

The Referendum and Other Essays on Constitutional Politics

Matt Qvortrup

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

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A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

ISBN: HB: 978-1-50992-929-0
ePDF: 978-1-50992-931-3
ePub: 978-1-50992-930-6

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



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The Referendum

Non basta più

What is a rebel? It is a man who says no; but whose refusal does not imply a renunciation ... A slave who has taken orders all his life, suddenly decides that he cannot obey some new command. What does he mean by saying 'no'? He means, for instance, that 'this has been going on for too long', 'so far but no farther', you are going too far, or again 'There are certain limits beyond which you shall not go'. In other words, his 'no' affirms the existence of a borderline.

*Albert Camus*¹

NON BASTA PIÙ – roughly translated – ‘enough is enough’, said the Roman taxi driver as we drove up *Via Pietro Roselli* towards the American University of Rome. He was not, he said, a ‘populist’, but he had voted against the proposal for a reformed constitution put forward by Prime Minister Matteo Renzi in 2016. Not, the man told me, ‘because he was against the welfare state or the EU’, but simply to send a message to *la classe politica*. In short, *non basta più*. His was a signal to the elected politicians that there were certain limits to what they could get away with; that immigration was perceived to be out of control; that growing inequality was unacceptable; and that he disapproved of cuts to healthcare spending.

Some might view these utterances as examples of irrationality, just as many saw the Brexit vote in Britain in 2016 and the Colombian voters’ rejection of the peace plan in the same year as indications of democracy gone amok; as conclusive proof that government by the people, should mean representative government; that too many referendums is a folly. There are, of course, examples of referendums that threatened and

¹ Albert Camus, *L’homme révolté* (Paris, Gallimard, 1951) 1.

discriminated against minorities. But the often unquestioned faith in the 'elected aristocracy' – to use Rousseau's term² – is on closer inspection in need of revision.

While politicians by and large are able to deliberate, there are a fair number of Acts of Parliament which, at the very least, question the sagacity of elected representatives. In the United Kingdom, the Dangerous Dogs Act 1991 and the Local Government Finance Act 1988 (introducing the Community Charge or 'Poll Tax') are examples of ill-considered legislation that reached the Statute Book.

It is to avoid such legislation that it can sometimes be necessary to complement representative democracy with mechanisms that allow the voters to say *non basta più* – and the referendum is, perhaps, the most appropriate means of doing so.

Populism can be crude and its proponents can be rude and obnoxious but often they are a symptom of an underlying malaise. In the 1890s, the original *Populists* urged the introduction of referendums that allowed the people to veto laws passed by legislatures and initiatives that could force recalcitrant politicians to introduce legislation that was opposed by big business. And they were often successful. The *Populists* were denounced as socialists when they proposed to introduce anti-trust legislation. The *Los Angeles Times* predicted that 'radical legislation would result and business and property rights would be subject to constant turmoil at the hands of the agitators'.³

In reality this legislation, perhaps, saved capitalism from itself and made sure that the monopolies – that Karl Marx had predicted in *Das Kapital*⁴ – never emerged, and that America did not experience the extreme ideological battles that characterised countries with mechanisms for direct legislation by the people or 'people's vetos' through referendums.

As I began to studying the previous examples of *Non basta più*, a kind of pattern began to emerge, namely one of a self-confident elite defending an abstract ideal which was opposed by 'ordinary people', whose everyday experiences were out of sync with the prevailing scientific orthodoxy. Economics professors, senior civil servants and business

²Jean-Jacques Rousseau, 'The Social Contract' in Frederick Watkins (ed & tr), *Rousseau: Political Writings* (Madison WI, University of Wisconsin Press, 1986) 74.

³*LA Times* cited in Thomas Cronin, *Direct Legislation: The Politics of Initiative, Referendum and Recall* (Cambridge MA, Harvard University Press, 1989) 52.

⁴Karl Marx, *Das Kapital Band III* in Karl Marx/Friedrich Engels – Werke, Band 25 (Berlin, Dietz Verlag, 1983) 211.

leaders would tell the voters that ‘you cannot stop progress’ and would denounce popular movements that called for lower taxes or opposed nuclear power stations.

Sometimes, as these groups were on the centre-right, as in the case of the Californian *Proposition 13* anti-tax revolt or in the case of the similar movement in Norway, where Anders Lange’s Party for Considerable Reduction in Taxation and Public Intervention (Anders Langes *Parti til sterk nedsettelse av skatter, avgifter og offentlige inngrep*) won representation in the *Stortinget* (Parliament) in 1974.

