

Plebiscite: An Old but Still Fashionable Instrument

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I. Introduction

If the plebiscite were an animal, it would certainly be considered by most scientists as an endangered species. Indeed, not only do very few legal texts expressly mention the term “plebiscite,” but legal scholarship equally devotes little attention to this form of popular consultation. Thus, the sporadic cases in which the consultation in question is expressly defined as such would represent the exceptions that confirm the rule. Most scientists would also agree that one of the main reasons the plebiscite is now a “threatened species” is that it has lost much of its “habitat.” In fact, this type of popular consultation has garnered quite a bad reputation, as it is considered an instrument typical of illiberal regimes through which people merely ratify a decision that has already been made “from above.” The numerous transitions to democracy that have taken place after World War II have considerably reduced the “habitat” of the plebiscite, which has been in turn replaced by other popular consultations – notably the referendum – more suitable to a democratic “environment.”

In this paper I challenge these assumptions and argue that the plebiscite is *de facto* still a very “fashionable” instrument, one often used not only in autocratic regimes, but also in democratic countries. In order to make this case, it is crucial to draw a distinction between the plebiscite and other forms of popular consultation, particularly the referendum. In analyzing legal texts this distinction is anything but clear, and even within the literature the picture is very confused. In order to overcome this extremely high degree of uncertainty, I will rely on comparative constitutional history. I will identify the purposes of “old” plebiscites (i.e., the plebiscites held during the eighteenth and nineteenth centuries) and I will then use these objectives to differentiate “modern” plebiscites (i.e., plebiscites that took place in the twentieth and twenty-first centuries) from other popular consultations. The reason I will rely on “old” plebiscites is that these seem to provide the only certain point of reference, the only anchor when trying to qualify a plebiscite, as witnessed by the fact that very few scholars would disagree that these consultations should be considered as such. By applying this historical approach, I will show that in the twentieth and twenty-first centuries, one can find a number of popular consultations that – irrespective of their formal denominations (most of these consultations are indeed generally referred to as “referendums”) – fall within the categorization of a plebiscite.

II. An Obscure Instrument

Very few legal instruments are more obscure and ambiguous than the plebiscite. Only its origins appear quite clear. Indeed, the Roman “*plebiscitum*” referred to the decisions made by the “*plebs*” gathered in the “*concilium plebis*” (plebeian council). While initially the “*plebiscitum*” only bound the “*plebs*” itself, following the enactment of *Lex Hortensia* in 286 B.C., the resolutions passed by the plebeians became binding on the whole population and gained legislative force.¹ The most famous definitions of “*plebiscitum*” have been

¹ CHARLES BORGEAUD, HISTOIRE DU PLEBISCITE: LE PLÉBISCITE DANS L’ANTIQUITÉ 137 ff. (1887).

provided by Gaius (“A *plebiscitum* is what the *plebs* directs and establishes”)² and Justinian (“A *plebiscitum* is that which was enacted by the *plebs* on its being proposed by a plebeian magistrate, as a tribune”).³

The modern notion of plebiscite derives from the French revolutionary period. Even if the popular consultations that took place in those years were often defined as “*appels au peuple*,” in actuality these remained for a long time in the limbo of the “*pratiques sans nom*”⁴ and began to be defined as “plebiscites” on a regular basis only in mid-nineteenth century.⁵ During the twentieth century, the term “plebiscite” was often used in the context of international law. Indeed, as will be shown below,⁶ the League of Nations and the United Nations frequently used this term while referring to popular consultations on territorial status. Nowadays, however, at both domestic and international levels, the word “plebiscite” has almost entirely been replaced by the term “referendum.”

In analyzing the (very few) constitutions and statute laws that still expressly mention the term “plebiscite,” an extremely confusing and contradictory picture emerges. For example, according to the constitutions of Brazil⁷ and Costa Rica,⁸ a plebiscite is required for territorial modifications, such as the creation, merge or split of sub-state entities (e.g., member states, provinces, counties...). The constitution of Iceland,⁹ on the contrary, uses the term “plebiscite” when referring to the “recall” of the president of the republic.

The distinction between plebiscite and referendum is likewise extremely uncertain. According to the Constitution of Honduras, referendums can be held to ratify or reject ordinary laws or constitutional norms, while plebiscites refer to “constitutional, legislative or administrative issues, on which the Constituted Powers have not made a previous decision.”¹⁰ In Australia, on the other hand, the Constitution does not distinguish between referendum and plebiscite, but the popular consultations aimed at amending the Constitution are conventionally called referendums, while issues put to a vote that does not affect the Constitution are known as plebiscites.¹¹ In Colombia, Law no. 134 of 1994 draws another distinction: it states that through referendums, people are asked to either

² “*Plebiscitum est, quod plebs iubet atque constituit*” (see JOHN THOMAS ABDY & BRYAN WALKER, *THE COMMENTARIES OF GAIUS AND RULES OF ULPIAN* 2 (2005)).

³ “*Plebiscitum est, quod plebs, plebeio magistratu interrogante, veluti tribuno, constituebat*” (see THOMAS COLLETT SANDARS, *THE INSTITUTES OF JUSTINIAN* 9 (2007)).

⁴ JEAN-MARIE DENQUIN, *RÉFÉRENDUM ET PLEBISCITE: ESSAI DE THÉORIE GÉNÉRALE* 1 (1976).

⁵ Cristina Cassina, “*Una pratica senza nome*”: quasi una storia del plebiscito, in *PAROLE VECCHIE, PAROLE NUOVE: OTTOCENTO FRANCESE E MODERNITÀ POLITICA* 116 ff. (2007).

⁶ See section IV.A.1.

⁷ Article 18 (3) and (4).

⁸ Article 168.

⁹ Article 11 (3).

¹⁰ Article 5.

¹¹ See *PARLIAMENTARY HANDBOOK OF THE COMMONWEALTH OF AUSTRALIA* 2011, 373 ff. (2011); Australian Electoral Commission (<http://www.aec.gov.au/elections/referendums/types.htm>).

approve or reject a bill, or to repeal (or not) a law that is already in force;¹² through plebiscites (which are to be called by the president of the republic), people are asked to approve or reject a decision made by the executive branch.¹³

Extreme uncertainty also reigns within the literature. According to Massimo Luciani, the most relevant criteria that has been used by scholars to differentiate the two forms of popular consultation are as follows: 1) the object of the referendum is a normative act, while the plebiscite refers to issues that are political in nature; 2) the object of the referendum is a statute law or an administrative act, while the object of the plebiscite is a normative *fact*; 3) unlike the referendum (which refers to “ordinary” issues), the plebiscite refers to “exceptional” events, and for this reason the latter is usually not provided for by legal texts; 4) unlike the plebiscite, in the referendum the initiative comes from the people; 5) the object of the plebiscite refers to a proposal of constitutional amendment, while in the referendum people are asked to vote on statute laws; 6) in a plebiscite, people, regardless of the object of consultation, are *de facto* asked to legitimize a person, a political party, or a constitutional body.¹⁴

Markku Suksi has suggested the term “policy vote” instead of plebiscite. Unlike a referendum, a policy vote would be “a very flexible device for consulting the opinions of the people” and it could be “adjusted to the political situation of a country, virtually without restraints from the Constitution.”¹⁵

Jean-Marie Denquin, on the contrary, has stressed that it is almost impossible to identify an “objective” criterion to differentiate these two forms of popular consultation.¹⁶ Other scholars have championed an extreme view, according to which, in light of the inability to draw a clear-cut distinction between the two, the only solution would be to abandon the term “plebiscite” and to include under the definition of “referendum” all popular consultations in which people are asked to vote “yes” or “no.”¹⁷

III. Looking at the Past: The “Old” Plebiscites of the Eighteenth and Nineteenth Centuries

In order to unravel the “plebiscitary knot” mentioned above, it seems necessary to step back and look at the plebiscites held in the eighteenth and nineteenth centuries, which undoubtedly represent the plebiscites *par excellence*. Relying on popular consultations from this time frame is essential, as they seem to be the only clear point of reference when

¹² Article 3.

