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# CHAPTER 2

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CHAPTER 2

# When the authorities call a referendum: design and political considerations

36. Referendums may be called either by political authorities or by a number of citizens. This chapter deals with referendums called by the political authorities, whereas chapter 3 deals with referendums called by citizens – generally called initiatives. In this chapter the political authorities are defined, different institutional designs are presented, and various procedural aspects are discussed. Finally, a number of recommendations are offered.

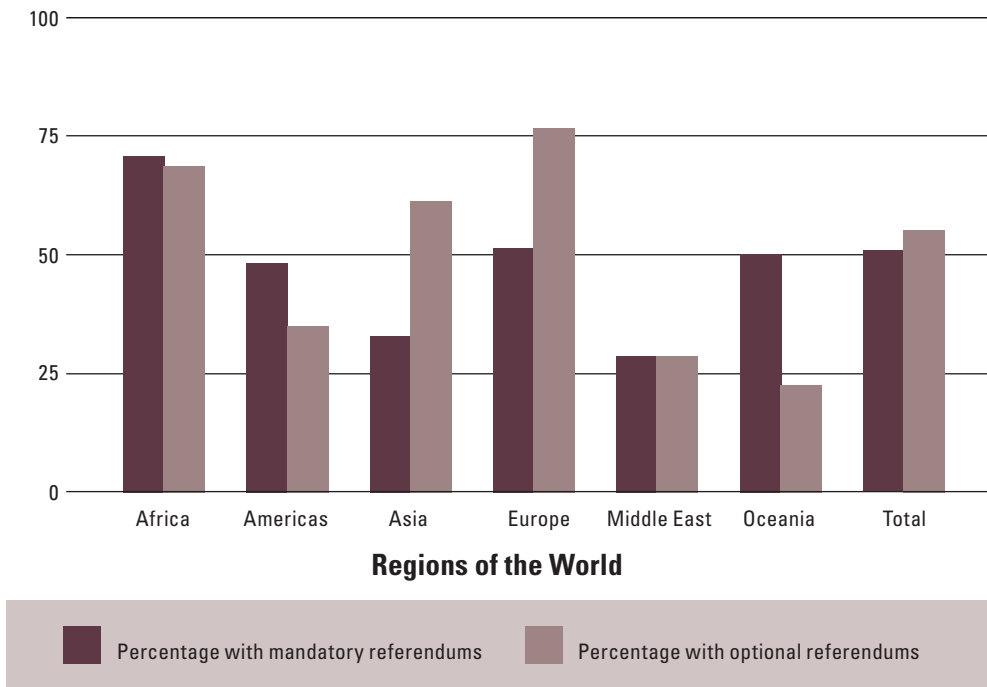
37. Political authorities are defined in this chapter as the executive and legislative institutions of government. At the national level the executive may consist of a president and/or a prime minister and cabinet, and the legislative institutions of the parliament or congress, or whatever the law-making institution representing the people is called. At the regional and local level the political authorities will generally consist of similar institutions – at the executive level a state governor, provincial premier or mayor, and at the legislative level a state or provincial legislature, parliament or council. The decision to call a referendum may rest with one of these, such as the president, and be taken under specific constitutional authority, or it may be a political decision taken by the president or prime minister in consultation with the cabinet, or by a vote of the parliament or legislature. In some jurisdictions, the authority to call a referendum may be specified in a constitution, while in others referendums may be called through legislative acts or executive orders.

38. The political authorities may call referendums either indirectly or directly. They call a referendum indirectly when they choose to make a decision that requires a referendum according to the constitution or ordinary legislation. Such mandatory referendums may be required on specific issues or in specific situations, such as a policy decision which by its nature raises a constitutional question. In such instances, the authorities may of course choose not to deal with the issue or to circumvent the requirement in one way or another. If they do decide to put an issue to a referendum, the authorities control the agenda, but they do not initiate the referendum directly. The authorities call a

referendum directly when they are not obliged to do so according to the constitution or ordinary legislation, but choose to do so for political or other reasons. Such optional referendums might be initiated by the executive, by a majority in the legislature, or in some instances by a minority in the legislature.

39. Mandatory and optional referendums called by the authorities were first introduced during the French Revolution in the 1790s. Napoleon I used referendums to obtain popular approval as he took power, first as consul, and later as consul for life and emperor. During the 1850s, Napoleon III also used referendums to legitimize his assumption of power. In more recent times, the instrument has been used by presidents or other executive authorities for consultative purposes or to obtain popular approval for their policies. Mandatory referendums on constitutional changes were introduced in Switzerland in 1848 and have since been adopted in many countries throughout the world. In recent decades, more countries have begun to use the referendum as either a consultative or constitutional device, and its usage has become more frequent in many jurisdictions. Figure 2.1 illustrates the distribution of mandatory and optional referendums at the national level in various parts of the world today.

