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Referendum in the Estonian Constitution:

Historical and Comparative Constitutional Aspects

The opportunities offered by and the limitations of direct democracy became important in constitutional law in the past decade in connection with the enlargement of the European Union and especially in the context of reforms in which different referendums have played a significant role.^{*1} This has also resulted in the bulking up of literature dealing with the problems of direct democracy.^{*2} The application of direct democracy is directly associated with the principle of subsidiarity. The principle of people's sovereignty mainly puts emphasis on the people as the bearer and source of the power of state and their role: the rights of organising political power and determining its structure are vested in the people while such rights must be linked with the legitimacy and will emanating from the people. It means, in particular, that the constitutional power (*pouvoir constituant*) is vested in the people.^{*3} This is to be understood to be imperative—state power may proceed solely from the people. Pursuant to §56 of the Constitution of the Republic of Estonia^{*4} (hereinafter referred to as the Constitution), the supreme power of state is exercised by the people through citizens with the right to vote by electing the Riigikogu and through a referendum. At that, pursuant to §162 of the Constitution, the provisions dealing with the fundamental principles and the procedure of their amendment (Chapters I and XV) may be amended only by a referendum.

This article explores the position of referendum provisions in the Constitution and also, more broadly, the subject of direct democracy in the context of Estonian constitutional law and in international comparison.

¹ For example, the referendums on the Treaty establishing a Constitution for Europe in France and Holland in 2005; the referendums held in 2008 and 2009 in Ireland on the ratification of the Treaty of Lisbon. There were 24 referendums on the European Union treaties and accession to the EU between 1998 and 2008.

² Here the following sources can be cited: S. Binzer Hobold. *Europe in Question: Referendums on European Integration*. Oxford: Oxford University Press 2009; M. Setälä, T. Schiller. *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation*. Routledge/ECPR Studies in European Political Science 2009; Z. T. Pallinger, B. Kaufmann, W. Marxer, T. Schiller. *Direct Democracy in Europe. Developments and Prospects*. Wiesbaden: VS Verlag für Sozialwissenschaften/GWV Fachverlage GmbH 2007; M. Qvortrup. *A Comparative Study of Referendums: Government by the People*. Manchester University Press 2005; T. Schiller. *Direkte Demokratie. Forschung und Perspektiven*. Westdeutscher Verlag 2003. There is also an abundance of other articles. As regards Estonia, there is a significant monograph by Vallo Olle. *Kohaliku omavalitsuse teostamine vahetu demokraatia vormis: kohalik rahvaalgatus ja rahvahääletus* (Exercising Local Government in the Form of Direct Democracy: Local Citizens' Initiatives and Referendums). Tartu Ülikooli Kirjastus 2002 (in Estonian).

³ M. Suksi. *Bringing in the People. A Comparison of Constitutional Forms and Practices of the Referendum*. Martinus Nijhoff Publishers, Kluwer Academic Publishers 1993, pp. 16–28.

⁴ *Eesti Vabariigi põhiseadus*. – RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian).

1. Referendum typology and application in the world

Direct democracy operates in two ways: either by a referendum or a citizen initiated referendum. In literature, various forms of referendum are distinguished between⁵:

- 1) mandatory constitutional referendum—set out *expressis verbis* in the constitution of the country as a mechanism required to make decisions related to the sovereignty of the state or amend the constitution; the outcome of a referendum is binding and mandatory for all of the public bodies; used, e.g., in Australia, Denmark, Ireland and Switzerland;
- 2) abrogative referendum—a procedure allowing the people to decide on a law already passed in the parliament; it has also been called facultative or veto referendum. For example, in Sweden and Austria such a referendum may be initiated by at least one third of the members of the parliament; in Italy such a referendum may be initiated either by a part of the parliament, citizens (at least 500,000) or regional councils (at least five). In Italy such a referendum may repeal any law (including those already enforced), elsewhere it is used to reject new laws (referendum is held before enforcement). The outcome is binding;
- 3) consultative referendum—also called the plebiscite or *ad hoc* referendum. A referendum may address any issues and is initiated either by the government or parliament. The outcome is non-binding. Such a regulation may be incorporated in the constitution (e.g., in France), be provided for by a special act (e.g., in Canada) or in the decision on the initiation of a referendum itself (e.g., in Great Britain).

As a rule, a referendum is general and direct; it may be held over a certain issue, including a draft act. A referendum should be distinguished from a public poll and a citizen initiated referendum.⁶ With the latter, a draft act is initiated by the people and requires collection of a certain amount of signatures from the citizens. The number of signatures required to initiate a referendum varies and is prescribed either in the constitution or in a special act. The outcome of a referendum is usually binding, although its legitimacy may sometimes be assessed by a court or the parliament (e.g., in Switzerland, New-Zealand and some states of the US).

