republic)	–	Article 89 para 3
1988	–	Self-Determination Agreement of New Caledonia (6 November 1988) 79.99 per cent ‘Yes’	Article 11 63.11 per cent abstention
1992	Constitutional Amendment 92–554 of 25 June 1992 (Authorising the ratification of the Maastricht Treaty and introducing Title XV <i>Des Communautés Européennes Et De L’Union Européenne</i>)	On the Treaty of Maastricht 7 February 1992 (20 September 1992) 51 per cent ‘Yes’	Article 11 30.30 per cent abstention
1993	Constitutional Amendment 93–952 of 27 July 1993 (Court of Justice of the Republic)	–	Article 89 para 3

	Constitutional Amendment 93–1256 of 25 November 1993 (Asylum Law and Schengen Agreements)	–	Article 89 para 3
1995	Constitutional Amendment 95–880 of 4 August 1995 (Parliamentary Matters, Referendum, Community Provisions repealed)	–	Revision of the referendum provisions in Article 11
1996	Constitutional Amendment 96–138 of 22 February 1996 (Law on the Financing of Social Security)	–	Article 89 para 3
1998	Constitutional Amendment 98–610 of 20 July 1998 (New Caledonia)	–	Article 89 para 3
1999	Constitutional Amendment 99–49 of 25 January 1999 (Treaty of Amsterdam 2 October 1997, Amendments to Articles 88–2 and 88–4)	–	Article 89 para 3
	Constitutional Amendment 99–568 of 8 July 1999 (International Criminal Court)	–	Article 89 para 3
	Constitutional Amendment 99–569 of 8 July 1999 (Gender Equality)	–	Article 89 para 3

2000	Constitutional Amendment 2000–964 of 2 October 2000 (Presidential Mandate)	On the reduction of the Presidential Mandate from seven to five years (24 September 2000) 73.21 per cent ‘Yes’	Article 89 para 2 69.81 per cent abstention
2003	Constitutional Amendment 2003–267 of 25 March 2003 (European Arrest Warrant)	–	Article 89 para 3
	Constitutional Amendment 2003–276 of 28 March 2003 (Decentralised Organisation of the Republic)	–	Article 89 para 3
2005	Constitutional Amendment 2005–205 of 1 March 2005 (Charter on the Environment)	–	Article 89 para 3
	Constitutional Amendment 2005–204 of 1 March 2005 (Authorising the ratification of the Treaty establishing a Constitution for Europe)	On the Treaty establishing a Constitution for Europe 18 June 2004 (29 May 2005) 54.67 per cent ‘No’	Article 11 Demise of the Treaty 69.37 per cent participation Rejected
2007	Constitutional Amendment 2007–237 of 23 February 2007 (Electorate of New Caledonia)	–	Article 89 para 3
	Constitutional Amendment 2007–238 of 23 February 2007 (Liability of the President of the Republic)	–	Article 89 para 3

	Constitutional Amendment 2007–239 of 23 February 2007 (Prohibition of Death Penalty)	–	Article 89 para 3
	Constitutional Amendment 2008–103 of 4 February 2008 (Authorising the ratification of the Lisbon Treaty 13 December 2007, amending Title XV <i>De l'Union européenne</i>)	–	Article 89 para 3
2008	Constitutional Amendment 2008–724 of 23 July 2008 (Modernisation of the Institutions of the Fifth Republic)	–	Article 89 para 3