¹³ Article 7.

¹⁴ See Massimo Luciani, *La formazione delle leggi: Il referendum abrogativo*, in COMMENTARIO ALLA COSTITUZIONE 133 ff. (Giuseppe Branca ed., 1981). The author supports the sixth criterion.

¹⁵ MARKKU SUKSI, BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM 11 (1993).

¹⁶ DENQUIN, *supra* note 4, at 13 ff.

¹⁷ Alexander H. Trechsel & Frédéric Esposito, *Why Plebiscite? A Critique of a Nebulous Concept*, in DIRECT DEMOCRACY: THE EASTERN AND CENTRAL EUROPEAN EXPERIENCES 271 ff. (Andreas Auer & Michael Bützer eds., 2001); DAVID BUTLER & AUSTIN RANNEY (EDS.), REFERENDUMS AROUND THE WORLD. THE GROWING USE OF DIRECT DEMOCRACY 1 (1994).

trying to qualify a plebiscite. This is demonstrated, *inter alia*, by the fact that almost all the literature agrees that these consultations should be considered as such.¹⁸

As the following paragraphs show, the various forms of plebiscite that took place during the eighteenth and nineteenth centuries may be classified, according to the purposes for which the appeal to the people was employed, into three categories: 1) territorial plebiscites; 2) plebiscites on the form of government; and 3) “personalistic” plebiscites.

A. Territorial Plebiscites

Plebiscites on territorial status took place for the first time during the French Revolution and were aimed at “ratifying” territorial annexations. Indeed, in the eyes of the revolutionaries, the plebiscite was a device to justify the right to conquer, and it represented a clear manifestation of the principle of popular sovereignty. The first consultation was organized in 1791 in the papal enclaves of Avignon and the neighboring Comtat Venaissin. This vote was subsequently followed by plebiscites in Savoy (1792) and Nice (1793), which at that time were part of the Kingdom of Sardinia. The last two plebiscites of this period took place in the Rhine Valley and Belgium (1793) and, like the previous ones, gave a favorable verdict to France. It should be noted, however, that the conditions and modalities by which these consultations were organized varied considerably. In fact, while the results of the plebiscites in Avignon, Comtat Venaissin, Savoy and Nice seemed to represent the real wishes of the people, in the case of the consultations organized in the Rhine Valley and Belgium, where a favorable vote was not a foregone conclusion, force and coercion were crucial in determining the outcome of the process.¹⁹

Almost sixty years later, territorial plebiscites represented an essential part of the birth of the Kingdom of Italy. In 1848, adult male citizens of Piacenza, Modena, Parma, Lombardy and Venetia expressed their desire for a union with the Kingdom of Sardinia – all, save the city of Venice, by plebiscite.²⁰ The following year, however, the defeat of the Piedmontese forces at Custoza and Novara by Austria restored the status quo: thus, the Kingdom of Upper Italy, created by plebiscite, “had lasted just a fortnight.”²¹

Despite this unlucky experience, the idea of consulting the people on their political future had rooted, and the prime minister of the Kingdom of Sardinia, Cavour, cited this process to neighboring countries as proof of the existence of an Italian national conscience.²² Indeed, the question of uniting with the constitutional monarchy of Victor Emmanuel was the object of popular consultations held in 1860 in Tuscany, Emilia, Sicily, Naples, Umbria, and the Marches. Significantly, on March 17, 1861, the Italian Parliament gave Victor Emmanuel the title of king of Italy “by the Grace of God *and the will of the Nation*.”²³

¹⁸ Among very few exceptions, *see* the Authors mentioned in note 17.

¹⁹ HAROLD S. JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* 74 (1967).

²⁰ In Venice the decision on the union with the Kingdom of Sardinia was made by the Assembly of Deputies.

²¹ *PLEBISCITE AND REFERENDUM* 71 (1920).

²² Vincenzo Arangio-Ruiz and Teodosio Marchi, *Plebiscito*, in *ENCICLOPEDIA ITALIANA* (Treccani, 1935), [http://www.treccani.it/enciclopedia/plebiscito_\(Enciclopedia-Italiana\)/](http://www.treccani.it/enciclopedia/plebiscito_(Enciclopedia-Italiana)/).

²³ Emphasis added.

One of the first duties of the Italian Parliament was to approve the Treaty of Turin (of March 24, 1860) for the cession of Savoy and Nice to France. This cession, however, was not unconditional; on Cavour's insistence, the treaty provided that the annexation should be effected without any constraint on the will of the populations. This led to plebiscites in Savoy and Nice, and in both territories the people voted for annexation to France.

The Italian territorial plebiscites (which were not always expressions of free and fair votes) ended with votes by manhood suffrage in Venetia (1866) and Rome (1870). The populations, in demonstrating their wish to become part of the recently established Kingdom of Italy, confirmed that the history of the kingdom's birth is a *history of plebiscites*. The consultations on territorial status that took place during the French Revolution and the Italian *Risorgimento* represented a historical step; for the first time, people began to take part in processes from which they had been previously excluded – thus changing their role *from observers to actors*. Sarah Wambaugh has rightly pointed out that before 1789, “sovereignty looked to the land, not to the inhabitants. Change of sovereignty through inheritance or marriage of the reigning prince, through barter or through conquest was the recognised and legitimate order. Title so acquired was admittedly valid without appeal to the will of the inhabitants.”²⁴ The French and the Italian plebiscites marked a radical change in the principles governing international law and international relations. Indeed, for the first time, the idea – which had already been formulated by Grotius and Pufendorf in the seventeenth century²⁵ – that questions of national sovereignty could not be settled without the consultation of the inhabitants was put into practice. In other words, the days in which the ministers could “cut and pare states and kingdoms as if they were Dutch cheeses”²⁶ were over.

The plebiscites on national sovereignty were not a French and an Italian “prerogative.” Indeed, these popular consultations led to the creation of Romania through the union of Moldavia and Wallachia (1857), and were then used in the case of Denmark's cession of the islands of St. Thomas and St. John, West Indies, to the United States (1868),²⁷ and when Sweden ceded the island of St. Bartholomew, West Indies, to France (1877). Furthermore, the plebiscite found a theoretical basis in the 1866 Treaty of Prague,²⁸ and in the 1883 Treaty of Ancón.²⁹

²⁴ SARAH WAMBAUGH, *A MONOGRAPH ON PLEBISCITES: WITH A COLLECTION OF OFFICIAL DOCUMENTS 2* (1920).

²⁵ Grotius, writing in 1625, said, “In the alienation of a part of the sovereignty, it is also required that the part which is alienated consent to the act”; Pufendorf, writing in 1672, affirmed, “But in alienation of a part of the kingdom, besides the king's consent, there is required not only the consent of the people which continues under the old king, but the consent of that part too, especially, whose alienation is at stake” (quoted in WAMBAUGH, *supra* note 24, at 4).

²⁶ See JOHNSON, *supra* note 19, at 60.

²⁷ However, the US Senate did not ratify the treaty. The islands of St. Thomas and St. John, and also the island of St. Croix, were finally ceded to the United States following the ratification of a treaty signed in 1917. Before its ratification, a plebiscite was held in Denmark on the subject of the cession, but no official vote was held in the islands.