Jurisprudent Markku Suksi believes that the provisions containing direct democracy in some form are present in 85 constitutions of the world.⁷ The table on the application of direct democracy (see Table 1) shows that direct democracy is more existent in European countries. In Europe, Switzerland has the greatest tradition of applying direct democracy—between 1945 and 2006 it held 396 direct democratic referendums.⁸ In other European countries, direct democracy was widely applied in the enlargement process of the European Union.

Table 1. Application of direct democracy in the continents of the world in 1951–2010

Period	Europe	Asia	North and South America	Australia and Oceania	Africa	Total	Average
1951–1960	38	13	3	5	9	68	6.8
1961–1970	44	22	4	7	19	96	9.6
1971–1980	116	50	8	14	34	222	22.2
1981–1990	129	30	12	7	22	200	20.0
1991–2000	235	24	76	15	35	385	38.5
2001–2010	167	30	44	22	35	298	29.8

Note: The table is based on data from the Initiative & Referendum Institute (hereinafter referred to as the IRI) Europe.⁹

⁵ L. LeDuc. *The Politics of Direct Democracy: referendums in global perspective*. Broadview Press 2003, p. 39.

⁶ Committee for Expert Analysis of the Constitution, final report. *Kommentaariid põhiseaduse 3. peatükile „Rahvas“* (Comments on Chapter 3 ‘People’ of the Constitution). Available at <http://www.just.ee/10726> (19.3.2011) (in Estonian).

⁷ M. Suksi (Note 3), p. 137.

⁸ M. Gallagher. *Elections and Referendums*. – D. Caramani (ed.). *Comparative Politics*. Oxford: Oxford University Press 2008, p. 257.

⁹ The IRI Guidebook to Direct Democracy in Switzerland and beyond 2010. Kőniz: Initiative & Referendum Institute Europe, Ast & Jakob, Vetsch AG, 2010, p. 208.

To sum up, alongside representative democracy direct democracy in its various forms is being applied worldwide, including in Europe as an active mechanism of democracy.

2. Referendum and citizen initiated referendum in Estonian law

Next let us have a look at the position of referendum clauses in Estonian legal order.

Two sections of the Constitution regulate referendums: §§105 and 106. Section 105 provides that the Riigikogu has the right to submit a draft act or other national issue to a referendum; the decision of the people shall be made by a majority of the participants in the voting. A law which is passed by a referendum shall promptly be proclaimed by the President of the Republic; the decision of the referendum shall be binding on all state institutions. If a draft act which is submitted to a referendum does not receive a majority of votes in favour, the President of the Republic shall declare extraordinary elections to the Riigikogu. Section 106 of the Constitution provides that issues regarding the budget, taxation, financial obligations of the state, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence shall not be submitted to a referendum. An act adopted by referendum normally has the same legal power as any act adopted by the parliament. The stance of the Constitutional Review Chamber of the Supreme Court is that the Riigikogu may submit an issue to a referendum only where such an issue is in the remit of the Riigikogu and holding a referendum is not prohibited under §106 of the Constitution; for example, deciding on the extraordinary elections to the Riigikogu is not within the powers of the Riigikogu—pursuant to §78 3) of the Constitution such elections are proclaimed by the President of the Republic and therefore the Riigikogu cannot submit that issue to a referendum.^{*10}

Such forms of direct democracy as referendum and citizen initiated referendum were also present in the constitutions of the Republic of Estonia before 1940. Section 29 of the constitution adopted by the Constituent Assembly in 1920 gave extensive powers to the people—besides elections of the Riigikogu and the form of a referendum, it also provided for the institute of a citizen initiated referendum. The people, i.e., the active citizenship, even had the right to step up as a legislator under the referendum regime—they could issue, amend or repeal acts (§31).

What was significant was that the active citizenship had exclusive rights to amend the constitution, whether by a citizen initiated referendum^{*11} or by the Riigikogu (§88).^{*12} Section 29 of the 1933 constitution provided that the people exercise the power of state by a referendum, citizen initiated referendum, election of the Riigikogu and election of the Riigivanem (president).

The 1938 constitution relinquished, *inter alia*, the referendum and kept only the institute of citizen initiated referendum (§35 4)).

Returning to current law, besides the Constitution the issues related to referendum are regulated also by a specific act. Clause 104 5) of the Constitution provides that the Referendum Act belongs to the constitutional laws, i.e., it may be passed and amended only by a majority of the membership of the Riigikogu. The Referendum Act^{*13} (hereinafter referred to as the RA) was adopted by the Riigikogu on 13 March 2002 and entered into force on 6 April 2002. Section 1 of the act provides for the issues already addressed in the Constitution (repeats the provisions of §§105 and 106 of the Constitution). A referendum is free, general, uniform and direct. Voting is secret, each voter has one vote. An Estonian citizen who has attained eighteen years of age by the date of a referendum may participate in the referendum. A person cannot participate in the voting if he or she has been divested of his or her active legal capacity by a court judgment or has been convicted by a court and is serving a sentence in a custodial institution (RA §2). Section 3 of the RA provides for the time of referendum so that a referendum is held not earlier than three months after the passage of a

¹⁰ CRCSCd, 30.10.2009, 3-4-1-20-09.

