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The Legal limits of direct democracy in France

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Abstract: Although France has different instruments of direct democracy at the national and local levels, the referendum practice is scarce at national level because there is no popular initiative. Since 2015, a new procedure called 'shared referendum initiative' allows a minority of parliamentarians supported by citizens to propose a bill that may be submitted to a referendum. There is not a single legislation regulating referendums and consultations in France. Laws have been adopted in order to regulate certain types of referendums, such as local referendums and shared initiative referendums, but some procedures are only regulated by the Constitution and occasionally by decrees. Various legal limits are imposed on the different referendum procedures provided for. At the national level, the Constitutional Council is competent to check some of these limits but it is not competent to check the conformity with the Constitution of laws adopted by referendum.

Key words: referendum, 'shared referendum initiative', Constitutional Council, clarity and loyalty of consultation

1. Introduction

France builds on a representative democratic system with few direct-democratic instruments. The popular initiative does not exist but referendums can be organised at the local and national levels by various procedures. However, the referendum practice is scarce at national level. The legal limitations imposed on direct-democratic instruments are weak at national level, especially when the referendum is initiated by the two chambers of parliament or by government and it is called by the President of the French Republic. The Constitutional Council (*Conseil constitutionnel*) is not prepared to assess the constitutionality of the referendums triggered by the President. So, in fact, the President is not subject to any legal requirements when deciding about a referendum. A minority of parliamentarians associated with a minority of citizens can also propose a law to the Parliament that may be submitted to a referendum, but the procedure is too complicated and the required number of petitioning citizens too high for this procedure to be effective. In this procedure, the legal requirements are more stringent and compliance with these requirements is checked by the Constitutional Council.

2. The different instruments of direct democracy

At the national level, four different instruments of direct democracy are provided for by the Constitution. They are all initiated by state institutions except for the constitutional referendum which is triggered automatically if certain conditions laid down by the Constitution are met. The Constitution does not provide for any direct-democratic instrument initiated by citizens on their own. A citizens' agenda initiative does not exist either at the national level.

2.1 Instruments at the national level

2.1.1 Constitutional referendum

The Constitution of the Fifth Republic, as the one of the Fourth Republic, was submitted to the approval of the people by referendum. The Constitution was approved with 79,25 per cent of the votes cast.[1] As provided for by the Constitution, a referendum can be organized to decide upon a constitutional amendment.

Article 89 of the Constitution provides that:

> The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution.
>
> A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of Article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.
>
> However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly (…).

The use of a referendum procedure to reform the Constitution is optional in case of Government Bills, while mandatory for Private Member's Bills.[2] Most of the constitutional revisions were approved by the Congress. This has principally happened because when the President chooses between approval by the Congress and by referendum, they, in line with their political majority, favor the Congress. The Congress' approval is considered to be more reliable than approval by referendum, even though the required qualified majority is more stringent in the Congress. One may note that so far, every constitutional amendment that was submitted to the Congress has been adopted, although in most cases the constitutional revision procedures fail before this last step. The only example of the use of a referendum to amend the Constitution is from 2000 when the constitutional amendment which set the duration of the presidential mandate to five years was approved through a popular vote.[3] In this particular case the referendum was not mandatory since the constitutional draft submitted to the popular vote was actually a Government Bill.

2.1.2 Executive- and legislature-initiated referendum

Article 11(1) and (2) of the Constitution provide that:

> The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the *Journal Officiel*, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or

*I thank Vanessa Richard for her translation assistance.

[1] Francis Hamon, *Le référendum. Etude comparative*, (2nd edn, LGDJ 2012) 110.

[2] Laurence Morel classifies it as a 'mandatory referendum' but she adds that mandatory referendums concern 'not all revisions but only those initiated by Parliament', Laurence Morel, 'Types of Referendums, provisions and practice at the national level worldwide', in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge 2018) 40.

[3] Loi constitutionnelle n° 2000-964 du 2 octobre 2000 relative à la durée du mandat du Président de la République.

which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.

Where the referendum is held on the recommendation of the Government, the latter shall make a statement before each House and the same shall be followed by a debate.

The referendum procedure evolved following two constitutional reforms of 1995 and 2008, which allowed to submit to a referendum a Government Bill which deals with 'reforms relating to the economic, social or environmental policy of the Nation, and the public services contributing thereto (…)'.[4] This provision was essentially used at the beginning of the Fifth Republic by General De Gaulle to propose constitutional amendments. Its use then dwindled and the last referendum based on this provision was held in 2005.[5]

This type of referendum has been subject to extensive discussions since the very beginning of the Fifth Republic. Although the initiative to use this procedure does not clearly belong to the President but either to the Government or the two Houses of the Parliament, this referendum has always been used by the President as a means to secure the support of the French people on different matters. Besides, this provision appears under Title II of the Constitution which deals with the powers of the President. Resorting to a referendum is thus a prerogative of the President and it is not subjected to any ministerial countersignature. So, this referendum procedure was conceived primarily as a prerogative of the President and not as a mechanism for citizen participation.[6]

The President used this referendum procedure in 1962 and 1969 to amend the Constitution. Such use was heavily criticized by the Senate and the parliamentarian opposition in 1962.[7] President De Gaulle wanted to revise the Constitution so that the President would no longer be elected indirectly but by direct universal suffrage. Instead of using the procedure under Article 89 of the Constitution, he initiated a referendum based on a broad understanding of the notion of 'organization of the public authorities' mentioned by Article 11(1) of the Constitution. This allowed the President to bypass the Senate, which was opposed to the proposed amendment, and to directly put the reform to the popular vote without requesting the vote of the Houses. French voters approved the constitutional revision with a 61.75 per cent majority of the votes cast. This approval is considered by part of the legal literature to be also an approval of the possibility to review the Constitution based on Article 11 of the Constitution.[8]

In 1969, President De Gaulle used this procedure in order to pass a constitutional amendment aimed at creating regions but at the same time also at weakening the Senate. This constitutional draft law was rejected by French voters.[9]

Despite the heavy criticism levelled against the use of Article 11 of the Constitution to amend the Constitution, this provision has never been amended to rule out this contentious practice. Although this issue was mentioned during the 1995 and 2008 constitutional reform processes,

[4] The word 'environmental' was added in 2008.
[5] Referendum on the ratification act of the Treaty establishing a Constitution for Europe held on 29 May 2005.
[6] Gérard Conac, 'Les débats sur le référendum sous la Ve République' (1996) no 77 Pouvoirs 101.
[7] Fabien Conord, 'De la 'République sénatoriale' à la 'forfaiture'. Le Sénat et la Ve République 1959-1962', (2010) no 12 Histoire@Politique 4. The author evokes the opposition of the President of the Senate, Gaston Monnerville, and of most jurists and political staff.
[8] Johanna Noël, 'Pour une analyse épistémologique de la querelle autour de l'article 11: de la dénonciation à la réhabilitation d'une violation de la Constitution', (2016) Revue française de droit constitutionnel 391.
[9] 53,18 per cent of the votes cast were against the project, Hamon, (n 1).

the governing majority has constantly decided to keep this provision's interpretation in limbo. Thus, one cannot describe this referendum as a 'legislative referendum' because its use remains ambiguous and, for the last 50 years, no other draft constitutional revision has been submitted to referendum based on this provision.[10]

The acute crisis of 1962, with the use of Article 11 to amend the Constitution, and the rejection of the text proposed in 2005 (Ratification of the Treaty establishing a Constitution for Europe) by a majority of 54,7 per cent of votes cast against the Government bill, may explain the resistance to resort to referendums which still exists nowadays. Indeed, no referendum has been held at the national level since that date.