²⁸ According to Article 5 of the treaty, Austria ceded to Prussia all rights acquired over the duchies of Holstein and Schleswig, with the condition that the people of the northern territories of Schleswig should be ceded to Denmark if, by a free vote, they should express a wish to be so united. However, since Prussia refused to call the plebiscite, in 1878 Austria formally released Prussia from the obligations of Article 5.

²⁹ In 1883, when the war between Peru and Chile ended, these two states agreed in the Treaty of Ancón that the populations of the provinces of Tacna and Arica, which were under the jurisdiction of Chile, would have had to decide by means of plebiscite at the end of a 10-year period which of the two states they wished to join. However, this consultation never took place; the controversy only came to an end in 1929, when the Treaty of Lima assigned Tacna to Peru and Arica to Chile.

During the nineteenth century, however, “popular consultation was not the rule: plebiscites were only rare exceptions to the general rule of arbitrary, forceful conquest or international political compromises, followed by annexation.”³⁰ The United States, for example, did not organize any plebiscite for the Louisiana Purchase (1803), the acquisition of Florida (1819) and Alaska (1867), the annexation of Texas (1845), New Mexico, California (1848), the Hawaiian Islands, Puerto Rico, and the Philippines (1898).

B. Plebiscites on the Form of Government

The second category includes the plebiscites on the form of government. This category derives from the plebiscites on territorial status held in Italy during the *Risorgimento*, and from the plebiscites aimed at ratifying the 1793 and 1795 French constitutions.

With respect to the plebiscites held during the *Risorgimento*, it should be highlighted that by voting in favor of the union with the Kingdom of Italy, the people of the various regions not only made a decision on territorial status but also expressed their consent for a monarchical regime, thus showing that these consultations were *de facto* also plebiscites on the form of government.³¹ Indeed, the plebiscite questions purposively not only referred to the *union* with Italy, but also specified the future *form of government* of the country – that is, a monarchy, with Victor Emmanuel as king. In the plebiscites held in 1860 in Tuscany and Emilia, for example, the people were asked to choose between the “Union with the *Constitutional Monarchy of King Victor Emmanuel*”³² or “Separate Kingdom”; similarly, in the same year, citizens of Sicily and Naples were asked to accept or reject the following statement: “The people wish Italy, united and indivisible, with *Victor Emmanuel as Constitutional King, and his legitimate descendants*.”³³

Even the plebiscites that ratified the 1793 and 1795 French constitutions became *in practice* also plebiscites on the new form of government.³⁴ The 1793 Constitution (“Jacobin Constitution”), which never actually came into operation, provided for the first time a republican regime, and the 1795 Constitution (“Thermidorian Constitution”) confirmed this form of government. Both constitutions were submitted for the acceptance of the people through primary assemblies. This system resulted in very different methods of voting. Indeed, the constitutions were read aloud before their acceptance was put to a vote (which was open and not secret), either by general acclamation, by roll call, by a signature in a registry, or by other systems. Given that the open voting took place under the eyes of central authority delegates, one can hardly define these votes as free. The results gave a large majority in favor of the acceptance of these constitutions: around 1,800,000 for the 1793 Constitution and around 1,100,000 for the 1795 Constitution. Only a few thousand people rejected them.

Even if the decision to abolish the monarchy and to establish the republic had been made “from above” without consulting the people, the 1793 and 1795 consultations (as

³⁰ YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 79 (1994).

³¹ CARLO GHISALBERTI, STORIA COSTITUZIONALE D’ITALIA: 1848-1994, 407 (2002).

³² Emphasis added.

³³ Emphasis added.

³⁴ The National Convention (as created in 1792) made clear since the very beginning that the people had to ratify the new constitution. Indeed, its first decree stated, “There can be no Constitution but that which is accepted by the people”.

mentioned above) also became, *de facto*, plebiscites *on the republic*.³⁵ Indeed, by voting in favor of these constitutions, the French expressed their support for the new “*régime politique*.”

C. “Personalistic” Plebiscites

In the third category of plebiscites we find the consultations in which the French people were asked to express their trust in one man – Napoleon, and (afterwards) Louis-Napoleon. Indeed, despite the fact that sometimes the object of these “*appels au peuple*” did not directly refer to a single person, in practice the aim of these consultations was to legitimize, from a formal and substantial point of view, the power of the country’s leader and to obtain popular approval for political actions that had already been taken.

The 1799 plebiscite represents the first example of “Bonapartist” plebiscites. French people were called to accept or reject a new constitution (i.e., the Constitution of 1799 [Year VIII]), which was drafted after the *coup d’état* of November 9, 1799 (18 *Brumaire*). Executive power was granted to three consuls, but the first consul – which, according to Article 39 of the Constitution, was Napoleon – clearly prevailed over the others. Indeed, there is a well-known saying concerning this Constitution: “*Qu’y a-t-il dans la Constitution? Il y a Bonaparte.*” Thus, voting “*oui*” to the Constitution meant making Napoleon the “master of France.”³⁶

The personalistic character of these plebiscites became even more evident in the 1802 and 1804 consultations. In 1802, when the Senate refused to make him consul for life, Napoleon decided to consult the people on the subject of his position. The question put before the people – “*Napoléon Bonaparte sera-t-il consul à vie?*” – clearly represents the quintessential plebiscite on a single man, as evidenced by the fact that for the first time the public question contained the *name* of a person.³⁷ Napoleon took a further step two years later. Indeed, after the “*Sénatus-consulte*” of May 18, 1804, proclaiming him emperor of the French was approved, even the principle of a hereditary empire was submitted to a plebiscite.

These three consultations represented a paramount success for Bonaparte. Indeed, the “*oui*” were more than three million in the 1799 consultation, and around 3,500,000 in the 1802 and 1804 plebiscites. These results, however, must be read with the following caveat: in each consultation, significant efforts were made to ensure a favorable popular vote so that there was never any doubt over the plebiscite results. The votes were taken per capita, publicly and in writing, by signing registers of acceptance and non-acceptance. Nevertheless, one can hardly deny that a significant majority of French people sincerely supported Bonaparte and his political action.

The conditions under which the 1815 plebiscite – the last plebiscite organized by Napoleon – took place made this consultation radically different from the previous ones. The plebiscite was on the “constitution” – more correctly, the “Additional Act to the Constitutions of the Empire” – drafted by Benjamin Constant at the request of Napoleon when he returned from exile on Elba. Since Bonaparte’s doom seemed sealed, this plebiscite was

³⁵ See FRANÇOIS-ALPHONSE AULARD, *HISTOIRE POLITIQUE DE LA RÉVOLUTION FRANÇAISE: ORIGINES ET DÉVELOPPEMENT DE LA DÉMOCRATIE ET DE LA RÉPUBLIQUE (1789-1804)* 576 (1901).

³⁶ PLEBISCITE AND REFERENDUM, *supra* note 21, at 38-39.

³⁷ Cristina Cassina, *L’istituto plebiscitario in Francia: Appunti per un profilo storico (1792-1805)*, in *VOX POPULI? PRATICHE PLEBISCITARIE IN FRANCIA, ITALIA, GERMANIA (SECOLI XVIII-XX)* 69-70 (Enzo Fimiani ed., 2010).

nothing more than “a weak and late attempt to regain popularity.”³⁸ Not surprisingly, only around 1,300,000 people accepted the new constitution, while the vast majority (almost 6 million) decided to abstain.

