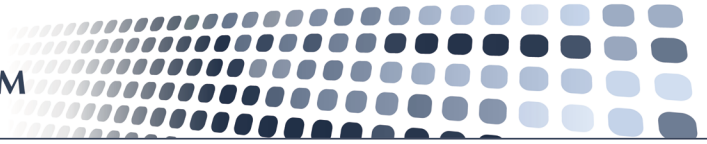




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The referendum and popular consultations in the Autonomous State

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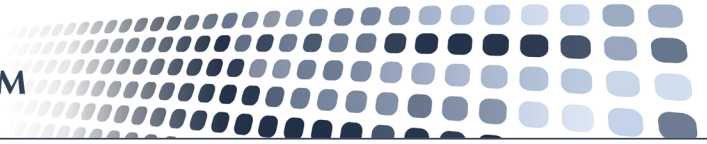
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E -134



Abstract

The referendum is a poorly used mechanism for direct participation in the Spanish system, at both state and regional level. The discussion on the feasibility of this system at regional level has been examined by the Constitutional Court. Influenced by the reluctance with which constituents viewed the mechanisms of direct democracy, they still have a reductive view of the referendum. The State therefore reserves the right to exercise very intensive controls on the provision and authorization of referendums and on the specific exercise of each referendum

Key-words

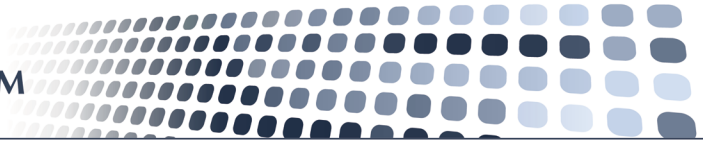
direct democracy, referendum, popular consultations, Autonomous Communities



1. Introduction

The second generation of statutes that have been reformed since 2006 shows a firm commitment to further explore mechanisms for citizen participation as a way of bringing political decisions closer to civil society, but only to complement the established model of representative democracy so that it is the same as the Constitutional model. The greater presence of participation in these texts is found in various forms: in the principles and objectives that autonomous public powers should pursue and that should then colour the autonomous communities' institutional organisation^I; as subjective rights that may be complemented by the specific provision of more innovative means of participation. Also in the right of their citizens to participate on equal terms in public affairs^{II}, not only through elections, but also through popular legislative initiatives^{III}, participation in drawing up laws^{IV}, the right of petition^V and the right to initiate popular consultations^{VI}, also recognised as within their competence.

This same interest in enhancing the right to citizen participation forms the context for some recent autonomous legislative proposals which can basically be divided into two kinds: encouragement of citizen participation in the legislative process, and popular consultations. In our autonomous state this kind of proposal is dealt with in two ways. Some communities have approved general legal frameworks for the phenomenon that include a range of instruments in their texts. Others have reformed or approved *ex novo* specific regulations for one of these instruments, like Catalonia with its regulations on popular consultations via referendum. My study will focus on this mechanism of direct participation, so rarely used in our system (by either the state or the autonomous communities) and indeed with little presence in doctrine.



2. Constitutional provision for popular consultations via referendum

There are very few references to direct participation in the Spanish Constitution (SC). Article 23.1 establishes that “Citizens have the right to participate in public affairs, *directly* or through representatives” which takes basically two forms: the popular legislative initiative (Art. 87.3 SC) and the referendum (Art. 92 SC), both subject to significant formal requirements and practical limitations. This has led the Constitutional Court (CC) to conclude that institutions of direct democracy are complementary to those of representative democracy, and remain an “exceptional” concept in our political system. Legal references are clear in this respect: “instances of direct participation are exceptional in a system (...) of the sort established by our Constitution, in which institutions of representative democracy take precedence over those of direct participation” (STC 119/1995); and in relation to the referendum it is noted that this is a “*special or extraordinary channel due to its opposition to the ordinary or common means of political representation*” (STC 103/2008). The conclusion, then, is clear: mechanisms of direct participation are “*restricted to circumstances in which the Constitution expressly imposes them, or those which, while expressly provided for, are conditional on the authorisation of the representative of the sovereign people*” (STC 103/2008).

The Constitution provides for two kinds of referendum: mandatory and consultative. The mandatory referendum is reserved for a series of matters which require popular ratification: those raised by the autonomous community for ensuring autonomy (Art. 151.1. SC); those held for the approval of Statutes (Art. 151.2, 3 and 5 and 152.2 SC)^{vii}; following the reform of Statutes approved by the procedure in Art. 151; for constitutional reform by the ordinary procedure if so requested by one tenth of the members of either House (Art. 167 SC) and after constitutional reform by the special procedure of Art. 168 SC; or for the possible incorporation of Navarre into the Basque Country (Temporary Provision 4).

Conversely, provision is made for the consultative referendum in Art. 92 SC as follows: “1. Political decisions of special importance may be submitted to all citizens in a consultative referendum. 2. The referendum shall be called by the King when proposed by the president of the government after previous authorisation by Congress. 3. An organic



act shall lay down the terms and procedures for the different kinds of referendum provided for in this Constitution.” The notes which define this type of consultative referendum are as follows. First, the decision is parliamentary: while it is true that the president of the government must propose a popular consultation, this must in all cases be authorised by Congress^{VIII}. Second, what is submitted to popular consultation is a specific political choice for the process of creation, modification and derogation of laws and the legislative process. Third, and as its very name indicates (“consultative”), the result of the consultation has no legal effect. In other words, the decision on the object of consultation must be attributed to the constitutional organs competent to adopt it. Furthermore, the king is also attributed the power to call for the referendum, a summons which as established in Art. 62.c) SC is apt not only for consultative referendums but for all cases provided for in the Constitution. Finally, Section 3 of Art. 92 creates a condition of an organic act to “lay down the terms and procedures for the different kinds of referendum provided for in the SC”, which is not a condition of the consultative referendums regulated in this article, but only of the kinds provided for in the Constitution^{IX}.

References to referendums in the Constitution end with the provision of Art. 149.1.32, which attributes to the state the competence of “authorisation of popular consultations through holding referendums”, without specifying, as earlier provisions had, whether this only applies to referendums provided for in the Constitution or to any kind of referendum which may be regulated at any territorial level. In principle, it should be understood that state authorisation refers to all kinds of popular consultations through holding referendums.