¹¹ In comparison, it should be pointed out that currently, under §161, the right to initiate amendment of the Constitution rests with not less than one-fifth of the membership of the Riigikogu and with the President of the Republic (subsection 1).

¹² H. Schneider. Riigiteoreetilisi probleeme: miks nad on tekkinud ja kuidas neid lahendada? (Theoretical Constitutional Problems: Why Have They Emerged and How to Solve Them?) – *Juridica* 1998/7, p. 355 (in Estonian).

¹³ Rahvahääletuse seadus. – RT I 2002, 30, 176; 2009, 29, 175 (in Estonian). The act repealed the Referendum Act which had been in force since 19 June 1994 (RT I 1994, 41, 659; 2000, 95, 610).

resolution to this effect by the Riigikogu (subsection 1) whilst a referendum is not held at a time when less than ninety days remain until elections to the Riigikogu. A referendum on a draft act to amend the Constitution or on another national issue may be scheduled for a time after the next elections to the Riigikogu; a referendum on another draft Act must not be scheduled for a time after the next elections to the Riigikogu; a referendum may be scheduled for the same day as Riigikogu elections or local government council elections (subsection 3). What is also important is the principle that referendums are not held on the same day on issues which are mutually exclusive or for the passage of acts which are in conflict with each other (subsection 4). Subsection 30 (1) of the RA provides that if a draft act is submitted to a referendum, the title of the draft act or, pursuant to a resolution of the Riigikogu, the text of the draft act, the question “*Kas Teie olete seaduseelnõu seadusena vastuvõtmise poolt?*” [Are you in favour of passage of the draft Act?] and spaces marked with the possible answers “*jah*” [yes] and “*ei*” [no] are entered on the ballot paper. If another national issue is submitted to a referendum, the wording of the issue and spaces marked with the possible answers “*jah*” [yes] and “*ei*” [no] are entered on the ballot paper.

A referendum is initiated pursuant to the provisions of Chapter 14 of the Riigikogu Rules of Procedure and Internal Rules Act¹⁴ (hereinafter referred to as the RRPIRA). Pursuant to §128 (1) of the RRPIRA a member of the Riigikogu, a faction and a committee have the right to initiate a referendum.¹⁵ Pursuant to §129 (6) of the RRPIRA a decision to hold a referendum in order for an act to be passed is taken by the Riigikogu by a final vote on the draft resolution at the third reading and in order for the draft resolution to be passed, a majority of votes in favour is required. In order to submit to a referendum draft acts of the laws listed in §104 (2) of the Constitution, the draft act must have a majority of the votes in favour of the membership of the Riigikogu. If the draft resolution is not adopted, the draft act is also deemed to have been rejected (RRPIRA §129 (7)). In order for the draft resolution on submitting other national issues to a referendum to be passed, a majority of votes in favour is required (RRPIRA §130 (2)). Pursuant to §6 (2) of the RA, the Riigikogu shall not amend or repeal a resolution to hold a referendum. Pursuant to §7 (1) of the RA, a referendum is postponed if a state of emergency or a state of war is declared. In case of a state of emergency, the Riigikogu may postpone the referendum by a resolution (subsection 2). The Riigikogu determines a new date for the referendum within two weeks after the reasons cease to exist, observing the term prescribed in §3 (1) of the RA which shall be calculated from the date on which the resolution of the Riigikogu determining the new referendum date is passed. Subsection 8 (1) of the RA provides that a referendum is not held if:

- 1) the Supreme Court repeals the resolution of the Riigikogu concerning submission of a draft act or other national issue to a referendum;
- 2) the Riigikogu has not passed a resolution determining a new date for the referendum within the term prescribed in §7 (3);
- 3) the time of the referendum is not in accordance with §3 (3) of the RA due to extraordinary Riigikogu elections being called.

In addition to a referendum, it was possible during a limited time period after the adoption of the Constitution in Estonia to call forth a citizen initiated referendum. Second paragraph of §8 of the Constitution of the Republic of Estonia Implementation Act¹⁶ provided that the right to initiate amendment of the Constitution during the three years following the adoption of the Constitution by a referendum also rests, by way of public initiative, with not less than ten thousand citizens with the right to vote. However, no law was passed to specify the procedure of a citizen initiated referendum. In 1994, 10,632 citizens of Estonia with the right to vote initiated a draft act to amend the Constitution. The draft act proposed to amend §28 of the

¹⁴ Riigikogu kodu- ja töökorra seadus. – RT I 2003, 24, 148; 2010, 28, 144 (in Estonian).

