SOME CONSTITUTIONAL SPECIFICATIONS ON THE REFERENDUM

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Referendums are most probably the constitutional institution that raises more confusion. For this reason, the question needs some clarification. Firstly, different terms are used indistinctly: *referendums* (referendums), *consultas* (consultations), *plebiscitos* (plebiscites), and so on. It is clear that the terms *referendum* and *consultation* are quite close. The Constitutional Court makes a difference between *consultas referedarias* (referendum consultations) and mere *consultas populares* (popular consultations). As regards the former, the question is about a public matter, it is necessarily addressed to the electorate and the specific safeguards of the electoral process, electoral roll and judicial protection are applicable. The more general consultations do not have these characteristics. These might have a sectoral nature and the participation requirements are lowered. In addition, strictly speaking the object of a consultation is not really political.

Referendums have been used as a substitute for democratic representation in authoritarian systems. Together with their obliged over-simplification, this fact explains why referendums are not really accepted by modern legal systems. In some constitutions such as the German one, this institution is not even mentioned. It is true that referendums can easily be subject to manipulation, reduce the problem to a consultation in binary terms and cause social division. It is also true that referendums can end up being plebiscites where the matter at issue is answered in terms of backing or rejecting the person posing the question or the current political system.

However, the use of normative referendums (such as those addressing the reform of the Constitution or ratifying modifications of the statutes of autonomy) is possible and desirable, and their legitimizing consequences for the system compensate their shortfalls. Let us take the example of the referendum on the inclusion of Navarre in the Basque Country, which is currently foreseen but obviously not mandatory. This referendum has been crucial to the constitutional inclusion of the Basque nationalism. In fact, it is important to keep in mind that the Spanish legal system lays down nine different kinds of referendums that have had a positive return so far.

In my opinion, alleging the negative functional ambiguity of referendums is not a good point: in the context of referendums, the institutions, in addition to fulfilling their duties, carry out other tasks that are not recognized or implicit but of vital importance. For example, EU elections can be used by voters to penalize the government under whose mandate it is held, or can be understood as a political test to select our representatives in Europe, although not responding to their ordinary aim. The last election in Catalonia was understood as a plebiscite by the pro-sovereignty forces. This was clearly a democratic inconsistency so that those obtaining a lower number of votes did not have to accept their defeat and proved that they had not been unauthorized in their pro-independence claims despite the results.

Referendums will be constitutional if they comply with two requirements: conditions and, most importantly, limits –that is, what can be decided in a referendum and what should necessarily be excluded from it. Both requirements are connected: procedural requisites, as well as those related to electoral turnout and results, are usually established as a way to stop constitutional prohibitions on the content that are not recognized by some. It is an attitude of rejection given its determining ambiguity.

As regards the first question, there is no doubt that the same freedom requirements must be fulfilled during the electoral campaign and during the referendum campaign. The question must be clear and the possible institutional abuse of the government calling the referendum must be controlled.

The second question, the violation of the constitutional limits, is more controversial. In this sense, no questions about matters falling outside the scope of these limits are accepted. The reason is that this would entail taking the place of the constituent power or conditioning its powers: the electorate does not have constituent powers and cannot decide on the constitutional system. It is well known that, when there is no difference between *poder constituyente* (the supreme power drafting the constitution) and *poder constitutive* (the legislative, executive and judicial branches), there is no limit to the power, and that power without limits is called despotism and not democracy. For this reason, our constitutional system does not accept a territorial referendum on independence beyond the limits of Article 92 of the Constitution. Through this question, the electorate becomes sovereign, because not respecting its decision would not be understandable. Additionally, there is no institution able to mediate between the electorate and the public body who decides about the matter.

All of this does not mean that the independence of a territory does not have a place in our constitutional system or that there are no constitutional means to carry it out. A referendum, however, is not the way since it would entail giving sovereignty to someone who cannot have it.

It is obviously illogical to call a referendum on a contingent constitutional reform or related statement on the kind of reform to carry out. The reform of the Constitution is laid down in this legal text. Only specific subjects are entitled to initiate the procedure, parallel to the subjects with ordinary legislative initiative. Introducing a new requirement not established by the Constitution unnecessarily complicates the procedure of reform, and obstructs the exercise of the duties of specific subjects. Frustrating or hindering compliance with the Constitution is nothing but a fraudulent and unconstitutional act.

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