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Introduction

by

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Abstract

The goal of this monographic is the analysis of citizen participation in the regional and local levels of government of Italy and Spain. The assays present the current situation of the different types of democracy: representative, direct and participatory, in the framework of the new generation of Statutes passed last decade in both countries. Instruments of participation are introduced in the decision-making process and they serve to ensure transparency, legitimacy and greater accountability to the public institutions

Key-words

citizen participation, decision-making process, representative, direct and participatory democracy, pluralist society, regional level of government in Italy and Spain

A renewed interest on the part of the legislator is on the rise concerning the participation of citizens in political life and, not surprisingly, it has extended to legal theory as a whole, permeating every aspect of our contemporary liberal democracies.

Notwithstanding the specific features of individual systems as such, a comparative analysis leads to the identification of a number of solidly rooted common elements regardless of any actual difference. Participatory instruments thus become a sort of antidote, a catalyst or a generator of institutional practices that are conceptually consolidated, taking on various forms, aimed to adjust to the changing needs of our times.

In addition to a more traditional view of direct and representative democracy – based on a concept of democracy that rests on majority decisions – that largely prevails in our systems, a new viewpoint is gaining momentum whereby participation is seen as an element that is not filtered by decision-making, but is itself part of the process. It entails the possibility for every citizen to take part in decision-making before, during and after deliberation. As a result, brand new instruments are taking shape that aim to bring out the eminently dialogical and cooperative nature of the consolidated democratic model of contemporary liberal democracies. They permeate decision-making processes and they serve – or are intended to serve – to ensure transparency in institutional procedures and greater accountability on the part of both the administration and the community at large.

Participation becomes a requirement dictated by the political and institutional dynamics afoot as an answer to the need for a more "customized" political attitude and the only true assurance that a socially and ideologically fragmented system is, indeed, democratic (Manzella: 2002).

There is no doubt that more emphasis is placed on participation at a time of crisis such as the one that set in a few years ago across : the majority of democracies based on a multiple-party system. It is precisely the lack of guidance that stems from these systems that has pushed voters towards abstentionism and has triggered a feeling of resignation towards the drift of delegated democracy.

Thus two different perspectives open up that aim to legitimize the decision-making process: a more central role for the "leader" and a new impetus towards greater participation of the electorate outside of the mere, one-off "voting" event. Clearly, the myth of a rational and fair law shared by all has been reconsidered in the awareness of the

shortcomings of the legislative process in a pluralist and multiethnic society, in favour of a majority-based approach.

However, if Kelsen's utopian version of parliamentary democracy appears no longer viable, it would be misleading to think of the electorate as a manipulated and passive entity, regardless of the national political system in place. In contemporary parliamentary systems, even where there is an apparently inexorable tendency towards the overexposure and the progressive presidentialization of the Executive Power (Di Giovine-Mastromarino: 2007), the adoption of participatory instruments outside of voting proper can contribute to stifling the rise of charismatic "heroes" and unrestrained monocratizations.

In this context, greater interest is generated by the comparative analysis of participation in its various forms of expression, particularly concerning the Italian and the Spanish systems, that aims to identify similarities and differences in their regional autonomy. Once again the Center for Studies on Federalism (Centro Studi sul Federalismo) collaborates on a research project with the University of Barcelona – specifically, a collaboration with *Grup d'Estudis sobre Democràcia i Constitucionalisme GEDECO* in the framework of a project titled "Estado autonómico y democracia: los derechos de participación en los Estatutos de Autonomía" (DER2009-12921) that was funded by the Spanish Ministry of Science and Innovation. In this case too, major constitutional points are discussed not in general terms but according to a local and regional perspective, as dictated by a bottom-up process to renew the Italian and Spanish political scene. What happened in Italy in the early 1990s with Title V of the 1948 Constitution is similar to Spain's new generation of statutes that concerned autonomous communities (without modifications to the Constitution).

In this case the research efforts aim to determine the new features introduced at regional level by the new statutes in terms of citizen participation. The following papers present the views of notable Italian and Spanish scholars, who share a similar approach while preserving the aspects specific to individual systems and personalities, aiming to analyze the various instruments of participation in the context of representative, direct and participatory democracy.

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Instruments of participation at regional level: an introduction to the Italian framework in new ordinary statutes

by

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Abstract

The new ordinary statutes of Italian Regions attempt to reconcile the more traditional instruments of representative and direct democracy with the new instruments of participatory democracy. While no original aspects have emerged, a progressive shift in perspective has occurred compared to previous versions of the statutes. Participation is now the *leit motif* that characterises the relation between individuals and institutions and it brings new momentum to this otherwise worn-out relationship
.

Key-words

regional statute, participation, representative system, participatory democracy.

1. Introduction

The restructuring of Italy's regional system responds to an evident need to boost participation also at local level, as a means to counter a growing distrust felt by the citizens towards representative and political institutions.

This objective was pursued through actions that have reflected most evidently on the institutional plan[I] rather than on the relationship between the electorate and the institutions, but the restructuring approach has not diminished the role of the civil component vis-à-vis the political one, as the new regional statutes clearly indicate (starting with the Electoral Law n. 43/1995, the Laws for the reform of the Constitution no. 1 of 1999, no. 2 and 3 of 2001, and the approval of the new ordinary statutes).

In order to fully understand the scope of this change, it is necessary to closely examine the concept of participation, a central theme in public law that has always been the object of juridical studies and that requires constant updating in order to ensure its effectiveness in the face of the challenges that arise in civil society.

In the scenario of contemporary constitutional liberal democracies, participation is no longer a concept pertaining solely to the sphere of *rights*. Participation in a constitutional democracy must be interpreted in a more co-active and mandatory form as a *duty*. Particularly at local level, participation functions as both an objective and an instrument, the epiphany of democracy and a possible way towards its implementation[II], through the consolidation of *citizenship awareness* that rests on a close relationship with the decision-making public institutions[III].

For this reason, under certain conditions, ensuring participation means focusing not only on the *instruments* that promote full and legitimate participation of the citizens in public decision-making, but on the *models* that, from the point of view of general participation theory[IV], are no longer to be regarded as alternative options but as integrated ones[V].

Participation is traditionally associated with three different models, based on three paradigms of public participation that differ in qualitative and quantitative terms, and that

reflect three corresponding models of democracy: representative, direct, and participatory democracy.

The characteristics, the limitations and the potential of representative and direct participation have been debated for centuries and these issues remain on the table to this day, while discussion on participatory democracy is based on the concept of "last-generation" participation and as such it is still in progress. While it is widely agreed that there is a substantial distance between this form of participation on the one hand and representative and direct ones on the other, it is also a fact that they are not perceived as antagonistic.

In its participatory form, democracy shows more clearly its ontologically and eminently dialogic and cooperative nature, taking a stance that is unmistakably different from the "one-off" events that characterize democracy in its representative and direct forms.[VI] Additionally, the instruments of participation – unlike the more classic ones that are typical of representative democracy – contribute to qualifying the political decisions that are taken in a representative system, to ensuring institutional transparency and to attributing greater responsibility to the administration and community that participate in the decision-making process[VII], in a sort of democratization of the democratic process itself[VIII].

There is no doubt that participatory democracy requires a change of perspective, in that decision-making follows a transformative rather than an aggregative pattern. According to the former, the voter's preference is an exogenous factor on which to base a calculation that is not subject to change in terms of content. According to the latter, the voter's preference is but a starting point that may vary in its essence in the course of decision-making and that may evolve during decision-making and eventually result in an entirely different position as the outcome of an exchange of opinions and a progressive socialization of data and information[IX].

Consequently, as regards participatory forms of democracy it is not only the voting procedure and the rules that regulate the vote count that matter, but the criteria that guide the debate - the very process leading to the voting itself[X].

2. The paradigms of participation

In line with the purpose of this paper, it should be noted that some of the aspects presented will be analyzed in greater detail in other articles. The present analysis will aim to outline the point of view of the regional legislator – and this will be further broken down and analyzed in other papers – with respect to its statutory rather than ordinary dimension, an activity that is often fragmented and bound to specific sectors, with some notable exceptions.

Based on the premises outlined in the previous paragraph and considering the three models of democracy as concomitant rather than mutually exclusive, it is possible to analyze the choices made in the drafting of the statutes of ordinary regions as well as in the so-called "new wave" of statutes that characterize the Italian regional landscape these days. It will be immediately apparent that the instances of participatory innovations – e.g., the adoption of original instruments to encourage a more active involvement of citizens – are few and far between, but it is also true that the new wave of statutes breaks away from the traditional concept of democratic participation at local level[XI]. When drafting the new statutes, the regional legislators have attempted - in some instances with a somewhat limited conviction – to respond to the demands for greater involvement that were voiced by several players on the social scene and to codify such measures into the legal framework. More traditional forms of representation and direct democracy have therefore been integrated with participatory democracy instruments that aim to bring to bear the experience matured at political level over the years, regardless of the haphazardness of such precedents. In addition to several examples from abroad, a case in point can be found in Tuscany, where special emphasis was placed on the need to boost participation in the forms of participatory democracy even before the revision of the regional statute.

Participation arose to the status of *leitmotiv* in the process for the renewal of the relationship between individuals and institutions, and in the wake of the Tuscan experience it could be said that participation has been adopted at statutory level as:

- *the autonomous initiative of citizens to address the public administration;*
- *to contribute to regional initiatives;*

- *to participate in official consultations;*
- *to assess the effectiveness of regional policy.*

There is no doubt that the traditional monolithic approach to participation has been replaced by a versatile and flexible one – both within and outside the procedural dimension – aiming to ensure the active involvement of civil society in the phases leading to decision-making as well as in the implementation of the decision itself.
The more generic concept of participation takes the form of a series of hendiadyses that serve both to characterize its scope and to define its content and its function in the various phases of the deliberative process.

In this sense, it should be noted that participation can be ensured only if accompanied by *information* – intended as an obligation to inform and as a duty to acquire and process data and knowledge. Clearly, such emphasis on information requires a context that promotes training, planning and bureaucratic simplification[XII].

The role of the community in the definition of public decisions must be supported through a long-term process during which adequate instruments are made available to civil society to ensure its participation in the decisional process. In this respect it is essential to know the "when" and "how": in other words, it is necessary to have access to several aspects that have importance when it comes to decision-making time and to be familiar with technical and political factors that come into play in the decisional process.
The combination of participation and information brings to mind two additional concepts.

First, having ascertained that information entails the possibility to access intelligible data, participation is ensured by the *transparency* of an action and of PA acts. This transparency cuts across all the phases of the decision-making process, particularly the preparatory one that precedes the actual taking of a decision[XIII]. It is in this phase that arguments are chosen to support the decision and it is in this phase that individual citizens have the opportunity to influence the ultimate decision, by orienting the discussion that will lead to the decision itself. The debate preceding deliberation is focused on the facts that have emerged in the preliminary phase: the shared data in which dialogue is rooted will necessarily result from a selection of the wealth of available data. This selection process is hardly neutral: one finds what one is looking for.

As regards the implementation phase, according to the principle of transparency the right to participation translates into a more active involvement in the decision-making process, in line with a more democratic dimension of administrative action, thus reflecting the constitutional requirements of impartiality and good public administration practice.
At this point some considerations appear to be relevant.

The first regards the applicability of Law 241/1990 which, following the reform of title V, will inevitably lose some of its original exclusivity. Pursuant to Law 15/2005 that modifies the 1990 principles of administrative procedure, national parameters will likely be regarded as a minimum standard. It is reasonable to assume that the regional legislator will adopt the national regulation as a starting point from which to increase the level of administrative transparency and the degree of participation of citizens.
Moreover, there is an intrinsic relationship that connects participation and transparency to any administrative procedure: it is the nature of the administrative procedure – according to the scope of its implementing and administrative relevance - that calls for the close participation of the individual affected by that procedure.