The following referendums have been held since the beginning of the Fifth Republic at the national level on the basis of Article 11 of the Constitution:

- On 8 January 1961, the referendum on the self-determination and organization of the government in Algeria was approved by 75.26 per cent of votes cast;
- On 8 April 1962, the referendum relating the approval of the Evian Accord (end of the war in Algeria and self-determination) was supported by 90.7 per cent of the votes cast;
- On 28 October 1962, the referendum concerning the election of the President of the Republic by direct universal suffrage was approved with 61.75 per cent of the votes cast;
- On 27 September 1969, the referendum on the creation of regions and the reform of the Senate was rejected by 53,18 per cent of the votes cast;
- On 23 April 1969 the referendum concerning the extension of the European Community, was approved by 67.7 per cent of the votes cast;
- On 6 November 1988, the referendum on the statutory and preparatory provisions for self-determination in New Caledonia was supported by 80 per cent of the votes cast;
- On 20 September 1992, the referendum on the ratification of the Maastricht Treaty obtained 51 per cent of the votes cast;
- On 29 May 2005, the referendum on the ratification of the Treaty establishing a Constitution for Europe was approved by 54,7 per cent of the votes cast.

2.1.3. 'Shared referendum initiative'

The constitutional revision of 23 July 2008 introduced a new instrument of direct democracy. The scope of this newly introduced referendum is the same as the referendum initiated by the Government or the Parliament provided under Article 11(1) of the Constitution. The 'shared initiative' is an optional legislative referendum with citizen support. This procedure is prescribed by Article 11(3)-(7) of the Constitution:

> A referendum concerning a subject mentioned in the first paragraph may be held upon the initiative of one fifth of the Members of Parliament, supported by one tenth of the voters enrolled on the electoral register. This initiative shall take the form of a bill proposal and shall not be applied to the repeal of a statutory provision promulgated for less than one year.

[10] Laurence Morel, *La question du référendum* (Les presses de SciencesPo 2019) 117.

> The conditions by which it is introduced and those according to which the Constitutional Council monitors the respect of the provisions of the previous paragraph, are set down by an Institutional Act.
>
> If the bill proposal has not been considered by the two Houses within a period set by the Institutional Act, the President of the Republic shall submit it to a referendum.
>
> Where the decision of the French people in the referendum is not favorable to the bill proposal, no new referendum proposal on the same subject may be submitted before the end of a period of two years following the date of the vote.
>
> Where the outcome of the referendum is favorable to the Government Bill or to the bill proposal, the President of the Republic shall promulgate the resulting statute within fifteen days following the proclamation of the results of the vote.

Although the referendum procedure provided for by Article 11(3) of the Constitution is called 'shared referendum initiative' by part of the literature[11] and on official websites[12], these words do not exactly describe the reality. This referendum procedure can only be initiated by a minority of members of the parliament.[13] If their initiative complies with constitutional requirements, then it can be backed by citizens. Although this procedure was established in France by means of the constitutional change of 2008, the implementing regulations have only been adopted at the end of 2013[14] and the procedure has only been in use since 1 January 2015.

It is a legislative referendum procedure since commitment of the bill proposal with the Constitution is clearly mentioned. If Parliament does not consider the bill proposal, the President must call the referendum. The Constitution does not specify whether the President retains the possibility of calling a referendum if Parliament examines the request but rejects it.

The first bill proposal supported by the required number of members of the parliament in order to start the 'shared initiative' was issued in May 2019. The proposal was directed against the privatization of the Paris Airport company. Citizens were encouraged to support this proposal until the end of February 2020. However, the required number of signatures is very high – 10

[11] Francis Hamon, 'Le référendum d'initiative partagée sera bientôt opérationnel mais l'on s'interroge encore sur son utilité', (2014) Revue française de droit constitutionnel 253; Marine Haulbert, 'Le référendum d'initiative "partagée': représentants versus représentés? Commentaire des dispositions législatives et organiques visant à l'application de l'article 11 de la Constitution', (2014) Revue de droit public et de sciences politiques 1650. It is now commonly called 'Référendum d'initiative partagée' (RIP).

[12] See, for example: <https://www.referendum.interieur.gouv.fr/contenu/comment-ca-marche> accessed 13 September 2020.

[13] Some authors qualify this procedure as a parliamentary minority referendum and I agree with these opinions: Stéphane Diémert, 'Le référendum législatif d'initiative minoritaire dans l'article 11, révisé, de la Constitution', (2009) Revue française de droit constitutionnel 55; Christophe Geslot, 'La mise en oeuvre du referendum d'initiative minoritaire', (2014) Actualité juridique Droit administratif 893; Olivier Beaud, 'Remarques sur le référendum d'initiative parlementaire et sur les arguments de ceux qui ont voulu en bloquer la procédure', (*Juspoliticum Le Blog*, 23 May 2019) <http://blog.juspoliticum.com/2019/05/23/remarques-sur-le-referendum-dinitiative-parlementaire-et-sur-les-arguments-de-ceux-qui-ont-voulu-en-bloquer-la-procedure-par-olivier-beaud/> accessed 13 September 2020.

[14] Loi organique no 2013-1114 du 6 décembre 2013 portant application de l'article 11 de la Constitution, JORF, no. 284, 7 Dec. 2013, 19937 and Loi no 2013-1116 du 6 décembre 2013 portant application de l'article 11 de la Constitution, JORF, no. 284, 7 Dec. 2013,19939.

per cent of the voters equals to over 4.7 million signatures. Since only 1 093 030 signatures were collected within the time limit, the referendum was not held.

2.1.4. Referendum on accession of a state to the European Union

Article 88-5 of the Constitution provides that:

> Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.
>
> Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of Article 89.

The procedure under Article 88-5 of the Constitution was originally established in 2005 in a slightly different version, when the Constitution was modified in order to ratify the Treaty establishing a Constitution for Europe. In the first version, the referendum was mandatory with regard to every new treaty of accession to the EU.[15] This provision aimed at reassuring the people who feared an arbitrary imposition of an enlargement of the EU to the East, in particular the adhesion of Turkey. The people called to vote in the referendum on 29 May 2005 rejected the new bill which ratified the Treaty establishing a Constitution for Europe and the provisions which had been incorporated into the Constitution with a view to ratification of the Treaty establishing a Constitution for Europe have lapsed. Nevertheless, a new version of the Treaty was negotiated which became the Treaty of Lisbon. Instead of being put to a referendum, this treaty was directly proposed to the ratification by the French Parliament. Therefore, a 'tidying-up' of the Constitution was performed in 2008. In the framework of the constitutional revision of 4 February 2008[16], the referendum became optional. It is thus only if the President decides so that the electoral body is called to a referendum to decide on a new accession.
So far, no referendum has been organized based on the above-mentioned procedure since no decision with regard to accession to the EU has been taken.

2.2. Instruments at the local level

At the local level, binding or advisory referendums can vary considerably. Some of them are regulated by the Constitution, others are provided for by law. The main procedure is provided for by Article 72-1(2) of the Constitution which states that: 'In the conditions determined by an Institutional Act, draft decisions or acts within the powers of a territorial community may, on the initiative of the latter, be submitted for a decision by voters of said community by means of a referendum'. Thus, the deliberative assembly of any local community may request a local referendum on a matter within its jurisdiction. Based on Article 72-1(1) of the Constitution[17]

[15] It was then Art. 88-7 Constitution, which provided that: 'Tout projet de loi autorisant la ratification d'un traité relatif à l'adhésion d'un État à l'Union européenne est soumis au référendum par le Président de la République' (our translation: 'Any government bill authorizing the ratification of a treaty relating to the accession of a State to the European Union is submitted to a referendum by the President of the Republic'). This Article was, together with other provisions, introduced by the Loi constitutionnelle no. 2005-204 modifiant le titre XV de la Constitution, 1 March 2005.