Louis-Napoleon understood well the relevance of this political device and was quick to follow in his uncle’s footsteps. By 1852, he had served as president of the republic for four years, and the 1848 Constitution prevented him from running for another term in office. Since he did not manage to obtain the two-thirds majority in the National Assembly required to amend the Constitution, he decided to retain power by other means, and on December 2, 1851, he organized a *coup d’état*. Interestingly, in the plebiscite that he called in the same year, Louis-Napoleon not only asked the people to confirm his authority (in order to legitimize the *coup*), but also asked the French to delegate him the powers necessary to draft a new constitution. Thus, the plebiscite represented the means through which Louis-Napoleon managed to concentrate in his hands both the executive and the constituent power.

In the wake of the success achieved in this consultation (almost 7,500,000 “*oui*”), the following year Louis-Napoleon called for another plebiscite to ratify the re-establishment of the Empire. The results gave the emperor an even greater majority, as the “*oui*” came close to 7,800,000. Finally, the third (and last) plebiscite organized by Louis-Napoleon took place in 1870. The consultation, in which the people were asked whether they approved the liberal reforms made to the Constitution, was once again a triumph for Napoleon III; it resulted in an overwhelming majority in favor of accepting the constitutional reforms (around 7,300,000). The Second Empire, however, came to an end just a few months later, during the war with Prussia.

Although their aim was extremely similar, the plebiscites held under Louis-Napoleon differed significantly from the ones held under Napoleon: indeed, under Louis-Napoleon, voting lasted only one or two days (instead of weeks), and the vote was (at least formally) individual and secret (not public).³⁹ Obviously, like the consultations organized by Napoleon at the beginning of the nineteenth century, the plebiscites held under Louis-Napoleon were far from being free and fair – the pressures from central authorities on the people were a matter of fact. If nowadays the term “plebiscite” has often a negative connotation, it is largely because of these consultations.

IV. The “Modern” Plebiscites of the Twentieth and Twenty-first Centuries

In the previous section I classified the plebiscites held in the eighteenth and nineteenth centuries according to the *purposes* for which the appeal to the people was employed, and I identified three categories: 1) territorial plebiscites; 2) plebiscites on the form of government; and 3) “personalistic” plebiscites. As these consultations represent (as mentioned above) a crucial point of reference when trying to qualify a plebiscite, it seems that their purposes can be used as solid criteria to differentiate “modern” plebiscites from other popular consultations, notably the referendum. Thus, by applying this “comparative constitutional history” approach, I will show that in the twentieth and twenty-first centuries, one can find a number of popular consultations (on territorial status, on the form of government, on the trust [or distrust] of a country’s leader, as well as on other “exceptional” and “political” issues) that – irrespective of their formal denominations (most of these consultations are indeed generally referred to as “referendums”) – fall within the notion of plebiscite.

³⁸ *Id.* at 71.

³⁹ *Id.* at 71-72.

A. Territorial Plebiscites

The territorial plebiscites that took place during the eighteenth and nineteenth centuries put into practice for the first time the principle of settling questions of national sovereignty through consultation of the inhabitants, thus marking the beginning of the right of the people to choose the political status of their territory.

Many consultations of a similar nature have been held during the twentieth and twenty-first centuries. Indeed, plebiscites on the dissolution of a Union, on the (re)unification of separate countries, on annexation, on secession... – all have referred to popular votes aimed at resolving sovereignty issues over territories and boundaries. They undoubtedly represent one of the most evident expressions of the fact that the Medieval, “patrimonialistic” conception of governmental bodies disposing as they please of their own territories has been replaced by the principle of self-determination.⁴⁰

The first example of a twentieth-century territorial plebiscite is the one that took place on August 13, 1905, in Norway to decide on its separation from Sweden. Not surprisingly, the vote was overwhelmingly in favor of the dissolution of the Union, which had been established in 1815.⁴¹

Puerto Rico is another interesting case, since four territorial plebiscites were held to try to resolve the longstanding issue of the more than 100-year affiliation with the United States: in 1967, 1993, 1998, and 2012. In the last consultation, citizens were asked to answer two questions: first, whether they wished to maintain Puerto Rico’s current political status; and second, whether they preferred US statehood, independence, or to be a “sovereign free associated state.” 54% of voters expressed their intention to change the political status of the island, and 61.2% expressed a desire to become the 51st state of the United States. Following this plebiscite, the Parliament of Puerto Rico adopted a resolution to request the president and the US Congress “to begin the process to admit Puerto Rico to the Union as a State.”⁴²

The territorial “referendum” that took place in Crimea on March 16, 2014, must also be mentioned, as it resembles the plebiscites on territorial annexation that were held in France at the end of the eighteenth century.⁴³ Crimeans were asked whether they wanted to join Russia “as a subject of the Russian Federation”, or whether they wanted to restore “the 1992 constitution of the Republic of Crimea and Crimea’s status as a part of Ukraine”. Of those who voted, 95% pronounced themselves in favor of joining Russia. Despite the fact that the Ukrainian Constitutional Court declared this consultation unconstitutional⁴⁴ and that even the Venice Commission considered the latter incompatible with the

⁴⁰ See Achille Chiappetti, *Plebiscito*, in ENCICLOPEDIA DEL DIRITTO 946-947 (vol. XXXIII, 1983). See also section IV.A.1.

⁴¹ WAMBAUGH, *supra* note 24, at 165 ff.

⁴² THE SENATE AND THE HOUSE OF REPRESENTATIVES OF PUERTO RICO, *Concurrent Resolution* (December 11, 2012), <http://www.puertoricoreport.com/wp-content/uploads/2012/12/2012-concurrent-resolution.pdf>.

⁴³ See Anne Peters, *Grenzwertig*, FRANKFURTER ALLGEMEINE ZEITUNG, May 15, 2014, at 7.

⁴⁴ Judgment of March 14, 2014.

Ukrainian Constitution and international standards,⁴⁵ the March 2014 plebiscite played a key role in Russia's annexation of Crimea.⁴⁶

Notwithstanding their formal denominations, even the so-called "independence referendums" must be included under the category of territorial plebiscites. This is the case for the popular consultations in former Soviet republics following the dissolution of the Soviet Union (in the early 1990s), in former Yugoslav republics following the breakup of Yugoslavia (also in the early 1990s), in Eritrea (1993), in Quebec (1980 and 1995), in East Timor (1999), in Montenegro (2006), in South Sudan (2011), in Scotland and in Catalonia (2014),⁴⁷ just to name some of the most recent consultations of this type. These plebiscites seem to represent the most "extreme" form of plebiscites on territorial status, as their outcome may determine the birth of a new state.

Direct popular participation in sovereignty issues through plebiscites has become more frequent, but there are some important exceptions. In Czechoslovakia, for example, the decision to dissolve the Federation was made without resorting to popular consultation, despite the fact that Constitutional Law no. 327/1991 provided for a "referendum" in case either the Czech Republic or the Slovak Republic wanted to secede from Czechoslovakia. The reasons this procedure was not followed are mainly political in nature. Indeed, not only did the political parties not want to classify the dissolution of the Federation as a secession of the Slovak Republic, but it was also well known that the majority of the population was against the dissolution and would have preferred this decision to be made through a popular consultation and not "from above."⁴⁸

1. Territorial Plebiscites in International Law and in International Practice

The principle of self-determination, at the basis of the plebiscites of the eighteenth and nineteenth centuries, officially entered the international scene during World War I and the Bolshevik Revolution. According to Lenin, self-determination was an instrument for the liberation of oppressed peoples, who were supposed to contribute to the success of the socialist revolution. However, Lenin supported this principle only strategically, insofar as it promoted class struggle.⁴⁹ On the contrary, according to US President Wilson, self-determination was strictly linked to popular sovereignty. As he remarked on May 27, 1916, "every people has a right to choose the sovereignty under which they shall live." Later, in a speech to Congress on February 11, 1918, he proclaimed: "National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-

⁴⁵ Venice Commission, Opinion no. 762/2014 of March 21, 2014 (Doc. CDLAD(2014)002).