Lastly, transparency must be ensured also when evaluating the effects of a decision, based on the principles of effectiveness and efficiency that cannot be disregarded in that they are enshrined in the constitution, which leads to a fourth hendiadys in which participation is connected to *control*.
It may appear redundant to evaluate the possibility to consider controlling instruments as instruments of participation. Some statutes – like the ones of Calabria and Piedmont – seem to have taken this direction in earnest.
In the overall picture that this paper aims to define, it may be useful to dwell on this point, starting from a traditional distinction of internal and external control as well as preventive versus subsequent control.

The concept of "control", without further specification, in our regional system has always been regarded with some distrust in that it is directly related to the idea of a centralized State Government and the supremacy of the central authority over the periphery. Hence the need of the Regions, on the occasion of the constitutional reforms of 1999 and 2001, to vent their distrust and to call for an effort to overcome State controls that are regarded as an excessive constraint that limits autonomy and that are perceived as the expression of an explicit lack of confidence in the Regions' self-government capacity.

It would be reductive and unrealistic to conclude that, following the 2001 reforms, all the issues related to control have been settled. What has happened is that the role of the State as a mere controller has been scaled down in favour of greater respect for the role of other institutional players, through the implementation of more coherent practices like concertation. Additionally, greater emphasis has been placed on internal control since external control has lost some of its primacy. Internal control – both in its pre-emptive and subsequent dimensions – is less likely to be experienced as an imposition from the top. It is rather an opportunity for the active involvement of society and it contributes to the formation of a collective political conscience that represents the foundation of an effective participation of all citizens, who acquire experience and knowledge that can be then applied in the decision-making process.

In this sense the idea of control acquires new meaning compared to the idea that refers to a more generic concept of participation viewed as mere involvement. Exercising control becomes a learning process in view of future policy-making, which also finds its place in the context of participatory democracy and as an effective instrument of extended decision-making.

Clearly, the exercise of control becomes an instrument of participation when the citizens undertake actions that are spurred by information, awareness and hard facts. In all other instances, it is reduced to an ineffective operation that is devoid of any significant value in an absolute sense.

This leads to the fifth pair of concepts that brings us back to the opening paragraphs of this paper, where it is noted that the main challenges to participation lie in the efforts that are put in place to contain the drift of democracy by proxy, that in some cases may degenerate in oligarchy and populism. Participation generates *consensus,* and consensus, in turn, facilitates participation, if the principles that have been listed above – information, transparency and control – remain standing. It is precisely in the various forms of participatory democracy that one finds the germs of plebiscitary democracy, where participation is only apparent but lacks information and leaves no room for collective reflection[XIV].

3. The subjects

As regards the subjects that are called to participate, the analysis of ordinary statutes shows a certain openness on the part of the regional legislator not only with reference to the involvement of individuals, according to a consolidated approach, but also to social groups.

In addition to the more traditional political rights of individuals that are recognized to all citizens – primarily by the Constitution and consequently by the Regions - the statutes envisage the involvement of *residents*, i.e. subjects that do not have Italian citizenship but that participate responsibly and fairly regularly to the life of the community.
It is an approach that has been approved by the Constitutional Court in Ruling no. 379/2004, concerning the statute of Regione Emilia Romagna, with some limitations.
Called to pass judgment on the legitimacy of art. 15, par. 1 of the Statute of Regione Emilia Romagna, whereby the Region «as part of the options constitutionally allowed to it» may recognise and grant «to all those residing in a municipality of the regional territory the right to participate as set forth by this Title I, including the right to vote in *referenda* and in other forms of balloting», the Court has identified the classic instruments of participation – with an explicit reference to the abrogative vs. advisory referendum – as the natural boundary of an extensive concept of participatory rights. The result is a sort of hypothetical distinction between traditional instruments of participation and new generation ones, which rests on an idea of deliberative democracy that would allow the participation of residents regardless of their citizenship.

Nevertheless, from a merely conceptual point of view, it is the extension of the right to participation to collective entities that represents the truly original feature of some ordinary statutes.
This issue is no stranger to Italian constitutionalism. It was MP La Pira who introduced in the works of the Constitutional Assembly the issue of the representation of social groups, with special emphasis on the potential of the second Chamber, with a view to highlighting the relational context in which human beings develop, in line with the spirit of art. 2 of the Italian Constitution[XV]. Little remains of this debate in the text of the Constitution: some

reference can be found to CNEL (National Council for Economics and Labour), but it is so marginal from an institutional point of view as to become irrelevant.

There is no doubt that the renewed interest of the Regions in the participation of collective entities in the decisional process issues from an explicit reference - that was included in the Constitution, with Constitutional Law no. 3 of 2001 - to the concept of horizontal subsidiarity. Its content has contributed to reviving the debate on social groups that are no longer viewed solely as instrumental to the development of the individual, but also as essential to good practices in public administration.

In this respect, there are two options that lay before the drafters of a regional statute, each quite different from the other, but that reflect the same determination to place greater emphasis on the action of various social components - whether institutional or spontaneous in origin – in public policy making.

First, at regional level the statutes have increased the number of advisory and supervisory bodies that may ensure greater institutional attention to the needs of the general population, as well as organisms that better reflect the needs of the citizens, also in the form of associations.

These are organisms that may not be required from a strictly constitutional point of view, some of which have been envisaged in past legislation, while others are entirely new. Witness the creation of statutory supervisory bodies, for which participation translates into consulting (preparatory phase) as well as preventive actions[XVI], or the constitutionally sanctioned Councils of Local Autonomies, in which the concept of participation of groups finds its full expression, while in a more limited form than the Constitution appears to envisage, as the texts indicate[XVII]. The legislators drafting the statutes have also considered the role of advisory bodies with reference to issues related to the economy and labour, in addition to providing formal recognition and status at statutory level for figures of supervisors like the Ombudsman[XVIII].

In addition to an envisaged increase in the number of supervisory and advisory bodies, participation of civil society to decisional processes also entails the establishment of *public registers*, in which associations intending to participate in the various phases of the decisional process must enlist: this is the case with the Statutes of Tuscany, Emilia Romagna and Abruzzo.

The creation of public registers would appear, at first, to respond to the need to overcome the occasional nature of the participation of social groups as well as to consolidate good government practices. On the other hand, it should be noted that their appearance on the institutional scene may lead to an excessively rigid evolution of the participatory process for citizens[XIX], characterized at least in origin by a spontaneous and supple component.

It is still early to pass a final judgment: it is a fact, however, that the registers may prove a useful instrument for rationalization, provided the weight of bureaucratic burdens in terms of registration and consultation is not overbearing. They may prove to be a good compromise between freedom and formal establishment.

If, on the one hand, participatory democracy in its various forms is difficult to codify – also in order to maintain the mouldable quality that allows the identification of approaches and actions that adhere in their content and their form to the decisions to be taken – on the other, the opening of institutions to a bottom-up approach, also through collective entities inevitably leads to a more formally structured participation.

Concerning the Constitutionality of public registers, little remains to be said, following Ruling no. 379 of 2004 by the Constitutional Court sanctioning the legitimacy of art. 19 of the Statute of Regione Emilia Romagna, that was challenged by the National Government on the belief that it violated art. 121 of the Constitution[XX] and which, in practice, entailed a change to the representative system.

The Court rejected this argument and stated that the norm, «which does not even seem such as to hinder the functions of the regional institutions», has the sole purpose of «guaranteeing (in more substantial terms that in the past) that associative organisations representing significant fractions of the social body have the possibility to be consulted by the council organs», thus also underscoring the fact that «recognising the independence of the representative bodies and the role of the political parties is not negated by a transparent governing of the relations between representative institutions and fractions of civil society».

4. The instruments

An analysis of the instruments of participation included in the statutes of ordinary regions in Italy points towards a prevalence of more traditional ones, but some elements of originality can still be detected.

As regards the legislative initiative, analyzed in greater detail in this issue by Anna Maria Poggi[XXI], it remains a prerogative of citizens with the right to vote.

The number of signatures required spans from a minimum of 5,000 to a maximum of 15,000, as is the case in Puglia. High thresholds can be found also in the statutes of Regione Lazio and Campania, where popular initiatives are required to be supported by at least 10,000 signatures.

No trends emerge that break away from the past. There is, however, a tendency to take away from the scope of popular secondary initiatives, probably as a direct consequence of the fact that the regulatory power of the Council has progressively shifted to the executive power[XXII].

Interestingly, regional statutory legislators have worked towards restricting the scope of legislative initiative vis-à-vis the legislative power. The burdens on the Council have been increased, becoming more time-consuming and procedurally complex. Campania is a particularly telling case in point.

Art. 15 of the Statute of Campania, under the heading *Referendum for Approval*, introduces a form of legislative initiative that is almost coactive for the regional legislator[XXIII], similar in its substance to the provisions contained in statutes of Regions with special systems[XXIV]. According to the statute of Campania, if the popular initiative on a law or regulation is not approved within six months of its submission or it is approved following substantial modifications, it is subject to a popular vote. In this occurrence, the proposal is approved if the quorum can be reached, i.e., if the majority of voters participate in the referendum and a majority of valid votes is reached. In this manner, the decision on the approval of draft legislation tips the balance in favour of the electoral body, leaving some room to considerations concerning the loss of power on the part of the competent authority.

The provisions of art. 15 appear to be in contrast with the constitutional provision that entrusts legislative power exclusively to the Councils, which entails at the same time

the availability of the object of the procedure for the approval of legislation and political discretionary power, which are in this case taken away from the Assembly whose decision becomes, in actual fact, superfluous.

The Constitution provides for Regions to regulate in their statute the functioning of referenda, but it does not envisage the possibility to transfer certain powers, particularly when these powers are defined by the Constitution itself. Furthermore, it cannot be ruled out *a priori* that the proposer may be using this instrument as a means to an end, namely bypassing the sitting majority and its political programme.

It is a fact that, notwithstanding the perplexities raised by the case of Campania, much could have been done to strengthen the power of legislative initiative through the referendum. This appears to be the direction taken by Regione Lazio, that imposed an obligation on the Council to consider - but not necessarily to adopt - legislative proposals that are accompanied by a request to call a referendum for its approval[XXV]. Additionally, no mention is made as to the consequences in case this provision envisioned by the Statute is not implemented if the referendum for approval is successful, which casts some doubt on the effectiveness of the provision to begin with. This also brings back the question of the balance between the principle of the exclusivity of legislative power and the promotion of an instrument of participation like legislative initiative, which can be easily deprived of its effectiveness.

Considering the instruments of direct democracy, it should be noted that the legislator has shown a renewed interest in the petition: considering its very limited impact on the institutional level in "first generation" statutes and the absence of any constitutional indication thereof, it would have appeared reasonable to abandon it. On the contrary, except for Tuscany and, based on the text approved in the first reading, Veneto[XXVI], all the Regions have included provisions on the petition, both in their statutes and in the Council Regulation. The right to petition is now open to local authorities, as well as individuals who do not have Italian citizenship (the reference is to "residents" and in some cases to "anyone" or "everyone")[XXVII], as well as minors, thus underscoring that second-generation statute legislators aim to grant greater political participation to subjects who are not yet entitled to exercise their political rights, but who are regarded as intellectually developed individuals.

