

Complementary democracy

The need to complement representative democracy by an adequate process of popular legislation: a consideration of the basic elements of a modern understanding of democracy from the perspective of the Austrian constitutional position.

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June/July 2013

1. Providing an up-to-date instantiation of democracy requires that there be, in addition to the right to vote, an adequate form, appropriate to its nature and needs, of the popular right of initiative and referendum. These twin aspects are the expression of a complementary understanding of *popular sovereignty*, such as has existed since its appearance at the time of the French Revolution. The Austrian Constitution expresses the principle of popular sovereignty in Article 1 of the B-VG [Federal Constitutional Law], in the sentence: "Austria is a democratic republic. Its law emanates from the people" - making its essential *legislative* nature clear.

Although at the level of the government (i.e. the executive) the various tasks are delegated to the most expert and competent persons, at the legislative level the principle of delegation is not adequate. The *popular or general will* (*volonté générale*) as the core element of popular sovereignty - as Rousseau already identified - cannot be transferred to individuals or to a group that is less than the entire populace. The *representative organs of democracy*, given authority in elections, may well pass laws, but the possibility must always exist for returning the democratic decision-forming and -making process to the *direct source of popular sovereignty*. This requires that representative democracy be complemented by the option of a direct exercise of the legislative function. In what follows, a more detailed explanation and justification of this claim will be offered.

2. If we examine the constitutional situation in Austria, we find both of the above aspects are contained. In addition to the regular elections, through which the representative legislative organs are formed, initiatives can be submitted to parliament via popular demands ("Volksbegehren"). Referendums take place if a decision has been taken in parliament to hold one, or if they are "obligatory" i.e. in the event of a proposal for an overall amendment of the constitution.¹

¹ To date, only two referendums have been held: in 1978, on the commissioning of the nuclear power station at Zwentendorf; and in 1994, on Austria's accession to the EU. The latter case was an example of an "obligatory" referendum because the issue involved an overall amendment of the constitution i.e. the fundamental structure of the constitution was affected.

In both cases, however, a referendum decision can only be made on something that has already been decided in parliament. The current rules do not allow popular referendums to take place if the proposal(s) submitted to the federal parliament have not been approved by that body. This is contradictory to the basic idea of complementary democracy, which provides for two independent "pillars" of legislation, which, though they work together in a complementary fashion, are nonetheless independent of each other i.e. they are both able to make autonomous political decisions.

Over the course of time, the parliamentary legislative activity of representative democracy has developed a differentiated structure (with different chambers, types of sittings, committees, inquiries etc.), whereas the plebiscitary aspect of democracy has remained undeveloped and rudimentary - not only in Austria. This is where there is a need for an adequate process of popular legislation which makes possible the free formation of popular will and encompasses both the initiative arising from the heart of the sovereign populace - a community governed and empowered by the rule of law - and the direct-democratic popular decision (referendum). We describe below what must be taken into account in instantiating these rights.

3. There must be a fundamental recognition that a complementary understanding of democracy requires that everything that would mean any kind of "to-ing and fro-ing" between the two pillars of democracy must be avoided. To be specific: on the one hand, everything that could put pressure on the elected officials of the representative side should be excluded; on the other hand, the responsibility that lies in the parliamentary process must not be 'unloaded' onto the sovereign people on an occasional, selective basis, as is the situation with the referendum in the Austrian constitution (except where it is mandatory). Parliamentary decisions - given legitimacy through the elections - must always be made in exercise of the free mandate and not delegated to the people. If citizens wish to be active themselves, they must have the possibility of launching a popular initiative for a referendum (cf. below). From this point of view it is clear that the recently much debated - and also used - instrument of the non-binding "Volksbefragung" (in effect a kind of opinion poll) must be seen as being contrary to both parliamentary privilege and popular sovereignty (expressed through the binding popular referendum) - in relation to the parliament because it is put under pressure to implement the expression of the people's will; in relation to the referendum because it cannot be that the expression of the people's will can be non-binding. - "When the sovereign [i.e. the people] expresses its opinion, then it also decides!"²

² CDU member of the German parliament Rainer Barzel on 24.4.1958. Cf. also: <http://goo.gl/3u8BGt> - In June 2013,

4. How such a decision can be made possible in an adequate way is the aim of the citizens' initiative "*Volks-gesetzgebung jetzt!*" ("*Popular lawmaking now!*") which proposes a three-stage process of popular legislation.³ This launched a democratic process which does not just link the right of initiative and the right to a popular referendum in some vague way, but makes this "the highest principle" („à la hauteur des principes").⁴

This proposal asserts that it has taken into account the objections which are repeatedly raised against direct democracy (but without any attempt to deal with the counter-arguments) and to have removed from its concept any and all questionable elements which may arise. This will be demonstrated by reference to the essential elements of the plebiscitary process.