⁴⁶ See 16(3) GERMAN LAW JOURNAL (2015), devoted to the crisis in Crimea; Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, in HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG. VÖLKERRECHT - EUROPARECHT - MENSCHENRECHTE. LIBER AMICORUM FÜR TORSTEN STEIN 278 ff. (Christian Calliess ed., 2015); Elena Ferioli, *Il labile confine fra secessione eterodiretta e annessione: il caso della Crimea*, 3 PERCORSI COSTITUZIONALI 685, 685 ff.; Giovanni Boggero, *Prime riflessioni sul diritto all'autodeterminazione della Crimea e di Sebastopoli nella crisi costituzionale dell'Ucraina*, 2 IL PIEMONTE DELLE AUTONOMIE 1, 1 ff. (2014).

⁴⁷ Officially, this non-binding consultation was defined as a "process of citizens' participation on the political future of Catalonia."

⁴⁸ See JUAN J. LINZ & ALFRED C. STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 328 ff. (1996).

⁴⁹ See Susanna Mancini, *Secession and Self-determination*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 488 (Michel Rosenfeld & Andras Sajó eds., 2012).

determination' is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril [...]."

However, the peace treaties after World War I "were far from applying these lofty principles."⁵⁰ Indeed, of all the territorial settlements that formed part of the Paris Peace Conference, "only a few found their place in the treaties on the basis of self-determination with a plebiscite as the means":⁵¹ five plebiscites were provided by the Versailles Treaty (Schleswig, Allenstein, Marienwerder, Upper Silesia, and Saar territory), and the sixth plebiscite was provided by the Saint Germain Treaty (Klagenfurt). Moreover, the Sopron plebiscite was decided by the Venice Protocol of October 13, 1921. All these consultations were held between 1920–21 (except for the Saar plebiscite, which was carried out in 1935) and were monitored by international or interallied commissions.⁵²

The case of the Saar is of particular interest.⁵³ The Versailles Treaty stated that the Saar should be placed under the administration of a commission responsible to the League of Nations and that a plebiscite was to be held at the end of a 15-year period to determine the ultimate sovereignty of the territory. In the consultation, held on January 13, 1935, 90% of the voters desired reunion with Germany, 8.8% favored the maintenance of the *status quo* (i.e., to keep an international commission responsible to the League of Nations), and only 0.4% supported the incorporation of the Saar with France. It should be noted that "while the plebiscite itself was an operational success for the League of Nations, its expected outcome had no pacifying effect on Hitler's plans for conquest and war."⁵⁴ Significantly, three years later, in 1938, the plebiscite on the annexation of Austria ("*Anschluss*") took place.

Following World War II, the principle of self-determination was explicitly mentioned in several of the United Nations' fundamental documents, including, *inter alia*, the UN Charter,⁵⁵ the International Covenant on Economic, Social and Cultural Rights,⁵⁶ and the International Covenant on Civil and Political Rights.⁵⁷ The UN also supported the adoption of the plebiscite as a regular international instrument for self-determination. For example, General Assembly Resolution 637 (VII), adopted on December 16, 1952, stated that the right of self-determination must be granted to the people of "Non-Self-Governing and Trust Territories" on their demand for self-government, the wishes of the people "being ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations."

The UN supervised or observed numerous plebiscites (sometimes called "referendums") in trust and non-self-governing territories between 1956 and 1991. This was the case in

⁵⁰ Yves Beigbeder, *Referendum*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 699 (2011).

⁵¹ JOHNSON, *supra* note 19, at 100.

⁵² See SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR: WITH A COLLECTION OF OFFICIAL DOCUMENTS* (1933); Ciro Lipartiti, *La prassi dei plebisciti nelle sistemazioni territoriali seguite alla guerra europea*, RIVISTA DI DIRITTO INTERNAZIONALE 205, 205 ff. (1926).

⁵³ See SARAH WAMBAUGH, *THE SAAR PLEBISCITE: WITH A COLLECTION OF OFFICIAL DOCUMENTS* (1940).

⁵⁴ Beigbeder, *supra* note 50, at 700.

⁵⁵ Articles 1 (2) and 55.

⁵⁶ Article 1.

⁵⁷ Article 1.

British Togoland, British Cameroon, Western Samoa, Ruanda-Urundi, Equatorial Guinea, Niue, the Gilbert and Ellice Islands, the Mariana Islands, French Somaliland, the Trust Territory of the Pacific Islands, the Marshall Islands, the Federated States of Micronesia, and Palau.⁵⁸ The plebiscite, therefore, has been a very important instrument in the decolonization process. It should be noted that the UN has since continued to organize or supervise popular consultations on territorial status, such as in Eritrea (1993), East Timor (1999), Cyprus (2004) and South Sudan (2011).

B. Plebiscites on the Form of Government

The second category of plebiscites that took place in the eighteenth and nineteenth centuries included the plebiscites on the form of government. Indeed, the consultations held in France in 1793 and 1795 were aimed not only at ratifying, respectively, the “Jacobin” and the “Thermidorian” constitutions, but also at approving the new “*régime politique*” that had been established (that is, the republic). Similarly, in the plebiscites that occurred during the *Risorgimento*, the people, by voting in favor of the union with the Kingdom of Italy, *de facto* also expressed their preference for a monarchical form of government.

In the twentieth century, one can find several popular consultations characterized by a similar aim. For example, in 1905, Norwegians not only voted (as mentioned above)⁵⁹ in support of the dissolution of the union between Sweden and Norway, but they were also asked to decide whether Norway should continue to exist as a monarchy or if it should become a republic. Therefore, a second popular consultation was held on November 12 and 13 of the same year, and the monarchy obtained a strong majority.⁶⁰

A popular consultation on the form of government was also held in Italy after the fall of Mussolini, thus following the plebiscitarian tradition of the *Risorgimento*. Indeed, although Decree no. 151 of 1944 (known as the “First Provisional Constitution”) had assigned to the Constituent Assembly the choice between monarchy and republic, two years later, in 1946, that decision was reconsidered, and a second decree was issued (no. 98 of 1946, known as the “Second Provisional Constitution”), stating that the Italian people – by means of a “referendum” – should decide on the future form of government.⁶¹ Thus, on June 2, 1946, men and women went to vote not only to elect the members of the Constituent Assembly, but also to decide whether Italy should maintain a monarchy or establish a republic: the latter obtained 12,717,923 votes (54.3%), while the former garnered 10,719,284 (45.7%). The case of Greece must also be mentioned, as the country is undoubtedly a “champion” in holding plebiscites on the form of government. Indeed, the choice between monarchy and republic was put to popular consultation *six* times between 1920 and 1974.⁶² It should be noted, however, that some of these consultations occurred under autocratic regimes,

⁵⁸ See Beigbeder, *supra* note 50, at 701.

⁵⁹ See section IV.A.

⁶⁰ PLEBISCITE AND REFERENDUM, *supra* note 21, at 133.

⁶¹ Whether the 1946 consultation, regardless of its formal denomination (i.e., “referendum”), should be considered a plebiscite or a referendum is a contentious issue within the Italian literature. For example, according to Chiappetti, *supra* note 40, at 955-956, the 1946 consultation is a “referendum,” while GIUSEPPE DE VERGOTTINI, DIRITTO COSTITUZIONALE COMPARATO 406 (2013), and EUGENIO DE MARCO, CONTRIBUTO ALLO STUDIO DEL REFERENDUM NEL DIRITTO PUBBLICO ITALIANO 110-111 (1974), consider it a “plebiscite.”