The option under the Constitution, then, was to incorporate the institution of popular consultation via referendum without interfering with the representative nature of democracy, particularly with the functioning of the parliamentary system which it set up^X. It is quite another matter whether the interpretation of these constitutional provisions can lead to their transposition to different areas of the state, such as the autonomous and local areas, respecting the principle of institutional homogeneity normally applied in politically compound states (Castellà, 2011, 209), after a state decision legally established in the form of an organic act. Clearly, the fathers of the Constitution did not imagine other circumstances for holding referendums than those expressly provided for^{XI}, leading the Constitutional Court to state that there is no place in our legal system for any implicit



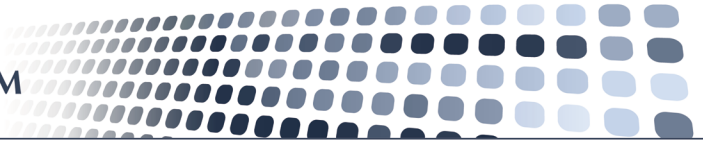
competence in this matter (STC 103/2008, FJ 3). The object of our analysis is to study the diverse forms of referendum which are feasible under our current legal system, differentiating them primarily from what are generically known as popular consultations. From here on, we analyse the constitutional feasibility of an autonomous and municipal referendum.

3. Doctrine of the Constitutional Court on popular consultations and the referendum

Constitutional jurisprudence on direct political participation and more specifically, on the referendum as an institution, is concentrated basically in two judgments: STC 103/2008 and STC 31/2010. The former results from the appeal on grounds of unconstitutionality lodged by Act 9/2008 of the Basque parliament, authorising the president of the Basque government (*Lehendakari*) to put the *right to decide* to citizen consultation. The second resolves the appeal lodged against the Catalan Statute of Autonomy.

In STC 103/2008, the Court declared the Basque law unconstitutional not only because it laid down the terms of a referendum process in which state permission was not required (a requirement imposed by Art. 149.1.32 SC) but also because this law was not based on any express jurisdiction to establish that form of direct participation of the electorate, putting itself outside Organic Act (LO) 1980 (which for the Constitutional Court (CC) complies with the reservations of articles 92.3 and 81SC). At the basis of this issue lies a highly significant question, the possible existence in our autonomous legislation of autonomous referendums not allowed as such in the Constitution. The response in this respect is fairly clear, the Basque law “(...) *was set up without a basis on any express jurisdiction*”, so has no implicit competence as regards referendums.

The STC also provides a definition of what we should understand as a referendum and how it differs from a popular consultation. “*The referendum is ...a species of the “popular consultation” genus, whose function is not “to gather the opinion of any group of people about any matter of public interest by any procedure, but a consultation whose aim refers strictly to the opinion of the electorate” (following the doctrine already established in STC 119/1995), and also requires that it be*



“formed and exteriorised through an electoral procedure, based on the census, administered by the electoral administration and secured by specific legal safeguards, always in relation to public affairs whose direct and indirect administration through the exercise of political power by citizens constitutes the exercise of the fundamental right recognised by the Constitution in Article 23”. To determine whether a popular consultation should be carried out via referendum *“one must consider the identity of the subject consulted, so that, provided that it is the electorate whose channel of self expression is that of the various electoral procedures with their corresponding safeguards, the consultation has the nature of a referendum”* (FJ 2). Its binding or consultative nature has no bearing on its nature as an institution of direct participation. It can therefore be understood that *“the fact that it is not legally binding is (...) irrelevant, since it is obvious that a referendum is not differentiated from other popular consultations by the binding nature of its result”* (FJ 3).

The final point is not new either (it was contained in STC 119/1995). The referendum as an instrument of direct citizen participation of a strictly political nature is complementary to the preferential mechanism of representative participation. It is an “occasional and sporadic” mechanism, for occasions of some importance but is not a normal phenomenon in the form of government either of the state or the autonomous community or the municipality^{XII}.

By examining elements established by the Court we may try to deduce *a sensu contrario* the requirements of a popular consultation not held by referendum. The same situation arises when the persons subject to consultation do not coincide with the electorate (extending it, for example, to minors, persons on the electoral register, domiciled residents; or even establishing criteria of encumbrance or interest in the decision to be taken by the consultation) and where, even when coinciding with and directed at the electorate, the consultation is not carried out by an electoral procedure but by other less formal methods such as surveys, forums or hearings and without the corresponding safeguards. A further requirement is that the object of the consultation concerns particularly important political matters.



4. The referendum and popular consultations in the Autonomous state

4.1 The competence of the Autonomous Communities as regards popular consultations and referendums

Until STC 103/2008 on the Basque law of consultations, the Constitutional Court had only dealt incidentally with the matter of the competences of the autonomous communities (ACs) in this area. Although constitutional jurisprudence has refused to define all possible forms of participation in the area of Art. 23.1 SC^{XIII}, the popular consultations whose form is laid down in the SC and the legislative initiative are expressly declared as such^{XIV}. Given that the referendum is one instrument of direct citizen participation included in Art. 23 SC, the margin for action of the state and the ACs in the implementation of this basic right will be determined by the competences recognised for each in this implementation.

The autonomous communities can and indeed have assumed the competence, organising their government institutions provided for in Art. 148.1.1 SC^{XV} which, for Lasagabaster (2008, p. 93-94), includes laying down the forms of political participation of their civil society. However, the state has exclusive competence for laying down the basic conditions under which the rights of political participation must be regulated under article 149.1.1 SC, basic conditions that determine and restrict the autonomous competence for self-organisation. It is precisely this jurisdiction, in connection with Art. 81 SC^{XVI}, underpinned by the organic act on the general electoral system (LOREG), which determines the conditions for exercising the right of active and passive suffrage, the electoral procedure itself and the provisions applicable to autonomous elections. However, the reservation of organic act of Art. 81 SC is not jurisdiction, and so cannot, a priori, exclude autonomous intervention in the areas that it regulates. This is what happens in the case of the institution of the popular legislative initiative (which is implemented at autonomous level), or autonomous electoral laws (which all ACs have with the exception of Catalonia). What obstacles could be raised to refuse the possibility of autonomous competence in matters of popular consultations via referendum? In addition, as regards



this mechanism of direct participation, Article 149.1.32 SC only allows state competence in authorising popular consultations to be held via referendum. It could be concluded from a first interpretation of the precept that it is feasible for ACs to include popular consultations via referendum among their competences, in any event reserving the exclusive competence of the state to “authorise their holding”. Autonomous regulation then has its place. This can also be deduced from STC 103/2008, when it states that “referendums can only be called and held if they are *expressly* provided for in regulations of the state, including the Statutes of Autonomy, in conformance with the Constitution” (FJ 3).