**Figure 2.1. Countries which have provision for mandatory and optional referendums, by region**



## Institutional design

40. A mandatory referendum is a vote of the electorate which is called automatically under particular circumstances as defined in the constitution or ordinary legislation. Such circumstances may arise either through the nature of the issue, for instance an amendment to the constitution, or from the situation in which the decision is adopted, for instance, when the president and the legislative assembly disagree on a specific proposal. Mandatory referendums are quite widespread: about half of all countries have provisions for mandatory referendums of some sort.

41. Mandatory referendums may be required in relation to certain types of predetermined subjects. Typically, these are issues of major political significance, such as constitutional amendments, the adoption of international treaties, the transfer of authority to international or supranational bodies, or other issues concerning national sovereignty or national self-determination. In countries such as Australia, Denmark, Japan, Switzerland, Uruguay and Venezuela, all constitutional amendments have to be approved by referendum, and in countries such as Austria, Iceland, Malta, Peru and Spain this is the case for certain constitutional amendments. In Switzerland certain international treaties have to be approved by a referendum, and in Denmark a transfer of authority to international or supranational bodies requires a referendum unless it is passed by a five-sixths majority in the parliament. In Europe, a number of referendums held on European Union issues have been mandatory because they involve an amendment to a country's constitution, as is the case in the Republic of Ireland.

### Box 2.1. Mandatory referendums: the Republic of Ireland's two referendums on the Treaty of Nice

The Treaty of Nice was formally signed by the (then) 15 members of the EU at Nice, France, on 26 February 2001. The aim of the treaty was to determine how power should be shared out within the institutions of the EU after enlargement to 27 member states.

The Republic of Ireland was the only one of the 15 member states in which a referendum on the treaty was mandatory. The referendum was set for 7 June 2001. Because accession to treaties involving any transfer of sovereignty in the Republic of Ireland requires amendment of the constitution, the question put to voters was as follows:

'Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?

Twenty-fourth Amendment of the Constitution Bill, 2001.

Art. 29 Abs. 4 Lines 7 and 8:

The State may ratify the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Nice on the 26 February, 2001.

The State may exercise the options or discretions provided by or under Articles 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1 of the Treaty referred to in subsection 7 but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas [parliament].’

Unexpectedly, the Irish voters rejected the Nice Treaty by 54 per cent to 46 per cent. Turnout was low, at only 35 per cent. Two other measures – the abolition of the death penalty in the Republic of Ireland and recognition of the International Criminal Court – were also voted on at the same time, and were both approved. The campaign waged against the Nice Treaty had been vigorous, while that in its favour had been more restrained. In part, this was because the government, which supported the Treaty of Nice, was prohibited by Irish electoral laws from actively campaigning for it.

The rejection of the treaty precipitated a political crisis, both in the Republic of Ireland and in the EU more generally. The treaty could not come into force until all the member states had ratified it, and the Republic of Ireland was not in a position to renegotiate it unilaterally. It became clear that a second referendum would be necessary. Ratification of the treaty by other member states made the issue of potential Irish isolation a more central issue in the campaign leading up to the second referendum, which took place on 19 October 2002. Moreover, the campaign waged by the political parties and other groups supporting the ‘Yes’ side was much stronger than it had been in the first referendum. With a higher turnout (49 per cent), the Nice Treaty was approved in the second referendum by a margin of 63 per cent to 37 per cent.

42. Certain types of issue, such as taxes and public expenditures, are often excluded from being the subject of mandatory referendums. The requirement for, or exclusion of, mandatory referendums on specific issues is usually contained in a jurisdiction’s constitution, but may also be specified by ordinary legislation. One example of a constitutional specification of the subjects that are excluded from referendums is found in article 42 of the Danish constitution (see box 2.2). In the absence of such a specification of the types of issue on which a referendum is mandatory, or those which are excluded, the government may from time to time determine, according to its own priorities, what is appropriate for a referendum.

**Box 2.2. Article 42 of the Danish constitution**

- Finance Bills, Supplementary Appropriation Bills, Provisional Appropriation Bills, Government Loan Bills, Civil Servants (Amendment) Bills, Salaries and Pensions Bills, Naturalization Bills, Expropriation Bills, Taxation (Direct and Indirect) Bills, as well as Bills introduced for the purpose of discharging existing treaty obligations shall not be submitted to decision Referendum.

43. Mandatory referendums may also be required in certain predetermined situations. One example is in a presidential system where, in the event of disagreement between the president and legislature, a referendum may be required to resolve the dispute. Thus, if the president of Iceland rejects a bill that has been passed by the parliament (the Althing), it remains valid but must be submitted to a referendum for approval or rejection as soon as circumstances permit. The law shall become void if it is rejected by the voters, but otherwise remains in force. In Chile, the president of the republic may, if she or he entirely objects to a proposed amendment approved by the Congress, consult the citizens through a referendum, which in the terminology of that country is called a plebiscite. Another example is when decisions on certain issues, such as a transfer of national sovereignty, require a qualified parliamentary majority, and if that is not obtained then a referendum is required; this is the case in Denmark, where a five-sixths majority in parliament is required for a transfer of national sovereignty to international organizations. Otherwise a referendum must take place.