⁶² They were held in 1920, 1924, 1935, 1946, 1973, and 1974.

and therefore their outcomes were a foregone conclusion. The last “referendum,” though, which took place in 1974 following the collapse of the Regime of the Colonels, passed as a free and fair vote under universal suffrage. This consultation saw an overwhelming victory for the republic, as 69.14% of the population voted against the monarchy.⁶³

The case of Brazil is peculiar. Indeed, the 1988 Constitution foresaw the holding of a plebiscite in five years to decide whether to restore the monarchy or to retain the republic, as well as whether to keep a presidential form of government or adopt a parliamentary system. While the decision to postpone the final resolution on whether to adopt a presidential or a parliamentary government was due to the fact that this had been the topic of a harsh confrontation within the Constituent Assembly, the *raison d'être* for holding a plebiscite in five years also on whether to retain the republic or to restore the monarchy was strictly linked to Brazilian constitutional history. Indeed, “the first governmental decree after proclamation of the Old Republic in 1889 had promised, but never delivered, a plebiscite on whether Brazil should have a monarchy or a republican form of government.”⁶⁴ In the 1993 plebiscite, 66% of voters were in favor of retaining the republic, against 10.2% for restoring the monarchy; 55.4% of votes cast were for a presidential form of government, against 24.6% for a parliamentary system.

Likewise, in Australia, on November 6, 1999, two questions were put to popular consultation. The first one was on the form of government – whether to replace the monarchy with a republic⁶⁵ – while the second question concerned the insertion of a preamble to the 1901 Constitution. Both questions were rejected: indeed, 54.87% voted against the establishment of a republican form of government, and 60.66% did not want to include a preamble to the Constitution.

Compared to the plebiscites on the form of government held in the eighteenth and nineteenth centuries, citizens in the twentieth century certainly played a more decisive role, as they had the possibility to *choose* the future form of government of their country, and not only to *confirm* a choice that has already been made “from above”. Moreover, the results of these plebiscites were considered expressions of free and fair votes, thus offering further evidence that the plebiscite is an instrument that is compatible with a democratic regime.

C. “Personalistic” Plebiscites

The third category of plebiscites that were held in the eighteenth and nineteenth centuries included the “Bonapartist” plebiscites, which were aimed at legitimizing and strengthening the power of Napoleon and (later) Louis-Napoleon. A strong personalistic character marked these consultations, as people were asked to express their trust in the country’s leader.

The twentieth and twenty-first centuries offer numerous examples of popular consultations with similar features, which can be found not only in autocratic regimes, but also in democratic countries. In these “personalistic” plebiscites, what really matters is not so much the object of the consultation (which may vary significantly), but the *political and*

⁶³ George Tridimas, *Referendum and the Choice between Monarchy and Republic in Greece*, 21(2) CONSTITUTIONAL POLITICAL ECONOMY 119, 119 ff. (2010).

⁶⁴ Keith S. Rosenn, *Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION-MAKING 464 (Laurel E. Miller ed., 2010).

⁶⁵ On the monarchy-republic debate, see Sarah Murray, *L’avenir de l’Australie et de ses relations avec le Royaume-Uni: de la monarchie à la république?*, 141 POUVOIRS 91, 91 ff. (2012)

institutional meaning of the consultation itself. As discussed below, autocrats, by showing through plebiscites the high degree of support that they enjoy, aim to consolidate their authority and legitimize their rule, whereas in democratic regimes, countries' leaders make their political fate dependent on the outcome of these consultations. As put it by Max Weber, the plebiscite represents a "profession of 'faith' in the vocation as leader of the one who lays a claim to such acclamation,"⁶⁶ thus becoming a very effective instrument to establish a *direct relation with the crowd*.⁶⁷

1. "Personalistic" Plebiscites in Non-democratic Regimes

The plebiscite was used frequently in non-democratic regimes throughout the twentieth century. In Italy, for example, two plebiscites were held during the Fascist regime, in 1929 and 1934.⁶⁸ In both cases, voters were asked to approve or reject the list of the members of the Chamber of Deputies, which had been prepared by the Grand Council of the National Fascist Party. The real objective of these consultations, however, was not the election of the deputies, but the demonstration of the full adhesion of the people to Fascism, and in particular to its *Duce*. Although the outcomes of both plebiscites represented extraordinary successes for Mussolini, the Fascist regime had never been fully convinced of the utility of this political device and subsequently decided to abandon it.⁶⁹

Under the Nazi regime, the plebiscite was one of the most evident manifestations of the permanent mobilization of the popular masses. The first "official" plebiscites were held on November 12, 1933 (on Germany's exit from the Disarmament Conference and from the League of Nations), and on August 19, 1934 (when Hitler also became head of state following the death of Hindenburg). Even the elections that took place on March 5, 1933 and on March 29, 1936 were plebiscitarian in nature.⁷⁰ Indeed, according to Carl Schmitt, the 1933 elections were in reality "a plebiscite by which the German people [...] acknowledged Adolf Hitler [...] as the political leader of the German people."⁷¹ Then in 1936, Germans were asked to endorse the single party list (composed exclusively of Nazi candidates) for the *Reichstag*. This vote involved a substantial plebiscitary question, i.e. the remilitarization of the Rhineland.⁷² Despite their differences, plebiscites under Mussolini and Hitler had the "function of conferring a kind of 'chrism' to the Fascist and Nazi powers,

⁶⁶ Quoted in JAN REHMANN, MAX WEBER: MODERNISATION AS PASSIVE REVOLUTION: A GRAMSCIAN ANALYSIS 157 (2015).

⁶⁷ On the relations between the leaders and the crowd see the seminal book by GUSTAVE LE BON, *PSYCHOLOGIE DES FOULES* (1895).

⁶⁸ See ALBERTO AQUARONE, *L'ORGANIZZAZIONE DELLO STATO TOTALITARIO* 151 ff. (1978).

⁶⁹ Indeed, the Italian plebiscitarianism has been defined "reluctant plebiscitarianism" (Leonardo Rapone, *Un plebiscitarismo riluttante: I plebisciti nella cultura politica e nella prassi del fascismo italiano*, in *VOX POPULI? PRATICHE PLEBISCITARIE IN FRANCIA, ITALIA, GERMANIA (SECOLI XVIII-XX)* 145 ff. (Enzo Fimiani ed., 2010).

⁷⁰ On the fact that an election – when it is centered on a political leader – may turn into a plebiscite (even in democratic countries), see FULCO LANCHESTER, *GLI STRUMENTI DELLA DEMOCRAZIA* 153 (2004).

⁷¹ CARL SCHMITT, *STATE, MOVEMENT, PEOPLE: THE TRIADIC STRUCTURE OF THE POLITICAL UNITY* 5 (translated by Simona Draghici (2001)).

⁷² Two more plebiscites were held during Hitler's regime: the 1935 Saar plebiscite and the 1938 plebiscite on the annexation of Austria ("*Anschluss*") (see section IV.A.1).

legitimizing them in some way from the bottom upwards, and often contributing to *legalizing* formally the more obvious aspects of their illegality.”⁷³

The plebiscite represented an important political device in many other authoritarian or hybrid regimes, such as in Portugal under Salazar, in Spain under Franco, in South Korea under Park Chung Hee and in the Philippines under Ferdinand Marcos. Numerous popular consultations of a plebiscitarian nature were also held in Egypt under Nasser, Sadat, and Mubarak.

