

# Peoples' Vengeances

## France: The Come-Back of Political Parties

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On 21 September 1792, at Danton's proposal, the French National Assembly declared that *'there can be no constitution but one approved by the people'*. In France, the idea of direct democracy dates back to the Revolution. However, due to the *Terror* and the practice under Napoleonic Empires, in which they were turned into plebiscites, referendums acquired a negative connotation. Under the V<sup>th</sup> Republic, De Gaulle turned referendums into an instrument of personalisation and presidentialisation, and since his day, there have been few referendums staged. In 10 years of office, President Jacques Chirac only used it twice with much less success and political courage.

There are three major points of interest. First there is the very special relationship existing of old between the President and referendum in general. Second, there is Chirac's peculiar decision, which was influenced by historical legacy as well as by the French and European political contexts. Finally there is the impact of President Chirac's decision to hold a referendum on the French constitutional situation and on the political spectrum.

### PRESIDENT AND REFERENDUM, A VERY SPECIAL RELATIONSHIP

The referendum of 29 May 2005 was the tenth under the V<sup>th</sup> Republic and the third to tackle a European issue.<sup>1</sup> Jean-Pierre Raffarin, the Prime Minister (PM) addressing the National Assembly on 5 April 2005, put forward the classical argument according to which the referendum embodies the direct expression of the *souveraineté populaire*. This concept dates back to 1789, when civil society turned into political society, with the people becoming a collective subject instead of an

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<sup>1</sup> In 1972 on the enlargement to UK, Denmark and Ireland (yes 68%, no 32%, turnout 60%) and in 1994 on Maastricht treaty (yes 51%, no 49%, turnout 70%).

aggregation of individuals, which expresses its sovereignty.<sup>2</sup> This reasoning led to the submission of the Montagnard Constitution of 24 June 1793 to the people.<sup>3</sup> It even provided for a legislative veto by which the people could express their opposition to a law proposed by the *Corps législatif* by means of referendum.<sup>4</sup> However, this Constitution never entered into force because of the war and the *Terror*<sup>5</sup> policy instigated by Robespierre.

This bloody period had a major impact on the practice of referendums in France. But it is the two Napoleonic emperors who most severely damaged the referendum in the popular image by letting it stray towards plebiscites.<sup>6</sup> They were mainly used as a way to confirm or extend the Emperor's mandate, a technique that is known as *Césarisme démocratique*.

After the Second World War, a tripartite government including the *Parti Communiste Français* (PCF), the *Mouvement Républicain Populaire* (MRP) and the *Section Française pour l'Internationale Ouvrière* (SFIO) was formed, led by De Gaulle. Their first mission was to agree on a new constitution. Given the tensions between De Gaulle, who favoured a strong executive, and both socialists and communists who wanted a strong legislative, the General resigned on 20 January 1946. The new constitutional text, elaborated by the socialists and communists, was put to a referendum in May 1946 and rejected by 53%. A new *Assemblée Constituante* was then convened. The second project put to referendum on 13 October 1946 was finally approved by 53,5%.<sup>7</sup>

In drafting the Constitution of the V<sup>th</sup> Republic, De Gaulle envisioned a strong executive, with the referendum as a device to correct 'the ultra-representative tendencies of the parliamentary regime'.<sup>8</sup> Thus, Article 3 stipulates that:

National sovereignty shall belong to the people, which shall exercise it through its representatives and by means of referendum.

<sup>2</sup> Pierre Rosanvallon, *Le sacre du citoyen* (Gallimard, Edition Folio/Histoire 1992).

<sup>3</sup> The so-called *Constitution de l'an I* was approved by 2 million citizens (12,000 voted against and 5 million abstained).

<sup>4</sup> See Arts. 59 and 60 of the Constitution of 24 June 1793.

<sup>5</sup> The Reign of *Terror* (June 1793-July 1794) was a period in the French Revolution characterised by brutal repression. The *Terror* originated with a highly centralised political regime, which suspended most of the democratic achievements of the Revolution, and intended to pursue the Revolution on social matters. Its stated aim was to destroy internal enemies and conspirators and to oust the external enemies from French territory.

<sup>6</sup> Under Napoleon I: 1799, 1802, 1804 et 1815. Under Louis-Napoleon: 1851, 1852 and 1870.