[16] Loi constitutionnelle no. 2008-103 modifiant le titre XV de la Constitution, 4 February 2008.

[17] Art. 72-1(1) Constitution provides that: 'La loi fixe les conditions dans lesquelles les électeurs de chaque collectivité territoriale peuvent, par l'exercice du droit de pétition, demander l'inscription à l'ordre du jour de l'assemblée délibérante de cette collectivité d'une question relevant de sa compétence'. (Our translation: 'The law

and Articles LO 1112-16 *et seq.* of the General Local Authorities Code (*Code général des collectivités territoriales (CGCT)*), an advisory referendum may be requested by the voters of a municipality. They can submit this request to the deliberative assembly by exercising their collective right of petition.[18] This right is larger than a citizens' initiative because there is no provision for the content or form of the petition. Texts simply state that the matter must fall within the jurisdiction of the local authority.
At local level, a participation quorum of 50 per cent of registered voters is required so that the result is mandatory for the local authority.[19]

Other types of direct-democratic instruments are directly provided under the Constitution. The Constitution prescribes mandatory consultations for a status change of overseas local authorities[20] and when an authority supersedes overseas departments and regions or in case of the establishment of a single deliberative assembly for these two authorities.[21] Meanwhile facultative consultations may be held on the creation of a local authority granted with a special status or of a review of its organization[22] and on the change in the overseas local authority's organization, competences or legislative regime.[23]

Specifically, on the New Caledonia situation, as a transitional provision Article 76 of the Constitution required the organization of a local consultation in order to approve the Nouméa Accords of 5 May 1998. This consultation took place on 8 November 1998 and the Accords were approved by a 71.86 per cent majority. Article 77 of the Constitution provides for the adoption of an organic law which allows the organization of referendums regarding independence.[24] The first referendum was organized on 4 November 2018, on the question: 'Do you want New Caledonia to become fully sovereign and independent?' The question was rejected with a 56.67 per cent majority of the votes cast. A second referendum on self-determination was held on 4 October 2020 and independence was rejected with 53.6% of the vote.

Besides the procedures provided for by the Constitution, other local referendums are established by laws. As regards the local community governed by Article 74 of the Constitution (Saint Barthélémy island, for example), citizens have a right to submit collective or individual petitions to the deliberative assembly.[25] This deliberative assembly, the territorial council, may decide to organize a referendum or a consultation, including when it is requested by a tenth of the voters[26].

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sets the conditions under which the electors of each local authority may, by exercising the right to petition, request the inclusion in the agenda of the deliberative assembly of that authority a question falling within its competence').
[18] Art. 1112-16 CGCT provides that: 'Dans une commune, un cinquième des électeurs inscrits sur les listes électorales et, dans les autres collectivités territoriales, un dixième des électeurs, peuvent demander à ce que soit inscrite à l'ordre du jour de l'assemblée délibérante de la collectivité l'organisation d'une consultation sur toute affaire relevant de la décision de cette assemblée ...' (Our translation: 'In a municipality, one fifth of registered voters and, in other local authorities, a tenth of registered voters, may request that a consultation regarding any question within their scope be included in the agenda of the deliberative assembly of the local authority').
[19] Art. LO 1112-7 CGCT.
[20] Art. 72-4(1) Constitution.
[21] Art. 73(7) Constitution.
[22] Art. 72-1(3) Constitution.
[23] Art. 72-4(2) Constitution.
[24] See Organic Law of 19 March 1999.
[25] Art. LO 6321-1, LO 6331-1 , LO 6441-1CGCT.
[26] LO 6233-1, LO 6333-1, LO 6443-1 CGCT.

In 2016, in the context of heated objections to the construction of a new airport on the Notre-Dame-des-Landes site, a new consultation was created aiming at consulting the people on projects having a significant environmental impact. Such a consultation could not be organized at national level, since it was not within the scope of Article 11 of the Constitution. Neither was it within the framework of a local consultation or referendum, since the project was of national interest. This new procedure was thus specifically established by Ordinance no. 2016-488 of 21 April 2016 regarding the local consultation of citizens on projects likely to have an environmental impact and Decree no. 2016-491 of 21 April 2016 regarding the local consultation of citizens on projects likely to have an environmental impact. The consultation was organized on 26 June 2016 and the airport project on the controversial site was adopted by a 55.17 per cent majority of the public consulted. However, because of the change of President of the Republic in 2017, the airport project was abandoned.

There is no official data on the number of local referendums or consultations organized.

3. Legal limits on referendums

The limits are very different depending on the type of referendum or consultation envisaged. Some of these limits are prescribed by the Constitution, others are specified by laws, others are deduced from the jurisprudence of the Constitutional Council. Indeed, there is no single legislation regulating referendums and consultations in France. Some laws have clarified the system of referendums and local consultations[27] or the framework of the 'shared referendum initiative'.[28] On the other hand, no law was adopted concerning the implementation of the referendum of Article 11(1) (optional referendum) or the referendum provided under Article 89 (constitutional referendum).

Three types of limitations can be distinguished for each procedure: substantive, formal and circumstantial or temporal limitations. Some of these limits are vague and, for lack of relevant practice, an interpretation of the respective texts has not been able to develop.

3.1 Substantive limits

3.1.1. Executive and legislature-initiated referendum and shared initiative

The positive scope of the referendum under Article 11(1) of the Constitution is rather broad, therefore, there is really no forbidden subject. Three different issues may be the subject of a draft bill that can be submitted to a referendum, namely:
'- the organization of the public authorities;
- reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto;
- authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.'
The notion of 'organization of the public authorities' has raised issues of interpretation. Could, for example, the referendums regarding the status of Algeria and its independence really be considered as an issue of 'organization of the public authorities'? Likewise, as happened in 1962 and 1969, could the election of the President by universal suffrage, or the creation of

[27] Loi organique no 2003-705 du 1er août 2003 relative au référendum local, JORF no 177, 2 August 2003, 13218 and loi no 2004-809 du 13 août 2004 relative aux libertés et responsabilités locales, JORF no 190, 17 August 2004, 14545.
[28] Organic law and ordinary law, 6 December 2013, implementing Art. 11 Constitution, cited above.

regions as a type of local authority, be considered to fall within the scope of this notion? Such uses of the referendum were criticized by the opposition in Parliament [29] and the legal literature.[30]The term is voluntarily vague and the uncertainties regarding its contours have given the President a lot of discretionary power.

Similarly, the notion of 'reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto' is very broad as well. It generated debates in 1995, in particular in relation to the protection of fundamental rights[31]. It was debated whether this provision could serve as a basis for organizing referendums on questions such as the death penalty or abortion. Questioned about the potential risk of such an expansion of Article 11 of the Constitution to cover fundamental rights and freedoms, the Minister of Justice explained that no freedom could ever be the subject of this procedure[32]. In practice, however, no topic is explicitly excluded from the scope of the referendum under Article 11 of the Constitution.

The only clear issue is that of treaty ratification. The Constitution provides that treaties cannot be contrary to the Constitution. Consequently, the ratification bill and – logically – the treaty itself must be brought into compliance with the Constitution before being submitted for ratification by the people.