It is stretching LO 2/1980 of 18 January on the regulation of different kinds of referendum (LODMR) to interpret it as implementing the state competence of Art. 149.1.1 SC and applicable to autonomous referendums, since it only lays down the terms of referendums provided for in the SC. This is the mandate established by Art. 92.3 SC, which makes no mention of autonomous referendums. This leads us to the conclusion that, based solely on the competence to organise their own government institutions, even if the regulation established in LODMR is considered as basic, ACs may not act on the regulation of an autonomous referendum without the simultaneous presence of two requirements: an express and not merely implicit provision in their Statute validating this autonomous competence, and the mandatory state authorisation to hold it (Art. 149.1.32 SC)^{xvii}.

This is the interpretation followed by Corcuera Atienza, who indicates that there are three essential requirements for autonomous regulations on referendums for being approved: 1) that the express competence appears in the corresponding Statute of Autonomy; 2) that there has been mandatory state authorisation, and 3) that the provisions established in LO 2/1980 are respected as basic. However, he also points out that this LO would require reform if it is to define the basic aspects applicable to autonomous referendums (2009, pp. 321-322). A different line is taken in the interpretation of the *Consell Consultiu* [consultative council] of Catalonia^{xviii} and the *Comisión Jurídica Asesora* [legal advisory committee] of the Basque Country^{xix}, which appear to deny state competence to regulate the basic conditions of autonomous referendums^{xx}, restricting state competence to its regulation by organic act of referendums provided for in the SC. It is even considered that state authorisation would only be required for the referendums



provided for in the SC. Castellà establishes an additional determining factor, that it not only be required that the Statute *provides* (in the sense of stipulating) that the referendum is necessary, but also that LODMR should *regulate* it, “which means determining its legal system, as the regulation constitutionally reserved for the purpose” (2011, 221).

In practice, the earliest Statutes of Autonomy approved at the start of the Spanish autonomous state introduced new kinds of referendum other than those provided for in the Constitution, including referendums for integrating a municipality from another autonomous community (Arts. 8 EAPV; DT 3 EACL; Art. 10 EAAR). After the most recent statutory reforms, new kinds of referendum were also incorporated, apart from those established in the Constitution, like the possibility of a referendum in the event of the reform of the Statute of Autonomy in Aragon (115.7), the Valencian Community (Art. 81.5 EACV) and Extremadura (Art. 91.2 EAEx)^{XXI}. So there seemed to be no disagreement on the possibility of introducing new kinds of referendum not allowed for in the Constitution. What is disputed is the margin of competence of the ACs as regards these new kinds of referendum. The first generation of Statutes of Autonomy provided for autonomous competences over popular consultations but within the basic legal framework of the state (understood to be LO 2/1980) and in all instances with state authorisation (Arts. 11.11 EAAs and 11.8 EAMur). After the statutory reforms of the late nineteen-nineties, similar competences over popular consultations were introduced into the Statutes of La Rioja (Art. 9.7) and the Canary Islands (Art. 32.5).

The issue of autonomous competence over popular consultations, and specifically over the kinds of popular consultation not provided for in the SC, was again addressed in the latest process of statutory reform initiated in 2006. The new statutes of the Valencian Community^{XXII}, Catalonia^{XXIII}, Balearic Islands^{XXIV}, Andalusia^{XXV}, Aragon^{XXVI}, Castile-Leon^{XXVII} and Extremadura^{XXVIII} provide for express competence over popular consultations^{XXIX}. On the other hand, except in the case of Aragon and Valencia, these latest statutes recognise the right to instigate popular consultations (Art. 29 EAC; 30 EAA; 15 EAIB; 11 EACL), which is just another way of recognising the popular initiative for the consultation.

Throughout the last decade consultations of very different natures have been called on questions related to self-determination by some autonomous communities, in particular the Basque Country and Catalonia^{XXX}. During the second legislature with a *Partido Popular*



majority in parliament (2000-2004) the president of the Basque government wished to put before Basque electors a referendum on the so-called *Plan Ibarretxe* (a draft political statute for the Basque Community).^{xxxI} During Zapatero's government, similar proposals were announced, including the approval of Basque Act 9/2008 of 27 June, *on the calling and regulation of a popular consultation in order to ascertain the citizens' opinion in the Autonomous Community of the Basque Country concerning opening of a negotiation process to achieve peace and political normalisation*. This was an unusual law which did not aim to lay down the form of the institution of autonomous referendum, but of one specific referendum, even if not identified as such, to avoid the requirement for state authorisation of its calling by attributing it with purely consultative effects.

As already noted, STC 103/2008 declares the unconstitutionality of this law, focussing on what interests us here, on the absence of express jurisdiction of the EPV (in which popular consultations are effectively not envisaged) and the breach of Art. 149.1.32 SC which requires state authorisation for holding a referendum. While the CC is clear that, based on the provision established in this precept, autonomous referendums require state authorisation^{xxxII}, it does not seem to deny that they may occur. However, the CC's interpretation of Art. 149.1.32 SC allows for greater flexibility in this constitutional requirement, perhaps on the understanding that lacks flexibility in certain circumstances. Mandatory state authorisation was intended as a means of control in state hands, and the CC understands that this form of state control in the autonomous and local area may be excessive. It therefore differentiates the referendum from the popular consultation as a way of avoiding state authorisation in less significant autonomous and local consultations^{xxxIII}. In any event, it seems that consultations in which a referendum is not held would not be an expression of Art. 23 SC's right of direct participation, but a different formula for channelling participative democracy. In this context, the competence of the ACs would be exclusive, and the possibility of state intervention via Art. 149.1.1 SC would be excluded, precisely because these are not the expression of the exercise of the fundamental right. Only if they are popular consultations used by the public administration in administrative procedures may the state cite Section 149.1.18 SC. In the other aspects raised, the Resolution is ambiguous, and although it seems to reserve for the state the competence for the regulation of autonomous referendums based on Art. 81 SC (FJ 3), it also seems to



require an express competence in the Statute for autonomous regulation of the referendum (FJ 3).