Morocco represents another interesting example. Since the country’s 1962 independence, the “constituent plebiscite”⁷⁴ has been used in a number of cases in order to strengthen the position of the monarch and his relations with the population. In March 2011, for example, King Mohammed VI decided to “grant”⁷⁵ a new constitution in response to the protests and revolts that had been occurring since February 20 of that year. As happened with the previous five constitutions adopted in the country, the 2011 Constitution was ratified through a “referendum,” and 98% of the people voted in favor of it. It should be noted that in Morocco, the “constituent plebiscite” has an extremely important religious meaning, as it is considered a “modern redefinition”⁷⁶ of two traditional institutes, the “*bay’a*” (pledge of allegiance to the king) and the “*shura*” (consultation). This instrument is therefore aimed at consolidating the spiritual link, the sacred covenant between the monarch – who is the “*Amir al Mouminine*” (Commander of the Faithful) – and the people.

As shown above, in non-democratic regimes the outcome of the plebiscites is usually a foregone conclusion. The case of the October 5, 1988 plebiscite in Chile, however, shows that “electoral surprises,”⁷⁷ although extremely rare, can happen even in autocratic regimes. It is well known that from 1973 to 1990, Chile was governed by the authoritarian regime of General Pinochet. In 1980, the *Junta* introduced a constitution that provided for a “transition period,” during which Pinochet would have continued to be the president of the republic for the next eight years. At the end of that period, Pinochet was proposed as the presidential candidate for a further eight years, but this choice had to be ratified by the citizens through a plebiscite. Pinochet was defeated in this consultation, as 54.71% of voters did not grant him another term in office. A work of graffiti scrawled on a sidewalk in Santiago del Chile asserted, in the aftermath of this historical victory, “*Lo echamos con un lápiz*” (“We threw him out with a pencil”).⁷⁸

⁷³ Enzo Fimiani, *Elections, Plebiscitary Elections and Plebiscites in Fascist Italy and Nazi Germany: Comparative Perspectives*, in *VOTING FOR HITLER AND STALIN: ELECTIONS UNDER 20TH CENTURY DICTATORSHIPS* 233 (Ralph Jessen & Hedwig Richter eds., 2011).

⁷⁴ DE VERGOTTINI, *supra* note 61, at 262 ff.

⁷⁵ On the fact that the 2011 Constitution – like the previous constitutions – was *de facto* an “*octroyée*” constitution, see Francesco Biagi, *The Pilot of Limited Change: Mohammed VI and the Transition in Morocco*, in *POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS* 56 (Justin O. Frosini & Francesco Biagi eds., 2015).

⁷⁶ El Houssain Abouchi, *La pratique référendaire dans le régime constitutionnel marocain, 1962-2011: une analyse du contenu*, in *CINQUANTE ANS DE VIE CONSTITUTIONNELLE AU MAROC. QUEL BILAN?* 45 (2013).

⁷⁷ Gianfranco Pasquino, *Plebiscitarismo*, in *ENCICLOPEDIA DELLE SCIENZE SOCIALI* (Treccani, 1996), [http://www.treccani.it/enciclopedia/plebiscitarismo_\(Enciclopedia-delle-scienze-sociali\)/](http://www.treccani.it/enciclopedia/plebiscitarismo_(Enciclopedia-delle-scienze-sociali)/).

⁷⁸ See ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA AND THE 1980 CONSTITUTION* 307 (2002).

2. “Personalistic” Plebiscites in Democratic Countries

“Personalistic” plebiscites are not solely the domain of illiberal regimes; in some cases, these also characterize democratic countries. The case of France under General de Gaulle is emblematic. First of all, his personality dominated the popular consultation on the adoption of the 1958 Constitution; indeed, “the debate switched from the quality of the project to his author: it was not a referendum on a text any longer. *Rather it was a plebiscite on a man.*”⁷⁹ Under his presidency (1958–69), de Gaulle called four plebiscites. The first two consultations aimed at obtaining people’s approval on the policy he wanted to pursue to resolve France’s relations with Algeria. Indeed, in January 1961, de Gaulle asked the people whether they agreed in principle to Algeria’s independence, and in April 1962 he asked them to approve the “Évian Accords” (which paved the way for the independence of Algeria) and to empower him to implement them. Although from a formal standpoint they were “referendums,” both consultations “bore the earmarks of plebiscites. [...] An act of faith was demanded from the electorate [...]”⁸⁰

The third consultation organized by de Gaulle was on a constitutional amendment that marked a turning point in France’s political, institutional, and constitutional history.⁸¹ The reform aimed to change the system of election of the president of the republic through replacing indirect election by an electoral college with a direct election. Since the Parliament was strongly opposed to this reform, de Gaulle decided to use the procedure provided for in Article 11 of the Constitution (which allows the president to use a referendum to approve changes to the “organisation of public institutions”), rather than the amendment procedure in Article 89 (which requires the approval of any constitutional amendment by both houses of Parliament before being submitted to a referendum). His decision drew harsh criticism from the literature, which argued that resorting to Article 11 for constitutional changes was unconstitutional.⁸² The public, however, was not interested in this legal dispute, and de Gaulle, whose aim was to reinforce the link between him and the population, managed to represent the campaign as a battle between him and the old Fourth Republic. This strategy was successful – in the October 28, 1962 consultation, 62.2% of citizens voted in favor of the constitutional amendment. When asked to review the constitutionality of this reform, the Constitutional Council stated that it did not have the jurisdiction to do so, since “the laws adopted by the People by referendum represent the direct expression of the national sovereignty.”⁸³

The fourth plebiscite organized by de Gaulle turned out to be fatal for his political career. The consultation was on a constitutional amendment aimed at reforming the regional system and the Senate. As in the previous three plebiscites, de Gaulle linked his future to the outcome of the consultation. In fact, two days before the April 27, 1969 “referendum”,

⁷⁹ Dominique Rousseau, *L’invenzione continua della Quinta Repubblica*, in *L’ORDINAMENTO COSTITUZIONALE DELLA QUINTA REPUBBLICA FRANCESE* 48 (Dominique Rousseau ed., 2000) (emphasis added).

⁸⁰ Henry W. Ehrmann, *Direct Democracy in France*, 57(4) *American Political Science Review* 883, 892 (1963).

⁸¹ In order to stress the paramount importance of the 1962 constitutional amendment, in 1973 the *doyen* Georges Vedel wrote an article stating that France had “two Constitutions”: the 1958 Constitution and the 1962 Constitution (*Les deux Constitutions*, *LE MONDE*, January 10, 1973).

⁸² Indeed, according to the literature, the object of the referendum provided for in Article 11 could only be a statutory law or an organic law, not a constitutional law. On this issue, see Gérard Conac, *Les débats sur le référendum sous la Ve République*, 77 *POUVOIRS* 97, 101 ff. (1996).

⁸³ Judgment of 6 November 1962, No. 62-20 DC.

the general declared: “If I am disavowed by a majority among you [...] my present task as Head of State would obviously become impossible and I would immediately cease the exercise of my functions.”⁸⁴ When 52.4% of the population voted “no” in the plebiscite, de Gaulle immediately announced his resignation, giving credence to the promise he had made.

De Gaulle was not the only national leader who hinged his political fate on the outcome of a plebiscite. Greek Prime Minister Alexis Tsipras affirmed that he would have resigned if the majority of the population had voted “yes” in the July 5, 2015 “referendum,” which asked citizens whether they approved the bailout conditions proposed jointly by the European Commission (EC), the European Central Bank (ECB), and the International Monetary Fund (IMF) to deal with the country’s government-debt crisis.⁸⁵ Indeed, Tsipras declared: “If the Greek people want to proceed with austerity plans in perpetuity, which will leave us unable to lift our head [...] we will respect it, but we will not be the ones to carry it out.”⁸⁶ By voting “no” (as 61% of voters did), Greek people not only rejected the conditions of the EC, ECB, and IMF, but also expressed their trust in Tsipras and more generally in the government’s policy.