A more detailed analysis of the matter is provided in this issue by Cristina Bertolino, but it should be noted here that the petition is an extremely versatile and flexible instrument, that falls largely outside of any formal framework. Versatility and flexibility represent at the same time its main strengths and weaknesses. The petition is not subject to substantial limitations except for the requirement of regional competence and the fact that it should consist of a "request for action" or the "statement of common needs"; it may be addressed to the Legislative Assembly, the Regional Executive Committee, directly to the President of the Region or, more generally, to "regional organisms"[XXVIII]. However, presenting a petition does not entail any obligation on the part of the recipient, except for the proviso that, as stated in most Statutes, the petitioner is entitled by law to be informed on the issuing decision, not necessarily supported by a motivation.

A different approach has been adopted towards the popular referendum. Next to the referendum for proposals, that may or may not support legislative initiative procedures, the Statutes also envisage abrogative or consultative forms of referenda. The Statutes seems to have recognized that the referendum is an effective instrument of participation, probably by virtue of its immediateness and its consolidated tradition.

It is in this light that one should see the openness of the Statutes towards the consultative referendum, which marks a watershed from the past. Nevertheless, it should also be noted that some legislators have shown some reticence towards the full application of the prerogatives sanctioned by the Constitution, so that while art. 123 of the Constitution expressly envisages the extension of the object of an abrogative referendum to general administration issues, in some cases only regional legislative acts are subject to an abrogative referendum[XXIX].

All the Statutes also show a renewed interest in the instruments that are available to the Council for the collection of data for the purpose of the adoption of single decisions – e.g., hearings, consultations, enquiry, etc. This trend may be interpreted as a means to offset the sort of personal approach that accompanied the direct election of the Regional President. It is indisputable, however, that the promotion of closer relations between public representatives and the citizens they represent in the context of the Council also serves to generate consensus towards the Council itself, whose role is rather marginalized in the framework of the regional government[XXX].

In this respect, one case stands out: Emilia Romagna. Art. 17 of its Statute envisages for the very first time an *istruttoria pubblica* (public examination), implemented by Law no. 8 of 2008, whereby if supported by a minimum of 50,000 signatures, a preliminary legislative proceeding may be subject to public debate with the participation of residents above the age of 16. Challenged by the National Government, this provision has been sustained by the Constitutional Court (Ruling no. 379/2004) that rejected the argument of the petitioner and stated that it does not entail an overburdening of procedural requirements, nor a violation of the principle of the good management of public administration as sanctioned by art. 97 of the Constitution.

5. Conclusions

Regardless of the specific profiles that will emerge from the following papers, one general conclusion can formulated at this point.

An analysis of the instruments of participation that are implemented at regional level by second-generation ordinary Statutes clearly highlights that the creative streak of the legislator has in actual fact been rather restrained compared to the actual expectations and possibilities, with a few notable exceptions. This is particularly true with reference to originality and differentiation, as well as in principle. Suffice it to say that not all the Regions have included participation as one of the principles that have inspired their Statutes[xxxi].

It could be argued that this is due to an atavistic tendency that leads political decision-makers to resort to the instruments of participation to improve their performance, while maintaining a certain level of diffidence based on the concern that such practices would lead, over time, to a progressive weakening of political representation.

But another reason lies in the very nature of the rights to participation, against the current trends: "swiftness" seems to have become the new buzzword in politics at all levels, whereas participatory instruments tend to encourage discussion and reflection, which inevitably extend the duration of the decision-making procedure. After all, their aim is not to make decision-making swifter, but to improve political decision-making as an instrument of political integration.

Moreover, a cognitive analysis of participatory instruments also requires an assessment of their effectiveness. In many ways it is still too early to assess the practical effects of some of these instruments, especially considering that some Statutes have been approved only in very recent times and that, in more general terms, the definition of relevant implementing legislation is being delayed.

Doubtlessly, as the number of participatory instruments increases there is the risk that they may eventually come to embody only a collective rite, and this may be reassuring for the general population but proves to be rather ineffective in terms of practical results.
In this sense one useful reference can be found in Tuscany's Regional Law no. 69 of 2007 (described in detail in this issue by Cecilia Corsi[XXXII]), approved to implement articles 3 and 72 of the Statute. This law, unlike other legislative measures approved in Italy up to this point, stands out because of its organic approach and its comprehensive scope on the issue of participation.

While it cannot be taken as a model for the definition of an effective theory of participation at regional level, this Regional Law puts the spotlight on the fragility of participatory instruments. It underscores the fact that participatory instruments – particularly the less conventional and traditional ones – rely for their effectiveness only on a sort of "pact" between the citizens and the decision-makers who commit to take into account the outcome of the relevant participatory process or to provide a motivation for partial or total rejection.

The current scenario is still far from being an explicit obligation for public administrations to take the outcome of participatory procedures into account. However, there is the symbolic weight of political commitment, guaranteed by the establishment of an authority that will safeguard and promote participation, a third guarantor that will contribute to enhance the effectiveness of the participatory instruments envisaged by Regional Statutes.

[1] For example, the introduction of the direct election of the President of the Region, that aimed to boost

public participation in the process. This initiative by the constitutional legislator remains partially unfulfilled, since it strengthened the position of the executive authority and its chief representative rather than that of the electorate, as part of a trend that is common to several systems at different levels of government. On this point, see Di Giovine, Mastromarino, 2007.

[II] On this point Algostino, 2011, 113 and subs., points out that «participation increasingly invested with the qualification of "human rights" is proposed as an element able to revitalise democracy, build new and "more democratic" forms of it"

[III] Significantly, the EU Commission in its 2001 White Paper on European Governance places participation at the centre of its considerations, recognising that civil society plays a fundamental role in the definition of EU policy: a role that can no longer be overlooked either by Member States or by European institutions - particularly the EU Parliament in the light of its function as a representative of all citizens. See Communication from the Commission dated 25 July 2001: COM(2001) 428 def. – Official Journal C 287 of 12.10. 2001.

[IV] Giuseppe Coturri, 2008, 28.

[V] In this sense Bifulco, 2010, 73, tries to reconcile different forms of democracy that may appear to be in contrast one with the other.

[VI] See Valastro, 2010, 53.

[VII] In this sense Valastro, 2010, 57, highlights the connection between participation and the concept of subsidiarity, particularly in its horizontal dimension, and underscores that «provisions that recognise, support and stress independent initiatives by citizens for performing actions of general interest should be more carefully interpreted under the principle of horizontal subsidiarity, in terms of the system component for reconstructing the connection between representation and popular power». See also Picchi, 2006, 303 ss.

[VIII] A play on words used by Allegretti, 2010.

[IX] See Arena, 2010, 85 ss.

[X] Allegretti, 2010, 23, recalls the benefits of the instruments of participatory democracy, that he also identifies, among others, as the self-representation of society in political procedure, the reconciling of disputes, and greater confidence on the part of the general public in public action. Nevertheless, as noted by Algostino, 2011, 121, enthusiasm for the participatory forms of democracy should not overshadow the fact that they remain inevitably suspended between prospects of citizen emancipation and exploitation, between equality and elitism.

[XI] See De Santis, 2010, 219.

[XII] In this respect see art. 9 of the Statute of Regione Lombardia, that provides for adherence to «principles of advertising and transparency as method of one's legislative and administrative action and as an instrument for permitting real participation of citizens in the region's actions and in forming regional policies, Regional law promotes administrative simplification and governs the forms and conditions of participation and access by citizens, individuals and associates, in proceedings and records, also by means of more extensive use of computer technologies».

[XIII] Statute of Regione Toscana, art. 72 and 73.

[XIV] Algostino, 2011, 121, underscores the risk of an anti-egalitarian and radical-chic drift of participatory democracy, that may be exploited through "social marketing" by hegemonic sectors.

[XV] Art. 2 of the Italian Constitution of 1948 states that «The Republic recognises and guarantees the inviolable rights of people, both as individuals and in social formations where they express their personality, and requires fulfilment of binding duties of political, economic and social solidarity».

[XVI] For an overview of statutory supervisory bodies in Italy's regional systems, see Mastromarino, 2008, 29-47, and also, for comparison, the volume Aparicio Pérez, Barcelò i Serramalera, 2009.

[XVII] No comprehensive overview can be provided here of the articles of statutes and implementation laws that have resulted in the establishment of the Councils of local autonomies. Suffice it to say that great emphasis was placed on the representation (i.e., participation) of local institutions, less on the so-called functional autonomies.

[XVIII] See Bifulco, Paparella, 2006, 262 ff.

[XIX] For example the measures adopted in this regard by Regione Emilia Romagna that provide for the drafting of a consultative protocol for each Council Commission.

[XX] Art. 121 of the Italian Constitution of 1948 states that: «Bodies pertaining to the Region are: the Regional Council, the Committee and its president.

The Regional Council exercises the legislative powers attributed to the Region and the other functions accredited to it by the Constitution and the law. It can propose laws to the Chambers.
The Regional Committee is the executive body of the Regions.
The President of the Committee represents the Region, managing and being responsible for the policies of the Committee, enacting laws and issuing regional regulations, managing the administrative functions delegated by the State to the Region, and complying with the instructions of the Government of the Republic».

[XXI] See the piece by Poggi in this issue

[XXII] Among new generation statutes , only the one of Piedmont associates to the power of legislative initiative the possibility to propose administrative amendments of a general nature, as well as draft proposals to the Chambers (art. 74).

[XXIII] Art. 15 of the Statute of Regione Campania states that: «1. Fifty thousand voters can present a proposal for a law or a regulation of the Region to be submitted for approval by popular referendum. The proposal cannot be presented in the six months prior to the end of the Regional Council's terms or in the six months following the calling of electoral meetings for forming new regional bodies.
2. The proposal is to be presented to the Council or the Committee beforehand. If the proposal is not approved within six months of being presented, or it is approved but with substantial amendments, it shall be submitted for popular vote.
3. The proposal will be approved if a majority of those with a right to vote have voted in the referendum and, of the votes cast, a majority is achieved.
4. The referendum for approval is not allowed for budgetary, fiscal, financial, territorial government, environmental protection laws or those on the juridical status of regional councillors, nor is it allowed for laws relating to international relations and those with the European Union nor on the Statute or laws for statute auditing».

[XXIV] See in this sense art. 23 of the Statute of Regione Friuli Venezia Giulia, the provisions adopted by Regione Valle d'Aosta introduced with Law no. 5 of 2006 or, in stricter terms, the procedure envisaged by the Autonomous Province of Bolzano.

[XXV] See art. 62 of the Statute of Regione Lazio: «1. Subjects holding powers to sponsor an abrogative referendum as per article 61 may present to the President of the Regional Council, in the ways set forth by the same article and in article 37, paragraph 4, a proposal for regional law to be submitted to popular propositional referendum.
2. If the Regional Council has not taken a decision about the proposed law to be submitted for a referendum within one year of stating the admissibility of the request, the President of the Region shall, by decree, call the popular propositional referendum on that same proposal.
3. The outcome of the referendum shall be favourable if a majority of those with a right to vote have voted and, of the votes cast, a majority is achieved.
4. Within sixty days of announcing the results of the propositional referendum, if the outcome has been favourable, the Council must examine the proposed law submitted to the referendum.
5. The law proposal to which the propositional referendum relates shall not expire at the end of the term of office but the time period, as per paragraphs 2 and 4, shall resume from the date the new Council begins.»

[XXVI] The text of the new Statute of Regione Veneto (approved by the Council in its first reading on 18 October 2011) does not explicitly envisage the petition, it simply requires that the Council (art. 22) ensure the involvement of "productive categories" in the definition of policies concerning economic and labour issues. The Council Regulation sets the times and the methods to ensure the presentation of proposals and observations by the interested organisations. However, this provision is not particularly significant if compared to Advisory Committees on economics and labour that were expressly established by most regional statutes except the one of Regione Veneto.