An analysis of the competences assumed by the different autonomous communities in their statutes reveals some differences. Catalonia assumes popular consultations as an exclusive competence “except for the provisions in Article 149.1.32 of the Constitution”, omitting all express reference to referendums other than the exception made in the Constitution. Conversely other communities like Andalusia, Aragon and Extremadura assume exclusive competence for popular consultations, without the need for state authorisation, but referendums are expressly excluded. On the other hand, the Valencian Community, Balearic Islands and Castile-Leon do not distinguish between referendums and popular consultations. In these communities every referendum which may be initiated by the president of the community (Art. 28.5 EACV; 27.1.e EACL) or by citizens (Art. 15.2.d EAIB; 11.5 EACL) requires prior state authorisation, and Organic Act 2/1980 is considered basic and wholly applicable. This competence is therefore shared between the state and the autonomous community. Lastly, some communities (the Basque Country, Galicia, Cantabria, Castile-La Mancha, Madrid) do not expressly assume anything on this matter, similar to others which to date have not engaged in a reform of their statutes.

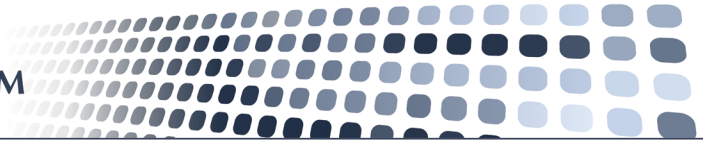
Even so, there have been several autonomous attempts to tackle this issue legislatively. The Valencian Act 11/2008 of 3 July on citizen participation includes the types of popular consultation that do not require prior state authorisation (forums of consultation, citizen panels and citizen juries): popular consultations administered by the public administration to groups of citizens to assess the effects of a public policy, matters of public interest or the results of a specific initiative. Along the same lines, the Canary Islands approved Act 5/2010 of 21 June, on encouraging citizen participation^{xxxiv}, which makes a distinction between referendum and popular consultation and regulates the latter without envisaging its prior state authorisation. However, it was Act 4/2010 of 17 March, on popular consultations via referendum that has aroused most controversy by tackling the issue of autonomous referendums, which I address below.



4.2. The competence of the Generalitat de Catalunya to regulate popular consultations via referendum and its restriction by STC 31/2010

Art. 122 EAC attributes to the Generalitat [Catalan Government] the exclusive competence for regulating “the establishment of the legal system, types, procedure, planning and calling by the Generalitat itself or other local bodies, within the area of its competences, for surveys, public hearings, forums of participation and any other instrument of popular consultation, with the exception of the provisions of Art. 149.1.32 of the Constitution”. This provision expressly refers to the autonomous competence to lay down the terms of some types of consultation (surveys, hearings, forums of participation), not a closed list but given as examples, and part of what is known as participative democracy. Referendums are not expressly mentioned but, from the provision in the statute, it could be interpreted as implicitly allowing for this institution through the reference to “any other instrument of popular consultation”. It is precisely the same exception as the provisions of Art. 149.1.32 SC which reserves to the state the competence of authorising popular consultations to be held via referendum. The complexity that arises in this case is whether the former interpretation can be assumed, given that the referendum is viewed as a type of consultation with a different nature, since it would be an instrument of direct democracy. It should be added that the exception established by this precept, of state authorisation (Art. 149.1.32SC), would only apply in the event of a referendum and not in other kinds of popular consultation. Some writers have maintained that the idea of using the open nature of the final paragraph to include content (the referendum) of a different nature from the circumstances expressly envisaged (consultations) is not feasible. “The implicit form could not have a significantly different nature and importance from the forms addressed explicitly” (López Basaguren, 2009, 221)^{xxxv}. If the intention had been to include the referendum, this would have been expressly established.

The statutory option was based on a legal prerequisite: that the referendum is identified with popular consultations which require state authorisation (Art. 149.1.32), but it did not imply that the state’s competence also incorporated the competence for regulation of referendums, beyond what may be considered the implementation of the



fundamental right to direct political participation. This understanding meant that the Generalitat was empowered to lay down the terms of the initiative and procedure prior to its holding^{xxxvi}. STC 31/2010 of 20 June, in its legal ground 69, endorses the constitutionality of the statutory precept but with a markedly restrictive interpretation which minimises the scope of the competence^{xxxvii}. For the CC the exception is not limited exclusively to authorisation of the summons but extends to the institution of the referendum “in its entirety”. The Court warns that the referendum is a type of popular consultation for whose authorisation, establishment and regulation the state alone is responsible, while the legal system, types, procedure, planning and calling of consultations to ascertain the opinion of any group of people on any matter of public interest, are a competence of the Generalitat. It thus denies that autonomous competence can include the referendum as an instrument of popular consultation. This exclusion is also justified by the inadequacy of the Statute as a regulatory base for establishing regulations reserved for organic acts. Thus quoting from STC 103/2008, it says that “*Organic Act 2/1980 of 18 January, on the regulation of the different kinds of referendum, is called on in Art. 92.3 SC to lay down the terms and conditions for the different kinds of referendum provided for in the Constitution, and is furthermore the only constitutionally adequate law for compliance with the other reservation, added to the jurisdiction dealt with in Art. 149.1.32 SC: the generic text of Art. 81 SC on the implementation of fundamental rights, in this case the right of political participation recognised in Art. 23 SC (FJ 3)*”.

The Court’s interpretation imposes limits as regards autonomous competence. It therefore understands that Art. 149.1.32 SC attributes to the state the competence for state authorisation to call popular consultations via referendum, and grants this competence a general nature, which can only be avoided if it is denied that the consultation is a referendum. In addition, the CC widens the scope of this competence, and understands that it goes beyond state authorisation to also include state regulation of this institution of direct participation. So of the various interpretations that could apply in relation to the Generalitat’s competences in Art. 122 of the EAC on the institution of the referendum, the one made in STC 31/2010, by reserving to the state through organic act *the entire discipline of this institution*, is a highly restrictive interpretation, “the narrowest possible”, as it has been described by Castellà Andreu (2010, 310). Along with these material and competential restrictions, the sentence adds another limit of a regulatory nature, the existence of two reservations by organic act – the material of Art. 92.3 and that of the implementation of



the right of participation of Art. 81.1 SC, which condition the possibilities of its statutory recognition. All this could lead to the conclusion that under the criterion of the Constitutional Court, not only must statutes expressly include competence on the matter of referendums, but the state must have previously anticipated the possibility and regulation “of the entire discipline of that institution” in a state law of organic nature^{xxxviii}.

