

## **Elements of direct democracy in the recent practice of European countries: some thoughts à propos the Roundtable ‘Constitutional Change and People’**

**A summary by Dr. Maria Pichou, Postdoctoral Researcher at the University of Luxembourg.**

### **Introduction**

How can the general public participate in constitution-making and constitution-amending procedures? Are popular initiatives in constitutional change more desirable or feasible in European countries today? The recent Roundtable ‘Constitutional Change and People’, organised by the University of Luxembourg and the International Association of Constitutional Law (Constitution-Making and Constitutional Change Research Group) on December 12<sup>th</sup> 2014, dealt with these issues.

The discussion was prompted by ongoing developments in some European countries, which reveal a tendency to introduce elements of direct democracy, such as referendums, online petitions and citizens’ initiatives into the field of constitutional change. The introductory address by the President of the European Court of Justice Prof. Dr. Vasileios Skouris, underlined the difficulties that many European constitutions face in integrating the ‘European phenomenon’. The interaction between the European legal order and national constitutions is still a source of legal uncertainty. There is a movement towards strengthening the possibility of people contributing to constitutional changes around the world in general, and in Europe specifically, after the adoption of the Lisbon Treaty. The timeliness of analysing recent examples of people’s participation in constitutional changes in France, Greece, Iceland, Ireland, Luxembourg, Romania and Switzerland, therefore, becomes evident.

### **Constitutional theories and civic engagement**

The recourse to civic engagement in constitutional change presents a counter-tendency to two other trends observed by Dr. Paul Blokker: the tendency to use the constitution for reasons other than constitutional revision (constitutional instrumentalism) and the tendency to substitute the constitution’s function in favour of international human rights instruments, which are outside the scope of the national political arena. Four theories of constitutionalism are distinguished depending on their receptiveness to civic engagement: a) Real constitutionalism, which advances the view that essential constitutional principles should not be dealt with in the political arena, while the involvement of people should be limited to legal practitioners, scholars, judges and politicians; b) Political constitutionalism, which is a confirmation of the representative type of constitutionalism, since it is up to the parliament to drive constitutional changes; c) Popular constitutionalism, according to which civic engagement is the only way to legitimise constitutional changes; and d) Democratic constitutionalism, which encompasses the most radical emphasis on citizens’ participation, since any type of constitutional change should always be designed through the most participative ways of civic engagement. The shift towards

democratic constitutionalism is demonstrated by countries such as Iceland, Ireland, Italy, Scotland, UK, Luxembourg and Romania. However, the distinction of the four theories of constitutionalism based on their openness to civic engagement, is not absolute and often raises questions when used outside the cultural or political context of each state.

### **The function of referendums**

The first group of states (Luxembourg, Greece, France) discussed during the Roundtable concerned referendums as means of expressing people's will in constitutional changes. The second group of case-studies analysed (Ireland, Iceland, Switzerland) referred to constitutional revision procedures with more innovative means of civic engagement.

Prof. Gergrath discussed the 'sudden eagerness' to consult the Luxembourgish people on constitutional change. Although four separate questions will be submitted to a consultative referendum in 2015, the participation of the public during the preparation of the Luxembourg Constitution was limited. The whole drafting procedure was done by the Parliament, the Council of State and other official bodies, after consultation with the Venice Commission, without the participation of the general public.

Dr. Fotiadou discussed Greece, where there have been no referendums since 1974, and George Papandreou's abandoned referendum of October 2011 raised arguments about the death of democracy there. The case of Greece shows that constitutional control has slipped away in an international context, since the EU leaders had underlined that any referendum on the bailout agreement should have been previously discussed with other EU leaders.

Prof. Reestman explained that in France, the constitutional amendments introduced by De Gaulle's referendums changed the political environment by rendering the president the *de facto* leader of the country. However, the function of referendums in France has changed over the years. In the 1960's, the referendum was an instrument to get people involved on important issues, especially on conflicts between the president and the parliament. The referendum was also a way for the president to render account to the people. Currently, the term of the President is reduced from seven to five years and the need to hold referendums may have become superfluous, as there is more stability in constitutional terms. Furthermore, the limited participation of people in referendums in France questions the idea that referendums constitute the ultimate expression of people's will in that country.