44. Mandatory referendums are usually restricted to what are generally considered very important political issues. Too many referendums may reduce political efficiency and affect political stability. Referendums are costly in terms of money, time and political attention, and the use of such resources needs to be considered carefully. If frequent referendums result in too many changes of policies and rules they may contribute to an unstable political situation where citizens find themselves living in an environment of uncertainty.

45. The second category of referendum is the optional referendum. This involves a vote of the electorate which does not have to be held by law but can be initiated by the executive, by a specified number of members of the legislature, and in some cases by other political actors. The main examples are optional referendums initiated by the executive branch of government, either the president or the prime minister and cabinet. Optional referendums initiated by the executive or legislature may take several forms. In terms of legal regulations, they may either be pre-regulated by constitutional rules or otherwise legally prescribed norms about the use of referendums, or they may be ad hoc, with the particular rules to be followed being specified at the time the referendum is called.

46. Some jurisdictions regulate optional referendums by law, and when this is the case the regulations that apply are usually specified in the constitution or in a referendum law. In Spain, political decisions of special importance may be submitted for a consultative referendum. According to the constitution, the king may call a referendum at the request of the president of the government following authorization by the Congress of Deputies. In France, the president is given a fairly free hand. According to article 11 of the French constitution, the president may submit to a referendum any government bill ‘which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation and to the public services contributing thereto, or which provides for authorization to ratify a treaty that, although not contrary to the constitution, would affect the functioning of the institutions’ (see also box 7.1 on the French referendum on the EU Constitutional Treaty). In Russia, the authority given to the president is almost unregulated, as the constitution only stipulates (in article 84) that the president shall ‘call a referendum under procedures established by federal constitutional law’. In Austria, according to article 43 of the constitution, a majority of members of the House of Representatives may demand that an enactment of the House of Representatives be submitted to a referendum. It is also possible – as in Argentina – for the constitution to give both the legislative and the executive branch the right to initiate referendums. In some US states, the legislative branch may submit legislation to a referendum in order to circumvent a possible veto by the governor or for other political reasons (see box 2.3).

**Box 2.3. Using a referendum to influence elections: Virginia’s 2006 proposal to define marriage in the state constitution**

In recent years voters in many of the US states have faced the question whether to ban same-sex marriage. The actual question put to voters is whether to define marriage constitutionally as ‘a union between one man and one woman’, but the effect and clear understanding among voters is to ban same-sex marriage. In Virginia, the voters faced this question in 2006 in what some observers saw as an attempt to draw conservative voters to the polls to aid Republican candidates. Virginia was a critical state for both of the major political parties in 2006 as one of the most closely fought US Senate campaigns in the nation was also on the ballot paper.

In 1997, the Virginia legislature passed a statute declaring any same-sex marriage from another state void in Virginia. In 2004, the legislature passed another statute prohibiting ‘civil unions or similar arrangements between members of the same sex, including arrangements created by private contract’. Also during 2004, voters in 13 other states approved bans on same-sex marriage, and there is some evidence that such proposals increased turnout among conservative voters.

Even though the legal status of same-sex marriage in Virginia was not in doubt, the 2006 legislature referred a constitutional amendment to the voters. Some observers saw this as a move by the Republican-controlled state legislature to boost voter turnout among conservative voters in an attempt to influence the US Senate election. The Republican Party controlled the Senate, but the widespread unpopularity of the Iraq War and of President George W. Bush led many to believe that the Democrats could win enough seats in 2006 to take control of the Senate.

The incumbent US Senator in Virginia, George Allen, a Republican, included his support for the marriage amendment in his speeches and contrasted his position with that of his opponent, Democrat Jim Webb, who opposed the amendment. 'We think Senator Allen is on the same side as the majority of Virginians', Allen spokesperson Dick Wadhams told the *Washington Post* on 26 April 2006.

In the end, even though opponents of the measure spent more than three times as much on the campaign than its promoters, the amendment passed by 57 to 43 per cent. Turnout was 53 per cent of registered electors, an increase of 9 per cent over that of a similar off-year election in 2002. If Republicans placed the amendment on the ballot to help ensure Senator Allen's re-election, they failed. Nevertheless, the race was exceedingly close: Webb defeated Senator Allen by 9,329 votes out of 2.4 million votes cast, a difference of less than 0.4 per cent, giving overall control of the US Senate to the Democrats.

47. Optional ad hoc referendums are those that are not regulated in the constitution or in any permanent legislation. In parliamentary systems the decision to hold an ad hoc referendum on a specific issue is generally made by the majority of the legislature by passing a specific law to authorize the holding of a referendum. In Norway, for example, the constitution contains nothing about referendums and the legislative assembly (the Storting) decides not only whether to hold a referendum, but also the details of its implementation. The United Kingdom (UK) has no written constitution, but the Political Parties, Elections and Referendums Act of 2000 sets out the legal framework under which national and/or regional referendums may be held and assigns a number of administrative responsibilities to the Electoral Commission. Nevertheless, parliament must pass a specific law in each instance in order for a referendum to be held. In presidential systems, either the executive may be given a general right to call referendums (as in Azerbaijan and Russia), or the president may act without any specific constitutional authority, as happened in Chile in 1978 when President Augusto Pinochet called a referendum asking the voters to support him.