4.3. From the Catalan law on popular consultations via referendum (2010) to the draft law on popular consultations not held by referendum (2011)

Under the protection of its statutory provision, the Catalan parliament approved Act 4/2010 on *popular consultations via referendum*, whose *Preamble* also cites as basic regulation for legislating Art. 23 and 149.1.32 of the SC, LORMR and LOREG. The law is based on the legal hypothesis: identify the referendum with popular consultations which require state authorisation (149.1.32 SC) following the parameters and requirements established by the Court in STC 103/2008, on the Basque law on consultations. It defines two types of popular consultation via referendum: popular consultations in the autonomous area and popular consultations in the municipal area. In both types, the object of consultation is political issues of particular importance to civil society in the field of the respective competences (autonomous and local). Also in both cases their nature is consultative.

The autonomous referendum establishes an initiative of *institutional* origin (the government, 1/5 of deputies or 2 parliamentary groups and 10% of municipalities who must represent at least 500,000 inhabitants) or of *popular* origin (the support is required of 3% of the population through a procedure of gathering signatures which must finally be validated by parliament). Taxation and budgetary matters are excluded. Both types allow for possible monitoring of the constitutional and statutory adequacy of the object of consultation by the Council for Statutory Guarantees, and final approval by an absolute majority of parliament, as a procedure prior to the request for authorisation of state authorisation of the consultation. Similarly, it is established that the government must appear before the plenary session of parliament to establish its position as regards the result of the consultation.



The regulation of municipal referendums states that the initiative may be *institutional* (sponsored by the mayor or 1/3 of all councillors) or *popular* (initiated by a minimum number of residents that varies with the number of inhabitants in the municipality). In both cases, the proposal must be approved by the plenary session of the town council by an absolute majority of all councillors. Excluded matters include those relating to local public funding.

In as far as STC 31/2010 reserves the establishment and regulation of the institution of the referendum *in its entirety* as a state issue, it deprived the Generalitat of autonomous competence for its regulation, and the effect of the decision on the Catalan law of popular consultations via referendum is obvious. Following a failed attempt to reach agreement in the Generalitat-State Bilateral Commission, the president of the government lodged an appeal of unconstitutionality against this Catalan law, following the resolution favourable to its lodging issued by the Council of State^{xxxix}, and endorsed in that the resolution had deprived the Catalan autonomous community of regulatory competences for conducting legislative regulation on referendums in the autonomous area. Leave was given to appeal by the plenary session of the Constitutional Court and it was agreed to suspend the validity of the precepts of the law which had been contested. Specifically, the appeal was lodged against Arts. 1 to 30 of the law, relating to the general provisions and popular consultations via referendum in the autonomous area, and against Arts. 43 and 45, referring to the calling of popular consultations, and conversely, not against municipal popular consultations. At this time, the Constitutional Court has lifted the suspension of validity and the Catalan law of consultations has become a law formally in force although lacking jurisdiction.

The change of government in Catalonia after the autonomous elections of November 2010, with the victory of *Convergència i Unió* has resulted in a new orientation in this area. In his inaugural address, the current *President* announced his intention to modify the law of consultations to facilitate citizen participation but “without the need for the state public powers to intervene”, in other words, they would not require state authorisation. A new draft law on popular consultations not held by referendum in the autonomous and local area has just been introduced in the Catalan parliament (December 2011), based on the competence provided by Art. 122 EAC. Its stated purpose indicates that the object of the law is popular consultations not held by referendum, defined by Art. 2 of the draft as



“any kind of consultation held of the populace by a public power, asking it to give its opinion on a particular public political action, through a free, direct and secret vote, carried out in accordance with the precepts of this law, without the use of a referendum”. This draft excludes from its regulation other instruments of citizen participation including surveys, public hearings and forums of participation. This new configuration seems to create a *tertium genus*, a citizen consultation addressed at the electorate and held through a procedure with safeguards different in nature and name from those provided by LOREG in the area of autonomous and if appropriate, local competences, but is expressly described as not involving a referendum and so does not require state authorisation. In short, a not very convincing attempt to avoid legal requirements.

4.4. The special nature of the municipal referendum

There is no express provision for municipal referendums either in the Constitution or in any Statute. The only mention of municipal popular consultations comes in the organic act of 1980, precisely to exclude them from its area of application. Any which have actually been held in municipalities have been seen not as referendums but as popular consultations, as we will see, with laxer conditions due to the lack of political importance of purely local issues^{XI}.

Not only are municipal popular consultations not provided for in the Constitution, LODMR itself excluded them from its area of application^{XII}. However this does not mean that none have been held. Municipalities may organise popular consultations whose regulatory framework (basic for the purposes of Art. 149.1.18), is found in state regulation of a local system (Arts. 70 *bis* and 71 of Act 7/1985, regulating the basic law of local government, LBRL)^{XIII}. The legal provision is as follows: “*in accordance with state and autonomous community legislation, when the latter has the competence therefor attributed by statute, mayors may, after agreement by an absolute majority of the plenary meeting and authorisation from the state government, take to popular consultation any matters within municipal competence and of a local nature which are of particular importance for the interests of residents, except those relating to local budgetary affairs*” (Art. 71 LBRL).

These municipal popular consultations, which legislators at no time describe as referendums, are regulated in LBRL. This law does not have organic rank, but is an

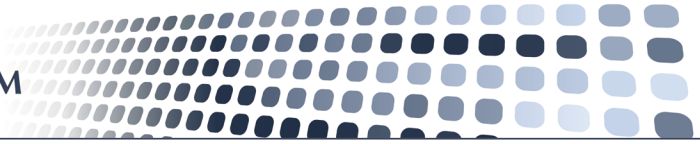


ordinary law of a basic nature approved under Art. 149.1.18 SC, in as far as it regulates the legal system of local administrations. However, they may be considered *referendums*, following the definition of the term by the Court: it requires authorisation of its calling from the state (Art. 149.1.32 SC); it calls on the electorate to express their will on particularly important political matters, it follows an electoral process which enjoys the legal safeguards provided for this institution. It is voluntary and consultative in nature and the popular initiative can be held at the request of a minimum number of residents which varies depending on the number of inhabitants in the municipality (Arts. 70 *bis* and 71 LBRL)^{XLIII}.

Practically all ACs have assumed competences (either over the local system or on municipal popular consultations) and have set up regulations to govern them through autonomous laws which respect the basic regulations established by LBRL. However, no Statute of Autonomy, or LODMR, or any autonomous law except for the above-mentioned Catalan Act 4/2010 of popular consultations via referendum, incorporate the term “referendum” in said consultations, although following the conception maintained by the Court, there can be no doubt that it is this same mechanism of direct participation.