Like his counterpart in America, 40 years later, Mr Lange was unpolished, expressed extreme views in an uncompromising language. Yet, he had a point. Soon, more mainstream political parties took notice and nudged their policies towards lower taxation. They did not follow the more extreme proposals of Mr Lange, but they adjusted their policies – and soon after support for the radical anti-tax party withered away. To paraphrase Friedrich Schiller’s play, the ‘the anti-tax movement had done its duty. The anti-tax movement could go’.⁵

In the same way, the referendum on nuclear power in Austria in 1978. The Conservative *Österreichische Volkspartei* (ÖVP) and the *Freiheitliche Partei Österreichs* (FPÖ), then in opposition, were opposed to the opening of the *Zwetendorf* nuclear power station. Sensing that the issue was controversial with a year to go before the next parliamentary election, the Social Democrat Chancellor, Bruno Kreisky, decided to hold a referendum on the subject. He did not need to do so, as his party had a majority in the *Nationalrat* (the lower house), but he sensed that it was necessary for political reasons. Kreisky narrowly lost the referendum but he did not resign. An issue that had the support of the ‘elite’ was denounced by the people. And, just as importantly, the consequence of the vote was not chaos. Normality soon returned. Kreisky won an absolute majority of the vote at the general election the following year and increased his party’s representation in the *Nationalrat*. One is tempted to agree with the conclusion drawn by Larry Bartels and Christopher Achen, ‘The historical record leaves little doubt that the educated, including the highly educated, have gone as wrong in their moral and political thinking as everyone else’.⁶

⁵Friedrich Schiller, *Verschwörung des Fiesco zu Genua* (*Fiesco’s Conspiracy at Genoa*) (1783), Second Act. Part IV.

⁶Larry Bartels and Christopher Achen, *Democracy for Realists* (Princeton NJ, Princeton University Press, 2016) 310.

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But this is very much a minority view – among commentators, that is. Examples of ‘ordinary people’ revolting against the elite on certain issues are not uncommon and are often denounced as ‘populist’. Indeed, there is a long tradition of lamentations about the supposed stupidity of the ordinary voters.

‘People in masses are like children, easy to influence and even easier to steer if the message is well-packaged and repeated’ wrote the French sociologist Gustave le Bon (1841–1931).⁷ Perhaps so for little children, but not for teenagers who are *not* easy to influence and certainly not easier ‘to steer’.

At this time in history we are witnessing the collective kind of adolescence in which large numbers of people – like youths on the threshold of adulthood – reject the diktat of their elders, in this case the political class. The referendum plays a key role in this but perhaps not in a way that most commentators appreciate. For referendums do not allow far-right or far-left demagogues to have free rein – though referendum can occasionally perform the role of a democratic safety valve.

This has even happened in Hungary – a country balancing on the brink of becoming a repressive and autocratic state. Yet, even in a country without a viable parliamentary opposition, the referendum has arguably been the only effective check on the semi-authoritarian rule by the *Fidesz* party. Thus, in 2016, Viktor Orbán *failed* to win support for his tough stance on immigration in a referendum on the matter as ‘the turnout was only 41.32 % and the poll ... thereby invalid’.⁸ But more importantly, opposition groups also utilised the provisions in the constitution for citizens’ initiatives to halt Orbán in his tracks. For example, a ‘sudden strong public support for a referendum [led] to the cancellation in 2017 of Budapest’s bid to host the 2024 Olympic Games after the new opposition group collected 266,000 signatures for a referendum’.⁹ Used in this way, the referendum is a shield against populists and a safeguard against rulers.

But the problem with referendums is that they are a heterogeneous category. When initiated by the people or by opposition groups, the institution can be a check on power. However, when a referendum can be

⁷ Gustave le Bon, quoted in Paul Lendai, *Orbán: Europe’s New Strongman* (Oxford, Oxford University Press, 2017) 193.

⁸ Marcin Pomarański, ‘Direct Democracy in Hungary’ in Maria Marczewska-Rytko (ed), *Handbook of Direct Democracy in Central and Eastern Europe After 1989* (Opladen, Barbara Budrich Publishers, 2018) 116.