¹⁵ Pursuant to §40 (1) of the RRPIRA a faction may be formed by and must comprise not less than five members of the Riigikogu who are elected from a list of candidates of the same political party. Pursuant to §17 of the RRPIRA the Riigikogu has standing committees, select committees, committees of investigation and study committees. Pursuant to §18 (2) of the RRPIRA committees prepare draft legislation for deliberation by the plenary assembly of the Riigikogu, exercise supervision over the exercise of executive power within their particular field and perform other functions assigned to the committees by law or by a resolution of the Riigikogu. Standing committees are formed under law; select committees are formed by a resolution of the Riigikogu which sets out the composition, including an alternate member to substitute for each committee member, functions and procedure for reporting on the activities of the committee (RRPIRA §19 (2)); committees of investigation and study are formed by a resolution of the Riigikogu which sets out the composition, including an alternate member to substitute for each committee member, functions and term of authority of the committee (RRPIRA §20 (2) and §21 (2)).

¹⁶ Põhiseaduse rakendamise seadus. – RT I 1992, 26, 350 (in Estonian).

Constitution to incorporate a guaranteed pension to everybody according to their labour input, and §56, supplementing it with the provision that the president is to be elected directly by the people.^{*17} The draft act was rejected without a debate by the Riigikogu in the autumn of the same year (with the votes 32 in favour, three against and four undecided).^{*18}

The current law of Estonia provides only for a referendum. Also, in addition to a citizen initiated referendum the current law does not provide for the institute of a public poll. A public poll is favoured by the principle of democracy according to which it is essential to take the opinions of the people into consideration—in such a case, the public authorities would have the right to ask non-binding opinions from the people in order to get information about the feelings and stances of the people. The Supreme Court has noted that the term ‘public poll’ is not used in the Constitution. The outcome of a public poll is, unlike the outcome of a referendum, not binding to a state or local government body and is limited just to the clarification of the opinion of the persons entitled to participate in a public poll.^{*19} The non-binding nature of a public poll, however, would be a problem—in terms of politics a public poll would acquire a binding substance and thus a referendum should be preferred to a public poll.^{*20}

3. Application of direct democracy in Estonia

A total of seven referendums and one citizen initiated referendum have been held in Estonia’s history (see Table 2).^{*21}

Pre-1940, direct democracy was applied in Estonia in five instances. Only two referendums were held during the prolonged Soviet occupation and the restoration of Estonia’s independence—the referendum on independence (3 March 1991) and the referendum on the constitution (28 June 1992) were the major political events of the transitional period and though close in time they took place under totally different circumstances.^{*22}

Just one referendum has been held under the current Constitution: On 14 September 2003, the Constitution of the Republic of Estonia Amendment Act^{*23} was adopted by a referendum. It was not possible to ratify the Treaty on accession to the European Union by a referendum as §106 of the Constitution prohibits to submit the issues related to the ratification and denunciation of international treaties to a referendum and there was no desire to amend §106 of the Constitution. It was important to amend the Constitution and hold a referendum as accession to the European Union was a matter of principle in terms of the nationhood and future of Estonia. A referendum was needed to amend the Constitution as the nature of such sections was altered whose amendment is possible only by a referendum; the decision of the Riigikogu on holding a referendum^{*24} was based on §§105, 162, 163, 164 and 167 of the Constitution and §30 (1) of the RA. The ballot paper presented the following question: “*Kas Teie olete Euroopa Liiduga ühinemise ja Eesti Vabariigi põhiseaduse täiendamise seaduse vastuvõtmise poolt?*” [Are you in favour of accession to the European

¹⁷ Pursuant to §79 of the Constitution, the President of the Republic is elected by the Riigikogu or an electoral body. The electoral body is comprised of members of the Riigikogu and representatives of the local government councils. Each local government council elects at least one representative to the electoral body, who must be an Estonian citizen. The specific procedure for the election of the President of the Republic is provided by the President of the Republic Election Act (Vabariigi Presidendi valimise seadus. – RT I 1996, 30, 595; RT I, 16.11.2010, 9 (in Estonian)).

¹⁸ A. Leps. Eesti põhiseaduse muutmisest (On the Amendment of the Estonian Constitution). – Akadeemia 1999/3, p. 461 (in Estonian).

¹⁹ CRCSCd, No. III-4/1-2/93, 11.8.1993. – RT I 1993, 59, 841 (in Estonian).

²⁰ T. Annus. Riigiõigus (Constitutional Law). AS Juura 2006, p. 56 (in Estonian).