Summarising the information given in the work of Martínez Alonso (2011, p. 449), a total of twenty-seven municipal popular consultations have been held under LBRL, as seen in this table:

Municipal popular consultations: 1985-2010		%
Authorised by the Council of Ministers (CM)	28	22
Not authorised by the CM	63	49.6
Abandoned by the requesting town council	12	9.5
Shelved	19	15
Being processed	5	3.9
TOTAL	127	100



As can be seen, although not formally described as referendums, state authorisation has been required, an authorisation only required when “calling popular consultations via referendum” according to Art. 149.1.32 SC. In other words, either the state has authorised consultations which are not referendums, and which therefore do not need to be authorised, or the municipal consultations held were referendums, in spite of not being considered as such in the Constitution or the Statutes of Autonomy or LODMR, which is precisely the reason why they were authorised by the state. Quite another matter are other types of informal consultation which are not included in the regulations of LBRL.^{XLIV}

It is precisely the use of the term *referendum* by the Catalan law to describe municipal popular consultations which for the Council of State^{XLV} may contravene the Constitution because “*this identification, far from being restricted to nomenclature, implies the intention to set up in the municipal area an institution of a constitutional nature which constitutes a channel for direct exercise of political participation and which as such an institution, throughout its entire discipline, (STC 31/2010) must be understood as beyond autonomous competence?*”. This is a curious statement, since the provision of the Catalan law on consultations does not materially contradict *the basic state regulations* included in LBRL. However, the objection cited by the highest consultative organ of the government of the state is not only terminological, but acquires a deeper significance. In this context, the words *in fine* are significant: “*There is good reason why, in the Spanish legal system in general and the Statutes of Autonomy in particular, including the Catalan, the term referendum is not used to refer to popular consultations in the municipal area. This is not merely to maintain terminological consistency, it is a result of the specific nature of the referendum as an institution for the exercise of the constitutional right of political participation, for whose regulation only the state is responsible*” (Section IV of the Resolution). Is this intended to indicate that only the state and the autonomous communities can convoke referendums? I think it unlikely that the Constitutional Court would endorse this interpretation.

In any event, how does lodging the appeal of unconstitutionality affect the Catalan law on municipal referendums? Certainly while the legal precepts relating to municipal consultations have not been challenged (Art. 31 to 42 Act 4/2010), this is not the case for the general provisions which by their nature are applicable (Art. 1 to 9). In this context, the appeal lodged by the president of the government referred to the possibility that the declaration of the Catalan law as unconstitutional might by relation or consequence affect the precepts concerning municipal consultations, as expressly stated in Art. 39.1 Organic



Act of the Constitutional Court^{XLVI}. In any event, and on the positive side, the appeal and the indirect mention of municipal consultations in the appeal for unconstitutionality should make it possible for the Constitutional Court to definitively resolve the doubts that even today persist concerning the scope of the referendum (both autonomous and municipal) and its differentiation from other popular consultations.

5. Conclusions

The spate of statutory reforms which began in 2006 has dynamised the participative phenomenon at both autonomous and local levels. One unusual case is that of the so-called *popular consultations*, an expression which covers a range of instruments which permit public opinion to be channelled: from the so-called mechanisms of participative democracy - surveys, public hearings, forums of participation, to the classical arrangement of direct democracy like the referendum. All attempts to *complement* the model of representative democracy established in the Constitution and the statutes of the autonomous communities. The reticence with which the constituent fathers provided for mechanisms of direct democracy lies at the heart of the jurisdiction of the Constitutional Court, perhaps also influenced by the experience of neighbouring states: arrangements for direct democracy do not work, although it is also true that they have been very rarely used.

There are three requirements if the figure of the referendum in the autonomous area is to be feasible: 1) the provision of an express competence in the corresponding Statute of Autonomy; 2) mandatory state authorisation as established in Art. 149.1.32 SC; and 3) respect for what is considered to be basic state legislation (Art. 149.1.1 in relation to Art. 81 SC). Along with these, there could be another determining factor: approval of the form of government established in the autonomous area, and which means that the so-called consultative referendum is only feasible in the autonomous community area (except for statutory reform). Not included are kinds or types such as the abrogative referendum which may mean a limitation or abridgement of the competences assumed by parliament.

Constitutional jurisprudence on popular consultations via referendum, concentrated mainly in SSTC 103/2008 and 31/2010, does not seem to have shone much light on the



constitutional feasibility of this figure in the autonomous area. Both judgements adopt an absolutely restrictive criterion on this possibility (the second more so than the first), by extending state competence on the matter not only to authorisation of the summons but taking in the *entire discipline of the institution*, and subjecting autonomous regulations to a prior restriction: to impede the autonomous referendum if it has not been provided for in the state organic act. The state therefore reserves the right to exercise very intensive controls on the provision and authorisation of referendums and on the specific exercise of each referendum.

With reference to the municipal area, popular consultations certainly present elements of greater flexibility, although they also suffer the limitation of state authorisation (Art. 149.1.32 SC). Practically all ACs have established autonomous regulations on these consultations based on competence of the local system and basic state regulations established in LBRL. However, STC 31/2010 has nothing to say on this kind of consultation, and from STC 103/2008 we cannot deduce that the definition of referendum which it establishes excludes its operation in the municipal area. This may be why town councils have sought and practised other more flexible forms of popular consultation not conducted through referendums, which avoid the need for authorisation by the state government.

*This work forms part of the research project “Estado autonómico y democracia: los derechos de participación en los estatutos de autonomía” (MCI, DER2009-12921).

^I So the provision to encourage or guarantee *the participation of their citizens in political, economic, cultural and social life*; Article 1.3 Statute of Autonomy of the Valencian Community (EACV); Art. 4.2 Statute of Autonomy of Catalonia (EAC); 10.1 Statute of Autonomy of Andalucía (EAA); 20.a Statute of Autonomy of Aragon (EAR); 8.2 Statute of Autonomy of Castile-Leon (EACL)

^{II} Article 9.4 EACV; 29 EAC; 30 EAA; 15.1 EAR; Art. 15 EAIB; 11 EACL

^{III} Art. 11 EACL, 15 EAR, 29 EAC; 30 EAA; 15 EAIB

^{IV} Art. 15 EAR, 29 EAC; 30 EAA; 15 EAIB

^V Art. 29 EAC; 30 EAA; 15 EAIB; 11 EACL

^{VI} Art. 29 EAC; 30 EAA; 15 EAIB; 11 EACL

^{VII} It is true that referendums for statutory reform are only required by the Constitution for Statutes drawn up in accordance with the procedure established in Art. 151 SC. Other Statutes do not have this requirement,



but the Constitutional Court has endorsed the possibility, *ex Art. 147.3 SC* and in virtue of the margin of configuration offered by the Statute itself, allowing for reform procedures which envisage a referendum to ratify the reform, followed by sanction, promulgation and publication. This is therefore a type of referendum not provided for in the Constitution but included in the new Statutes of the Communities of Valencia, Aragon and Extremadura, mandatory in the first of these, provided that the reform does not only involve an extension of competences (Art. 81.1 EAV), and in the other two, discretionary, if so agreed by two thirds of the autonomous parliament (Art. 115.7 EAr, Art. 91.2.e EAEx). In any event in this case, the lack of provision in the Constitution has not implied its prohibition. *See* STC 31/2010, FJ 147 and C. Aguado Renedo (2011, 395).