<sup>7</sup> De Gaulle condemned this Constitution of the IV<sup>th</sup> Republic in his now famous speech of Bayeux.

<sup>8</sup> Raymond Ferretti, 'Le référendum sous la V<sup>e</sup> République ou l'ambivalence d'une institution'. *Les petites affiches*, No. 136, 1998.

However, very quickly the original intention of the text was circumvented and De Gaulle transformed the referendum into a technique for requesting confidence. Making an issue of its responsibility and putting his mandate in the hands of the voters, De Gaulle tested the trust of the French citizens in their President until the last one, which forced him to leave power in 1969.

In the Constitution of 1958, the President and the Government have two instruments to call for a referendum. Article 11 (*référéndum législatif*) stipulates that:

The President of the Republic may, on a proposal from the Government, [...] from a joint motion of the two assemblies, [...] submit to a referendum any government's bill which deals with the organisation of the public authorities.

The bill may concern reforms relating to the economic or social policy of the Nation, to public services, or to the authorisation to ratify a treaty. If the answer is positive, then the law is adopted. Article 89 (*référéndum constituant*) concerns the revision of the Constitution. It reads:

The President [...] on a proposal by the Prime Minister, and members of Parliament alike shall have the right to initiate amendment of the Constitution. A [...] bill [...] shall be passed by the two assemblies in identical terms. The amendment shall have effect after approval by referendum. However, a government bill [...] shall not be submitted to referendum where the President [...] decides to submit it to [...] the Congress; the [...] bill shall then be approved only if it is adopted by a three-fifth majority of the votes cast.

De Gaulle's practice contributed to blur the distinction between the two provisions, Articles 11 and 89. Not until 2000 was a referendum held under Article 89.<sup>9</sup> Since De Gaulle was suspicious of political parties and parliament, he used Article 11 as a technique to prevent the obstruction of a bill by one of the assemblies.<sup>10</sup> On 28 October 1962,<sup>11</sup> a controversial referendum was staged to allow for the election of the President by direct suffrage. The campaign was extremely tense, notably because of the use of Article 11, which contravened the original reading of the Constitution. Despite the fact that Article 11 was not intended for amending the Constitution,<sup>12</sup> but to involve the citizens in the day-to-day policy

<sup>9</sup> The Constitution was then amended to shorten the Presidential mandate from seven to five years.

<sup>10</sup> In particular by the Senate, which he wanted to replace by an Assembly where economic and social interests would have been represented.

<sup>11</sup> The referendum mobilised the electorate and was approved by 62.2% of the suffrage.

<sup>12</sup> Unlike Art. 89, Art. 11 does not belong to Title XVI of the Constitution, which is exclusively devoted to procedures for amending the Constitutional text.

making, De Gaulle thought that introducing direct presidential elections was such a decisive political move for the regime that the people deserved to make the final decision.

During the Algerian war, it was through a referendum that De Gaulle solved a deep political crisis. Political parties and the population being extremely divided, the referendum was a necessary instrument to overcome tensions.<sup>13</sup> Whatever one thinks of De Gaulle's intentions when using referendums, he finally pushed his idea to its extreme by resigning the day after his defeat on 27 April 1969. On that day, 53,5% of the French said 'no' to the creation of regions and to the reform of the Senate. In reality, the debate turned more around upholding De Gaulle as President than anything else. The turnout was extremely high, with only 19,85% abstentions.

In De Gaulle's opinion, referendums were to be used to allow people to arbitrate between the executive and parliament and to express their will without being misled by political parties, whose interests were dictated by short-term considerations.

#### JACQUES CHIRAC: MOTIVES AND RISKS

On 14 July 2004, in the traditional Bastille Day interview, Jacques Chirac dropped his reservations about the referendum declaring: 'The French people are directly concerned and will therefore be directly consulted'.<sup>14</sup> This decision was a turn-about for Chirac, one of the most reticent European leaders on the referendum, who used to fear that the occasion could be turned into a dangerous protest vote.<sup>15</sup> Except for a very consensual issue in 2000, President Chirac never used the referendum. Instead, he used the less risky constitutional revision procedure of Article 89. When it comes to ratifying international treaties, such as the Nice Treaty, the President used Article 53(1), which stipulates that a treaty may be ratified by a simple act of Parliament.<sup>16</sup>

Chirac had vacillated for a long time between having the Treaty establishing a Constitution for Europe (TCE) approved by the French parliament or by referendum. The referendum on the Maastricht Treaty had already demonstrated that

<sup>13</sup> On 8 Jan. 1961, a referendum was organised in order to confirm the self-determination policy of the country. Then, one year later, on 8 April 1962, a new referendum authorised the President to negotiate a treaty with the Algerian government, namely the Evian agreements.