²¹ The following sources were used in the table: Eesti Entsüklopeedia (Encyclopaedia of Estonia). Vol. 7. Eesti Entsüklopeedi-akirjastus 1994, article “Rahvahääletus” (Public Poll), p. 674; T. Raitviir. Eesti üleminekuperioodi valimiste (1989–1993) võrdlev uurimine (Elections in Estonia during the Transition Period: A Comparative Study (1989–1993). Institute of International and Social Studies. Tallinn: Teaduste Akadeemia Kirjastus 1996, pp. 165–181; informative Web site of the Electoral Committee of the Republic, available at <http://www.vvk.ee> (25.3.2011).

²² T. Raitviir (Note 21); J. Ruus. Estonia. – Direct Democracy: The Eastern and Central European Experience. A. Auer, M. Butzer (ed.). Ashgate 2001, pp. 51–55.

²³ Eesti Vabariigi põhiseaduse täiendamise seadus. – RT I 2003, 64, 429 (in Estonian).

²⁴ Decision of the Riigikogu “Rahvahääletuse korraldamine Euroopa Liiduga ühinemise ja Eesti Vabariigi Põhiseaduse täiendamise küsimuses” (Holding a Referendum on Accession to the European Union and Amendment of the Constitution of the Republic of Estonia). Adopted and entered into force 18.12.2002. – RT I 2003, 60 (in Estonian).

Union and the passage of the Constitution of the Republic of Estonia Amendment Act?].^{*25} However, a member of the Riigikogu Igor Gräzin noted that the legally correct question would have been “*Kas olete nõus loobuma Eesti praegusest iseseisvusest Eesti astumise korral Euroopa Liitu?*” [Are you in favour of relinquishing the current independence of Estonia upon Estonia’s accession to the European Union?] “as the State of Estonia ceases to exist in the form we know albeit the sovereignty of the nation (the right to an armed resurrection, national self-determination, etc. is inalienable”.^{*26} Jurisprudent Lauri Mälksoo finds that irrespective of the form and title of the amendment, in essence the Constitution was changed. Adoption of the Constitution Amendment Act enabled the Riigikogu to ratify the already signed treaty on Estonia’s accession to the European Union.^{*27} Section 1 of the adopted act provided that Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia and §2 provided that as of Estonia’s accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty. The Constitution Amendment Act can be amended only by a referendum, meaning that should the legal nature of the European Union change drastically in the future and become unacceptable to Estonia and contrary to the provisions of the Constitution Amendment Act, the latter can be amended. The Riigikogu has the exclusive powers to organise a referendum, i.e., the Riigikogu must decide whether, for example, an issue concerning the future structure of the European Union is so fundamental that in order to form a stance a referendum is required to be held in Estonia.

The 2003 referendum was disputed quite actively and some disputes were referred to the Supreme Court.^{*28} However, none of the complaints was successful as the voting procedure had not been violated; the accession to the European Union was also disputed by neither the Chancellor of Justice nor the President of the Republic.^{*29}

Just one referendum has been held under the current Constitution. However, the Riigikogu has on several occasions attempted to broaden the forms of direct democracy: The 10th and 11th compositions of the Riigikogu conducted a proceeding on a draft act which sought to amend the Constitution in order to legitimise citizen initiated referendums (210SE) and the 11th composition conducted a proceeding on a draft act (477SE) seeking to introduce the institute of a local referendum.^{*30} The Government of the Republic was unresponsive to both draft acts. As regards the legitimisation of citizen initiated referendums, the Government of the Republic noted that the circle of subjects entitled under §103 of the Constitution (*inter alia*, every member of the Riigikogu has the right to initiate laws) is sufficient to ensure that all the draft acts enjoying considerable support in society will eventually be proceeded by the Riigikogu. There is no need to broaden the options of a legislative initiative^{*31}. As regards the draft Local Referendum Act, the Government of the Republic noted that the draft act was unnecessary and, moreover, adds excess financial liability upon local self-governments.^{*32}

²⁵ J. Laffranque. *Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles (European Union Legal System and Estonia’s Place in It)*. AS Juura 2006, pp. 69–71 (in Estonian); A. Albi. *EU Enlargement and the Constitutions of Central and Eastern Europe*. Cambridge 2005, pp. 138–162.

²⁶ I. Gräzin. *Eesti põhiseadus ja Euroopa Liidu referendum (Estonian Constitution and European Union referendum)*. – Riigikogu Toimetised 2002 (5). Available at <http://www.riigikogu.ee/rito/index.php?id=11891&highlight=Gräzin&op=archive2> (25.3.2011) (in Estonian).