[XXVII] See art. 10 of the Statute of Regione Calabria; art. 16 of the Statute of Regione Emilia Romagna; art. 65 of the Statute of Regione Toscana.

[XXVIII] With reference to the participation of "regional organisms" as such, see art. 10 of the Statute of Regione Calabria and art. 16 of the Statute of Regione Campania.

[XXIX] The Statutes of Piedmont, Puglia and Campania provide for referenda exclusively for the purpose of abrogating regional laws in part or in full; Umbria, Toscany and Calabria extend to Regulations, but do not include direct abrogative referenda on administrative laws.

[XXX] See Francesca Angelini, 2010, 231 ss.

[xxxi] In this sense see art. 2 of the Statute of Regione Calabria, art. 1 of the Statute of Regione Campania, art. 12 of the Statute of Regione Abruzzo, art. 2 of the Statute of Regione Lombardia, as well as the text of art. 9 of the new Statute of Regione Veneto, approved in its first reading on 18 October 2011.
[xxxii] In this issue, see the piece by Corsi in this issue.

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Principles, rights and participatory institutions in the reformed statutes

by

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Abstract

This article reviews the new approaches to citizen participation introduced by the statutes of autonomy reformed from 2006 onwards. The reform process included the introduction of participatory values and principles, rights, institutions, competences over popular consultations and participation in the amendment process. By ruling out the possibility of autonomous communities holding referendums without prior state regulation via an organic act, the Constitutional Court has deprived the new statutes of one of the measures with greatest potential for participation. More scope is left for institutions of participatory democracy

Key-words

participatory rights, direct democracy, participatory democracy, referendum, popular initiative, sub-national government

1. Introduction

As well as regulating the institutions of government and competences of the autonomous community, as did the first statutes approved between 1979 and 1983, the statutes reformed in 2006 and 2007[I] place particular emphasis on the principles and values which identify the political objectives of the autonomous community and its axiological order (in the preamble and preliminary title), and on the rights, duties and guiding principles and their guarantees (in an innovative first article). However the 2011 statute of Extremadura is much more laconic and the only right described is the right of participation. Other legally-protected rights appear under the title and in the form of "guiding principles".

The purpose of this article is to study the presence in these statutes of values and principles related to democracy and participation. It will also examine the deployment of regulations rooted in principles within other statutory precepts, whether in the form of rights and guiding principles, autonomous community competences (basically over popular consultations) or participatory institutions and concepts, and finally references to participation in the statute's amendment process. This will serve to draft an overview of the fundamental political options of the different statutory powers that affect how the Autonomous Communities (ACs) exercise democracy. These fundamental options will also be compared with their equivalents in the 1978 Constitution. Once the points prioritised by each autonomous community have been identified, the features that link and differentiate the different ACs and the central state can be investigated. Providing, that is, that the respective statutory provisions allow an individual sub-model of democracy to be inferred in each autonomous community, within the model of democracy designed by the Constitution for all levels of power within the state.

The Constitutional Court has repeatedly sustained that the democratic model which defines the form of the state is representative democracy, in which limited space is reserved for institutions of direct and semi-direct democracy. Indeed, in Decision 119/1995, 3, the Court asserts that direct democracy is an exception: participation "is normally exercised through representatives and [which] *exceptionally* may be directly exercised by the people"[II].

The "special" or "extraordinary" nature of the referendum, "as opposed to the ordinary or common nature of political representation" (Decision 103/2008, 2) is related to the constitutional option of parliamentary monarchy as the form of government: "under this premise, it designs a system of political participation by citizens which prioritises mechanisms of representative democracy over those of direct participation" (Decision 76/1994, 3). In Decision 103/2008, 2, in a recapitulation of its own doctrine, the Court concludes "In our system of representative democracy, in which the sovereign will has its natural and ordinary means of expression in the Spanish parliament (Art. 66.1 SC) as do autonomous wills in the respective parliaments of the autonomous communities, mechanisms of direct participation in public affairs are limited to circumstances in which the Constitution expressly so imposes (for example, constitutional reform by Art. 168 SC and procedures of statutory elaboration and reform envisaged in Arts. 151.1 and 2 and 152.2 SC) or to circumstances which, also expressly allowed for, are conditional on the appropriate authorisation of the representative of the sovereign people (the Spanish Parliament) or of one of its houses". And it concludes its argument, clearly and grandiosely asserting its option for representative democracy: "Our Constitution therefore guarantees through the procedures envisaged therein, in the statutes of autonomy and other laws, one of the fullest democratic systems to be found in comparative constitutional law. This is generally a representative democracy but is *complemented* by certain instruments of direct democracy, which logically and as required under the constitution, must act not as an undervaluing or substitution but as a *reinforcement* of such representative democracy." This, then, is the model of democracy which emerges from the Constitution for all levels of government, both the central state and the ACs and local bodies. In my opinion, the institutions of direct and participatory democracy have a more residual rather than strictly complementary function.

2. Democracy as a principle in the statutes

In the preamble and first title some of the reformed statutes have incorporated abundant references to the values and principles which the public powers of the autonomous community should promote. Before the reforms of 2006-7, the earlier

versions of the statutes generally limited this point to: 1) indicating that the rights of citizens of the autonomous community are the rights envisaged in the Constitution (Basque and Catalan model, Art. 8); 2) including a list of general political objectives (Galician and especially Andalusian model, Art. 12), which acted as programming guidelines; and 3) common to all, reiterating the principles of material equality and participation of Art. 9.2 SC applied to autonomous public authorities. The reforms of the past decade have opted for maintaining the participatory principle, although with additions that are significant for our present concerns, as in the Andalusian statute of 2007: the autonomous community undertakes to protect the "quality of democracy" and promote "egalitarian democracy" (Art. 10.1 and 2 St And).

A glance at the different reformed statutes confirms the range of different circumstances and the different techniques used when setting out the main values and defining principles and goals of the respective ACs. It is above all in the Catalan and Balearic Island statutes where there is most recourse to the proclamation of values and principles[III], reiterating and expanding on the four "highest values of its legal system" of Art. 1.1 of the Constitution: freedom, justice, equality and political pluralism, sometimes adding dignity as in Art. 10.1 SC. Other contrasting values/principles are added, among them democracy (differently described in every statute) and to a lesser extent, participation and pluralism.

The Catalan statute is the most comprehensive example of a statement of general principles or values. The preamble, with echoes of the preamble of the 1978 Constitution, declares the intention to enable the construction of "a *democratic and advanced society*, of welfare and progress, offering solidarity with the rest of Spain and linked to Europe". This is reiterated in Art. 4.3, when it mentions the "values" to be promoted: freedom, *democracy*, equality, *pluralism*, peace, justice, solidarity, social cohesiveness, gender equity and sustainable development.

The preamble of the statute of the Balearic Islands is particularly detailed in its proclamation of values and principles, even if the difference between them is not clear. As "higher values of their collective life" the peoples (in plural) of the "Islands" proclaim "the inalienable principles of equality, *democracy* and pacific and just coexistence". Through the statute, the islands hope to advance towards self-government "in accordance with the

supreme value: the *democratic system* that draws inspiration from freedom, justice, peace, equality and defence of human rights, as well as solidarity between all peoples".

According to the preamble of the Statute of Andalusia, the Andalusian people bring to contemporary society "the inalienable principles of equality, *democracy* and peaceful and just coexistence". Much more laconically, the Valencian statute merely indicates that the Valencian Community has "objectives" of attaining self-government, "reinforcing *democracy* and guaranteeing the *participation* of all its citizens in the achievement of its ends" (Art. 1.3).

The statute of Aragon makes a restrained use of values and principles. Only in its stated purpose (not the preamble) does the Aragonese statute indicate that its institutions of self-government "base their action on respect for the law, freedom, justice and *democratic values*", but without actually saying what these values are. The statute, in short, "gives the autonomous community the precise instruments to continue furthering the social, cultural and economic progress of the men and women who live and work in Aragon, committing its public powers to the *promotion and defence of democracy*".

Lastly, the statutes of Castile-Leon and Extremadura make no reference to democracy or participation either in the preamble or in the first article.

Thus democracy, the democratic and advanced society, the promotion and defence of democratic values, pluralism and participation are among the values, principles and objectives normally proclaimed, in greater or lesser detail, by the reformed statutes. In general, the inclusion of axiological norms like these serves as a "flag" which identifies the autonomous community and through which it wishes to be recognised. The differences between statutes as regards values and principles relating to democracy are too slight to allow conclusions to be drawn about their different political options, or the model of democracy pursued. Apart from this, the over-abundance of statements like these in some statutes does not exactly help to distinguish the major fundamental options of their respective statutory powers. The statutes carry to extremes the option followed by constitutional documents approved after the Second World War which increasingly incorporate norms of principle.

3. Model of democracy and popular participation in the statutes

The axiological references seen in the previous section are included by different types of norm. First of all, through the recognition of the rights of participation and good administration in the Charter of rights and duties. Added to this is the provision for participatory concepts in the context of the regulation of institutions of self-government, for autonomous competences on popular consultations and finally, for the inclusion of referendums on statutory reform in some statutes where this had previously not been envisaged. Statutory options made in all these fields help to define the form of exercising democracy followed by each statute.

The statutes approved between 1979 and 1983 (some still in force) were not characterised by special attention to issues of democracy and participation. The recently approved Constitution of 1978 had already defined the model of democracy and had in general terms established institutions and concepts across all areas of government (the electoral system) and general state institutions (popular legislative initiatives, consultative referendums) but paying little attention to the local or then-uncertain autonomous communities. References to these were limited to the "open council" [concejo abierto] as a system of government by assembly for smaller municipalities (140 SC); autonomous initiatives for referendum for the approval and reform of statutes of ACs in the special regime (the Basque Country, Catalonia, Galicia and Andalusia) in Arts. 151 and 152 SC; and the referendum for incorporating Navarre into the Basque Community (Temporary Provision 4). In any event, caution was of the utmost when dealing with territorial bodies, and Art. 149.1.32 SC reserved to the central state the exclusive competence for authorisation of popular consultations by means of referendums.

In this context, statutes were limited to including one-off specific provisions on the electoral system and popular legislative initiatives within the autonomous parliamentary remit, as well as the general clauses on the promotion of participation, in a repetition or adaptation of Art. 9.2 SC already discussed. In both cases, their legal implementation normally depended on a law passed by the autonomous parliament, while the limits of autonomous regulation were fixed: they had to comply with the provisions of the Organic Act of the general electoral system, and the provisions of Art. 87.3 SC and its implementing Organic Act in relation to popular initiatives. On popular consultations, some statutes allow specifically for municipal consultations (Catalonia, Andalusia, Valencian Community), and others do so in general terms, allowing them to include both

autonomous and municipal consultations (Asturias and others following it)[IV]. Referendums for statutory reform were only allowed in ACs in which the Constitution so demanded: those in the special regime.

The legislative implementation of these statutory provisions by the ACs over more than twenty-five years of self-government concentrated on the approval of electoral laws (except for Catalonia), popular legislative initiatives and, in a few cases, municipal consultations, as well as the inclusion of participatory institutions in administrative and sectoral legislation.

3.1. Participation as a true statutory right

The inclusion of an article on rights and guiding principles in all the new statutes (apart from LORAFNA) means that the right of participation in public affairs has acquired particular importance (as already indicated, in Extremadura this is the only right allowed, along with that of petition, Art. 6).

As with the fundamental right of Art. 23 SC, the statutes opt to regulate a right of participation in public affairs which includes direct participation and participation through representatives, instead of restricting it to the right of suffrage. From here on, the technique followed by most statutes differs from that adopted by the Constitution in Art. 23 SC.