⁹ Lendai, *Orbán*, n7 above, 186.

called by the president or the head of government, it is a different story. In this case the referendum has the potential to be used as a plebiscitary instrument that gives the government *carte blanche* to enact policies with little or no deliberation – especially if the head of government is a popular figure.

This is the way the referendum was often used by Charles de Gaulle (who adorns the cover of this book). The former French President (and war hero), stated that he was convinced the ‘sovereignty belongs to the people, provided they express themselves directly and as a whole’. For this reason, he went on, ‘I introduced the referendum system, made the people decide that henceforth its direct approval would be necessary’.¹⁰ But what de Gaulle failed to add was that *he* was to decide when this ‘direct approval’ was ‘necessary’.

There can be no doubt that a referendum can make a decision legitimate and that a direct appeal to the voters can be a way of overcoming parliamentary opposition. Charles de Gaulle used the referendum when he was unable to win approval of controversial policies (such as the direct election of the president in 1962). He was not the first French executive to do so. A century before, Napoleon III had done the same. On that occasion, Karl Marx noted that the president was in a stronger position and this was why he could use (and abuse) the appeal to the people:

While the votes of France are splintered to pieces upon the 750 members of the National Assembly, they are here, on the contrary, concentrated upon *one* individual. While each separate Representative represents only this or that party, this or that city, this or that dunghill ... the President, on the contrary, is the elect of the nation, and the act of his election is his trump card, that the sovereign plays out every four years. The National Assembly stands in a metaphysical relation to the nation; the President stands in a personal relation to the nation.¹¹

Giovanni Sartori – the eminent Italian political scientist – thus concluded that the ‘more patent usurping of presidential powers has occurred with referendums’.¹² While the referendum could be justified as a tie-break (as in the case of the Danish referendum on the Single European Act in 1986), Sartori maintained that ‘the line that separates use and abuse is – in the case of referendums – a very fine line. Though, he went on,

¹⁰ Charles de Gaulle, *Memoirs of Hope* (London, Weidenfeld and Nicolson, 1971) 6–7.

¹¹ Karl Marx, *Der achtzehnte Brumaire des Louis Bonaparte* (Frankfurt am Main, Suhrkamp, 2016) 26.

¹² Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2nd edn (London, Macmillan, 1997) 137.

‘the French Fifth Republic has employed the referendum judiciously (and parsimoniously).’¹³

Yet the same cannot be said of the United Kingdom, where the referendum – with the exception of the referendum on Scottish independence in 2014 – has been used almost solely for party political purposes – first to keep the Labour Party together in 1975,¹⁴ then to maintain unity in the Conservative–Liberal Democrat coalition in 2011,¹⁵ and lastly (and fatally) to maintain unity within the Tory Party in 2016.¹⁶

When constitutions allow politicians to initiate votes merely to safeguard their own political interests (as in the case of the unofficial referendums in Mexico on President AMLO’s pet projects¹⁷) there is a potential that the referendum can be abused.

The referendum ought to be a ‘people’s veto and for this reason it was appropriate that a referendum was held on Scottish independence as an election victory for the Scottish National Party (SNP) did not in itself give Alex Salmond’s party a mandate for leaving the United Kingdom. Indeed, 38 per cent of backers of union voted SNP in 2011 according to the Scottish Social Attitudes survey.¹⁸ Hence a vote for the Scottish National Party did not imply support for a break-up of the United Kingdom. For this reason, a referendum was necessary. But who decides when a referendum should be called? Who decides if a question is of a constitutional nature that requires it to be put to a referendum? In a country without a written constitution, such as the United Kingdom, the constitutionality of an issue is bound to be a political one.

Albert Venn Dicey proposed a law

enacting that a ... referendum ... be required by a resolution of either House [of Parliament], in respect of any Act e.g. affecting, 1) The Rights of the Crown, 2) The Constitution of Parliament, the Acts of Union & and other large constitutional topics which might easily be enumerated.¹⁹

¹³Sartori, *Comparative Constitutional Engineering*, n 12 above, 165.

¹⁴The United Kingdom European Communities membership referendum, 5 June 1975. On this see: M Qvortrup, *Government by Referendum* (Manchester, Manchester University Press, 2018) 25ff.

¹⁵The United Kingdom Alternative Vote referendum (on whether to replace the existing ‘first-past-the-post’ system with the ‘alternative vote’ method), 5 May 2011.