²⁷ L. Mälksoo. *Eesti suveräänsus 1988–2008. Iganenud või igavene? – Tekste kaasaegsest suveräänsusest (Estonia’s Sovereignty 1998–2008. Obsolete or Infinite?—Texts on Modern Sovereignty)*. H. Kalmu, M. Luts-Sootak (ed.). Tartu Ülikooli Kirjastus 2010, p. 141 (in Estonian).

²⁸ CRCSCr, 12.9.2003, 3-4-1-10-03; CRCSCr, 24.9.2003, 3-4-1-11-03; CRCSCd, 29.9.2001, 3-4-1-12-03; CRCSCr, 30.9.2003, 3-4-1-15-03; CRCSCd, 2.10.2003, 3-4-1-13-03; CRCSCd, 2.10.2003, 3-4-1-16-03; CRCSCd, 3.10.2003, 3-4-1-17-03; CRCSCr, 10.10.2003, 3-4-1-20-03; CRCSCd, 14.10.2003, 3-4-1-19-03; CRCSCr, 17.10.2003, 3-4-1-21-03; CRCSCr, 26.2.2004, 3-4-1-6-04.

²⁹ J. Laffranque (Note 26), pp. 72–73.

³⁰ E. Liivik. *Legitimacy through Direct Democracy in the EU Member State: Direct Democratic Initiatives in the Estonian Parliament*. The Proceedings of the Institute for European Studies. – Journal of Tallinn University of Technology 2010/8, pp. 91–93.

³¹ Opinion of the Republic of the Government on draft act 210SE, 4.2008, No. 10.2-3/3174. Available at http://www.riigikogu.ee/index.php?page=en_vaade&op=ems&eid=254354 (25.3.2011) (in Estonian); draft act No. 210 SE II, initiated 28.2.2008. Available at http://www.riigikogu.ee/index.php?page=en_vaade&op=ems&eid=254354 (25.3.2011) (in Estonian).

³² Opinion of the Government of the Republic on draft act No. 477SE, 4.6.2009, No. 10.2-3/5487. Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=611481 (25.3.2011) (in Estonian); draft act No. 477 SE II-1. Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=611481 (25.3.2011) (in Estonian).

Table 2. Application of direct democracy in Estonia in 1923–2003

Time	Form of direct democracy	Issue put on vote	Outcome	Distribution of votes
17–19.2.1923	Referendum	Proposal by the Christian Party to make religious studies compulsory in general education schools	Yes	In favour 328,369 (71.9%), against 130,476
13–15.8.1932	Referendum	Draft act by the Riigikogu to amend the constitution	No	In favour 333,979 (49.2%), against 345,215
10–12.6.1933	Referendum	Draft act by the Riigikogu to amend the constitution	No	In favour 161,598 (32.7%), against 333,188
14–16.10.1933	Citizen initiated referendum	Draft act to amend the constitution tabled by the Veterans ^{*25}	Yes	In favour 416,878 (56.3%), against 156,894
23–25.2.1936	Referendum	President's proposal to set up a two-chamber National Assembly to amend the constitution or draft a new constitution	Yes	In favour 474,218 (75.3%), against 148,824
3.3.1991	Referendum	Restoration of Estonia's sovereignty (independence from the Soviet Union)	Yes	In favour 737,964 (77.8%), against 203,199
28.6.1992	Referendum	Draft Constitution and its implementation act; additional question on whether to allow the applicants for Estonian citizenship to participate in the elections of the parliament and the president	Yes	In favour 407,478 (91.3%), against 36,147 (8%); additional question: in favour 205,980 (46.13%), against 236,819 (53.04%)
14.9.2003	Referendum	Amendment of the Constitution in connection with joining the European Union	Yes	In favour 369,657 (66.83%), against 183,454 (33.17%)

³³ The League of Veterans (in Estonian *vabadussõjalased* or *vapsid*)—in actuality the League of Veterans of the Estonian War of Independence was founded in 1929. It was headed by General Andres Larka (1879–1943) and lawyer Artur Sirk (1900–1937). The veterans sought, among other things, to introduce the institute of a president in the constitution. In 1934, the leaders of the veterans were imprisoned upon the initiative of the then Prime Minister Konstantin Päts. See A. Kasekamp. *Vaps. – World Fascism. A Historical Encyclopedia*. C. P. Blamires, P. Jackson (eds.). ABC-CLIO, Inc California 2006, Vol. 2: L-Z, p. 696.