In fact, the reformed statutes list some significant and specific rights included in the right of participation in public affairs after a generic statement[V]. Mention is made about the right of active and passive suffrage. Also included with the structure and wording of rights are institutions known from earlier statutes, like the popular legislative initiative and the popular consultation, as well as other participatory concepts with no tradition in Spanish legislation. The latter includes participation in the legislative procedure, up to then only found in some AC standing orders (LARIOS, 2003, 267ss). Another case of inclusion as a specific right within the generic right of participation is the right of petition in the statutes of Catalonia, the Balearic Islands, Andalusia, and Castile-Leon. This right, whose origins pre-date the right of participation, appears as an autonomous right in the Constitution and many other charters of rights (Art. 29 SC). Although in the Constitution it refers to the "Spaniards", the statutes of Catalonia and Castile-Leon extend it to all "individuals".

The technique followed has one important consequence. The rights as stated differ among themselves. According to the Constitutional Court, some are rights of political participation conferred on the citizens of autonomous communities in the strict sense (suffrage, popular initiative, and sometimes petition). However, it is not clear that others form part of the constitutional content on fundamental right of Art. 23 SC, and might in fact be considered institutions of participatory democracy. This is what would happen with citizen participation - directly or through associations - in the procedure of drawing up laws, and with the popular consultations expressly mentioned in some statutes: surveys, hearings and forums of participation, not so popular consultations via referendum, a clear example of the right of direct participation. All this means that the right of participation appearing in the statutes would include specific rights which the Constitutional Court does not recognise as content of fundamental right of Art. 23.1 SC.

The Court has listed the instruments of direct participation that are included within the fundamental right of participation: a) "popular consultations envisaged in the Constitution itself (Arts. 92, 149.1.32, 151.1, 152.2, 167.3 and 168.3)" (Decision 63/1987 and *Auto* 399/1990: for these purposes, and in accordance with the precepts mentioned, the Court identifies popular consultations as the different types of referendum); b) the popular legislative initiative of Art. 87.3 SC (Decision 76/1994 and *Autos* 570/1989 and 140/1992); and c) open councils (Art. 140 SC). The Court restricts participation in public affairs in the form of direct participation "to circumstances in which political decisions are taken through a direct appeal to the holder of the sovereignty" (Decision 119/1995), which may therefore include a subjective element – citizens who act as such - and an objective element: "such rights are confined to the area of direct democratic legitimisation of the State and the different territorial bodies that comprise it, excluding other participatory entitlements that arise either from other fundamental rights, or from constitutional regulations of other kinds, or finally, from their legal recognition" (Decision 119/1995). It also seems to leave the door open to the inclusion of other cases, although with a reminder of their exceptional nature: "even if it is admitted that the law may extend cases of direct participation, the circumstances would in any event have to be exceptional" (Decision 119/1995). This is where, in my opinion, we should include different forms of participation in the legislative procedure, other than the popular initiative which many statutes allow for[VI].

Types of participation in government and administration in the form of hearings or forums mentioned in the statutes, as indicated above, are clearly excluded from the ambit of the fundamental right in Art. 23 SC: this is what occurred in a 1995 decision of the Constitutional Court referring to public information in the town planning procedure. And this is precisely what happens in the situations of sectoral and administrative participation mentioned fairly often in the statutes.

Therefore in accordance with what is, in our opinion, an excessively restrictive criterion (CASTELLÀ, 2001, 203) employed by the Constitutional Court, other rights with a partly participatory content, like the "right of good administration", recognised by most statutes, remain outside the ambit protected by the right of participation. Variously worded under this heading in different statutes, and following the EU Charter of Fundamental Rights, we find rights of defence of subjective positions (grounds of administrative decisions, impartial and objective treatment, proportional action of public powers, timely resolution) and rights of administrative information and participation (access to documents, participation in decisions which affect them)[VII]. On this point, by regulating the rights of participation and good administration in separate precepts, the statutes closely follow the criterion adopted by the Constitutional Court, of distinguishing political from administrative participation.

Lastly, in its Decision 247/2007, the Constitutional Court considered that the participatory rights established in the statutes to be true subjective rights. This affirmation is based on the direct connection between such rights and the constitutional precepts which establish the necessary content of the statutes, among which is the regulation of the institutions of government (Arts. 147.2 c and 152.1 SC). This contrasts with most statutory rights, for example social rights or rights before the administration, which are held to be directive norms, and whose effectiveness as subjective rights is relegated to legal implementation[VIII].

3.2. Participative institutions

In the chapter in the reformed statutes devoted to institutions of self-government, references to the popular legislative initiative are retained[IX] and some aspects of the electoral system are regulated, including constituencies and a mandate in favour of gender

equivalence[X]. In general the new statutes confine themselves even more closely than the former texts to a brief mention of these institutions, with a general referral to law for the regulation of their contents[XI]. In the case of popular initiative, this regulatory technique contrasts with that of Art. 87.3 SC for initiatives before the Spanish parliament which, although referring their implementation to an Organic act, contain elements which are imposed on the legislator (matters which are excluded and the number of signatures required). Under the earlier statutes, ACs approved laws of popular initiative, among them the Catalan law of 2006, which differs from the rest due to the contents favouring the exercise of the initiative and its far-reaching scope[XII].

The statutes also contain other references to administrative participation[XIII], and to some sectors or groups (consumers, young people, and the elderly)[XIV]. However, in spite of references to participation ostensibly extending throughout the statute texts, no basic change of orientation or a modulation of the representative system can be noted in the existing model of democracy, with substantial progress in openness to forms of direct and participatory democracy. The cases of Andalusia and Catalonia are those which, in comparative terms, feature greatest citizen intervention in public affairs.

3.3. Popular consultations in the autonomous communities

Along with rights, the most novel and controversial aspect of participation in all the statutory reforms concerns the widespread reference to "popular consultations". The system differs from statute to statute. Popular consultations usually appear as a right and competence of the autonomous community[XV]. The statutes of Catalonia (Art. 29), the Balearic Islands (Art. 15.2 c), Andalusia (Art. 30) and Castile-Leon (Art. 11) seem to consider it as a "right to promote popular consultations" within the right of participation, as already indicated[XVI]. But most statutes normally include a specific competence or power of the autonomous community on popular consultations. This is an *exclusive* competence in the statutes of Catalonia (Art. 122), Andalusia (Art. 78), Aragon (Art. 71.27) and Extremadura (Art. 9.1.50). In the other reformed statutes (Art. 50.8 Valencia, Art. 31 Balearic Islands and Art. 71.1 Castile-Leon) it appears as a competence *shared* with the state, in which the central state has the authority to dictate the basic regulations on the matter. In addition, the latter statutes expressly mention the reservation of the organic act on

referendums of Art. 92.3 SC. So for example, Art. 71.15 of the statute of Castile-Leon contains the competence of legislative implementation and execution of the "system of popular consultations in the area of Castile-Leon, in conformance with the provisions of the law referred to in article 92.3 of the Constitution and other laws of the state". Therefore the reference to the Organic Act on referendums and indirectly, to the Organic Act of the general electoral system, forms the framework for the autonomous community's competence. Although in Catalonia and the other ACs cited earlier, this is not invoked, the autonomous legislator's compliance with these laws is due, in my opinion, to the fact that it is the laws which implement the fundamental right of Art. 23.1 SC. Quite another matter is considering the reference to Art. 92.3 SC as a dubious provision, since this constitutional precept refers to "the different types of referendum envisaged in this Constitution", among which autonomous and municipal consultations certainly do not figure[XVII].

The most important aspect of the provision for popular consultations in the statutes is the literal heterogeneity of their scope in each statute. The point at issue is deciding whether or not popular consultations include referendums. While the Balearic Islands and Valencian statutes have nothing to say on this aspect, the others do so in two different ways.

First, the Catalan statute when referring to popular consultations mentions "surveys, public hearings, forums of participation and any other instrument of popular consultation, with the exception of the provisions of article 149.1.32 of the Constitution" (Art. 122 EAC)[XVIII]. It therefore expressly cites forms of participatory democracy but has nothing to say on referendums, a fact which has created great controversy. The question is whether or not the referendum is included in the final words of Art. 149.1.32 SC, which means it sets aside the "authorisation of the summons" due to the central State[XIX]. The exclusive competence of the *Generalitat* [Catalan government] as regards popular consultations includes literally "establishing the legal system, types, procedure, organisation and calling by the Generalitat itself or local bodies, within the area of its competences".

Second, the Andalusian and Aragonese statutes expressly exclude the referendum via popular consultations (Art. 78 S.And and Art. 71.27 S.Ar: "with the exception of regulation of the referendum and the provisions of article 149.1.32 of the Constitution"; after declaring this exception for the referendum, it does not make sense to say that

authorisation is limited to the State)[XX]. In these statutes, popular consultations refer only to the instruments of participatory democracy (forums, hearings, etc.)[XXI]. The same occurs in Extremadura, whose statute adds that consultations shall not be binding. We understand that this norm on the consultative nature of referendums may be generalised to all statutes, and concerns the homogeneity of the referendum in the autonomous ambit with the constitutional model of Art. 92 SC (LÓPEZ BASAGUREN, 2009, 232 ss).

The statutory regulations of popular consultations therefore differ as regards the subjects who may legitimately sponsor them being called and the type of consultations that can be held. In the Valencian Community and the Balearic Islands, citizens may not sponsor calling popular consultations, but there is no exclusion of the form of referendum (on institutional initiative[XXII]); in Andalusia, citizens may sponsor consultations but not referendums (also excluded in Aragon and Extremadura), and in Catalonia and Castile-Leon, citizens are also allowed to organise consultations, without literally excluding the referendum.

The Constitutional Court has resolved the issue of the type of consultation allowed due to the challenge by representatives of the People's Party on the legitimacy of the Catalan statute's regulating popular consultations. In Decision 31/2010, 69, applying the doctrine established in Decision 103/2008, it goes one step further in the restriction of consultations. It completely excludes the possibility of ACs being able to call popular consultations via referendum, arguing that the State competence of "authorisation" of these consultations (Art. 149.1.32 SC) covers the whole institution of the referendum, and not only its authorisation, as could be inferred literally from Art. 122 of the Catalan statute. This has been justified by the lack of express provision either in the statute or above all in the Organic Act of referendums (CASTELLÀ, 2011, 197 ss; AGUADO, 2011, 389 ss. is more restrictive towards this concept)[XXIII]. As regards other types of consultation which may fall into the category of participatory democracy, Decision 31/2010 considers them legitimate, but subject to State regulation under Art. 149.1.18 SC (shared power).

Up to now, few ACs have legislated for the implementation of the statutory precepts discussed. Some have opted for the implementation of public policies without having recourse to law (Aragon and Catalonia on the issue of participatory democracy)[XXIV]. Two legislative lines can be noted. On the one hand, the Catalan Parliament has undertaken the regulation of popular consultations via referendum in the Catalan and

municipal ambit in Act 4/2010[XXV]. After Decision 31/2010, the law has been left without constitutional protection, at least as regards referendums at regional level. In addition, the president of the Spanish cabinet lodged an appeal of unconstitutionality against this law on 25 December 2010. The Council of State issued a report favourable to lodging the appeal in relation to regional referendums and, as regards local referendums, objects to municipal popular consultations being considered referendums[XXVI]. The preamble of the law indicates that the objective is "to encourage participation and increase the quality of democracy by promoting the implementation of mechanisms of citizen participation, to bring the administration closer to its subjects". As has been noted, other popular consultations have not yet been regulated in law.