Before doing so, we shall describe in its essentials the three-stage popular legislative process in the form proposed for Austria:

a.) Popular initiative (Stage 1): a minimum of 30,000 registered voters can submit to national parliament an elaborated legislative draft, or a specific political policy, to be dealt with according to the rules of procedure. The signatures of support for the initiative are freely collected [i.e. there are no restrictions on the manner of collection]. Parliament treats any such proposal submitted by popular initiative as of high priority and makes a decision on it within a maximum of 6 months after it has been submitted. Up to three persons delegated by the initiators are to be included in the discussions.

b.) If the initiative proposal is not accepted in its entirety, the initiators have the option of launching a popular demand (Volksbegehren - Stage 2)

at the end of the legislature period, a compromise between the SPÖ, the ÖVP and the GREENS led to a debate on a "democracy package" which should be decided on quickly before the elections. It provides for popular initiatives which have met the criteria of support to be put to a non-binding 'Volksbefragung'. The proposal provoked opposition. Cf. <http://goo.gl/J8rMzj>

3 The proposal was presented to parliament as a citizens' initiative on 27 February 2008. Cf. <http://goo.gl/PZWupo>

4 This combination tends to appear in the repeatedly discussed proposals that provide for a plebiscite in the case of particularly successful Volksbegehren. This proposal, repeatedly presented by the ÖVP (Austrian People's Party) - first of all in 1951, then twice in 1953 with the same wording (5.12.1953, 96/A and 28.10.1953, 44/A) - is rightly termed an "automatism", which does not belong in a living process of opinion formation. To be sure, more recently there has been talk of a "three-stage process" (by Barbara Prammer, President of the Parliament, for example), but an understanding of why this would be an adequate solution does not as yet seem to have made much headway.

for a referendum. The signatures supporting the demand are gathered during a specified "enrolment week". Prior to this, every household is sent, in good time, a communication containing the precise wording of the demand.

c.) A popular demand is 'successful' if it is supported by at least 300,000 registered voters. If this is the case, a referendum must be held at the earliest within 3 months and at the latest within 6 months (Stage 3). A majority of the votes cast decides whether the draft law, or the policy, shall be adopted or rejected.

d.) Media stipulations: in the period from at least 3 months before a referendum, the mass media must provide unbiased information and opportunities for public debate on the pros and cons of the referendum issue. A media council mediates and monitors the content.

5. For purposes of clarification, the separate elements of the process are described here; attention should be paid in the first instance to the *three stages*. The first stage - the initiative - brings into play, out of the potential of all citizens, from their very midst so to speak, a new idea for a law. If this idea meets with a certain level of support (in the proposal presented here, 30,000 indications of support), the Parliament must address the issue. The first stage thus functions as a bridge between the two pillars of democracy in their complementary relationship. Parliament, legitimised through elections, is enriched by the creativity of an active citizenry (civil society), but must not feel that it has been put under pressure. It can agree with the proposal or reject it. But this freedom to act out of the self-understanding of complementary democracy is only possible because a rejection by parliament does not block the further development of the *volonté générale* - the popular will. In the three-stage process of popular lawmaking, no blocking occurs, as a popular referendum can now be set in motion via the second stage (in our proposal, a popular demand [Volksbegehren] requiring the signatures of 300,000 citizens).

Whereas the emphasis in stage 1 was still on "the new idea", now it is a question of whether the initiative concerns an issue on which the entire community governed by the rule of law should be able to express its democratic will in a binding manner i.e. whether it is a matter which concerns the whole community being oriented towards the common welfare. If the question receives a positive answer i.e. if the signature threshold is reached, then the referendum follows.