Beyond the vague terminology, it is also not clear whether, based on Article 11 of the Constitution, a constitutional revision could be effected in derogation of the procedure of Article 89 of the Constitution. The 1962 practice, although it gave rise to criticism, has never been questioned afterwards. None of the constitutional revisions has ever clarified the scope of referendums initiated by the government or the assemblies in the framework of Article 11 of the Constitution. By contrast, the 23 July 2008 constitutional amendment, which introduced 'the shared initiative', expressly specifies that the draft bills that may be the subject of this procedure cannot provide for any constitutional change. [33] Besides, there is a specific constitutionality assessment for this type of referendum proposal[34].

During the assessment of the organic law on the implementation of the shared initiative[35], the Constitutional Council specified an additional limitation, which also applies to ordinary draft bills presented by parliamentarians: financial inadmissibility. Accordingly, the draft bill cannot be admitted if its adoption leads to either a decrease of public resources or the creation or worsening of a public burden. The Constitutional Council considered itself to have jurisdiction to assess compliance with this limitation which, with regard to ordinary bills, is directly assessed by the assemblies.[36]

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[29] In particular the Presidents of the Senate Gaston Monnerville in 1962 and Alain Poher in 1969, taking the head of the opposition to the recourse to the referendum of Article 11.

[30] See Gérard Conac, 'Les débats sur le référendum sous la Ve République', (1996) no 77 Pouvoirs 105.

[31] Francis Hamon, 'L'extension du référendum: données, controverses, perspectives' (1996) no 77 Pouvoirs 111; Marthe Fatin-Rouge Stefanini, 'Le référendum et la protection des droits fondamentaux' (2003) Revue française de droit constitutionnel 77.

[32] Débats parlementaires, Assemblée nationale, 1ère séance du 11 juillet 1995, Journal officiel de la République Française, p. 920.

[33] Art. 61(1) Constitution which states that ' The organic laws, before their promulgation, the legislative proposals referred to in Article 11 before they are submitted to the referendum, and the rules of the parliamentary assemblies, before their implementation, must be submitted to the Constitutional Council, which decides on their conformity with the Constitution' (our translation).

[34] Art.61(1) Constitution and Organic law no. 2013-1114 implementing Art. 11 Constitution, 6 December 2013 which specifies the competencies of the Constitutional Council.

[35] Organic law no. 2013-1114 implementing Art. 11 Constitution, 6 December 2013.

[36] Conseil Constitutionnel, Decision no. 681 DC, 5 December 2013, Loi organique portant application de l'article 11 de la Constitution, para. 8.

Since Article 11(1) may enable the President of the Republic to amend the Constitution, limitations which apply to constitutional revisions should also be applied to referendums organized in this framework.

3.1.2. Constitutional referendum

For constitutional revisions, Article 89(5) provides that: 'The republican form of government shall not be the purpose of any amendment'. When this limitation was introduced in the Constitution, in 1884 during the Third Republic, it was aimed at preventing a return to monarchy. In a decision of 1992, the Constitutional Council re-affirmed this limitation and clarified additional circumstantial limitations as well.[37] Such limitations must in principle apply to Article 11 referendums if their purpose is to amend the Constitution.

3.1.3. Referendum on accession of a state to the European Union

The limits which apply to the procedure under Article 88-5 of the Constitution are related to its very narrow scope: the ratification of an accession treaty with a new Member State. When the Constitution imposed a mandatory referendum for any new accession of a State to the European Union, (cf § 2.1.4, above), the question arose of whether this procedure should be followed for the States with which negotiations for accession had been conducted. The Constitutional Law of 23 July 2008 clarified that Article 88-5 does not apply to accessions following an intergovernmental conference the convocation of which was decided by the European Council before 1 July 2004[38]. Indeed, the question of Turkey's accession was at the heart of the debates in France during the 2005 referendum campaign on the ratification of the Treaty establishing a Constitution for Europe[39]. Turkey has been applying for membership since 1959 and was officially accepted as candidate by the European Union in 1999, but public opinion in Europe, particularly in France, has been increasingly hostile to this enlargement[40]. Other applications for accession have been examined by the European Union since that date, but the Article 88-5 was never implemented. In 2019, France vetoed the opening of the accession negotiations for Macedonia and Albania[41].

3.1.4. Local referendums

With regard to local referendums, their scope is defined either by the Constitution itself or by the respective implementing laws.
As far as local referendums under Article 72-1 of the Constitution are concerned, the referendum can only address a deliberation or an act which falls within the jurisdiction of the

[37] See in this chapter para. 3.3.
[38] Constitutional Law No. 2008-724 of 23 July 2008 Article 47 III :'Article 88-5 of the Constitution, in its drafting resulting from both Article 44 of this Constitutional Law and 2 of the I of this Article, shall not apply to accessions following an intergovernmental conference the convocation of which was decided by the European Council before 1 July 2004'.
[39] Dorothée Schmid, 'La Turquie aux portes de l'Union : vers une négociation politique !', Revue du Marché commun et de l'Union européenne (RMCUE), n° 485, 2005, 73-78 ; Cengiz Aktar, 'Et si l'Europe puissance passait par la Turquie', RMCUE, n° 488, 2005, 303-304.
[40] Chantal Kafyeke, 'L'adhésion de la Turquie à l'Union européenne : enjeux et état du débat', Courrier hebdomadaire du CRISP, n° 1933-1934, 2006/28-29, 5-72
[41] Alain Buzelay, "Les défis de l'élargissement de l'Union européenne à l'est", Revue de l'Union européenne, 2020, 256.

local authority concerned. This is a significant limitation since it entails the illegality of all deliberations which are related to national projects or concern several local authorities.

3.2 Formal limits

3.2.1. National referendums

Regardless of the type of direct-democratic instrument, the only formal requirement is that the proposal must be drafted.[42] The case-law of the Constitutional Council[43] provides additional details in this regard.

Since 1987, it has gradually imposed the requirement of clear and fair consultations for all types of referendums. In Decision 226 DC of 2 June 1987, the Constitutional Council stated that

> The question put to the populations concerned must satisfy the double requirement of loyalty and clarity of the consultation; (…) if it is permissible for the public authorities, within the framework of their competences, to indicate the envisaged orientations, the question put to the voters must not contain any ambiguity, particularly as regards the scope of these indications[44].