The Valencian Community followed a different path, approving a law of citizen participation (Act 11/2008, of 3 July) which focuses on the instruments of participatory democracy (citizen hearing, forums of consultation, citizen panels and citizen juries), the participatory rights of Valencian citizens, and measures for promoting participation, but excluding popular initiatives (regulated in another specific law) and consultations via referendum, since the statute does not allow for them at autonomous level. This is the first law approved by an autonomous community which attempts to provide an overall solution in the field of participation across the Valencian administration, although many of its precepts require regulatory implementation to become fully effective. The Valencian statute currently being implemented, as we have seen, alludes to the objectives of the Valencian Community as the reinforcement of democracy and the guarantee of participation (Art. 1.3) and, under rights, the right of participation (Art. 9.4). As the preamble states, the law aims to achieve "an active, responsible and participatory citizenry, in other words, a civil society organised into citizen organisations which make proposals and collaborate with the public institutions in their application". This is the path followed by the Canary Islands, which has not reformed its statute (Act 5/2010).

Finally, the present nationalist Catalan government (CiU) has presented a draft bill to the Catalan Parliament on popular consultations not held by referendum, pending approval as I write. This is a "third way" between referendums and the types of participatory democracy cited by Art. 122 of the statute. In fact it closely resembles the referendum in that it involves a generalised summons of residents of legal age on the voter's register in Catalan municipalities, thus avoiding the need for authorisation by the

State (according to Art. 149.1.32 SC). This is a grey area, and there is some doubt as to whether it complies with constitutional doctrine on the matter, as also is the municipal popular consultation, not formally called a referendum. In this case, however, authorisation to call it must be requested from the State government (Art. 71 Basic Law on local government).

3.4. Popular participation in the reform of the statutes

Some statutes have also introduced provisions which allow for holding a referendum at the end of the procedure of approval of the statutory reform. Up to the statutory reforms of the last decade, this referendum of ratification was limited to ACs in the special system. Under Art. 152.2, the Constitution imposed a referendum whatever the scope of reform, parallel to arrangements for its approval. Now this also includes the statutes of the Valencian Community, Aragon and Extremadura, but with a more flexible regulation than in their precedents. In Valencia a referendum may be omitted if the reform merely extends competences (Art. 81.5)[XXVII]. In Aragon, however, a referendum is only called if 2/3 of the Aragonese Parliament so requires (Art. 115.7). The same occurs in Extremadura (Art. 91.2).

In its Decision 31/2010, 147, the Constitutional Court makes a passing reference to the legitimacy of the statutes of ACs in the ordinary system incorporating a reform referendum, allowing for the possibility in accordance with the freedom enjoyed by the statutes when drawing up the reform procedure (Art. 147.3 SC). For the Court, this type of referendum is different from those mentioned in the Constitution, but it must still be required to comply with the "elementary procedures and formalities" regulated in the Organic Law of referendums of 1980.

Only the Catalan statute also includes the popular initiative for statutory reform (Art. 222.1 a), which has still not been legally implemented. This allows for the inclusion of a significant sector of the electorate (300,000 electors) as persons with legitimacy to propose a reform, in addition to the legitimacy of members of Parliament, the Catalan cabinet and municipalities (and the Spanish Parliament in the ordinary reform of Art. 123).

4. Conclusion

The new statutes include provisions on citizen participation in a more intense form than before the reforms, and follow less closely the types of participation envisaged in the general institutions of the State. On this point, the reasoning of the statutes is closer to the federalism of the American or German systems, which leave more room for participation at sub-national levels. After examining the most prominent characteristics of the new statutes on participation, we may ask if they help to configure a sub-model suitable for a way of exercising democracy at autonomous level which differs from the general arrangements of the State profiled in the Constitution. In the light of the above study, it must be said that the provisions of the reformed statutes do not substantially alter the constitutional model of representative democracy. This is only to be expected, given the substantial homogeneity of treatment of the form of state and government between the different levels of political organisation, often found in Comparative Law and, of course also in Spain. Although more substantial than those normally envisaged in the constitutional ambit for general State institutions, institutions of direct and participatory democracy in the ACs maintain their complementary function and their marginal role in the autonomous systems. We will have to wait for the legislative implementation which has just begun and its practical exercise to form more definitive conclusions.

Each autonomous community has given its own style to its statutory regulations, but they generally fall within the guidelines common to all the statutes reformed in the same period, and tend to reinforce participatory rights and institutions. A result of this is the new types of participation in the legislative procedure and popular consultations (after referendums were excluded by the Constitutional Court), as well as the initiative of statutory reform (in Catalonia). These reforms serve to reinforce the function of encouraging citizen involvement in politics, but decisions are nonetheless reserved to the public institutions competent to adopt them. Referendums on statutory reform processes are intended for ratification. Decision 31/2010 has opted to reject any possibility of regional referendums, except by prior regulation in the Organic Law of referendums (State Law), and with express inclusion in the statutes. This has limited the field of autonomous development in the types of participatory democracy. It has also provided a more uniform reading of the differing potential of each statute.

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

[I] We refer to Organic Act (OA) 1/2006, of 10 April, of reform of Organic Act 5/1982, of 1 July, of the Statute of Autonomy of the Valencian Community; OA 6/2006, of 19 July, of reform of the Statute of Autonomy of Catalonia; OA 1/2007, of 28 February, of reform of the Statute of Autonomy of the Balearic Islands; OA 2/2007, of 19 March, of reform of the Statute of Autonomy of Andalusia; OA 5/2007, of 20 April, of reform of the Statute of Autonomy of Aragon; OA 14/2007, of 30 November, of reform of the Statute of Autonomy of Castile-Leon; and OA 1/2011, of 28 January, of reform of the Statute of Autonomy of Extremadura. OA 7/2010, of 27 October, of reform of LORAF of Navarre, is a partial reform and unlike the above, does not contain a dogmatic part.

[II] Unless otherwise indicated, italics are the author's.

[III] In Art. 10.3 Andalusia also maintains a long list of 24 "basic objectives", as in the earlier statute of 1981, although now the first section of the statute adds rights and guidelines on practically the same legally-protected rights as objectives, and that are seen above all in the deployment of the social principle. No other reformed text except for the Valencian statute has maintained such objectives.

[IV] Popular consultations are not provided for in LORAFNA (Navarre), but this "Comunidad Foral" [regional community] regulated them by a law ("Ley foral" 27/2002).

[V] Except in the Valencian statute, which only includes some more or less generic references to the right of participation based on variations on the formulas used in Art. 9.2 SC and Art. 23.1 SC (and Art. 9.4 S. CV) and transforms the norm of principles of Art. 9.2 SC into a right. The statute of Extremadura also views the right to participate in public issues directly or through representatives generically and separately from the right of petition (Art. 6, S. Ex).

[VI] The right to participate in drawing up laws appears in Arts. 29.4, 15.2 S. IB, Art. 30.1 and 113 S And, and Art. 15.2 S. Ar.

[VII] In Catalonia (Art. 30), Andalusia (Art. 31), and Castile-Leon (Art. 12), with diverse contents. Outstanding for its clarity is Art. 31 of the Statute of Andalusia. On this issue, see EXPÓSITO and CASTELLÀ, 2009, 85 ss.

[VIII] Decision 31/2010 substantially follows Decision 247/2007, although it does not expressly indicate which rights are strictly speaking subjective and which are directive norms or norms of principle.

[IX] Arts. 26.2 S. CV, 62.1 S.AC, 47.3 S.IB, 111.2 S.And, 42.2 S.Ar, 25.2 S.CL, 23.4 S.Ex (the most exhaustive in the regulations: number of signatures) and 19.1 LORAFNA. Normally also regulates the initiative of town councils. Some statutes still include a clause which was customary in the previous statutes, by which the popular initiative is regulated within the framework of the provisions of the Organic Act which implements Art. 87.3 SC (as in Andalusia, Castile-Leon, and Navarre). In the others, this clause disappears, extending the scope of autonomous regulation.

[X] Either as a mandate for promotion of effective equality between men and women in access to representative mandates in Castile-Leon. Or more importantly, as a requirement that the electoral law must establish for drawing up electoral lists (Art. 56.3 S.C and Art. 105.2 S.And). Both statutes also allude to gender equality in relation to other institutional appointments and designations (Art. 107 S.And) as regards directive organs of the Administration (Art. 135 S.And), in very similar terms to the Catalan statute. On the restricted scope which the Organic Act on the general electoral system leaves for the ACs for establishing elements of the electoral system like the minimum barrier, see Gavara, 2007 and Oliver, 2011.

[XI] In the case of the electoral law, this is a special law which requires approval by a qualified majority of MP (2/3: in Catalonia, Balearic Islands, Valencia; 3/5 in Extremadura; and absolute majority in Andalusia and Aragon. In Castile-Leon nothing is said).

[XII] In Catalonia, current regulation of the popular legislative initiative is by Act 1/2006, approved shortly before the statute. This law deals with the popular initiative in wider terms, both as regards the legitimate subjects (over 16 years of age, residents, small number of signatures required: 50,000), and the powers of the sponsors (presentation in the plenary session of parliament, right to withdraw if it departs substantially from the initial proposal). We understand that the reduction of age to 16 and the extension to residents infringes the doctrine of the Constitutional Court on Art. 23.1 SC, which includes the popular initiative within the ambit of fundamental right, so restricting its holders to citizens in the strict sense. Conversely, it defends its compliance with the Constitution Larios, 2008, 189.

[XIII] The statutes usually mention principles of action of the administration, among which is transparency (Art.

62.3 S.Ar). In Andalusia, the statute which devotes most attention to the issue of participation, expressly mentions a system of evaluation of public policies (Art. 138 S.And) and the forms of participation in administrative procedure and access to the administration (Art. 134). See Pérez Alberdi, 2008, 190 ss.

[XIV] The statutes frequently mention participation when referring to different sectors, whether as rights or, above all, as guiding principles. For example, the elderly and young people (Art. 10.3 S.CV and Art. 16.3 S.IB), members of the educational community on school and university matters (Art. 26.6 S.IB), or consumers (Art. 17.2 S.Ar). There are more general references to encouraging social participation, associative and voluntary organisations (Art. 43 S.C, 16.24 S.CL) and the promotion of social participation in drawing up, carrying out and evaluating public policies (Art. 15.3 S.Ar).

[XV] Conversely, the Valencian statute incorporates them in the chapter on institutions of government, by mentioning the competences of the President of the Autonomous Community "in the ambit of the Valencian Community, on questions of general interest on autonomous or local matters" (Art. 28.5).

[XVI] On its passage through the Lower House of the Spanish parliament, an addition was made to the right to propose popular consultations of Art. 30.1.c) of the Andalusian statute: "in the terms established by law"; and a reference was added to Art. 149.1.32 SC in Art. 11.5 of the Castile-Leon statute. Curiously, the proposal of the Balearic Island statute, approved by the island Parliament, had no article on the rights of participation: Art. 14 in its entirety was added in the Spanish Lower House.

[XVII] An issue emphasised by Lasagabaster, 2008, 66 ss. After the reform of Lorafna of 2010, Navarre still does not mention this, although it does regulate municipal consultations in an ordinary law.

[XVIII] The final words of Art. 122 Catalan statute, which refers to the exception of Art. 149.1.32 SC, was introduced in the Spanish lower house, and did not appear in the original text approved by the Catalan Parliament.

[XIX] More clearly showing favour to the admission of the referendum as a consultation is the Statute of Castile-Leon, whose Art. 71.15 concludes by indicating that "it is the latter [the State] which is responsible for authorising the referendum to be called" and Art. 11.5 states the limitation of Art. 149.1.32 SC. The Balearic Islands statute does not expressly exclude the referendum either (Art. 31.10) and it is limited to the municipalities in the Valencian statute (Art. 50.8). Also these latter cases mention the State regulatory framework of the law of Art. 92.3 SC and the limit in competences of Art. 149.1.32 (Balearic Islands) and 149.1.18 (Valencia).

