

Is the Referendum a Constitutional Safeguard?

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ABSTRACT: Are most referendums controlled and pro-hegemonic, i.e. do governments only submit issues to referendums if they are certain that they will win (as asserted by Lijphart)? This paper shows conclusively that the constitutional referendums in Western polities have performed the functions of constitutional safeguards, and that the governments have been unsuccessful in their attempts to control the referendum.

The use of referendums has recently been on the increase¹. This development begs the question if this tendency is a result of a growing willingness to let the 'people' have a say in the regulation of their own affairs, or if the growing use of the referendum merely reflects a renewed form of plebiscitarian democracy. Scholars have tended to support the latter interpretation. This research note offers evidence to the contrary.

It is the *raison d'être* of the referendum that it ought to be a constitutional safeguard². Yet we have no guarantee that the referendum does provide the voters with a check on parliament. Indeed, it has been argued that referendums in practice strengthen the power of the ruling elites rather than the reverse. This view, which will be discussed in this research note, has been summed up by David Butler and Austin Ranney:

"Referendums are held infrequently, usually only when the government thinks that they are likely to provide a useful ad hoc solution to a particular constitutional or political problem or to set the seal of legitimacy on a change of regime"³.

This conclusion indicates that the referendum is unlikely to provide the citizens with a constitutional safeguard. For as Lijphart has concluded: "when governments control the referendum, they will tend to use it only when they expect to win"⁴.

This is a depressing conclusion from the point of view of the Diceyan ideal of the referendum as a constitutional safeguard. For the referendum is unlikely to provide the voters with a constitutional safeguard, let alone answer the question of *quis custodiet ipsos custodes*, if parliament is to decide when it in effect wants to be checked. What Dicey believed to be an effective "People's veto" might prove to be a constitutional paper-tiger; an ineffective constitutional safeguard, which only fulfils its function as a "people's veto" when governments miscalculate the unpopularity of a proposed measure. The philosopher Michael Oakeshott summed up this view when he concluded that the

"plebiscite [or the referendum] is not a method by which 'mass man' imposes his choices upon his rulers; it is a method for generating a government with unlimited authority to make choices on his behalf. In the plebiscite the 'mass man' achieved release from the burden of individuality he was told emphatically what to chose"⁵.

Yet even critics of referendums concede that parliaments -on rare occasions- might be willing to hold referendums on issues that are unpopular among the voters but supported by the political elites, as allegedly was the case in Norway in 1972.

The fundamental question in relation to the referendum's function as a constitutional safeguard is not, however, when and why referendums occur, but if the government's actions are restricted by referendums. Political theorists support for a referendum has been based on the a priori assumption that the referendum would be used as a check on the excesses of unrestricted party-government. What some modern observers have feared is that the opposite might happen, namely that the referendum might be used as an elite strengthening device. Based on the referendum experience until the mid-1970s David Butler and Austin Ranney have argued that;

"referendums are held entirely at the option of elected officials, parliaments and their governments, with a few minor exceptions for compulsory referendums for constitutional amendments and a few special kinds of legislation".⁷

This assertion can be tested empirically by using Gordon Smith's typology of referendums.

Gordon Smith's Model

Smith makes a distinction between two categories of referendums, "Controlled" and "Uncontrolled referendums". "It is", writes Smith in principle possible to place all referenda "on a continuum of control, partly based on the right of initiation and partly based on the actual course of events which leads to a particular vote...A continuum running from 'Controlled' through 'Uncontrolled' could therefore alternatively be termed in terms of desired or intended effect, whether the referendum is supportive of the outlook and policies of the authorities or not"⁸.

It follows, when we are dealing with binary-choice referendums, that referendums can have two possible outcomes; the proposal can be adopted or rejected. Given that the result of a referendum can be either "detrimental or supportive to a regime", Smith distinguishes between two categories, respectively "Pro-hegemonic" and "Anti-hegemonic" referendums. These distinctions lead to four different categories (See figure 1).

Figure 1. Smith Categories

Pro-Hegemonic-Controlled Referendums (Austria 1994, France 1962)	Pro-Hegemonic Uncontrolled Referendums (Ireland 1987)
Anti-Hegemonic Controlled Referendums: Norway 1994, France 1969	Anti-Hegemonic Uncontrolled Referendums (Britain 1979)

Based on Smith 1976, Examples added by the author.