Another head of government who recently declared his intention to link his political future to the outcome of a popular consultation is the Italian President of the Council of Ministers, Matteo Renzi. For the past two years, Italy has been undergoing a process of major constitutional reform aimed, *inter alia*, at transforming the Senate into a chamber representing the territorial institutions, as well as modifying the allocation of competences between the state and the regions. Parliament adopted the constitutional reform in April 2016 and the people will be asked to ratify it in a referendum that will take place in October of the same year. Renzi made his intentions very clear: “If I were to lose the referendum I would consider my career over because I deeply believe in the value of the dignity of politics.”⁸⁷ Italians will thus be asked to vote in a popular consultation that would also be plebiscitarian in its nature.⁸⁸

In all the cases mentioned above, popular consultation becomes to a large extent – to use an expression of Maurice Duverger, who referred to the Gaullist practice – “a kind of a

⁸⁴ See HERVÉ DUVAL, PIERRE-YVES LEBLANC-DECHOISAY & PATRICK MINDU, REFERENDUM ET PLÉBISCITE 62 (1970).

⁸⁵ On the debate concerning the constitutionality of the referendum see Xenophon Contiades & Alkmene Fotiadou, *The Greek Referendum: Unconstitutional and Undemocratic*, <http://constitutional-change.com/the-greek-referendum-unconstitutional-and-undemocratic/>; Giorgio Grasso, *Il referendum greco e la questione democratica nella (ri)costruzione del soggetto politico europeo*, OSSERVATORIO COSTITUZIONALE 4-5 (July 2015), <http://www.osservatorioaic.it/il-referendum-greco-e-la-questione-democratica-nella-ri-costruzione-del-soggetto-politico-europeo.html>.

⁸⁶ “Greece debt crisis: Tsipras may resign if Greeks vote yes,” BBC NEWS, June 30, 2015, <http://www.bbc.com/news/world-europe-33322754>.

⁸⁷ “Renzi will retire if loses referendum,” ANSA, January 20, 2016, http://www.ansa.it/english/news/politics/2016/01/20/renzi-will-retire-if-loses-referendum_7c665a7c-fbb9-4b71-8f13-11d6f7ab21aa.html.

⁸⁸ It should be noted, however, that in Italy the term “plebiscite” has often a negative connotation, and therefore the October consultation has been qualified as such by those scholars who wanted to stress its negative features. On this debate see Gianfranco Pasquino, *Riforme, un'altra narrazione*, 5 IL MULINO 738, 738 ff. (2014); Francesco Clementi, *Il referendum costituzionale misura di credibilità della politica*, IL SOLE 24 ORE, January 13, 2016, at 17; see also the articles devoted to this consultation (*Focus sulla riforma costituzionale – Riflessioni sul referendum costituzionale*) in FEDERALISMI.IT (www.federalismi.it).

question of confidence put to the country.”⁸⁹ If it is true that an abuse of “personalistic” plebiscites should be avoided, it is also true that this type of popular consultation does not seem incompatible with democratic regimes. Unlike what happened under Napoleon and Louis-Napoleon, or under other authoritarian or hybrid regimes, the abovementioned plebiscites are held in a completely different context and are characterized by profound differences in their nature. Indeed, the political parties are well structured, and they actively participate in the electoral campaigns; the press is very influential and extremely critical; and the possibility of electoral fraud is almost non-existent. Put differently, these votes are truly competitive, and leaders take a huge risk when centering these consultations on themselves, as the outcome is often hardly predictable. If the result is unfavorable to them (as it was for de Gaulle in the 1969 plebiscite), they pay a very high political cost.⁹⁰

D. Plebiscites for Other “Exceptional” and “Political” Issues

According to the historical approach that I have followed in this paper, popular consultations aimed at adopting a decision on the territorial status, on the form of government, and on the trust (or distrust) of a country’s leader fall within the notion of plebiscite. It is worth asking whether this approach also permits the identification of other purposes in addition to the ones mentioned above, which consequently would lead to an expansion of the categories of plebiscite. The answer to this question seems positive, but only if two essential requirements are met. Indeed, it is necessary to consider that the three “historical” categories of plebiscite have two distinguishing features in common. The first is their character of “*exceptionality*”: the plebiscites occurred *una tantum* and referred to issues of paramount importance and utmost seriousness for the future of the country as a whole. Indeed, they often concerned decisions on national identity and sovereignty, that are two elements upon which the very existence, the essence of the State is based. Second, the questions that were the object of the plebiscites seemed more “political” than “normative” in nature. When people were asked to choose the territorial status of their country, or when they had to decide on the new form of government, or when they were asked to express their trust and support in a country’s leader, the consultations were not centered (or were not only centered) on normative acts, but referred to crucial *political choices*.⁹¹

Therefore, according to these criteria, a popular consultation would be considered a plebiscite *only as long as it refers to issues that are both “exceptional” and “political”* in the sense mentioned above. Thus, for example, despite their formal denominations, country “referendums” on membership to the European Union are characterized by both requirements, falling within the notion of plebiscite. The upcoming “referendum” in the United Kingdom (scheduled for June 23, 2016), in which people will be asked whether they want to remain in the EU or to leave it, represents a paradigmatic example. First (and not surprisingly, given the nature of the European Union), the electoral campaign is centered on issues related to nationality and sovereignty, which make this consultation largely similar to a territorial plebiscite. Moreover, this consultation may determine the political future of Prime Minister David Cameron, and may also be decisive for the future of the country itself, as the Scottish National Party has already announced that a “*Brexit*” may

⁸⁹ MAURICE DUVERGER, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL 633 (1970).

⁹⁰ See Conac, *supra* note 82, at 102.

⁹¹ See DE VERGOTTINI, *supra* note 61, at 405 ff.

trigger another vote on Scottish independence.⁹² Additionally, this plebiscite appears to be one of the most crucial events not only in the United Kingdom, but also in the European Union, as the withdrawal of one of its most important member states would probably have an enormous impact on the EU itself.⁹³ Thus, the consultation will not only be on the project of a nation, but also on the project of Europe.

V. Concluding Remarks

In this paper I showed that far from being an “endangered species” and a device typical of illiberal regimes, the plebiscite is still a very “fashionable” instrument that can be found not only in authoritarian regimes but also in democratic countries. My argument relied on comparative constitutional history, which was essential to clarify a current dispute – that is, the distinction between the plebiscite and other forms of popular participation, notably the referendum. What has emerged is that consultations aimed at adopting a decision on territorial status, on the form of government, and on the trust (or distrust) of a country’s leader, as well as on other “exceptional” and “political” issues, fall within the notion of plebiscite, while all the other popular consultations that do not meet these requirements must be excluded from this “category.”

The analysis carried out in this paper also shows that the plebiscite cannot really be regulated by a legal text (particularly by a Constitution) as an autonomous legal “institute,” in a way similar to how other popular consultations (for example, the referendum) are regulated. Indeed, while the latter correspond to “abstract typologies” that can be predetermined on the basis of certain *formal* features (such as the object of the consultation), the former can often be identified only on the basis of *substantive* characteristics (such as the *purposes* for which the appeal to the people is employed and the *meaning* that the consultation acquires in a *specific circumstance*).⁹⁴

Its formal absence from legal texts, however, does not mean that the plebiscite has disappeared. Indeed, this instrument has marked history deeply and, even if sometimes under false pretences, it continues to play a prominent role in today’s societies.

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⁹² *The Brexit Delusion*, THE ECONOMIST, February 27–March 4, 2016, at 16-18.

⁹³ See EUROPEAN PUBLIC LAW 22 (1) (2016), largely devoted to the June 2016 consultation.

⁹⁴ See Luciani, *supra* note 14, at 137 ff.