48. Political authorities might decide to initiate a referendum for several reasons. Referendums are sometimes called by executives to resolve divisions within a governing

party or coalition. Such referendums are motivated by two somewhat different kinds of goal – to use the referendum as a mediation device between competing factions, or to avoid the electoral repercussions of a divisive issue. By announcing a referendum, the executive seeks to depoliticize a specific issue by taking it out of an election campaign. Optional referendums initiated by the executive have been held frequently in Europe on issues such as European integration.

**Box 2.4. Referendum by decree of the president of Azerbaijan ‘On Conducting a Referendum on Amending the Constitution of the Azerbaijan Republic’**

‘Taking into consideration of the necessity of amending to the Constitution of the Azerbaijan Republic with new provisions arising from the fact that the Azerbaijan Republic has joined the European Convention on Protection of Human Rights and Fundamental Freedoms, and implementation of courts reforms, and which are related to activities of the Milli Majlis and improvement of the election system of the Azerbaijan Republic, and in accordance with the Constitution of the Azerbaijan Republic, Article 3, Section II, Item 1 and Article 109, Item 19, I hereby decree the following:

1. Draft Referendum Act ‘On Amending the Constitution of the Azerbaijan Republic’ shall be put on for referendum (the draft is enclosed).
2. The Referendum shall be appointed to August 24, 2002.
3. The Draft Referendum Act of the Azerbaijan Republic ‘On Amending the Constitution of the Azerbaijan Republic’ shall be published within 48 hours effective the day of signing of this Decree.
4. The Central Election Commission of the Azerbaijan Republic shall ensure conducting of the nationwide voting (referendum) on the date, specified by Item 2 of the present Decree.
5. The Cabinet of Ministers of the Azerbaijan Republic shall be assigned to carry out the necessary measures related to finance of the nationwide voting (referendum).
6. The decree enters into force effective the date of its signing.’

*Heydar Aliyev, President of the Azerbaijan Republic*  
*June 22, 2002*  
*Baku*

Source: Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, <<http://www.legislationline.org>>.

49. Political authorities have also used the referendum to promote a law that would not have passed through the normal legislative process for various reasons, for example, when a government is unable to mobilize sufficient support for its policies (France, in 1988, on New Caledonia; Denmark, in 1986, on the Single European Act; Bolivia, in 2004, on natural gas reserves); when a government is split on an issue (the UK, in 1975, on membership of the European Community); when there is disagreement between the chambers of the legislature (Belgium, in 1950, on the return from exile of King Leopold III; Sweden, in 1957, on supplementary pension plans); or when the constitution requires a qualified majority or the assent of constituent units in a federal state before a proposal can be adopted (Canada, in 1992, on constitutional reform).

50. Political authorities have sometimes initiated referendums in order to demonstrate popular support for the president or government. In these cases, the vote may be less on the particular issue than on the political leaders themselves, who maintain that chaos may result from a defeat and possible resignation of the president or government. An example in Europe of this kind of vote of confidence occurred in France, where President Charles de Gaulle on several occasions used the referendum as a means to demonstrate public confidence in his leadership. However, such an attempt failed in 1969, leading to his resignation. In Chile, Augusto Pinochet in 1978 called a referendum asking the voters to support him by agreeing to the following ballot text: 'In the face of international aggression against the government of our fatherland, I support President Pinochet in his defence of Chile's dignity, and I once again confirm the legitimacy of the government of the republic in its leadership of the institutional proceedings in this country'. Another and more direct example is Russia where in April 1993 in a referendum the voters were asked questions such as 'Do you express confidence in Boris Yeltsin, president of the Russian Federation?' and 'Do you approve of the socio-economic policies of the president of the Russian Federation and of the government of the Russian Federation since 1992?'

51. Executives have also initiated referendums in order to demonstrate popular support for a specific political decision. Governments often claim that this is their main or only reason for organizing a referendum, whereas the true motivation may be (and often is) provided by political and tactical considerations. Such political and tactical reasons for initiating referendums have been criticized from a democratic point of view because here the referendum instrument has been used not in order to strengthen popular sovereignty and increase political equality but rather to bypass popular control and maintain or even extend the authority of the executive. Both democratic and authoritarian governments can initiate referendums, which may contribute to the stability and efficiency of the regime. Thus, a large number of referendums held in Latin America have been called by the executive branch, whereas few have been initiated through the collection of signatures (all of these in Uruguay). Some referendums called by the executive in Latin America were attempts to legitimize authoritarian regimes, but such attempts have not always been successful. Whereas the people of Chile in 1978 voted for Pinochet and a continued military regime, in Uruguay in 1980 the people rejected the proposal for

a new constitution put forward by a constituent assembly appointed by the military government.