Based on Lijphart's analysis we could expect most of the referendums to fall within the categories of "controlled referendums", with a majority of the referendums being "pro-hegemonic referendums". For, as Lijphart writes "most referendums are both controlled and pre-hegemonic"⁹.

It must be stressed that these categories are ideal types. That is to say, the real types might be difficult to categorize. I categories all constitutional referendums, and referendums initiated by the opposition and by citizen petition as "uncontrolled". Smith further categorizes the outcome of a poll as anti-hegemonic if the government has campaigned against it. This leads to the following distribution of referendum types listed in Table 1. The results in table 1. clearly falsify Lijphart's assertion.

Table 1. Types of Referendums Using Smith Categories 1945-97.

Country	ConPro	ConAnti	UnconPro	UnconAnti
Australia	0	0	0	24
Belgium	0	0	1	0
Denmark	2	0	5	6
Finland	1	0	0	0
France#	5	1	4	1
Ireland	0	0	11	6
Italy	1	0	20	19
Norway	0	2	0	0
Sweden	3	1	0	0
U.K.*	3	0	1	0
New Zealand□	4	0	0	5
Austria	1	1	0	0
Total	20	5	42	61
Total-%	15.6%	3.9%	32.8%	47.6%

Sources: Albert Blaustein and Gisbert Flanz (Editors), *Constitutions of the Countries of the World* (New York: Ocean Publishers, 1997). *The U.K. Referendums include the Border-Poll in 1973 and the devolution referendums in 1979 and 1997. Changes to S.189 of the Electoral Act of 1956 are included as constitutional referendums.

The pro-hegemonic controlled referendums only account for 15.9 percent of the referendums studied, the uncontrolled referendums, by contrast, account for more than 80 percent of the total number of referendums. There is, indeed, some support for the assertion that governments only submit issues to referendums when they have a good reason to suppose that they will be endorsed by the voters; only five "controlled" referendums produced "anti-hegemonic" outcomes. But this result does not disguise the fact that the majority of referendums, 103 out of a total of a 128, were "uncontrolled", i.e. either obligatory constitutional referendums, abrogative referendums, initiatives, or minority veto referendums.

It might, however, be argued that Smith's definition of uncontrolled referendums is too wide as it includes, so-called, *pouvoir constituent*-referendums, i.e. the referendums held to ratify a new constitution (e.g. the Italian referendum on the constitution for the First Republic in 1948 and the French referendum in 1958).

The *pouvoir constituent* can, according to Klaus von Beyme, be defined as a pre-constitutional,

latent, and inalienable right to consent to a constitution, exercised by the people before they transfer some of, their sovereignty to new political institutions¹⁰. It follows from this definition that referendums on such issues are neither legally, nor politically uncontrolled as they are held at the discretion of the initiators (typically the drafters of the constitution). A classical example of this is the 1937 referendum in Eire. Eamon DeValera found that it was necessary to hold a *pourvoir* constituent-referendum because "there is one thing more than another that is clear and shining through the constitution...the fact that the people are the masters"¹¹. To describe such referendums as uncontrolled would be misleading as these polls often have a quasi-plebiscitary nature (Cf. de Gaulle's use of the referendum in 1958).

It might, therefore, be argued that these referendums ought to be categorised as controlled referendums, as it is the drafters of the constitution who initiate them. This re-categorisation does not however, alter the conclusion that most referendums are uncontrolled, as *Pouvoir* constituent-referendums are relatively rare (only four of the studied polls fall in the category, namely the Italian referendum in 1948, the two referendums on proposed constitutions for the Fourth Republic in 1946, and de Gaulle's referendum on the constitution of the Fifth Republic in 1958).

The result of this re-categorisation is that 77 percent of the referendums were uncontrolled, as only 3 percent of the polls were *Pouvoir* constituent-referendums. The general conclusion is, in other words, the same most referendums are uncontrolled.

Last Thoughts

The research note has falsified Lijphart's bold assertion that referendums are "weapons in the hands of the government". The pro-hegemonic controlled referendums only account for 15.9 percent of the referendums studied, while the uncontrolled referendums, by contrast, accounted for more than 80 percent of the total number of referendums. Moreover the majority of the referendums, 103 out of a total of a 128, were "uncontrolled".