The scope of the requirement of clarity and fairness of consultations was not detailed by the Constitutional Council.[45] However, some aspects can be deduced from the few cases in which the Constitutional Council applied them in response to the applicants' arguments. In general, it is clear from the case law that the Constitutional Council's review of compliance with this double requirement is minimal and therefore very favorable to the government. The clarity of the consequences of voting obliges public authorities to propose an 'unequivocal' [46] question and to recall the purely consultative scope of voting when this is the case[47]. In the case of the

[42] In Arts. 11 and 89 of the Constitution the words 'Government's Bill' or 'Private Member's Bill' are used.
[43] On the competencies of the Constitutional Council, see para 4.
[44] Decision no. 87-226 DC, 2 June 1987, para. 7.
[45] The Constitutional Council uses the generic term '*consultations*' referring to as referenda or '*consultations référendaires*'.
[46] Decision no. 87-226 DC, 2 June 1987, para. 7 to 9. The Constitutional Council decision was about the constitutionality of a law organizing a consultation on the evolution of New Caledonia towards an independent status of the French State. The question was 'Do you want New Caledonia to become independent or to remain within the French Republic with a status whose essential elements have been brought to your attention?'. This consultation was organized on the basis of Article 53(3) Constitution. The Constitutional Council considered that the wording of the question was 'ambiguous' because 'it may, in the minds of the voters, give rise to the erroneous idea that the elements of the statute are already fixed, whereas the determination of this status is, pursuant to Article 74 of the Constitution, a law taken after consultation of the territorial assembly'(our translation). The law was found unconstitutional.
[47] Decision no. 2000-428 DC, 4 May 2000, *Consultation de la population de Mayotte*, para. 16 and 17. In this decision, the Constitutional Council was reviewing the constitutionality of the law organizing the consultation of the people of Mayotte. Section 3 of the Act stipulated that 'voters will have to answer with a "yes" or "no" to the following question: 'Do you approve of the agreement on the future of Mayotte, signed in Paris on January 27, 2000?'. This wording came out from a government bill. The applicants' criticisms focused on the ambiguities of the government and the conditions under which this 'agreement' was obtained (without a real consensus). Regarding the advisory nature of the vote, the Constitutional Council expressed a reservation of interpretation of the law by considering that, although the law uses the words 'avis' (as opinion), and that Parliament has the right to choose to do such consultation concerning the future of a territorial community, 'it will be up to the competent authorities, in particular the regulatory authority, to make all necessary provisions to remind the people of Mayotte of the purely consultative scope of their vote.' If the Constitutional Council had found that the principle of clarity and loyalty was not respected, it would have declared the legislative provision to be unconstitutional. In this case, the law could not have been enacted.

referendum on the status of New Caledonia, the Constitutional Council held that the question was ambiguous because it led voters to believe that the essential elements of the status were already fixed when they were not.[48]
The Constitutional Council has indicated that clarity and loyalty of consultations requires that election documents are communicated to the electors in advance[49] and that the administration implements 'all means at its disposal to ensure that electors are able to read it before the election'.[50] Finally, with regard to the documents which are sent to voters, the transmission of recitals of the bill (recitals being 'inseparable' from the bill itself) is not contrary to the requirement of clarity and loyalty of the vote in so far as its content 'does not exceed' its purpose, which is twofold : 'to present its main characteristics, but also (…) to highlight the interest which is attached to its adoption'.[51]

It can be underlined that clarity and loyalty are rarely distinguished by the Constitutional Council even at the request of the applicants. In the decision '*Consultation de la population de Mayotte*', it held that the loyalty related to the process that preceded the drafting of the text submitted to the electors and the clarity concerned the text itself and its consequences.[52] In the decision *'Consultation de la Nouvelle-Calédonie*' (1987) the law was found unconstitutional because a lack of clarity of the consultation.[53]

Finally, it should be noted that the legal basis of this double requirement is not entirely clear.[54] It is argued here that it can be deduced from Article 3 of the Constitution and in particular from the freedom of vote, which clearly implies the sincerity of the vote.[55]

3.2.2. Local referendums

According to Article 72-1 of the Constitution, either a draft deliberation of the local assembly or a draft executive act can be submitted to a referendum. Individual draft acts cannot be submitted.

[48] Decision no. 87-226 DC, 2 June 1987, para. 7 to 9.
[49] Decision no. 33-REF, 7 April 2005, *De Villiers et Peltier*, para. 5.
[50] Decision no. 31-REF, 24 March 2005, *Hauchemaille et Meyet*, para. 11.
[51] Decision no. 33-REF (n 11*)* para. 9.
[52] Decision no. 2000-428 DC, 4 May 2000, *Consultation de la population de Mayotte* (n 14). According to the applicants, the law was contrary to the requirement of clarity of consultation because the persons consulted would not be able to understand the consequences of their votes ('yes' and 'no'). They argued that the agreement did not offer a clear solution on the status of Mayotte. Similarly, they objected that the drafting of certain articles of this agreement would be too complex and their understanding would be reserved for experts. They also criticized the very process of drawing up the agreement as being unfair because there would have been no consensus on its vote and the two Mayotte parliamentarians members of the French Parliament were opposed to the text. In addition, according the applicants, 'by planning to give Mayotte the status of "departmental community", the Government would deliberately maintain confusion with "the clear and constant departmental claim of the population of Mayotte"'.
[53] Decision no. 87-226 DC, 2 June 1987, para. 9.
[54] In Decision no. 87-226 DC, 2 June 1987, *Consultation des populations intéressées de la Nouvelle-Calédonie,* the Constitutional Council had based the double requirement on para. 2 of the Preamble to the 1958 Constitution, dealing with the free determination of the peoples of the overseas territories and the free expression of their will, and on Art. 53(3) Constitution, which states that 'No assignment, no exchange, no addition of territory is valid without the consent of the populations concerned'. This requirement could therefore be interpreted as imposing itself only on the overseas populations as former colonies.
[55] Marthe Fatin-Rouge Stefanini, 'La sincérité de l'expression référendaire', in Sophie De Cacqueray and others (eds), *Sincérité et démocratie* (PUAM 2011) 347-377.

The requirement of clarity and fairness in referendums is also assessed by the administrative courts.[56]

3.3. Circumstantial or temporal limits

3.3.1. Constitutional referendum

Regarding constitutional revisions, Article 89(4) of the Constitution provides that: 'No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy.' On 2 September 1992, a decision of the Constitutional Council noted that other constitutional provisions specify some similar circumstantial limits which forbid a constitutional revision during certain periods.[57]

First, Article 7(11) of the Constitution provides that no constitutional change procedure can be triggered 'during the vacancy of the Presidency of the Republic or during the period between the declaration of the permanent incapacity of the President of the Republic and the election of his successor'. Vacancy describes the situation where the position of President is not filled as a result of death or resignation. Incapacity describes the situation where the President cannot perform his or her functions anymore, due to physical or mental health problems for example, but he or she has not officially resigned.

Second, Article 16 of the Constitution deals with the implementation of the President's exceptional powers. This provision does not expressly forbid a constitutional change during the exercise of such powers but the restriction stems from its interpretation.[58]

These provisions could also apply to institution-initiated referendums when used to amend the Constitution.

3.3.2 Shared referendum initiative

Article 11(3) of the Constitution provides that the referendum initiative 'may not be applied to the repeal of a legislative provision promulgated for less than one year'. This limit aims at protecting a bill which has just been adopted. In practice, in 2019 the parliamentary opposition found a way to bypass this limitation by submitting a draft referendum bill just before the final adoption of another law, the PACS law. This draft referendum bill directly called into question one of the purposes of the PACS law, the privatization of the *Aéroport de Paris* company, by declaring it a national public service. Even though the adopted PACS law could have entered into force, the draft referendum bill resulted – in practice – in the suspension of its application pending the statutory period for collecting citizens' signatures. This situation had not been considered by the 2008 Constitution revision at all.

A second limitation is based on Article 11(6) of the Constitution, stating that 'no new referendum proposal on the same subject may be submitted before the end of a period of two years following the date of the vote'.

[56] See Marthe Fatin-Rouge Stefanini, 'L'exigence constitutionnelle de clarté et de loyauté des consultations', in *Renouveau du droit constitutionnel*, Mélanges en l'honneur de Louis Favoreu (Dalloz 2007) 1525-1552.
[57] Decision no. 92-312 DC, 2 September 1992, *Traité sur l'Union européenne*, para. 19.
[58] Decision no. 92-312 DC, 2 September 1992, *Traité sur l'Union européenne*, para. 19.