Also, the Treaty establishing a Constitution for Europe (Treaty of Lisbon) caused the question whether or not a referendum should be held to approve the treaty. For instance, the then Chancellor of Justice noted that a referendum was required to approve the treaty, reasoning that: the question of whether Estonia agrees to share its sovereignty with other Member States to that extent should be posed to the bearer of the supreme power—the people. It would also be helpful in that the nation would subsequently embrace the Treaty establishing a Constitution for Europe. It is not insignificant that one of the key objectives of the treaty is to bring the European Union closer and make it more understandable to people and thus the practical added value of a referendum should not be underestimated.^{*34} The group of experts formed within the constitutional committee of the Riigikogu noted that holding a referendum under §6 was out of question as the issue concerned the ratification of a foreign treaty. The Riigikogu considered holding a referendum unnecessary and approved the treaty (in favour 91, against 1).^{*35}

4. Problems related to the referendum provisions of the Constitution

David E. Butler and Austin Ranney, who have analysed issues related to direct democracy, note that citizens themselves consider a referendum to be the most authentic and direct way to express their will. Therefore the decisions adopted by a referendum are more legitimate than the decisions based on representative democracy. However, Butler and Ranney note that this does not mean that the decisions made in direct democracy are necessarily wiser or that all the decisions made within a political system should be directly democratic, but rather the question is primarily about the legitimacy of politics.^{*36} The application of direct democracy does not concern just the question of legitimacy but has many other aspects—both positive and negative (see Table 3).^{*37}

Table 3. Positive and negative aspects of a referendum

Positive aspects	Negative aspects
Referendums promote democracy as the people are directly involved in decision making.	Professional politicians have decision-making know-how, entitling everyone to decide reduces the quality of decisions.
Referendums allow addressing issues in the clearest and most direct way.	Participants in a referendum base their decision on external circumstances, thus election behaviour and the final outcome are not indicative of the correct/actual interests.
A decision made by the people has greater legitimacy; this is especially important in issues of great relevance for the society.	A referendum facilitates the minority to be suppressed by the inconsiderate or prejudiced majority.
A referendum as a process raises the awareness of those participating in it as things are thoroughly discussed.	Those who participate in a referendum are predominantly those who have a (very) clear opinion/stance in the matter; as such referendums work against those who are moderate and less interested.
A reasonably implemented referendum enhances representative democracy.	The implementation of a referendum trivialises the decision process, i.e., referendum topics become mundane, participants are less motivated to understand things or search for information.

³⁴ A. Jõks. *Rahvahääletust ei ole vaja karta* (No Need to Fear the Referendum). – *Postimees*, 28.4.2005. Available at http://www.postimees.ee/280405/esileht/arvamus/164191_1.php (25.3.2011) (in Estonian).

³⁵ *Lissaboni lepingu, millega muudetakse Euroopa Liidu lepingut ja Euroopa Ühenduse asutamise lepingut, ratifitseerimise seadus* (Act Ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community). – *RT II 2008*, 14, 36 (in Estonian). Information about the proceeding of the draft act available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=240477&u=20110408144446 (29.3.2011) (in Estonian).

³⁶ D. Butler, A. Ranney. *Referendums Around the World: The Growing Use of Direct Democracy*. AEI Press 1994, pp. 14–15.

³⁷ M. Gallagher (Note 8), p. 256.

At the same time, the main objective of applying direct democracy—to ensure that the people as the bearer of the supreme power of state can express their will beyond parliamentary elections—does not mean that the political decision-making process becomes uncontrollable or that the fulfilment of the functions of state becomes paralysed. The drafting of the current constitution was guided by the principle that Estonia is a parliamentary republic and the application of direct democracy depends mainly on parliamentary decisions; thus a provision was made for a referendum but not for a citizen initiated referendum. Some jurists have maintained that direct democracy should have been more broadly provided for in the constitution. The lawyers who prepared the report of the Committee for Expert Analysis of the Constitution pointed out that the current constitution was too Riigikogu-centred and that the people were not sufficiently trusted to exercise the powers of state. The State expects acknowledgement from all individuals through the people, but does not sufficiently take the opinions of the people in direct consideration.^{*38} This standpoint was shared by several jurists already while the Constitution was being drafted. Professor Ilmar Rebane noted in his analysis of the draft constitution (wording of 15 December 1991) tabled in the Constitutional Assembly that the opportunities for the people to exercise the supreme power of state are rather negligible and limited just to the election of the Riigikogu and referendums. Exercise of the power of state via public polls was omitted (a provision to that effect was contained in one of the original versions) and the right of citizen initiated referendums was also not provided for.^{*39} Dr. Heinrich Schneider has claimed that the Estonian experience speaks not only about the need to broaden the functions and powers of the people but also about preventing the restriction of existing functions and ensuring their realisations. This, however, was not considered in drafting the 1992 Constitution, empowering the Riigikogu to decide on the holding of a referendum (Constitution §65 (2)).^{*40}