The new idea of a law-based popular initiative is a result of clear thinking. In the second procedural stage, answering the question as to the social relevance of the proposal presented here is more a matter of feeling. In the referendum which follows we see a clear expres-

sion of the will. Thus, three-stage popular lawmaking reveals itself as an integrated process in which the three soul qualities and ‘activities’ of the human being - thinking, feeling and willing - are, as it were, lifted up from the individual to the general social level.⁵

This “soul dimension” must not be confused with an imagined “healthy popular sentiment”, which has more to do with a kind of mass phenomenon. At no point is the three-stage process dependent on the acclamation of such a mass, but always and only on individual acts of accession motivated by conscience and individual responsibility.

6. A further element of the process are the *quorums*. The proposal described here provides for 30,000 statements of support at the first stage and 300,000 at the second. These quorums function as filters; the only issues which justify being submitted to a popular decision are those that arise out of the “rational social sense” of the general public. An issue that is too ‘specialised’, or which presumes a high level of expert knowledge, will be filtered out - since it will not be capable of securing a majority. It must be brought forward for further elaboration at the representative level of democracy. If the quorums are too low, this filtering function loses its effectiveness; if they are too high, the democratic process suffers from paralysis.

In this connection, concern must be expressed about the “catalogues of excluded issues” that are often demanded i.e. lists of those legislative matters that are to be excluded a priori from direct-democratic decision-making. This represents a problem for a philosophy of democracy - for what other authority than the sovereign people themselves can determine what can be the subject of a decision and what not. This can only be achieved through the filtering function of quorums which are built into the process. If there are subjects which people should not be allowed to decide upon, then this must apply equally to both parliamentary and direct democracy. In both cases, where there is doubt, the constitutional court must decide.

The three-stage process of popular lawmaking provides for no other quorums than those required for qualifying the first two stages; thus, for example, quorums which specify a certain percentage of the electorate which must have taken part in the referendum before it can be deemed valid (a turnout quorum), or a specified level

⁵ Further details of this and other contexts, which here can be merely hinted at, can be found in the “archetypal consideration” in the Appendix to the response of the “Volks-gesetzgebung jetzt!” initiative to the “Democracy package” (2177/A) presented by the governing parties on 30 January 2013. Cf. <http://goo.gl/bCJMd4> - Further relevant material can be found in the writings of Wilfried Heidt and Bertold Hasen-Müller at: <http://goo.gl/E7Fqdo> - which present the rationale for the “three-stage process of popular lawmaking”.

of absolute support (an approval quorum), are not provided for, as such quorums distort the referendum outcomes. In the former case, it is not only the number of “No” votes that are counted, but de facto also the number of those who do not turn out to vote. This can lead to a situation in which a tactical recommendation to opponents of the referendum proposal not to go out to vote at all, rather than voting “No”, may result in a law proposal being rejected, as the likelihood increases that the opponents, added to the number of those who do not take part, perhaps out of lack of interest, prevent the participation quorum from being reached.

An approval quorum, on the other hand, can lead to citizens who do not or cannot inform themselves about a particular law proposal being dragooned into voting “Yes” nonetheless. Then the opposing side may be tempted to do the same. The result is a referendum campaign - like an election campaign - in which the debate over the pros and cons of the issue tend to be pushed into the background.

These few examples show why it is not reasonable that those who, for whatever reasons, do not take part in the democratic process, should nevertheless be able to exert an influence on the outcome of the referendum. - The only way of preventing distortions of the referendum result is to specify that the simple majority of those who have voted decides the outcome.

7. Point 4 (d) above refers to “*media conditions or stipulations*”. In the logic of the three-stage process of popular lawmaking it represents a *conditio sine qua non* for a free and fair gestation of the popular will in the runup to the referendum. In the kind of strongly media-influenced society that has come into being more and more markedly in recent decades, the idea of social responsibility in these societal communications media should not apply solely to publicly funded radio and television. From a certain size upwards, the other media should also have a constitutionally grounded duty - a duty which comes into force only when the second stage of the sovereign process is entered. That the legal duty to provide free information and communication on the pros and cons of the issue in the runup to a referendum should be given a higher value than, for instance, the existing prerogatives of media owners, who can influence the opinion formation of voters in a biased way, is very clear to those who launched the initiative “*Volks-gesetzgebung jetzt!*” (“Popular lawmaking now!”). It is not a question of restricting freedom of opinion or the freedom of the press. On the contrary, these freedoms are given greater value through access to the media - which in the three-stage process is also made available to smaller initiatives, if they secure the necessary level of support.