3.3.3. Local referendums

There are many circumstantial limitations to the organization of local referendums specified by Article LO 1112-6 CGCT. The organization of a referendum is prohibited before elections and during election campaigns: six months before an election; during the election campaign until the polling day as regards part or total renewal of the deliberative assembly of a local authority; during the election campaign or on the voting day for a consultation under Article 72-1(3) Constitution,[59] for a consultation by referendum under Article 72-4 of voters from an oversea territory[60], or else for an Article 73 referendum.

Likewise, no local referendum can be organized during the campaign or the voting day of any legislative, senatorial, presidential or European election, or a referendum initiated by the President of the Republic.[61]

Moreover, resignation, cancellation of the election of the members of a deliberative assembly or its dissolution cancel the deliberation providing for the referendum.

Finally, more than one local referendum cannot be organized in the same local authority on the same subject during a time period of less than a year.[62]

The scale of these limitations can be debated for two reasons. First, the great diversity of the elections, consultations and referendums concerned significantly decreases the periods when a local referendum can be organized. Second, the multiplication of polling days instead of their batching encourages abstention, since voters prefer to spend their weekend elsewhere and will only participate in the polls that they regard as the most important.

4. Institutions and procedures for reviewing the limits of referendums

The Constitutional Council ensures the proper conduct of referendum proceedings (Article 60 of the Constitution) and it is the competent state organ to check the constitutionality and legality of the 'shared referendum initiative' (Article 61-1 of the Constitution).

The Council is an independent constitutional judicial body with constitutional status.[63] It is composed by nine members appointed respectively by the President of the Republic (three members), the President of the Senate (three members) and the President of the National Assembly (three members). The decisions of the Constitutional Council are not subject to appeal. As constitutional judge, the Constitutional Council is competent for carrying out a judicial review of the organic laws, the bills proposed by a parliamentary minority submitted in a 'shared referendum initiative' procedure and the rules of procedure of parliamentary assemblies (Article 61-1 of the Constitution). The judicial review is mandatory and occurs

[61] Arts. 11, 73, 88-5, 89 Constitution.
[62] Art. LO 1112-6 CGCT.
[63] Art. 56 to 63 Constitution.

before the coming into force of the legal acts mentioned above. The Constitutional Council is also competent for the judicial review of the constitutionality of ordinary laws before their enactment (Article 61(2) of the Constitution) if it is requested by the President of the Republic, the Prime Minister, the President of the Senate, the President of the National Assembly, 60 members of the National Assembly or 60 members of the Senate. Since 2010, the Constitutional Council can also rule on a question of constitutionality[64] raised during a trial before a court under the judicial or administrative order (Article 61-1 of the Constitution and organic law implementing this article).[65] The question is raised by one of the parties to the trial. If the Constitutional Council deems the legislative provision to be unconstitutional, it will declare it unconstitutional and the provision will be repealed (Article 62 of the Constitution).

As a judge of elections and referendums, the Constitutional Council monitors all national elections (that is presidential elections, elections of deputies and senators and referendums). The powers of the Constitutional Council in electoral matters vary depending on the election in question.[66] The jurisdiction that derives from Article 60 of the Constitution, in the matter of a referendum, has been broadened in the course of its jurisprudence as it is permitted the legality review of decrees organizing a referendum.[67] Since the introduction of the 'shared referendum initiative' in 2008[68], the Constitutional Council also has new powers starting from the moment when the initiative is submitted by a parliamentary minority to when it is placed on the ballot for the referendum.

4.1. Institution-initiated, constitutional and EU accession referendums

The issue of the review of the referendum bills submitted under Article 11(1) of the Constitution has been one of the most debated issues in French constitutional law since 1962.[69]

As mentioned, the President used the referendum procedure in 1962 to bypass the assemblies, in particular the Senate. The Constitutional Council was petitioned to give its advisory opinion on the decrees which organized the referendum and to review the constitutionality of the draft referendum bill.

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[64] This procedure is called 'QPC' as 'Question prioritaire de constitutionnalité'.

[65] Organic Law n° 2009-1523, 10 December 2009, implementing article 61-1 Constitution, JORF 11 December 2009, 21379.

[66] Constitutional Council competencies are specified by the Organic Law on the Constitutional Council: *Ordonnance no 58-1967 du 7 novembre 1958 portant loi organique sur le Conseil constitutionnel*, Art. 30-51 (*Organic Law on Constitutional Council).*

[67] Decision no. 2000-21 REF, 25 July 2000, *Hauchemaille*, para. 5.

[68] Art. 11(3) and 61(1) Constitution specified by Organic law no. 2013-1114 implementing Art. 11 Constitution, 6 December 2013 and law no. 2013-1116 implementing Art. 11 Constitution, 6 December 2013. These details are contained in the Organic Law, 7 November 1958, on the Constitutional Council: Art. 45-1 to 45-6.

[69] See Marthe Fatin-Rouge Stefanini, *Le contrôle du référendum par la justice constitutionnelle* (Economica 2004) 381; Georges Berlia, 'Le problème de la constitutionnalité du référendum du 28 octobre 1962' (1962) Revue de droit public et de sciences politiques 936; Bernard Branchet, 'L'article 11 et le respect de la Constitution de 1958', (1990) Revue de droit public et de sciences politiques 1705; Jean-François Flauss, 'Le contrôle de la constitutionnalité des lois référendaires' (1987) Les Petites Affiches 7; Francis Hamon, 'L'extension du référendum: données, controverses, perspectives', (1996) no 77 Pouvoirs 113; Benoît Mercuzot, 'La souveraineté de l'expression référendaire: un principe nécessaire au droit constitutionnel' (1995) Revue de droit public et de sciences politiques 661; Jean-François Prévost, 'Le droit référendaire dans l'ordonnancement juridique de la Constitution de 1958', (1977) Revue de droit public et de sciences politiques 6.

The advisory opinion issued by the Constitutional Council on the decrees organizing the referendum is part of its jurisdiction under Article 60 of the Constitution, which provided in its initial version that 'the Constitutional Council shall ensure the proper conduct of referendum proceedings and shall proclaim the results of the referendum'. The organic law on the Constitutional Council specifies the scope of the Council's jurisdiction.[70] Its Article 46 provides that 'the Constitutional Council shall be consulted by the Government on the holding of referenda. It shall immediately be informed of all measures taken for that purpose'. Consequently, the Government consulted the Constitutional Council as well as the Council of State (*Conseil d'État*) – the French administrative supreme court – on the referendum. Both issued (but did not publish[71]) unfavorable opinions and considered that the use of this procedure to amend the Constitution was unconstitutional[72] because the only one provided by the Constitution was the procedure of Article 89.

Once the referendum had been approved with a 61,75 per cent majority, the President of the Senate made an application to the Constitutional Council based on Article 61(2) of the Constitution which empowers the Constitutional Council to adjudicate the constitutionality of laws. In its Decision 20 DC of 6 November 1962, the Constitutional Council declared itself '*forum non conveniens*' since it has only subject-matter jurisdiction and such jurisdiction only includes laws voted by the Parliament and not those laws which have been adopted by the people by means of a referendum and thus are a direct expression of national sovereignty. This position has never been contradicted thereafter, even with regard to a treaty ratification law which can only be subordinated to the Constitution[73] or a law assessed in the framework of a *a posteriori* constitutionality judicial review (Article 61-1 of the Constitution).[74] In the latter two cases, the provisions subject to the Constitutional Council judicial review were indeed laws in nature and did not proceed to a revision of the Constitution as in 1962. One would have thought that the Constitutional Council would have changed its jurisprudence and accepted to control laws approved by referendums[75] by departing from the tense context of the 1962 referendum.[76]

Henceforth, the sole authority who has the power to check compliance with the limitations imposed by Article 11 of the Constitution is the President. The President has complete discretion in calling the referendum and he or she is considered to act as the main guardian of the Constitution following the mandate stemming from Article 5 of the Constitution: 'The President of the Republic shall ensure due respect for the Constitution'.