52. In some jurisdictions referendums serve as way of protecting a legislative minority that may demand a referendum on a decision taken by the legislative majority. In Denmark, one-third of the members of the legislature (the Folketing) may demand a legally binding referendum on a bill passed by the Folketing. In Sweden a pending constitutional amendment must be referred to a legally binding referendum if one-tenth of the members of the legislature (the Riksdag) so request.

53. In terms of the legal consequences, referendums initiated by the political authorities may be consultative or legally binding. The distinction may, however, not be very important. It may be difficult for a democratic government to disregard the result of a referendum even though it is only consultative, as the referendums on the EU Constitutional Treaty in France and the Netherlands in 2005 demonstrate. Moreover, if a government finds it impossible to accept the outcome of a legally binding referendum, it may find ways to circumvent a referendum result, for instance by calling a new referendum on a slightly different question (as happened in the referendums in Denmark in 1992 and 1993 on the Maastricht Treaty and in the Republic of Ireland in 2001 and 2002 on the Nice Treaty). But in some jurisdictions a referendum cannot be repeated within a specified period; for example, in Argentina it cannot be repeated for two years.

54. In Palau, seven referendums were called between 1983 and 1990 on the proposed Compact of Free Association with the United States, which involved access by warships with nuclear capability to Palau waters. In each referendum, there was a simple majority for the compact, but not the 75 per cent vote required for its approval. The failure of this 'keep on holding referendums until you win' strategy led to a constitutional amendment removing the 75 per cent majority requirement and replacing it by a simple majority, following which the compact was approved in an eighth referendum in 1993. However, governments which take this kind of approach may find themselves subject to criticism for manipulation, even when the result is ultimately accepted.

55. It is not always clear for how long the result of a referendum is considered valid and applicable. Swedish voters rejected a proposal to switch from driving on the left-hand side of the road to the right-hand side in a 1955 referendum; in 1963, however, the Swedish parliament passed a law which enacted this change without a further referendum. It may be good practice to address this kind of question in advance in a referendum law rather than resolving it only at a time when a specific issue is under debate.

## Procedural aspects

### *The institutional framework*

56. It is important to decide how the referendum fits within the legal system and political culture of the jurisdiction. Referendums can be regulated by a written constitution, by general and permanent legislation or by specific ad hoc laws on a particular popular vote. In Switzerland the federal authorities can only call mandatory referendums on constitutional amendments and certain international treaties. If referendums are regulated by specific laws, the constitution or permanent legislation may specify whether such laws require a specific procedure or follow the ordinary procedure for law-making. If referendums are not directly forbidden by the constitution they may be regulated by specific ad hoc laws passed by ordinary legislative procedures, as is the case in Norway.

57. The advantages of regulating referendums in the constitution or in ordinary legislation are transparency and greater popular control, which contribute to the democratic legitimacy of referendums initiated by the political authorities. If the constitution regulates the issues on which and the circumstances under which referendums are to be held – that is, it provides for mandatory referendums – the citizens have better opportunities to participate effectively in the political process and are less likely to fall victim to deliberate manipulation by the political authorities. Optional referendums, which are unregulated by the constitution or by permanent legislation, tend to give political authorities more opportunities to use referendums for tactical purposes and sometimes to influence the result by deciding the issues to be voted on, the timing of the vote, the wording of the ballot question, the approval quorum, and so on. This is one reason why such optional and ad hoc referendums have often been criticized from a democratic point of view. The disadvantage of regulating referendums in the constitution or in legislation is that this reduces flexibility, particularly if the constitutional regulation is exhaustive and prohibits optional referendums. Thus, a balance has to be found between democratic legitimacy on the one hand and political efficiency and stability on the other. It is not possible to give exhaustive guidelines for achieving this balance, which has to be determined according to the particular circumstances of each jurisdiction.

### *Political issues*

58. Typically, the subjects on which mandatory referendums are to be held are issues of major political significance, such as constitutional reform; the adoption of international treaties; the transfer of national competences and rights to international or supranational organizations; aspects related to national sovereignty such as privatization or nationalization; conflict between government bodies; or the regulation of economic and financial resources such as the imposition of new taxes, rates, public expenditure, and so on. Mandatory referendums may also be required by the constitution on moral issues such as the admissibility of divorce, abortion, euthanasia, the validity of human rights legislation, possible violations of human rights of the past and the present, and so on.

59. Where referendums are optional, the subjects on which they are held may vary. Referendums could be allowed on any issue that is the subject of legislation without restriction. However, some jurisdictions that provide for referendums place restrictions on the issues that can be the subject of referendums. The most common restriction is that taxes and public expenditure commitments cannot be submitted to referendums: such restrictions have been identified in a large number of countries, including some in Western Europe (Greece, Italy); in Central and Eastern Europe (Hungary, Latvia); in Latin America (Chile, Ecuador); and in Africa (Ghana, Lesotho).