It should be noted that the current proposal provides for a *media council*. This results from the insight that a

direct democracy that is living and developing needs a diverse “organ system”. In this context, the media council can be seen as the first of such organs, to which others may be added as the experience of popular lawmaking grows and develops. Such a council has the task - together with representatives of the initiative and also its opponents, and with the inclusion of the media - of shaping the information and communication space around the initiative. In addition, it could take on the function of an ombudsman, to arbitrate in cases of dispute - as to whether the information giving and discussions are really free and fair.

8. The above exposition was intended to show what must be taken into account in ensuring a high-quality design of popular lawmaking as one of the two pillars of complementary democracy. It referred to the axiomatic quintessence of the matter. The detailed shaping of the design can take place in different ways. That is why the political proposals of the initiative “Volks-gesetzgebung jetzt!” have not yet dealt with those details.

Based on what has now been presented, we can turn to a problem that has so far been given little attention in the Austrian debate on the pros and cons of direct democracy. We refer to the *problem of legitimacy* in an exclusively representative democracy.

The primary deficit in legitimacy in a purely representative system is only removed if and when lawmaking in the sense of complementary democracy stands on two legs - parliamentarism *and* popular lawmaking. In the act of voting, it is only *individual persons* who can be empowered to exercise their *own* free will within the context of an indirect legislative process. As we have established earlier, the general or popular will (*volonté générale*) itself cannot be transferred to those individuals. In the elections, people organised into parties present themselves with whole packages of policies. It is impossible to express a differentiated response (acceptance or rejection) to such blanket programmes. Only when a popular lawmaking process can be initiated from below at any time to deal with a specific individual issue does it become possible to challenge or disagree with the elected representatives on a concrete issue - whenever it is regarded as necessary - or to bring into play some other way of resolving a problem that is being publicly debated.

Given the above, this means that any and all decisions made by parliament would - in principle and structurally - be conditional (i.e. subject to popular approval or rejection). Structurally so, because what is important is only that the conditionality exists - not whether it is activated in practice. Thus, in respect of every parliamentary decision, three possible scenarios present themselves: 1. No objection: the parliamentary decision receives its legitimacy through the absence of a

popular response. 2. Objection arises in the form of a popular initiative, but the three-stage process fails to reach its final stage i.e. there is no referendum to challenge the parliament’s legislative proposal or act. In this case, the parliamentary decision is likewise legitimized. 3. The popular initiative makes it to the third stage, creating the possibility for a new solution to be agreed upon and/or for the parliamentary decision to be struck down. In this case, parliament is contradicted. (Whether the representative legislators reinstate their decision at some later time must be held to lie within the freedom of parliament’s own autonomy - assuming that one takes a consistent view of complementary democracy. Of course, if it were to do so, its action could be expected to affect the outcome of the next elections).

Thus we must recognise that a purely parliamentary system cannot have full democratic legitimacy in respect of legislation. This can only be the case within a system of complementary democracy. In this sense, complementary democracy represents a strengthening of parliament. Parliament would no longer have to be constantly looking over its shoulder at what it suspects is the public will, but would be able to make its decisions unperturbed, out of its own autonomous and legitimized (through elections) process of forming its opinions and making its decisions. If these decisions provoke public opposition, the popular will can express itself directly - and autonomously - through the popular lawmaking process. Non-binding referendums (*Volksbefragungen*) and “top down” referendums can thus be recognised as an inappropriate and improper see-sawing between parliament and the sovereign people and be set aside.

9. Full democratic emancipation - in which a politically mature community based on law is able to respond to challenges in all areas of life in a responsible and (because freely chosen) socially sustainable way - exists only in the interplay between two cooperating, but mutually independent, legislative organs. Some non-specific, general “upgrading” of the direct-democratic tools which are currently provided for in the constitution - ever and again proposed by the political parties in the runup to elections - would not suffice as long as the representative principle retains the dominant role and is merely complemented by “elements” of direct democracy, as one often hears. What is needed is not the addition of this or that individual element, but a real and living process of popular initiative, popular demand and referendum!

If the decision were taken to upgrade our political system to that of a complementary democracy, an ever more vibrant culture of parliamentary-extraparliamentary cooperation could emerge capable of meeting the challenges of the 21st century. ■

Translated by Paul Carline