<sup>14</sup> 'Chirac's U-Turn', *The Guardian*, 15 July 2004.

<sup>15</sup> 'So Much For Stability', *The Economist*, 15 July 2004.

<sup>16</sup> Art. 53 reads: 'Peace treaties, commercial treaties, treaties or agreements relating to international organisations, those that commit the finances of the state, those that modify provisions which are matter for statute, those relating to the statute of person, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an act of parliament'.

direct democracy was risky. The French used the consultation as a confidence vote on François Mitterrand's government, adopting the Treaty by a margin of less than 1%.<sup>17</sup> President Chirac's government was so unpopular that the risks were high for the scenario to repeat itself and lead to a 'no' vote against him. In addition, the oppositional Socialist Party was split on the Treaty, with a large portion eager to join forces with the extreme left and the extreme right to create a blocking majority.<sup>18</sup>

Why did Chirac take the risky path? First, pressure was put on him both at the French and European levels. On the French political scene, President Chirac was compelled by his own political party, with the then finance Minister Nicolas Sarkozy calling for a referendum. Chirac thought the referendum could be used as a tool to reassert his waning authority in the face of his aggressive and self-declared rival for the presidential elections of 2007. Secondly, knowing the long-standing division on Europe within the Socialist Party, Chirac took the opportunity to weaken the opposition by dividing them and obliging them to take a stance in the campaign. Thirdly, Chirac could not delay the decision any longer without creating the impression that he was scared of a rejection.

Lastly, at the European level, Chirac, who had hoped that member states would co-ordinate the period of ratification, was pressed by the unforeseen decision of Tony Blair to hold a referendum in the United Kingdom. On top of this, ten countries decided to hold consultations with their citizens, representing over half of the EU's population. This constituted a small revolution in EU politics, since in the past only Denmark, France and Ireland held referenda on revisions of the EU treaties. Chirac could certainly not have ignored this.

## CONSTITUTIONAL CONTEXT

On the very day of the signature of the Treaty on a Constitution for Europe in Rome on 29 October 2004, resorting to Article 54(2),<sup>19</sup> Chirac referred the text to the *Conseil Constitutionnel* (CC), which issued a decision on 19 November 2004.<sup>20</sup> As was the case for both the Maastricht<sup>21</sup> and Amsterdam<sup>22</sup> Treaties, the

<sup>17</sup> 12.9 million of the voters were in favour; 12.5 million against.

<sup>18</sup> *The Economist*, *supra* n. 15.

<sup>19</sup> Art. 54 of the French Constitution stipulates: 'If the Constitutional Council, referred to by the President of the Republic, by the Prime Minister, by the President of one or the other assembly or by 60 Members of Parliament or 60 Members of the Senate, has declared that an international commitment includes a clause that is contrary to the Constitution, the authorisation of ratification or to approve the international commitment, can only intervene after a revision of the Constitution.'

<sup>20</sup> CC Decision No. 2004-505 DC, 19.11.2004.

<sup>21</sup> CC Decision No. 92-308 DC, 09.04.1992.

<sup>22</sup> CC Decision No. 97-393 DC, 31.12.1997.