^{VIII} However, the literal expression of the precept seems to preclude the possibility of including a popular initiative in this area.

^{IX} To date, only two consultative referendums have been held in Spain. The first, held in 1986, brought to consultation the political decision of the government to leave or remain in NATO; the second, held in 2005, directly consulted the electorate on the ratification of the treaty establishing a constitution for Europe.

^X Some of the interventions by Spanish MP Pérez-Lorca (UCD) in the Constitutional Commission and the Plenary in the Constitutional Committee and the Plenary Session of the Chamber of Deputies are significant in this respect: “Basically, we are dealing here with a problem of deciding whether it is better to firmly impose the parliamentary system in all its purity in our Constitution, or whether we can insist that it coexists with other systems whose effectiveness in a parliamentary system have not been properly put to the test” (*Diario de Sesiones*, Chamber of Deputies, Constitutional Affairs Committee, meeting of 6 July 1978, p. 2915-2916); “...we must let the parliamentary system function, take root (and this is not easy) in the people; while leaving the door ajar so that once the rationalised parliamentary system which we have established or are going to establish in the Constitution has become established, then we can attach other forms of action of direct or semi-direct democracy (*Ibid.*, Plenary session, meeting of 13 July, 4213).

^{XI} The Draft Constitution provided for a referendum in three circumstances: on *particularly important political decisions*, an *abrogative legislative referendum* which already existed in the 1931 Constitution (Art. 66), and a *referendum of laws voted by parliament and not yet sanctioned*, that is, a legislative referendum used for ratification. On its passage through the Constitutional Committee in the Chamber of Deputies this precept was practically suppressed, leaving only the first instance, the consultative referendum for “particularly important political decisions”. *Diario de Sesiones*. Chamber of Deputies. Constitutional Affairs Committee, meeting of 6 June 1978, p. 2936-2946.

^{XII} However, after thirty years of democracy, our representative institutions are now consolidated, and with the political parties as their absolute protagonists, the need can be seen for closer links with citizens when taking political decisions through instruments of participative democracy, in which democratic representatives still have the last word, but their form makes citizens more participative. *See* J.M. Castellà Andreu (2001).

^{XIII} Excludes from this area public information in the administrative procedure – STC 119/1995, of 17 July.

^{XIV} STC 63/1987 of 20 May; STC 76/1994 with respect to popular consultations.

^{XV} The only exception in this sense is Catalonia. In fact, the Statute of 2006 *omits* this competence while it is recognised in the previous Statute.

^{XVI} Which establishes a reservation in the organic law for the regulation of the implementation of fundamental rights (Art. 23 SC).

^{XVII} Below we will see how in the municipal areas, the constitutional provisions which determine the legal system lie in Arts. 149.1.18 SC (basic rules of the legal system of public administrations) as well as 149.1.32 SC, as regards state authorisation of their calling.

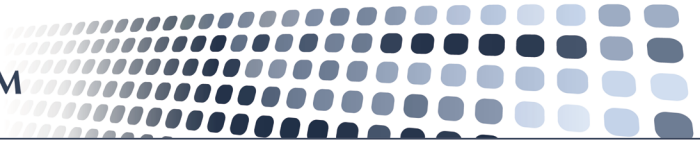
^{XVIII} Resolution 269/2005 of 1 September 2005, FJ XII

^{XIX} Resolution no. 96/2008, Paragraph 99, in *Revista de la Función Consultiva*, no. 8, 2007, 557-594

^{XX} Also Lasagabaster (2008, 90).

^{XXI} The CC seems to support this idea when in STC 31/2010 it states that this is “*a type of referendum different from those envisaged in the Constitution and therefore, although it cannot be called without keeping to the most elementary procedures and formalities regulated in Organic Law 2/1980, it should be exempt from the application thereto of the procedures and formalities less necessary for the purpose of the identification of the consultation as a true referendum*” (FJ 147)

^{XXII} *Article 32 ECV* 1. Within the framework of basic state legislation and if appropriate in the terms established therein, it is the *Generalitat de Valencia* [Valencian Government] which is responsible for the legislative implementation and execution of the following matters: 8) the Valencian Government is responsible for the legislative implementation of the system of popular consultations at municipal level, in



accordance with the provisions of the laws referred to in Section 3 of Article 92 and Number 18 of Section 1 of Article 149 of the Constitution, and the state is responsible for authorising its calling.

XXIII *Article 122 EAC. Popular consultations.* The Generalitat has exclusive competence for establishing the legal system, types, procedure, planning and whether by the Generalitat itself or local bodies, within the field of its competences, of surveys, public hearings, forums of participation and any other instrument of popular consultation, except for any envisaged in Article 149.1.32 of the Constitution.

XXIV *Article 31.10 EAIBB.* 1. Within the framework of basic state legislation, it is the autonomous community of the *Illes Balears* [Balearic Islands] which is responsible for the legislative implementation and execution of the following matters: 10. Systems of popular consultation within the area of the *Illes Balears*, in accordance with the laws referred to in Section 3 of Art. 92 and No. 32 of Section 1 of Art. 149 of the Constitution.

XXV *Article 78 EAA. Popular consultations.* The Junta de Andalucía [Andalusian Government] has exclusive competence for establishing the legal system, types, procedure, planning and calling, by itself or by local bodies within the area of its competences, of surveys, public hearings, forums of participation and any other instrument of popular consultation, with the exception of referendums.

XXVI *Article 71.27 EAR.* The autonomous community has exclusive competence over: 27^a Popular consultations, which in any event, includes establishing the legal system, types, procedure, planning and calling by autonomous community or local bodies in the area of its competences, of surveys, public hearings, forums of participation and any other instrument of popular consultation, with the exception of the regulation of referendums and what is envisaged in Article 149.1.32^a of the Constitution.