¹⁶United Kingdom European Union membership referendum, 23 June 2016.

¹⁷Though note that the otherwise popular AMLO (Andrés Manuel López Obrador) was unable to secure a high turnout and that the legitimacy of the poll was therefore in doubt. *El País*, 18 August 2018, ‘López Obrador someterá a referéndum el nuevo aeropuerto de Ciudad de México’.

¹⁸I am grateful to Sir John Curtice for providing me with this statistic.

¹⁹AV Dicey to Leo Maxse, 2 February 1894, Maxse Papers, West Sussex County Record Office, Chichester.

In countries with a written constitution – like Ireland or Denmark – this means that a referendum is automatically held every time the constitution is amended. This is right and proper but there are important issues which are not in the constitution. Issues like nuclear power, abortion, immigration and same-sex marriage are not usually in the constitution (though in this regard, Ireland is an exception); yet these issues are hotly debated and failure to allow people a say in these matters can lead to a legitimacy crisis.

Is there a solution to this? Might it be provided by the referendum? Perhaps we should allow the people a say on the matter – like in some US States, Uruguay, Italy and Switzerland – where a specified number of voters have a right to demand a referendum on existing laws (Italy and Uruguay) or on newly enacted laws (California and Switzerland). These polls, of course, should only be held if this is consistent with the rule of law (such as codified human rights and treaty obligations), and there are many examples of referendums and initiatives that have been nullified due to these concerns.²⁰

But would this not lead to demagogue-fuelled populism and ill-considered decisions? That is always a possibility. Democracy is not risk free. But it is a myth that voters always vote for populist measures such as the death penalty. Indeed, the voters in Ireland voted overwhelmingly to abolish capital punishment in 2001, and ‘Oregon ... twice voted to abolish the death penalty ... It abolished the death penalty by a large majority on a referendum in 1964’.²¹

The attraction of the referendum is not that it leads to more liberal or more conservative legislation. Institutions should be neutral and provide equal opportunities for the enactment of policies that reflect the preferences of the voters – the ultimate sovereign.

The problem with pure representative democracy is that it does not allow voters to have views that differ from those of the political parties. In Scotland this problem was resolved through a referendum – though only because this was granted by the British government.

²⁰ Kenneth P Miller, *Direct democracy and the courts* (Cambridge, Cambridge University Press, 2009).

²¹ JL Kirchmeier, ‘Another place beyond here: The death penalty moratorium movement in the United States’ (2002) 73(1) *University of Colorado Law Review* 1, 17, fn 103. It should be noted, however, that the otherwise liberal Californian voters rejected Proposition 62 in 2016. The initiative would have put a moratorium on the use for the death penalty in the Golden State. See Jim Miller, ‘California Votes to Keep Death Penalty’, *The Sacramento Bee*, 9 November 2016.

But the system should not rely on the whim of politicians. Whether an issue merits a referendum should be decided by the voters. This is how it is in most American States. Thus in 2018, a majority of the voters in Florida voted for a conservative Republican, Ronald DeSantis, in the gubernatorial election. Yet, at the same time the voters in the Sunshine State also endorsed a citizen-initiated proposal to enfranchise former convicts (excluding those who have served time for murder or serious sexual offences). Sixty-four per cent endorsed the so-called Amendment 4. In other words, the Floridians showed that they could distinguish between measures and men. The system in Florida allows voters to have their democratic cake and eat it.

But for this to happen, there must be a mechanism which takes the initiative away from the executive and returns it to the People. Writing at the height of the Populist revolt in America around 1900, Morsei Ostrogorski believed this could be achieved through direct democracy. He suggested that the referendum was ‘aimed at the arbitrariness and the corruption of the parties, which are entrenched behind legislatures’, and that this device provided a mechanism for ‘holding in check the permanent and crystalized forces, in which selfish designs of every kind so easily take refuge’. ‘These designs’, he went on, in an almost Madisonian fashion,²² can be ‘combated by temporary combinations, which interpret more faithfully the aspiration of current opinion, the real and not the factious opinion’,²³ in short by a referendum.

It is difficult to see what has changed.

²² See James Madison’s Federalist Paper No 51, ‘the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority’ James Madison in *The Federalist Papers* (New York, Signet Books, 1961) 321.

²³ Morsei Ostrogorski, *Democracy and Political Parties II* (London, Macmillan, 1902) 690.