Council declared that the Treaty could not be ratified without a revision of the French Constitution.<sup>23</sup>

In 1992, for the first time, the constitutional judge had ruled that the Maastricht Treaty was contrary to 'the essential conditions for the exercise of national sovereignty'.<sup>24</sup> Some provisions on the European Monetary Union (EMU) and qualified majority voting as applicable from 1996 onwards to the visas policy were judged to be affecting these essential conditions and therefore to be contrary to the French Constitution.<sup>25</sup> Again for the Amsterdam Treaty, the transfer of parts of the third pillar to the first pillar, namely from intergovernmental co-operation to qualified majority voting, was seen as being against the national sovereignty expressed in Article 3 of the Constitution. Those two decisions led to revisions<sup>26</sup> under Article 89, including the introduction of a 'European integration clause' as well as explicit provisions concerning these issues in the Constitution.<sup>27</sup> The Nice Treaty was not reviewed by the *Conseil Constitutionnel* and did not lead to any revision.<sup>28</sup> The Minister for European Affairs at the time, Pierre Moscovici, argued during the debate in the National Assembly that the Nice Treaty addressed technical issues linked to the enlargement that did not deserve any constitutional review. Thus, the government kept full control of the ratification.

With respect to the Treaty on a Constitution for Europe, the nine judges of the *Conseil Constitutionnel* developed the same line of argument relying on provisions impeding French sovereignty, the so-called 'unconstitutionality factors'. Under the area of freedom, security and justice (AFSJ), new constitutional clauses such as on policies on border control, asylum and immigration (Article III-265), judicial co-operation in civil matters (Article III-269), judicial co-operation in penal matters (Article III-270 and 271) or the creation of a European Public Prosecutor (Article III-274) challenge core areas of sovereignty.<sup>29</sup> The same goes for the Common Foreign and Security Policy (CFSP), in which the EU would have found its role considerably strengthened through the creation of a post of European Council President (Article I-22), a post of Minister for Foreign Affairs (Article I-28)

<sup>23</sup> Guy Carcassonne, Case note, *EuConst* (2005), p. 293.

<sup>24</sup> *Supra*, n. 21.

<sup>25</sup> Florence Chaltiel, 'Une première pour le Juge Constitutionnel – Juger un traité établissant une Constitution', *Revue du Marché Commun et de l'Union Européenne*, (2005, 484) p. 5-10.

<sup>26</sup> Constitutional Law No. 92-554, 25.06.1992 for Maastricht; Constitutional Law No. 99-49, 25.01.1999 for Amsterdam.

<sup>27</sup> Arts. 88-1 to 88-4.

<sup>28</sup> Anne Levade, 'Le Conseil Constitutionnel aux prises avec la Constitution européenne', *Revue du droit public et de la science politique en France et à l'étranger* (2005), p. 3-17.

<sup>29</sup> Christine Maugué, 'Le Traité établissant une Constitution pour l'Europe et les juridictions constitutionnelles', *Revue française de droit administratif* (2005), p. 30-33.

and the establishment of a European External Action Service (Article III-296).<sup>30</sup>

Surprisingly, the *Conseil* intentionally disregarded the term 'Constitution' and bypassed the difficulty by simply referring to it as an international Treaty. The judges even concluded that there was no need to revise the Constitution, since the intention of the member states was to see the EU functioning in the Community way, and not in a federal one.<sup>31</sup>

However, the most important innovation in the 19 November decision was that a new kind of unconstitutionality factor was established. This is not about undermining the *essential conditions for the exercise of national sovereignty*, but rather what Florence Chaltiel calls a '*negative unconstitutionality*' related to national parliament's competences.<sup>32</sup> The Council argued that the Treaty endows national Parliaments with new European powers but that the French Constitution lacks the necessary legal basis for these powers to be exercised. On the one hand, national Parliaments are empowered to oppose a European Constitutional revision according to the simplified procedure as provided in Article IV-444, and on the other they can challenge any European legislative initiative before the European Court of Justice on the ground that it is infringing the subsidiarity principle.<sup>33</sup>

In order to lift these various unconstitutionality factors raised by the *Conseil Constitutionnel*, the Council of Ministers adopted a draft constitutional law,<sup>34</sup> with the purpose of modifying Title XV of the French Constitution, on 3 January 2005. Respecting the constitutional revision procedure laid down in Article 89, the National Assembly and the Senate adopted the text separately<sup>35</sup> and then convened at the Palace of Versailles on 28 February 2005 to adopt the new constitutional law<sup>36</sup> by a three-fifths majority.

There is a fascinating new Article 88(5) introduced by the newly adopted constitutional law and which is to take effect only upon entry into force of the European Constitution. It reads as follows:

The national Assembly or the Senate can formulate an opinion on the conformity of a European legislative act with the principle of subsidiarity [...]. The Government shall be so informed.