XXVII *Article 71 ECL 1.* Within the framework of basic state legislation and, if appropriate, in the terms established therein, it is the Community of Castile-Leon which is competent for the legislative implementation and execution of state legislation in the following matters: 15^o System of popular consultations in the area of Castile-Leon, in accordance with the provisions of the law referred to in Article 92.3 of the Constitution and other state laws, and the latter is responsible for authorising its calling.

XXVIII *Article 9.1. EE.* The Autonomous Community of Extremadura has exclusive competence in the following matters. 50. System and calling of non-binding popular consultations other than a referendum.

XXIX The Statutes of Valencia, Balearic Islands and Castile-Leon maintain the competence in terms similar to their previous versions, i.e. as the competence for legislative implementation and execution.

XXX In Catalonia, popular consultations were carried out on independence following an initial experience in a village in Barcelona (Arenys de Munt) which was later reproduced in many municipalities. This consultation was organised by private bodies who asked the electorate the following question: *¿Está de acuerdo que Cataluña sea un estado de Derecho, independiente, democrático y social integrado en la UE?* [Do you agree that Catalonia should become a social, democratic and independent state and member of the European Union?]

XXXI This led to the creation within the Penal Code of the offence of illegally holding a referendum (LO 20/2003) later abolished by LO 2/2005 of 22 June.

XXXII The same line is taken in State Council resolution, no. 1119/2008 of 3 July.

XXXIII FJ 2 quoted above.

XXXIV The section in the Constitution on which this law is based, as indicated in its preamble, is Art. 30.1 of the Statute of the Canary Islands (which has not been subject to reform) on matters of the organisation of its institutions of self-government and in Art. 32.5, system of popular consultations in the area of the Canary Islands, including the referendum and state authorisation of its calling.

XXXV In STC 103/2008 the CC had already stated that “in our constitutional ordinance, *no implicit competence* on matters of referendums is contemplated, since in a system like the Spanish, whose general norm is representative democracy, only referendums expressly envisaged in state regulations, including the Statutes of Autonomy, may be called and held, in conformance with the Constitution” (FJ 3).

XXXVI Conversely, the scope of state competence is defined by the requirement for state authorisation for calling referendums, but not for other different popular consultations.

XXXVII Precisely on the basis of this argument the Dissenting Opinion formulated by magistrate Rodríguez-Zapata in STC 31/2010 on the Statute of Autonomy of Catalonia requested the declaration of unconstitutionality.

XXXVIII What is certainly inconsistent is to state, as STC 31/2010 does, that the only constitutionally adequate law to regulate the referendum is the LO of 1980, excusing its application to other kinds of referendum provided for in the statute, not in the section of competences but in the provisions on the procedure for statutory reform for Communities other than those covered by Art. 151 SC.

XXXIX Resolution no. 1618/2010 of 16 September 2010.



XI. On local referendums *see*: J.L. Martínez-Alonso Camps (2010, 447-486).

XI.I LO 2/1980 incorporated a single additional provision as follows: “*The provisions of this law do not affect the regulation popular consultations which may be held by town councils, relating to important matters of municipal interest in their respective territories, in accordance with legislation on the local system, in all cases, except for the exclusive competence of the state for their authorisation*”.

XI.II Act 7/1985 of 2 April, regulating the basic law of local government, introduces mandates to local public powers for the encouragement of citizen participation. The reform of this law in Act 57/2002 of 16 December, on *measures for the modernisation of the local system*, has influenced the area of citizen participation. Participation is defined in the basic law, both as a residents’ right – Art. 18.1 a),b),e) and f) - and a basic institution for the operation of municipal life, regulating essential aspects of local popular consultations, of popular initiative in town councils, and of citizen participation (Arts. 69 to 72)

XI.III In its last paragraph, No. 2 of Art. 70 *bis* states that “*these initiatives may incorporate a proposal for local popular consultation, which in this event will be processed by the procedure and with the prior requirements envisaged in Article 71*”. Art. 70 *bis* of LBRL itself prescribes that “*the dispositions in this section are understood without prejudice to the autonomous legislation on this matter*”, which resolves in favour of the latter the discrepancies on the number of residents’ signatures required to formulate the consultation. Autonomous legislation has incorporated specific determinations on the number of residents whose signatures are required to request that popular consultations are held. Act 7/1999 of the local administration of Aragon; the Andalusian Act 2/2001; Act 1/2003 of the local administration of La Rioja; Catalan Act 4/2010, already mentioned. In Navarre, *Ley foral* 27/2002 of 28 October was used, regulating popular consultations in a local area, while its Statute (LORAFNA) does not allow for any specific competence on matters of consultations but relies on the generic competence existing in the legal system of public administrations.

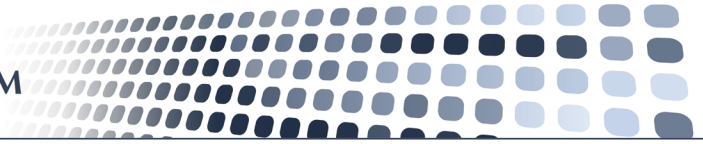
XI.IV There are other *popular consultations*, formulated by LBRL, of note among which was the *citizen consultation* held by Barcelona City Council on proposals for the transformation of *Avenida de la Diagonal*, under Art. 35 of Catalan Act 22/1998 of 30 December, of Barcelona’s municipal charter

XI.V Resolution no. 1618/2010 of 16 September, already noted.

XI.VI Specifically, it indicates that “nothing would impede the declaration of unconstitutionality being extended, under Art. 39.1 LOTC, to precepts relating to municipal consultations via referendum (Articles 31 to 42) and, if appropriate, to the whole of Catalan Act 4/2010 since the hypothetical invalidation of Art. 1 to 42 would render the whole of the legal text meaningless, Arts. 43 to 59 and additional, temporary, derogatory and final provisions” (FD° 1°, fourth paragraph). And it concludes that “the acceptance of the thesis of the Council of State (...) would permit the declaration of unconstitutionality of the explicit or implicit references contained in these legal precepts to municipal referendums. That is, if both referendums in the area of Catalonia and municipal referendums regulated in Catalan Act 4/2010 are unconstitutional, the declaration of unconstitutionality and nullity of Articles 1 to 9, 43 and 45 would include their total and entire content” (FD° 3°, *in fine*).

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