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[70] Organic Law on Constitutional Council.

[71] The Constitutional Council provided an opinion provided on 2 October 1962, which was unofficial. The Council of State gives an opinion on all bills but they are not published. The general assembly of the Council of State rendered an unfavorable opinion on 29 September 1962. See the Constitutional Council unofficial Opinion on the referendum on the election of the President of the Republic by direct universal suffrage, in Bertrand Mathieu and others, *Les grandes délibérations du Conseil constitutionnel, 1958-1983* (Dalloz 2009) 99-100.

[72] On debates within the Constitutional Council on the use of referendum Art. 11 (1), see Bertrand Mathieu and others, *Les grandes délibérations du Conseil constitutionnel, 1958-1983* (Dalloz 2009) 99-112.

[73] Decision no. 92-313 DC, 23 September 1992, *Loi autorisant la ratification du Traité sur l'Union européenne*. According to Art. 11 Constitution, only 'Government Bill (…) which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions' may be submitted to a referendum.

[74] Decision no. 2014-392 QPC, 25 April 2014, *Province Sud de Nouvelle-Calédonie*. In this case, the legislative provision subject to the Constitutional Council judicial review was adopted by referendum.

[75] Marthe Fatin-Rouge Stefanini, *Le contrôle du référendum par la justice constitutionnelle* (Economica 2004) 95-102.

[76] The 1962 referendum came at the end of the Algerian War and its declaration of independence. General De Gaulle was perceived as the man likely to stabilize the institutions. The Constitutional Council had a very weak legitimacy at that time and very limited competences.

Unfortunately, this interpretation of the Constitution has never been challenged on the occasion of subsequent constitutional reforms, despite the legal literature's criticism[77] and the unease of the Constitutional Council itself. Since 2000, the latter has accepted to check on an exceptional basis the legality—and thus the constitutionality— of the preparatory acts of referendums, which include the presidential decrees to organize a referendum. Before that, these decrees had eluded all controls since both the Constitutional Council and the Council of State declared themselves *forum non conveniens*.[78] In 2000, in the *Hauchemaille* decision, the Constitutional Council based itself on its general referendum surveillance mandate under Article 60 of the Constitution to expand its jurisdiction over other acts. It considered that

> by virtue of Article 60, it is part of its mandate to decide on requests bearing allegations on the regularity of forthcoming operations, in cases where the inadmissibility of these requests could seriously compromise the efficiency of its referendum operations compliance check, vitiate the general execution of the vote or adversely affect the normal functioning of public powers.[79]

This means that the principle of an advisory opinion of Constitutional Council over preparatory acts remains, but exceptionally requests about these acts can be admitted by the Constitutional Council and may be examined in judicial proceedings before it when potential irregularities could have seriously damaging consequences.

In 2005 several requests related to the organization of the referendum on the Treaty establishing a Constitution for Europe were submitted to the Constitutional Council. In one of its decisions, it agreed to check compliance with the formal framework of Article 11 of the Constitution. The appellant, *Hauchemaille*, asked for the cancellation of the decree based on the reason that the Prime Minister had not signed it and that the decree had not been sent to one of the two assemblies and did not give rise to a declaration followed by a debate before the assemblies. The Constitutional Council accepted to check these grievances and thus assessed compliance with the formal and procedural framework as provided by the Constitution. As a result, it dismissed the arguments put forward by the appellant. Another grievance was substantive: the appellant argued that the ratification law on the Treaty establishing a Constitution for Europe submitted to referendum was contrary to the Charter for the Environment which had been granted constitutional status a few days before. The Constitutional Council declined to pronounce itself on its jurisdiction but nevertheless stated that 'in any case, the Treaty is not contrary to the Constitution'.[80]

Despite the request addressed to parliamentarians by some legal authors[81] to clarify the scope of Article 11 of the Constitution, the ambiguity of this provision remains. The 23 July 2008 constitutional reform does not deem the Constitutional Council competent, as a constitutional judge, to review the constitutionality of draft laws introduced under Article 11(1). With this amendment, the scope of Article 60 of the Constitution only has been clarified so that the Constitutional Council is competent, as an electoral judge, for ensuring the proposer conduct

[77] See n 62.
[78] Constitutional Council, decision n° 62-20, 6 November 1962; Council of State, Assembly, 19 October 1962, *Brocas* in which the Council of State refused to control the decree of the President of the Republic deciding to hold a referendum because it considered it an 'act of government' (political decision).
[79] Decision no. 2000-21 REF, 25 July 2000, *Hauchemaille*, para. 5.
[80] Decision no. 2005-31 REF, 24 March 2005, *Hauchemaille et Meyet*. Marthe Fatin-Rouge Stefanini, 'La décision Hauchemaille et Meyet du 24 mars 2005: un nouveau pas en matière de contrôle des référendums', (2005) Revue française de droit administratif 1040.
[81] See n 62.

of national referendums and not local referendums. Article 60 of the Constitution provides that 'The Constitutional Council shall ensure the proper conduct of referendum proceedings as provided for in Articles 11 and 89 and in Title XV and shall proclaim the results of the referendum'. These provisions are detailed in the organic law on Constitutional council.[82]

This reasoning also applies to referendums organized in the framework of Article 89 and as a consequence to all the referendums whose purpose would be a constitutional change. Indeed, if the Constitutional Council admitted that there are limitations to constitutional amendments[83] it considers itself to be incompetent to control compliance with them.[84] Again, the sole check remains the political one performed by the President of the Republic at the time when he or she decides to have the constitutional change ratified by the Congress or a referendum.

Within the framework of its mandate to ensure 'proper conduct of referendum proceedings', the Constitutional Council could assess alleged violations of the two-fold requirement of clarity and loyalty of the consultation (see Section 3.2.1 above). As we have seen above, the control of compliance with this requirement is nevertheless not systematic since it is only conducted if a request is submitted to the Constitutional Council and if it exceptionally accepts to review it before the popular vote takes place (Decision no. 2000-21 REF, 25 July 2000, *Hauchemaille*, cited above).

4.2. 'Shared referendum initiative'

With regard to the 'shared initiative', judicial control takes place at all steps of the procedure. Article 61(1) of the Constitution provides that at the very beginning of the process the referendum draft bill is sent to the Constitutional Council. Article 61(1) of the Constitution states that 'institutional Acts, before their promulgation [and] proposal Bills mentioned in Article 11 before they are submitted to referendum (…) shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution'. This compulsory prior check entrusted to the Constitutional Council is clarified by an organic law of 6 December 2013.[85] It covers the control of the threshold number of parliamentarians required to initiate the procedure (one fifth of the members of the Parliament), compliance with the framework of the referendum as provided for by Article 11(1) of the Constitution and compliance with the prohibition to submit a referendum draft bill about a legislative provision promulgated for less than one year[86] or a new referendum proposal on the same subject before the end of a period of two years following the date of the vote.[87] Compliance check of the referendum draft bill with the constitutional provisions is also included in the control of the admissibility of the referendum.[88]

The first shared initiative proposal was submitted in May 2019 and resulted in the first shared initiative decision of the Constitutional Council of 9 May 2019.[89] The decision found that all

[82] Organic law on Constitutional council, arts. 46-50.
[83] Decision no. 312 DC, 2 September 1992, *Traité sur l'Union européenne*.
[84] Decision no. 2003-469 DC, 26 March 2003, *Loi de révision constitutionnelle sur l'organisation décentralisée de la République*.
[85] Organic law no. 2013-1114 implementing Art. 11 Constitution, 6 December 2013.
[86] Art. 11(3) Constitution.
[87] Art. 11(6) Constitution.
[88] Art. 61(1) Constitution and Art. 45-2 (2) and (3) Organic law on the Constitutional Council.
[89] Decision, no. 2019-1 RIP, 9 May 2019.

the formal, substantive and procedural requirements were complied with. The Constitutional Council allowed the collection of signatures to start.