<sup>30</sup> Anneli Albi, Peter Van Elsuwege, 'The EU Constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"', *ELRev.* (2004) p. 741-765.

<sup>31</sup> Laetitia Van Eeckhout, 'Le traité européen impose une révision de la Constitution', *Le Monde*, 20 Nov. 2004. Guy Carcassonne, *supra* n. 23.

<sup>32</sup> Florence Chaltiel, *supra* n. 25, p. 10.

<sup>33</sup> Protocol on the National Parliaments annexed to the TCE.

<sup>34</sup> Draft constitutional law modifying Title XV of the Constitution, No. 2022, 05.01.2005.

<sup>35</sup> The national Assembly adopted the text in first reading on 1 Feb. 2005 and the Senate followed on 17 Feb. 2005.

<sup>36</sup> Constitutional law No. 2005-204, 01.03.2005. *OJ* no. 51, 02.03.2005, p. 3696.

Each assembly can bring an appeal ('former un recours') before the European Court of Justice against a European legislative act for violation of the principle of subsidiarity. The Government shall transmit this appeal to the ECJ.

In addition, taking the opportunity of this revision to address the fears of its citizens towards enlargement, Jacques Chirac included an additional clause, presently in Article 88(5), stipulating that any new enlargement from 2007 onwards would be automatically put to referendum.<sup>37</sup> This excludes Bulgaria, Romania, and Croatia, but makes sure that Turkey will be concerned. Chirac wanted to disconnect the Turkish issue from the debate on the referendum, but this constitutional trick did not really succeed.

On 1 March 2005, the newly amended text of the French Constitution was officially promulgated,<sup>38</sup> opening the door to the ratification process of the European Constitution. At this stage the President was still legally entitled to choose the path to ratification by any means proposed by the Constitution: a referendum under Article 11, or Article 53's approval by a mere Act of Parliament.<sup>39</sup> However, in political terms the Article 53 procedure was no longer available. This was rapidly confirmed by a decree issued by the President on 9 March 2005,<sup>40</sup> officially announcing that the 10<sup>th</sup> referendum of the V<sup>th</sup> Republic following Article 11 would be held on 29 May 2005 and that the French people would have to answer 'Yes' or 'No' to the following question:

*Do you approve the law authorising the ratification of the Treaty establishing a Constitution for Europe?*

The referendum gave the opportunity for civil society and interest groups alike to get involved in a nation wide, heavily politicised debate, which challenged and renewed some of the most established political divisions. This is our last point of concern.

#### RIPPING UP THE POLITICAL SPECTRUM

Political parties were divided to an unusual degree on the issue. On 6 March, the governmental party, the *Union pour un Mouvement Populaire* (UMP) approved a

<sup>37</sup> Introduced as Art. 88(5) with immediate effect; upon entry into force of the European Constitution, it is to become Art. 88(7).

<sup>38</sup> This was the 18<sup>th</sup> revision of the French Constitution since it was adopted in 1958.

<sup>39</sup> Conseil Constitutionnel. *Le Conseil Constitutionnel et le référendum des 28 et 29 mai 2005 sur la ratification du traité établissant une Constitution pour l'Europe*. 2 juin 2005. [online: <[www.conseil-constitutionnel/dossier/referendum/2005](http://www.conseil-constitutionnel/dossier/referendum/2005)>].

<sup>40</sup> Decree No. 2005-218, 09.03.2005. *OJ* no. 58, 10.03.2005. p. 3984.



motion to endorse the ratification by a majority of 90.8%.<sup>41</sup> However, when it comes to the Turkish issue, the divisions run deeper: Chirac supports the accession of Turkey while his rival, Nicolas Sarkozy, does not. Again, although the *Union pour la Démocratie Française (UDF)*, the centre-right party of François Bayrou supported the ratification, he clearly stated that ‘Turkey’s membership would completely change the nature of the European project. [...] The EU’s vocation is not to have borders with Iran and Iraq’.<sup>42</sup>