60. In the case of a referendum promoted by the political authorities, it may be necessary to determine whether it can be called by any one of the governmental institutions on its own authority or if it requires coordination between different institutions for the procedure to be triggered. If the president or the government according to the constitution is free to call a referendum without the approval of the legislature or other governmental institutions such as a constitutional court – or if no regulation exists – these executive institutions have greater flexibility in making use of the referendum procedure. However, these advantages from the point of view of the political authorities may well be at the expense of democratic legitimacy, as popular support is most often sought when it suits the government.

**Box 2.5. A plebiscite called by a military government:  
Thailand's 2007 constitutional referendum**

Since the abolition of absolute monarchy in 1932, Thailand has had a long history of military coups and changes of constitutions. On 19 September 2006 a military junta toppled the democratically elected government of Prime Minister Thaksin Shinawatra. The generals claimed to be acting in defence of King Bhumibol Adulyadej. It was widely claimed that, even though the king did not initiate the coup, no coup could have succeeded without his consent. The leaders of the coup annulled the 1997 constitution and appointed a Constitution Drafting Assembly to write a new constitution in order to eliminate the loopholes that they said had allowed Thaksin to abuse power.

By the end of June 2007 a draft proposal for a new constitution was published by the Constitution Drafting Assembly. The parliamentary system was to remain in place, but critics argued that the new constitution was less democratic than the former because about half of the new Senate was to be appointed by judges and government bodies rather than elected.

The Constitution Drafting Assembly also announced that a national referendum on the proposed constitution would take place on 19 August. Copies of the draft

constitution, comprising more than 300 articles, would be ready for the public on 31 July and sent to all Thai families. Thus, a very short period of only 19 days was allowed for the voters to be informed about a lengthy and complex document.

A general election was tentatively scheduled for December, although interim Prime Minister Surayud Chulanont hinted that the poll could take place in November if the public passed the draft constitution. Thus, the military government motivated the voters to turn out and vote, but threats were also indicated: 'If the referendum fails, it will create continuing problems and a chaotic situation', Defence Minister Boonrod Somtad told reporters.

The result of the referendum was an endorsement of the new constitution as 57.8 per cent voted 'Yes' and 42.2 per cent voted 'No'. However, little more than half of the eligible electors (57.6 per cent) participated.

The vote was a typical plebiscite in the derogatory sense, indicating a popular vote where there is no real possibility of free and fair contest over an issue. As Dr Pasuk Pongpajittr of Chulalongkorn University argued, 'This is not a referendum. A referendum is where you ask the people and there is an alternative – but if you say no to this, you don't know what you get' (BBC News, 17 August 2007).

### **Timing**

61. It may also be necessary to establish when a referendum will take place, thus allowing an adequate period for the campaign. Referendums may have to be held within a certain period of time after they are called. If such a period of time is not established in each particular case, the government may either call the referendum so quickly that a genuine public debate is impossible or prolong the debate for such a long time that the issue becomes submerged among others or public interest is exhausted. A referendum on a new constitution in Thailand, held by the military government in 2007, was widely criticized on a number of procedural grounds, including the length of time allowed for the campaign (see box 2.5). General and permanent rules for the length of referendum campaigns may improve democratic legitimacy, whereas specific ad hoc rules may allow more governmental flexibility and increase efficiency, depending on the level of public knowledge and awareness of the issue(s) placed on the referendum ballot paper.

62. It may be appropriate to consider whether the constitution or general and permanent legislation should stipulate whether referendums can be carried out simultaneously with a national election, regional elections, municipal elections and so on, or if they should be carried out at a different time. From an efficiency point of view, money can be saved

by holding referendums and elections together, and participation may sometimes be improved in circumstances where elections produce a higher turnout. To the extent that the democratic legitimacy of a referendum result often depends on the turnout, this may be desirable. On the other hand, the referendum issue may become submerged during a referendum campaign that coincides with an election, and may not receive sufficient attention. Democratic legitimacy also requires that an issue be sufficiently discussed and debated by the voters, and their attention may be distracted by an election taking place at the same time.

63. Consideration might also be given to the question whether it should be stipulated that referendums on more than one issue can be held at the same time. In some jurisdictions, such as California and Switzerland, several issues are typically decided by the voters on the same day. In the 2003 referendum called by President Álvaro Uribe of Colombia, 19 separate issues were to be decided by the voters. The advantage of this procedure is that the voters are involved more efficiently in the decision making on a wider range of public affairs, which may increase democratic legitimacy and responsiveness. The drawback is that the voters have to inform themselves on a large number of issues which may not be related to each other. Obtaining sufficient information for deciding how to vote on so many issues is both time-consuming and intellectually demanding. Public debate cannot penetrate deeply into all subjects, the campaign tends to be less focused, and the voters may become dependent on the advice given by political parties, interest organizations or ad hoc campaign groups. If votes on several issues at the same time result in less informed decisions, confusion among the voters and a resulting low turnout, the democratic legitimacy of the referendum results is undermined.