On the other hand, in Switzerland referendums is the only way to hold the country together according to Prof. Fleiner. In Ireland, the Irish Constitutional Convention was designed to bring Irish people into the heart of constitutional change. As a process, it was deemed successful by Prof. Farrell, while the outcome is to be judged by the government's response and the participation of people in the upcoming referendums. Ireland's Constitutional Convention attempted to go beyond the political parties, with 'ordinary' citizens, selected randomly, experts as advisors/witnesses and politicians as 'fellow members'. The reform agenda in Ireland was

more restricted than the one of Iceland's constitutional revision of 2010 – 2013. In Iceland, political parties were excluded from the preparation and the drafting of constitutional amendments. Although, there was an extremely open and transparent procedure, the outcome was not successful as eventually the bill was blocked in Parliament and no other constitutional changes were made. The broad agenda of issues to be considered for constitutional change and the freedom of choice granted to people, combined with time constraints, contributed to the unsuccessful result. According to Prof. Thorarensen, Iceland's experience shows that neither a wave of popular support, nor advisory referendums or any other process, no matter how strong or democratic may seem, can bypass the parliament or the established democratic institutions.

Finally, it became clear these conventions are easier to run when their agenda refers to human rights provisions rather than institutional issues, as human value related questions are the most popular to be dealt with by the general public.

### **Does the economic crisis or the size of states play any role in the forms of peoples' involvement with constitutional change?**

Admittedly, economic and political crisis has been an important trigger in some of these national attempts to introduce direct participation of people in the field of constitutional change. However, Luxembourg's example proves that the growing need to find means to reflect better the will of people in the decision-making process is not always connected with the financial or political crises. The Roundtable concluded that the size of the country does not carry any value for initiating a process of constitutional change or adopting one specific model of people's participation. The issue at hand refers only to the method that a country decides to design constitutional changes.

### **Defining 'people'**

The question of defining the 'people' who participate either in referendums or in constitutional conventions like those in Iceland or Ireland, is central to the discussion. First, there is a generalist view of 'people', encompassing all individuals who are equal before the law. According to a second view, 'people' as a notion, refers to all person who are rights' bearers and may even be a broader term, encompassing different groups or vested interests. The issue of whether foreign citizens who reside in a country and are tax payers should participate in decision making processes is also raised. In this regard, Prof. Gergrath used the example of Luxembourg where the question on Luxembourg's constitution amendment is only limited to whether foreign residents should have a say.

Additionally, the concept of ‘ordinary’ citizens whose participation is sought in constitution making and amending is equally interesting. In Ireland, the selection of ‘ordinary’ citizens to participate in Ireland’s Constitutional Convention was random and the citizens did not feel that they had a mandate. The citizen-participants gave positive feedback while the politician-participants had a stake in the result as well. In Iceland, the consultation forum consisted of 950 randomly selected citizens from the national registry, who came largely from the capital and there were no politicians or experts.

### **Concluding remarks**

What the Roundtable discussion revealed was that although, there is a growing need to find means to reflect better the will of the people in decision-making processes, the question remains which is the best way for the people to express their will: through referendums, national parliaments, or constitutional revision processes such as the ones in Ireland and Iceland. The innovative examples of Ireland and Iceland with their alternative mechanisms for getting the public involved with constitution-making processes should be regarded as an additional element to traditional representative institutions and democracy, rather than a replacement for parliamentary procedures. The analysis of the examples in each state shows that the function of referendums is unique to each country’s specific context. Approving a constitution in a binding referendum may be the only means to exercise constituent power by people today. Nonetheless, even the most liberal constitutions do not provide opportunities for popular participation in initiating radical changes on the political system.