[XX] In the proposal approved by the Parliament of Andalusia, the then Art. 76 (corresponding to the present 78) included a first paragraph which, without mentioning it, enabled referendums to be held as long as in compliance with Art. 149.1.1 and 32 SC. This paragraph was eliminated in the Spanish Lower House, and the second paragraph was left as the only content of Article 78. Art. 111.3 of the Andalusian statute refers to the law on the regulation of the types of popular consultation "for matters of special importance for the autonomous community". Note how the Andalusian statute of 1981 permitted municipal popular consultations (Art. 15.2). The draft statute approved by the Aragonese Parliament did not expressly exclude referendums either, but on the other hand it does so in the definitive statute approved by the Spanish Lower House (Art. 71.27).

[XXI] It should be appreciated that the popular consultations provided for in all the reformed statutes except the Valencian refer both to the autonomous and the local ambit. They do so by express reference to both (Catalonia, Andalusia and Aragon) or by a generic formula which includes them. Only the Valencian statute envisages the competence of legislative implementation and execution of the Generalitat [Valencian government] to regulate *municipal* popular consultations" 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", excepting in all cases the State's competence to authorised them being called (Art. 50.8). The reference to the Organic Act of referendums is surprising, since its Additional Provision expressly excludes its application to municipal consultations. Conversely, in the Valencian statute nothing is said in the chapter on competences about popular consultations in the autonomous area.

[XXII] In the Valencian Community this means only the president; in the Balearic Islands this means the cabinet, the Island councils and town councils (Art. 15. 2 c).

[XXIII] See also the paper by Martín in this monographic issue.

[XXIV] See the paper by Tur in this monographic issue.

[XXV] At autonomous level there is only one precedent of legislation of consultation via referendum, regulated very succinctly in the standing orders of the Canary Islands Parliament (Art. 198).

[XXVI] Resolution 1618/2010, of 16 September.

[xxvii] This exception was introduced in the Spanish Lower House.

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Legislative initiative and popular participation in the 1948 Constitution and its transposition in the first generation

by

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Abstract

The instruments of people's participation found in the "first generation" Statutes (1971) were initially perceived as a further possible link between politics and civil society, in line with the overall favourable opinion that was attributed to people's participation mechanisms in every field of social life in those years.

However, Regions thwarted the hope that people's participation instruments would become a second channel of participation in politics. The instruments described in the State model did not ensure the results hoped for and political parties remained the main way of participating in political life.

At the beginning of the Nineties, the Public Administration proceedings were amended and some instruments of citizens' participation were introduced. These changes influenced the future discipline of legislative proceedings.

After the first reform of Title V of the Constitution (1999), the new text referring to art. 123 described the instruments for regional people's participation as the previous one had done but the other significant changes introduced by the constitutional reforms in 1999 and 2001 permitted this norm to be interpreted differently. The difference may be based on three grounds: 1. the new presidential form of government, which implied research into closer links between Government Bodies and civil society; 2. greater legislative powers assigned to Regions, giving those Bodies more power to exert their influence on citizens' lives; 3. "disaffection" with politics, as participation in the legislative process might become an alternative channel to traditional political representation.

Therefore, in the "second generation" Statutes, instruments of people's participation were described as "broad concepts" or as instruments strictly linked to their purpose.

Regional norms encourage legislative initiative (provided that technical assistance for those who are promoting a law project is free, the costs sustained for collecting signatures are not charged to promoters, people's legislative projects do not lapse at the end of legislation, some promoters are allowed to explain the project to the Regional Council, and if the project has not been discussed by a precise day, it is automatically

registered in the agenda of the Regional Council). The limits of that instrument consist in: 1. a number of issues where the initiative cannot be exercised; 2. a minimum number of signatures are requested.

Despite the guarantees mentioned above, people's legislative initiative has not been exercised a great deal. This is mainly due to the fact that the norm found in most of the related provisions foresees that the Council cannot amend the projects presented by promoters.

However, the new Statutes guarantee other forms of people's participation in legislative proceedings, such as cognitive hearings, preliminary investigations, the opportunity to propose issues of great interest to the Council and the Registers of Associations, which are gaining considerable success.

Another way of participation consists of establishing Bodies representing the economic or social parts of society but their implementation has been very unassuming up to now.

To sum up, there are two models of people's participation: the first one, comprising the initiative, is based on the principle of separation; the second one, comprising the other instruments, is based on the principle of integration/concerted action. The Constitutional Court has recognized the importance of the statutory provisions that refer to people's participation institutes, therefore asserting their "juridical" nature

Key-words

legislative initiative, popular participation, Italy, regional system

Preliminary Remarks

The "first" regional statutory events in 1971 produced a time of hope for public participation institutions.

It was expected that the statutes would create links between political and civil society, with the essentially representative form of the regional government structure and thanks to a provision of the Constitution that provided ample opportunities for implementation in such terms. Moreover, article 123, par.1 of the Constitutional law provides that *"The statute defines the exercise of initiative and of referendum on regional laws and regional administrative decisions"* hence making provisions for popular votes. In fact we know that legal theory considered this passage as the clearest evidence of the originality in the approach of the Constitution, indicating the expectation that the future statutes would deliver a meaningful response and signifying the need for the links the new political entities (Regions) were to create with local communities. Against this backdrop, nascent Italian regionalism faced the challenge of drafting statutory charters that would provide an answer to the participation and emancipation expectations that had arisen during the 1968 revolutionary movement and were the basis for the country's political and institutional debate (Barrera 2006: 117). It was a time in which "the main elements of the constitutional republican edifice" all "unfroze" simultaneously. These were the years during which elections were first held in the "ordinary" regions and the Law on referendums was adopted. The subsequent political events – the first memorable referendum on divorce in 1974, the regional elections in 1975 and the political elections in 1976 – highlighted the new political mood the Nation was experiencing.

During those same years, in other but equally important areas, ordinary legislation aimed to extend the principle of participation to all areas of associative life: from schools (with the introduction of parent and student participation in the school bodies) which until then had been the prerogative of teachers only, to districts in large cities (where representative political assemblies were established), to work places (with trade union representation in all workplaces) and, keeping to the best known instances, to the

organisation of healthcare, actually introducing the principle of City Councils taking on the role of administrating the health service.

In the early 70s the climate was unquestionably favourable to seizing the constitutional invitation to endow regional statutes with institutions that might act as bridges between political and civil society. In such a context, "Planning" and "Participation" were seen to be the two pillars of a new form of governance (Paladin 2004: 251). In essence, the notion of participation could be understood schematically yet effectively as an opportunity to establish new channels that might integrate traditional political representation.

Unquestionably, as has been well explained, this climate changed with the appearance of terrorism (Barrera 2004: 119). However it is also true that the Regions fell short of their expectations. The statutes remained confined to the model of weak participatory institutions provided for by the Constitution and by state legislation. One of the most convincing explanations, according to legal scholars, is that " <...> the regional political class was still unsure about its own identity and its potential to establish itself as a socio-political entity that might have some level of autonomy from the political class at a State level. Hence there was little stimulus for it to promote forms of debate with public opinion at a regional level. In any event, in a context where there was little understanding of the special value of 'regional politics', such a debate would not have been of much benefit in terms of gaining direct visibility at national level" (Luciani 2005: §1).

In other words, the national parties (and the national trade union associations) kept a firm grasp on the participatory channels in a context in which political presence was perceived as being mediated only by those entities which, thanks to their strength, could achieve the promise of the constitutional revolution provided for under art. 3, paragraph 2 of the Constitution, the promise of substantial equality (Caretti 1972: 485). The call for "*effective participation of workers in political, social and economic activities*", contained in art. 2 of the 1971 Calabria Statute, is emblematic in this respect.

In other words, the aforementioned statutes lacked one essential condition for public participation, what political scholars have defined as the "outcomes of participation", in other words a reasonable belief in the successful outcomes of initiatives undertaken by individuals for whom such participation is intended.

Petitions, legislative initiatives and referendums have never been considered as capable of assuring sufficiently effective outcomes to justify their adoption by the social entities for which they are intended: in other words instruments whose use might be warranted by the effectiveness of their outcomes.

Hence one can easily grasp how the public participatory channels provided for by the 1970 statutes soon shifted away from the original model, which linked them closely to the Regional Councils, the assemblies providing direct representation to local communities. In other words it is not difficult to appreciate why the preferred interlocutors chosen by single citizens and social and economic stakeholders became instead either the regional Juntas of the regional administration in its entirety.

1) The 1999 and 2001 Constitutional Revisions: the same "text" but a different "context"

What was subsequently and rather unfairly defined by some as "participation euphoria" (Cuocolo 2003: 314) soon died out, leading to the establishment of faded political participatory institutions at a local level.

However, it was only the later round of reforms, in the early nineties, that substantially affected local authorities (City Councils and Provinces), once again focusing on the participation issue, albeit in the field of administrative procedures. It was during this period that models for the participation of individuals in the decision making process of public administrations were introduced, and such models were to change not only the actions but also the actual "features" of local government administration. As we will discuss later, it is precisely some of these institutions that some of the Regions have recently taken into consideration in re-shaping their own political participation institutions and more specifically participation in the legislative process.

On the strength of the changes achieved at a local level (mainly municipal), it had been expected that the "second" statutory season, which started with the 1999 – 2001 constitutional reforms, would be extremely incisive and better able to keep the promises that the first statutory round had not fulfilled.

Despite analogies with the previous formulation, the specific content of the statute in the reformulated article 123 of the Constitution ("*The statute regulates the exercise of the right of initiative and referendum with respect to Regional laws and administrative procedures and to the publication of regional laws and regulations*") should be considered in today's different setting. While prior to 1999, the statute established "*the provisions for the internal organization of the Region*", today it "*determines the form of government as well as the fundamental organizational and operational principles*".

Even though the text is basically similar, it is today's context for legislative initiative (and, generally speaking, for public participation in legislative processes) that makes the difference. There are at least three factors that could have a significant effect on its revitalisation.

The first factor, as far as the form of government is concerned, is that the clear presidential option, and hence the extensive powers conferred upon the regional government, together with the majority electoral system, requires a re-balancing of political representation (Rivosecchi 2006: 126). In other words the Regional government should be creating room for the variety of instruments that can strengthen its ties with regional political society, both through the direct representation provided by the parties in the Regional Council, and also through channels outside the Regional Council that can provide more appropriate representation of other interests.

The second factor pertains to the greater legislative power conferred upon the Regions through the 2001 revision of Title V. Today, more than in the past, legislative initiative and public participation in regulatory processes may prove of interest to regional society as a whole, since it is able to relate to concrete interests more than in the past.

The third factor is the generalised and increasing "disaffection" with politics in our country. In this respect, like it or not, participation in the legislative process could become a channel that would no longer be just an adjunct but would be a real alternative to traditional political representation.

2) The "second generation" statutes – public participation in the legislative process

In view of the above-described context, one comes to realise why several statutes confer upon public participation what has been defined as "[...] a broad meaning [...]" (Luciani 2005: §4.1).