### ***The ballot text***

64. The alternatives presented to the voters have to be considered carefully. Usually referendums give the voters the possibility to vote for or against a specific proposal. In some cases voters have been given a choice between three alternatives, for example, in Sweden in 1980 on the nuclear power issue. The clearest result is obtained if the voters are asked to choose between two alternatives. If they have to choose between three or more alternatives it may be difficult to interpret the referendum result. However, if a choice between more than two alternatives is really wanted, a vote where the alternatives are rank-ordered could be applied, or the issues could be split up into two or more questions – each of them with two alternatives – as in the Republic of Ireland, where policy on abortion was split up into three separate questions in the 1992 referendum dealing with that issue.

65. Whether referendums are regulated in the constitution or in ordinary legislation or are not regulated at all, an important issue under all circumstances relates to the ballot text – the question put on the ballot paper. The wording of the question can have an important effect on the result and on its legitimacy. In general, the ballot text should be as precise and clear as possible and should have one goal and interpretation only. It should not be vague or capable of different meanings (see box 2.6). It should

be neutrally formulated and avoid expressions with any evident positive or negative overtone. In the abstract, this may seem to be straightforward and self-evident, but in practice it may be less easy to achieve. Malpractices such as double negatives and biased language abound. In some US states disagreements over the language of the ballot text may end up in court.

**Box 2.6. A controversy of question wording: the text of the ballot paper for the 1980 Quebec referendum**

‘The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations. This agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes, and establish relations abroad – in other words, sovereignty – and at the same time, to maintain with Canada an economic association including a common currency. No change in political status resulting from these negotiations will be effected without approval by the people through another referendum. On these terms, do you agree to give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?’

66. It may be appropriate to specify who decides the exact formulation of the ballot text. In particular, it is important to consider whether the government shall be responsible for drafting the question, even in cases when the government initiates the referendum and therefore has an interest in designing the question in such a way as to increase the chances of achieving the result it desires (see box 2.6). In some jurisdictions, an electoral management body (EMB) may have oversight of the formulation of the referendum question, so that this responsibility is placed in the hands of a more politically neutral body.

67. The question of appeal should also be addressed. Should there be a possibility of appeal against the way in which the ballot text has been formulated? If this option is adopted, it must be precisely established who can appeal, for instance, a governmental institution different from the one which wrote the ballot text, or a certain number of citizens, and within what period of time. Consideration should also be given to which body shall be called upon to decide upon the matter. In the same way, there should also be a clear regulation about the period of time the body will have to resolve the conflict.

***The campaign: organization and regulation***

68. Communicating information to the public about the main content of a referendum

question is vital for the legitimacy of the referendum result. Thus, consideration has to be given to whether, and to what extent, rules in the constitution or in a referendum law should regulate campaign activities by limiting the amount of money that can be spent on the campaign, regulating access to the public and private media, and so on. On the one hand, a main principle of good practice in this respect is to ensure a level playing field between those in favour and those opposing the proposal. On the other, a fundamental principle of freedom of expression also has to be respected (see chapter 7).

69. It should be established whether a government that promotes a referendum proposal should limit itself to informing the public about the main aspects of the proposal, or whether it should also be allowed to use public money on advocating for the proposal. In the Republic of Ireland, Supreme Court decisions have held that the government was not allowed to spend public money in support of one side of a referendum campaign and that the public service broadcaster was not allowed to give more air time to one side than to the other in a referendum campaign.

70. If spending limits are imposed on those campaigning for and against the proposal, this may create problems for freedom of expression and the legitimacy of the referendum result. In the Republic of Ireland, under the Referendum Act of 1998, a Referendum Commission was established as an independent statutory body, for each referendum, to oversee the information campaign on proposed amendments to the constitution in order to facilitate debate and discussion on the matter in a manner which was fair to all interests concerned (see box 7.3 in chapter 7). It is a matter of contention whether this provision is conducive to a vibrant public debate or whether it restrains the public debate unnecessarily. Because of this contention, the mandate of the Referendum Commission has been revised on several occasions.

### ***Voting qualifications, mechanisms and rules***

71. Regarding the referendum itself, whether mandatory or optional, consideration should be given to how it is to be organized and which authority is to be responsible for ensuring that voting procedures are carried out in accordance with the law. There may be specific regulations stating whether there is a difference between those who can vote in a referendum and those eligible to vote in a national election, for instance with regard to citizenship or the voting age. Similarly, the period of time for the voting and the way(s) in which voting can be done may be specified. The possibilities for postal voting, absentee voting or voting via the Internet, for example, may need to be specified. Regulations may need to be introduced on whether voting in a referendum shall follow the same rules about compulsory or voluntary voting as national elections, and whether rules about compulsory voting shall be strictly administered, as they have been in Belgium and Uruguay. In general, in order to avoid deliberate manipulation by the political authorities, the best practice is to apply the same rules in national elections and referendums.

72. A critical issue to be considered is when a referendum proposal is judged to have passed. In some jurisdictions, it will pass if a simple majority of voters vote 'Yes'. In others, a referendum vote passes only if a specified turnout threshold (turnout quorum) is reached, or a specified number of voters cast a 'Yes' vote (approval quorum). Some jurisdictions require a double majority for a referendum vote to pass, for example, an overall majority among the voters and a majority of the sub-national jurisdictions in a federal country, as is required in Australia and Switzerland. Such general rules about turnout and approval quorums have to be made clear in advance of the referendum. Legitimacy, transparency, fairness and popular acceptance of the referendum results are improved if such quorums are specified in the constitution or in ordinary legislation, and not decided on an ad hoc basis just before each referendum.