Reproducing the national method, the Socialist Party (PS) and the Greens held internal referendums. Although during the Maastricht campaign, divisions were much more stringent on the right hand side of the political spectrum, with sharp divisions amongst the *Rassemblement Pour la République (RPR)*, Philippe Séguin and other *sovereignists* leading the revolt, this time it was in the ranks of the Left that internal cohesion was blown up. On 1 December, the day of the internal referendum in the PS, 59% of the activists voted in favour of the ratification. The ‘yes’-side was lead by François Hollande, the general secretary, and the ‘no’-side by Laurent Fabius, a former Prime Minister of François Mitterrand. Fabius argued that the text should be improved on social issues and that it will be impossible to revise it, thus advocating its rejection. Due to a clear lack of leadership, divisions remained during the campaign, and the ‘no’-side, in spite of the internal referendum, conducted a very harsh campaign of disinformation. Laurent Fabius, in particular, clearly employed the referendum for his personal strategy within the PS, since he tried to reposition himself as a more leftist leader.

Thus, the referendum has revealed the identity crisis that has been facing the Party for decades: accept the realities of the market economy and try to regulate the system to make it less harsh, or reject capitalism as a whole and snub social democracy. Although he has always been intimately convinced of the former, Fabius argued in favour of the latter and did not hesitate to use the European Constitution to further his own political ambitions. The PS was the only European socialist party to have split over the Treaty.<sup>43</sup>

Although clearly one of the most pro-European parties of the French political landscape, the Greens held an internal referendum on 13 February 2005. Of the party members, 53% voted *yes*, and 42% *no*. Again, the party was divided during the campaign, some party members joining the ranks of the ‘*non de gauche*’, adding a little bit more confusion to the debate.

The referendum allowed civil actors actively to take part in the campaign and to have their say on such a crucial issue. It is certain that a parliamentary ratifica-

<sup>41</sup> Markus Wagner, *France and the Referendum on the EU Constitution*. European Policy Brief, The Federal Trust, March 2005, issue 8.

<sup>42</sup> *The Guardian*, 10 July 2004.

<sup>43</sup> Nicolas De Broisgrollier, *The French Political Landscape After the ‘Non’*. US-Europe Analysis Series, The Brookings Institutions June 2005.

tion would not have allowed for such a broad debate in French civil society. Trade unions, which were traditionally split on European issues, actively took part in the campaign. But what was the most striking phenomenon of the campaign was the political dimension gained by ATTAC (*Association pour la Taxation des Transactions pour l'Aide aux Citoyens*), the anti-globalisation group that was strongly against the Treaty. On 12 December 2004, the organisation held an internal referendum whereby 84% of its members expressed their opposition to the ratification of the Treaty. The *mouvement* campaigned as would have done a political party, and it would not be exaggerated to say that on the eve of the poll, ATTAC could be considered to be the fourth political force in France, with over 30,000 members.

The referendum also constituted a window of opportunity for small parties on both extremes of the political spectrum. The two Trotskyites parties *Lutte Ouvrière* (LO) and the *Ligue Communiste Révolutionnaire* (LCR) or the devoutly Catholic and nationalist party *Mouvement pour le France* (MPF) of Philippe de Villiers tried with success to influence the policy process beyond their actual political power.<sup>44</sup> They managed to take over the control of the campaign and to influence the vote by playing on people's social fears of and discontent with the current government.

As a consequence, the French political landscape has been torn apart, the Socialist Party facing huge internal conflicts, the government being replaced with tensions running high between the new PM, Dominique de Villepin and Nicolas Sarkozy, the new Home Affairs Minister. Small political forces, which managed to take hostage the referendum on the Constitution for Europe, will nonetheless have to wait until 2007 to see things changing. They had their moment of glory but are now unable to propose any credible alternative. This situation resembles very much the situation of 2002 when, during the first round of the presidential elections, 16 candidates were running for the election, fragmenting the political landscape even more.

## CONCLUSION

Under the constitutional practice of the V<sup>th</sup> Republic, referendums have been used as an instrument to strengthen the executive branch and to circumvent political parties and elected assemblies. However, the referendum of 29 May 2005 on the ratification of the Treaty on a Constitution for Europe will be remembered for the comeback of political parties on the political scene. This did not take place in the cosy *Palais Bourbon*, but in the media and in the public sphere.

<sup>44</sup> Austrian Academy of Sciences, Research Unit for Institutional Change and European Integration. *The Peoples of Europe and the European Constitutional Treaty: on Legitimacy and Participation*.