This first decision has been heavily criticized by part of the literature[90] but also by the Government itself[91], because the Constitutional Council accepted that parliamentarians may bypass the prohibition to ask for the abrogation of a law passed less than a year ago. However, the Constitutional Council strictly adhered to the provisions of the Constitution and the organic law on referendum. Another interpretation would have resulted in a restriction of the constitutional right granted to the parliamentarian minority and to citizens by the 23 July 2008 constitutional reform.

Once the period of signature collection is over, the Constitutional Council checks whether the threshold of citizens' support as required by the Constitution is reached, so that the initiative can be submitted to the Parliament. It ensures the regularity of voters' signature collection and has competence regarding all related grievances.

Finally, if the threshold of citizens' support is reached and the resort to referendum is decided, the Constitutional Council exercises its competences as it does for every referendum within the framework of its mandate under Article 60 of the Constitution – ensuring the regularity of referendum-related operations.

Shared initiative referendums are thus subjected to multiple checks stemming from the specificity of the way the procedure is triggered. This is in stark contrast with the minimal mandate entrusted to the Constitutional Council by Article 60 of the Constitution for the other types of national referendums.

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[90] Olivier Duhamel and Nicolas Molfessis, 'ADP: Avec le RIP, le Conseil constitutionnel joue avec le feu ', (*Le Monde*, 14 May 2019) < https://www.lemonde.fr/idees/article/2019/05/14/adp-avec-le-rip-le-conseil-constitutionnel-joue-avec-le-feu_5461684_3232.html> accessed 13 September 2020 ; Anne Levade, 'Privatisation d'ADP: le Conseil constitutionnel comme si de rien n'était !' (*L'Express*, 23 May 2019) <https://www.lexpress.fr/actualite/privatisation-d-adp-le-conseil-constitutionnel-comme-si-de-rien-n-etait_2078634.html> accessed 13 September 2020; Jean-Eric Schoettl, 'De quelques questions épineuses sur le RIP 'Aéroports de Paris', (*Lextenso*, 7 June 2019) <https://www.lextenso-etudiant.fr/article-à-la-une-constitutionnel/de-quelques-questions-épineuses-sur-le-rip-«-aéroports-de-paris-»> accessed 13 September 2020 Contra: Denis Baranger, 'Notre Constitution démocratique donne au peuple la possibilité de s'exprimer', (*lepoint.fr*, 16 May 2019) <https://www.lepoint.fr/editos-du-point/laurence-neuer/adp-notre-constitution-democratique-donne-au-peuple-la-possibilite-de-s-exprimer-16-05-2019-2313090_56.php> accessed 13 September 2020; Olivier Beaud, 'Remarques sur le référendum d'initiative parlementaire et sur les arguments de ceux qui ont voulu en bloquer la procédure', (*Juspoliticum Le Blog*, 2 May 2019) <http://blog.juspoliticum.com/2019/05/23/remarques-sur-le-referendum-dinitiative-parlementaire-et-sur-les-arguments-de-ceux-qui-ont-voulu-en-bloquer-la-procedure-par-olivier-beaud/> accessed 13 September 2020; Paul Cassia and Patrick Weil, 'Sur ADP, le Conseil constitutionnel n'a pas commis de faute', (*Le Monde*, 17 May 2019) <https://www.lemonde.fr/idees/article/2019/05/16/referendum-sur-adp-le-conseil-constitutionnel-n-a-commis-ni-faute-juridique-ni-faute-politique_5462653_3232.html> accessed 13 September 2020; Jean-Philippe Derosier, 'Complémentarité démocratique' , (*La Constitution décodée*, 15 May 2019) <https://constitutiondecodee.fr/2019/05/15/complementarite-democratique/> accessed 13 September 2020; Marthe Fatin-Rouge Stefanini, 'LE RIP pourrait devenir une nouvelle forme de veto suspensif, (*LeMonde.fr*, 17 May 2019) <https://www.lemonde.fr/idees/article/2019/05/17/marthe-fatin-rouge-stefanini-le-rip-pourrait-devenir-une-nouvelle-forme-de-veto-suspensif_5463514_3232.html> accessed 13 September 2020; Marthe Fatin-Rouge Stefanini, 'La décision n° 1-2019 RIP ou quand un mécanisme voué à l'échec devient un véritable atout pour l'opposition', (2019) Revue française de droit constitutionnel 999.

[91] Franc Lemarc, 'Référendum ADP: le gouvernement demande au Conseil constitutionnel 'd'interrompre' la procédure', (*Maire info*, 17 May 2019) <https://www.maire-info.com/test-2/referendum-adp-le-gouvernement-demande-au-conseil-constitutionnel-d%27interrompre-la-procedure-article-23058> accessed 13 September 2020.

5. Conclusion

In late 2018, the main demand of a huge social protest called the 'yellow jackets' (*gilets jaunes*) was the introduction of a citizen-initiated referendum in order to submit proposals regarding ordinary laws and constitutional amendments, to ask for the abrogation of ordinary laws (rejective citizen-initiated referendum) and for the revocation of elected officials (recall).[92]

The President of the Republic, and his government, also organized a nationwide discussion which pointed to the will of the French citizens to be more involved in decision-making on public affairs.[93] A constitutional reform proposal which takes these demands into account was presented in August 2019.[94] It would extend the scope of Article 11(1) of the Constitution to the organization of *territorial* public authorities. However, no judicial review of draft referendum bills would be provided for.

Besides, and above all, a new title on 'citizen participation' would appear in the Constitution. The shared initiative would be part of this title and the number of required signatures would be reduced to one million. Furthermore, the temporal limit for proposing a shared initiative whose purpose is the abrogation of a law that has just been enacted would be raised from one to three years. A Citizen Participation Council (*Conseil de participation citoyenne*) would be established as well.

This reform of the Constitution is unlikely to be approved as it lacks sufficient support in parliament. However, sooner or later, a reform will definitely be required to modernize the institutions of the Fifth Republic in order to allow citizens to be more directly involved in political decision-making.

[92] Anthony Berthelier, 'Les gilets jaunes réclament le 'RIC', le référendum d'initiative citoyenne', (*Huffington post*, 6 December 2018) <https://www.huffingtonpost.fr/2018/12/06/les-gilets-jaunes-reclament-le-ric-le-referendum-dinitiative-citoyenne_a_23610454/> accessed 13 September 2020; Raul Magni-Berton and Clara Egger, *RIC. Le référendum d'initiative citoyenne expliqué à tous* (Limoges FYP éditions 2019).
[93] https://granddebat.fr
[94] Constitutional draft bill, no 2203, 29 August 2019, *Pour un renouveau de la vie démocratique*.