73. Although high turnout is often seen as an indicator of the democratic legitimacy of a referendum, specifying a certain turnout quorum may not in itself encourage a high turnout. Experience has shown – for instance in Italy – that those who oppose a proposal may campaign for the electors not to turn out to vote. To encourage political passivity and to undermine the norm of the citizen's duty to vote is not conducive to the development of popular control of political decisions. Important decisions may be stopped without being truly discussed and considered. The risk of a small and active minority dominating a large and passive majority can be handled by other means than turnout quorums, such as opening up genuine opportunities for vigorous information campaigns and political mobilization of the voters by political parties, social movements and ad hoc campaign groups.

74. The result of a referendum may be either legally binding – that is, the government and appropriate authorities are compelled to implement the proposal – or consultative – that is, in legal terms only giving advice to the government or appropriate authorities. It has to be clearly specified either in the constitution or in ordinary legislation what the legal consequences are. If the consequences are not specified prior to a referendum, the political authorities may adapt the legal consequences according to political and tactical considerations. A decision by the authorities not to implement a proposal which commands the support of a majority of citizens runs the risk of undermining the democratic legitimacy of the process. In this context it is important to distinguish between the legal and political consequences.

75. In summary, careful consideration has to be given to how far the rules, norms and principles of good practice are specified in the constitution or in the legislation regulating referendums (see chapter 9 and annex A). A balance has to be found between a large number of specific and detailed regulations that may limit flexibility and transparency, on the one hand, and a complete or almost complete absence of regulations, which may lead to arbitrariness and deliberate manipulation, on the other. In jurisdictions which have greater experience with direct democracy procedures, it is generally possible to specify the rules and procedures to be followed in a constitution or general referendum law, and therefore to provide greater confidence among the citizens that proper

procedures are being followed. Where there is less experience with such procedures, or where a referendum is being held for the first time, the political authorities must make sure that the rules and procedures governing the referendum are not manipulated to favour one side over the other.

## Conclusions

76. The referendum is a direct democracy procedure that provides for a vote by the electorate on an issue of public policy. As such it provides the potential for a further development of democracy by granting direct control of public decisions to the people on the basis of political equality. In the hands of the political authorities, however, it involves both dangers and democratic opportunities. Before including the instrument of the referendum called by the political authorities into the constitutional framework of a country or sub-national jurisdiction, a careful evaluation of its probable and possible impacts has to be considered. A referendum may become a weapon in the hands of the political leadership, or may precipitate major divisions in countries where there is little sense of nationhood or where local or regional identities are very strong.

77. Opponents of referendums sometimes argue that if the political authorities – indirectly or directly – have the power to determine when referendums are held, if they can decide what issues they are held on, if they control the campaign and the information provided for the voters, and if they can interpret the referendum result as they like – perhaps calling a new referendum if they do not like the result – referendums become merely a political tool that is used to serve the needs of the governing party rather than the interests of democracy. Furthermore, if the turnout in referendums is substantially lower than that at national elections, the argument that referendums increase the legitimacy of political decisions may not stand up.

78. Opponents of referendums called by the political authorities may also argue that, unless the voters are given a choice between two equally applicable alternatives in a free and fair way, referendums become ‘plebiscites’ in the derogative sense. In such votes, strong leaders appeal directly to the people for personal support, and more or less explicitly threaten the onset of political chaos if they do not receive the popular support they expect. The referendum held by the military government in Thailand in 2007 was widely criticized on all these grounds.

79. Such objections to referendums initiated by the political authorities, and in particular by the executive branch of government – the president or the government – may be well founded if the political authorities have the exclusive right to call referendums and the citizens are denied all possibilities for demanding referendums or taking initiatives. Chapter 3 considers in more detail the design and political issues that arise when the citizens themselves, rather than only the authorities, can initiate a popular vote.

80. Even though the results of referendums in the hands of the political authorities are sometimes mistrusted, it is possible to improve the democratic quality of such referendums by adhering to principles of good practice. Referendums called by the executive under authoritarian forms of government may stabilize the regime and reduce political pressures on it, but they cannot always be taken as valid expressions of the will of the people and thus often lack democratic legitimacy. The same can hold true, although to a lesser extent, of optional ad hoc referendums initiated by the executive under more democratic forms of government. In order to improve democratic legitimacy it is, in general, recommended to regulate the use of referendums in the constitution or in general and permanent legislation and to avoid ad hoc decisions – in particular in jurisdictions that lack a long democratic tradition and a broad consensus on the democratic rules of the game. The less the experience with referendums and the less mature the democratic culture, the greater the need for regulation in order to avoid misuse or deliberate manipulation of the voters when the political authorities call referendums.