There is some conceptual confusion regarding the referendum clauses of the current Constitution: A referendum is in part mandatory (e.g., to amend certain provisions of the Constitution), however, in part it is optional (as in other issues, holding a referendum depends purely on the relevant decisions and choices of the Riigikogu) but notwithstanding the outcome of a referendum is binding upon all public bodies. It may well be that the fourth paragraph of §105 of the Constitution requiring that if a draft act is rejected at a referendum, the Riigikogu should be dismissed curbs the parliament's enthusiasm to submit any draft acts to a referendum.^{*41} In essence, the fourth paragraph of §105 makes the whole section redundant as there is no parliament that would risk holding a referendum if the failure of the submitted draft act results in extraordinary parliamentary elections. Jurisprudent G. Carcassonne opined in the expert analysis of the Constitution that it is most likely that no referendums will be held.^{*42} However, it should be pointed out that the negative outcome of a referendum in other national issues does not cause extraordinary elections.^{*43}

The substantial problems related to the application of direct democracy do not preclude the need to analyse the referendum clauses of the Constitution and discuss, for example, the need to legitimise citizen initiated referendums. Jurisprudent Rait Maruste has highlighted the latter point in recent debates on the amendment of the Constitution.^{*44} The opinion of the Committee for Expert Analysis of the Constitution also proposed to recreate the institute of a citizen initiated referendum in a restricted form, making its outcome politically but not legally binding.^{*45} It may be added here that citizens' political initiatives were granted recently at the EU level in order to bridge the alienation between the government level and the citizens (so-called deficit of democracy). The Treaty of Lisbon provided for a citizens' initiative which in substance means citizen initiated referendums. Namely, the citizens who are nationals of the European Union Member States may, under Article 11 (4) of the Treaty establishing the European Union, take the initiative of inviting the European Commission, within the framework of its powers, to submit any appro-

³⁸ Committee for Expert Analysis of the Constitution (Note 6).

³⁹ Põhiseadus ja põhiseaduse assamblee. Koguteos (Constitution and the Constitutional Assembly. The Complete Work). Eesti Vabariigi Justiitsministeerium; Juura, Õigusteabe AS 1997, p. 1290 (in Estonian).

⁴⁰ H. Schneider (Note 12).

⁴¹ T. Annus (Note 20), pp. 54–55.

⁴² K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). AS Juura 1998, pp. 39–40 (in Estonian).

⁴³ M. Suksi (Note 3), p. 121.

⁴⁴ R. Maruste. Miks põhiseadus vajab korrastamist (Why Constitution Needs Structuring). – Riigikogu Toimetised 2010 (22), p. 33 (in Estonian).

⁴⁵ Committee for Expert Analysis of the Constitution (Note 6).

priate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.^{*46} One million citizens from at least one quarter of the EU Member States can invite the European Commission to bring forward proposals for legal acts in areas where the Commission has the power to do so. The organisers of a citizens' initiative, a citizens' committee composed of at least seven EU citizens who are resident in at least seven different Member States, will have one year to collect the necessary statements of support. The number of statements of support has to be certified by the competent authorities in the Member States. The Commission will then have three months to examine the initiative and decide how to act on it. European citizens' initiatives can be launched as from 1 April 2012. The procedure and conditions of the European citizens' initiative have been set out in Regulation No. 211/2011 of the European Parliament and the Council (16 February 2011).^{*47} In addition to the already realised initiative, a proposal has been tabled to provide for a pan-European referendum—important EU agreements would no longer be debated in individual Member States (i.e., the states which allow referendums) but in the European Union as a whole and all citizens of the European Union can participate.^{*48}

5. Conclusions

The principle of people's sovereignty mainly places emphasis on the people as the bearer of the power of state and its role as a source of legitimacy. The people express their will through elections and various forms of direct democracy; direct democracy is being increasingly applied throughout the world—the most recent instances are related to the reform process of the European Union. The provisions of direct democracy are present in the constitutions of many countries. Referendums are addressed in §§105 and 106 of the current Constitution of the Republic of Estonia, and also in the Referendum Act. A referendum, as set out in the Constitution, covers both the referendums to amend the Constitution, referendums on other draft acts and referendums on other national issues. An act adopted by referendum normally has the same legal power as any act adopted by the parliament. Just one referendum has been held in Estonia under the current Constitution, although draft acts have on several occasions been tabled in the Riigikogu seeking to broaden the forms of direct democracy (local referendum, citizen initiated referendum). There have also been developments in European Union legislation (legitimisation of a pan-European citizens' initiative). Such a development dynamic justifies the need to analyse the justifiability of the application of direct democracy in Estonian legal regime.

⁴⁶ European citizens' initiative. Available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_et.htm (25.3.2011).

⁴⁷ OJ L 65, 11.3.2011, p. 1. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:ET:PDF> (4.7.2011).

⁴⁸ R. Rose. The case for pan-European referendums. *Europe's World*, Spring 2011. Available at http://www.europesworld.org/NewEnglish/Home_old/Article/tabid/191/ArticleType/articleview/ArticleID/21795/language/en-US/Default.aspx (25.6.2011).