Moreover the research note has offered reassuring a conclusion from a the perspective of Dicey's model, i.e. from the perspective that the referendum can be a constitutional safeguard. Constitutional theorists - like Dicey - have proposed the introduction of an uncontrolled referendum, which, by constitutional entrenchment of certain institutions and rights, would force the rulers to submit issues to referendums. That the majority of the referendums held have been uncontrolled referendums, and that most of them have gone against the wishes of governments suggests that the referendum can provide an effective check on the legislature.

Appendix 1. Provisions for Types of Referendums in Constitutions in Western Polities¹²

Country	Ref.Provsn.	Const.Am.	Faculative	Min.Ab
Australia	Yes	Sec123(23)□	-	-
Belgium	No#	-	-	-
Denmark	Yes	§.88,29(6)	§.20(1)	§.42(4)
Finland	Yes	Art.22A(1)	-	
France	Yes	Art.89(0)	Art.11(8)	-
Ireland	Yes	Art.46(17)	-	Art.27(0)

Italy	Yes	-	Art.123,132	Art.71*,75(38)
Norway	No	-	-	-
Sweden	Yes	-	Ch.8.§4,15(1)	-
UK	-	-	-	-
NewZealand	-	Sec.189(6)	-	C.I.R.A(1)
Austria	Yes	Art.44(1)	-	Art.48*
Total		Const.(53)	Facul.(11)	Min.ab(43)

Sources: CD2-Geneva. Albert Blaustein and Ghisbert Flanz (Editors), *Constitutions of the Countries of the World* (New York: Ocean Publishers,1997), and (Suksi 1993).

Ref.Provsn=Provisions for referendums mentioned in the constitution.

Const.Am.=Optional Referendum for constitutional amendments

Facultative= provisions for facultative referendums on non-constitutional measures

Min.Abr.Ref= minority-veto, abrogative referendum, or other constitutional provisions for semi-direct democracy* Popular petition,(resp.Volksbegehren(Austria),Iniziativa di legge popolare (Italy))

C.I.R.A= "Citizen Initiated Referendum Act 1993". The numbers in the parentheses show the number of referendums which have been held under this provision.

Footnotes:

1. Ian Budge, *The Challenge of Direct Democracy* (Cambridge: Polity Press, 1996), p.85
2. Mads Qvortrup: A. V. Dicey: The Referendum as the Peoples Veto", in *History of Political Thought*, Vol. xx, No. 1, Spring 1999 pp. 1-16.
3. David Butler and Austin Ranney, "Summing Up", in David Butler and Austin Ranney (Editors), *Referendums. A Comparative Study of Practice and Theory* (Washington DC: American Enterprise Institute, 1978), p.221.
4. Arend Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press, 1984), p.203
5. Michael Oakeshott, *Rationalism in Politics and other Essays* (Indianapolis: Liberty Fund, 1991), p.380.
6. Giovanni Sartori, *Comparative Constitutional Engineering* (London: Macmillan, 1994), p.130.
7. David Butler and Austin Ranney, "Summing Up", in *Referendums*, cit.op. p.222.
8. Gordon Smith, "The Functional Properties of Referendum", in *European Journal of Political Research*, Vol.4, No.1, March 1976, p.6. For an earlier version of Smith's model see: Gordon Smith, "The Referendum and Political Change", in *Government and Opposition*, Summer 1975, pp.204-305.
9. Arend Lijphart, *Democracies*, p.203. The same view is championed by Silvano Möckli, *Direkte Demokratie* (St. Gallen: Haupt Verlag, 1994), p.160.
10. Klaus von Beyme *Die verfassunggebende Gewalt des Volkes. Demokratische Doktrin und politische Wirklichkeit* (Tubingen: J.C.B. Mohr, 1968), p.5.

11. Eamon DeValera quoted in Basil Chubb, "Government and Dail: Constitutional Myth and Political Practice", in Brian Farrell (Editor), DeValera's Constitution and Ours (Dublin: Gill and Macmillan, 1988), p.98.

The number of referendums listed are nationwide referendums held after 1945, except for France, where the figure refers to the number of referendums held under the 5th Republic.