Hence, under article 15, the Emilia-Romagna statute provides that:

1. *The Region, within the scope of its constitutionally recognized powers, acknowledges and guarantees the right to participation, provided for by the present title, to any person residing in a municipality within the region, including the right to vote in referendums and in other forms of popular consultation.*
2. *The Region acknowledges and encourages the autonomy of democratic forms of associations and self-management and assures any organizations that express widespread or collective interests the right to publicly disseminate and exchange opinions on topics of regional relevance, through appropriate consultation mechanisms;*
3. *Any stakeholder of general or private interests, as well as diffuse stakeholders representing widespread interests in associative form, to whom an act of the Region may cause harm has the right to intervene in the process of formulating such an act, according to the procedures established by the Statute and by the regional laws.*

In the Calabria statute too, article 4 reads:

The Region encourages the participation of individuals, of social and political entities, of all the components of the Calabria community, and of Calabrian communities worldwide, in the life of regional institutions, so as to achieve a state of full democracy and the civil development of its population." (paragraph 1) and *"In order to achieve the above, the law establishes the necessary procedures and criteria for participation to be effective, also assuring services and regional structures and providing for consultation with entities that represent diffuse social requests"* (paragraph 2).

The wording here depicts a truly broad form of participation, a generic participation in the "life" of institutions and an openness to "consultation" with civil society.

On the other hand, the approach that has been defined as "restrictive" (Luciani 2005: §4.1), consists in shared participation in public decision making processes and entails accepting responsibility for public decision making.

Article 72 in the Tuscan statute reads:

The law promotes (…) the participation of citizens, residents and organised social players in different forms: as an independent initiative submitted to an administration, as a voluntary, proactive contribution to regional initiatives, as an instrument to take part in the formal stages of consultation, as a contribution in the evaluation of the effects of regional policies.

Furthermore, article 20 of the Umbria Region statute states that: "*In order to create new opportunities for direct democracy and social inclusion, the* Region *ensures the recognition and participation of individual citizens and their associations, in the exercise of the legislative, administrative and governance functions of regional bodies and institutions*" (paragraph 1) and that "*participation is achieved through legislative and referendum initiatives, through the right to petition and to consultation"* (paragraph 2); as well as article 72, paragraph 1 in the Piedmont statute, which reads:

The following are to be considered as participation institutions:
a) popular initiatives;
b) local authority initiatives;
c) abrogative and consultative referendums*;*
d) questions to regional bodies, addressed by local bodies, trade unions, regional or provincial professional associations;
e) Petitions submitted by individual citizens, bodies and associations.

Lastly, article 8, paragraph 2 of the Lombardy Statute states that "*The Regional Council and the Junta, within their respective spheres, shall consult stakeholders' representatives on regulatory texts and programming instruments with particular concern for measures that produce financial effects"* and article 50, paragraph 4 reads *"any person who resides in Lombardy may, individually or as an association, present a petition to the Regional Council requesting it to act on matters of general interest".*

Basically, the approaches that may seem to be the most restrictive in actual fact are not, as they present the strictly institutional terms of the issue, thus linking the end (the democratic growth of the regional community) to the means (*stricto sensu* the participatory institutions).

We shall now attempt to understand the regulatory impact and participatory "outcomes" these instruments have delivered so far.

3) Popular legislative initiative in the statutes of ordinary Regions; many favourable provisions, few limitations and conditions

In reading about the provisions for legislative initiative (both the statutory and the legislative rules, to which the former make reference), such an instrument would appear to be the "primary instrument" for popular participation in the legislative process.

Many favourable rules therefore do exist and should lead to encouraging the use of such an instrument. First of all, there is a provision established by all the Regions, that assures technical assistance free of charge, enabling any citizen intending to present a popular initiative proposal to require the assistance of the appropriate Regional office in drafting the texts. They may also request any useful data for the drafting of such a proposal[I].

Secondly, the promoters shall not incur any expenses for the collection of signatures: Regions generally commit to refunding them, if so requested and provided that the bill has been declared admissible, in other words that it does not relate to one of the matters excluded by statute from such initiatives[II].

Thirdly, a further important and favourable rule has been incorporated by all the Regions; according to this provision, popular initiative legislative proposals cannot lapse at the end of the legislative period (as instead occurs in the case of any other legislative proposal) and, therefore they do not require re-submission to the newly appointed Regional Council[III].

Fourthly, the Advisory Commission, tasked with examining the legislative proposal, is required to inform its presenters of the date on which its discussion will start: presenters are entitled to intervene in the discussion, to illustrate the proposed legislation and to present relevant reports and documents.[IV]

Lastly, should the proposal not be examined, or in the event a decision has not been taken within a specific time limit (ranging from three to six months, depending on the Region) the proposal will be entered de jure into the agenda of the Regional Council and it shall be discussed during the first Council session that follows the date on which the period expires, and it shall have precedence over any other item of business.

In contrast to the above, not many restrictions have been applied to such legislative initiatives. Most Regions provide for a minimum number of supporters (from 3,000 to

10,000 according to the total population)[V], moreover there are issues for which legislative initiatives are prohibited. Despite some differences between Regions, the following is a list of the issues to which such prohibition applies[VI]:

a. tax and budgetary laws;
b. statute reviews;
c. approval of regional plans and programs;
d. laws relating to the organisation of regions and the financial status of their employees[VII];
e. electoral laws;
f. laws that ratify agreements with foreign States and territorial entities in other States or other Regions[VIII];
g. laws restricting land and environment use[IX].

The same restrictions apply to legislative initiative at a state level with one proviso: proportionally, the number of sponsors required at a regional level is higher (50.000 at state level and 3-5000 at regional level) and even disproportionately higher, as in the case of Lazio (10.000!).

Thus the regional situation confirms what we already know about popular initiative at a state level: as things stand one can hardly consider the above described initiative as a popular initiative, in the sense of an initiative freely taken by each of the 3, 5 or 10,000 citizens. Such an initiative is more feasibly undertaken by political parties (or ideologically based associations) which deal with gathering the signatures of individual citizens. On the other hand, this "tension" between direct popular participation and the political mediation of parties or associations is inevitable, as the example of the Tuscan statute proves.

Article 72, paragraph 1, on the one hand, affirms the direct participation of citizens ("*Under the law [...]the participation of citizens is encouraged [...] in different forms: as an independent initiative submitted to the administration, as a voluntary, proactive contribution to regional initiatives, as an instrument for taking part in the formal stages of consultation, as a contribution in the evaluation of the effects of regional policies*"), but immediately after, in paragraph 3, the same provision specifies that "*political parties are fundamental instruments for participation* ".

This may be understandable in terms of state-level politics; it is less so at a local level where the principle of subsidiarity (which was formally added to the Constitution with the

2001 revision) could have recommended alternative options to enable citizens to achieve a greater closeness to the entity by which they are governed, by the use of request processes better suited to the principle of subsidiarity.

However, over and above this last point that unquestionably does affect the force of the institution, the availability of such an instrument to citizens, either individually or as associations, and the fact it is an institution with significant favourable provisions, creates the expectation that it be accessible[X].

4) The "real" limits of the institution and its poor participatory "outcomes"

In actual fact, the "outcomes" of this instrument are extremely limited.

In the region of Piedmont only one popular initiative legislative proposal has become law; five such legislative proposals were presented during the last but one legislative period, but none of them became law. Not a single proposal was presented during the last legislative period.

The latest Report on the 2008 status of Legislation in the Puglia Region shows that not a single popular initiative bill was presented that year either.

The same is true for Lazio, where the most recently published Report refers to the year 2007. The 2005-2002 reports for the regions of Lombardy and Abruzzo both highlight that not even one popular legislative initiative was presented during the years covered by the reports.

The region of Emilia Romagna Report for same years states that two public initiative bills were presented in 2005, one in 2006 but none were presented in either 2007 or 2008.

As regards Calabria one can infer from the 2005-2009 Report that one popular initiative legislative proposal was presented and adopted.

If we consider the special regions the situation does not change, all the more so because these regions provide less favourable conditions for this institution.

The Report on legislation in Friuli Venice-Giulia shows there were no popular initiative legislative proposals from 2003 to 2009.

The Report presented by the autonomous Province of Trento is even more eloquent. Four popular initiative bills were presented since 1948 but none of them was adopted.
One can therefore wonder why there is such a discrepancy between the provisions that favour the institution and its surprisingly limited "outcomes".

The main reason may lie in the participation "model" embodied in the popular initiative approach, or how it has been transposed into statutes. In actual fact, it is a model that separates the participation circuit from the political circuit, *tout court*.
The real limits of the institution and the main reason for its disappointing results can be found in a provision that would appear to be absolutely consistent with the *ratio* of the institution itself, but can actually paralyze its potential. The provision exists in all the Regions and finds its clearest formulation in the Regional. Law of Tuscany, no. 51/2010: "Rules governing popular initiative legislation".
"*To protect the will expressed by the voters who have signed for a legislative proposal, provision is made for the proposal to be put to the vote in the Chamber with regard to the substance of the original text (within nine months), whereas any possible amendments from the referring Council commission shall be presented separately.*" (Preamble, paragraph 5).

Similar formulations are provided for by almost all the other regional laws that govern popular legislative initiatives:

-"*Proposals are submitted to the examination of the Council with the wording drafted by the applicants*" (article 9 of regional law no. 1/1971 of Lombardy "Rules governing popular initiative for the making of laws and other Regional acts"; article 8 of regional law no. 4/1973 of Piedmont "Popular and local authority initiatives, abrogative and consultative referendums" and article 9 of regional law no. 9/1973 of Puglia "Popular participation in the regulatory activities of the Region");

- "*No amendments may be made to the Commission's proposal not even with the assent of the official Applicant, and it will be submitted to the Chamber as drafted by the applicants, together with any possible amendments presented during its discussion before the Commission*" (article 7 of regional law no. 1/1973 of Veneto "Rules governing popular initiative for regional laws and regulations, regional abrogative and consultative referendums");
- "*In all instances, popular initiative proposals are subject to examination by the Council in the text drawn up by the applicants*" (article 67, statute of Basilicata);

- "*The proposals are subjected to the examination of the Council in the text drawn up by the applicants. Any amendments made by the Commission are provided separately*" (article 12 of regional law no. 13/1983 of Calabria "Implementing measures of the Statute for popular legislative initiatives and referendums"; article 12 of regional law no. 44/1977 of Liguria "Implementing measures of the Statute for popular legislative initiatives and referendums"; article 9 of regional law no. 23/1974 of the Marche "Popular legislative initiative").

On the one hand, the fact that the original text may not be changed shows respect for the wishes of applicants, but on the other hand it is the main reason for which proposals are hardly ever adopted. All laws are the result of political composition and compromise, which are achieved through the opportunity to implement amendments. If amendments are not an option, a legislative proposal has no chance of being adopted.

5) Hearings and consultations: the presence of citizens as individuals or associations in the legislative process

Other important instruments, different from legislative initiative, also exist "within" the legislative process: accepted institutions such as public and other hearings as well as fairly innovative tools introduced recently by several Regions, such as public preliminary inquiries (Emilia-Romagna statute); the possibility of proposing issues of significant interest to the Council. (Emilia-Romagna and Lombardy statutes) and the Register of associations and collective entities to be consulted and/or heard (Emilia-Romagna statute).

With respect to the first of these, article 17 provides that:

1. *In the process of making general regulatory or administrative acts, the adoption of the final provisions may be preceded by a preliminary public inquiry.*
2. *Such an inquiry is held in a public proceeding in which all parties are heard and with the participation not only of the regional Councillors and the regional Junta, but also of associations, committees and groups of stakeholders not representing individual interests who may participate through a spokesperson or with the assistance of an expert.*
3. *The legislative assembly calls a public inquiry, at the request of no less than five thousand persons, and identifies the entity responsible for the procedure.*

4. *The regional law establishes the implementation methods for the public inquiry and the time limits for the completion of each stage and of the entire process.*

It is firstly worthy of note that in the wording of the statutory rules, laws and administrative acts are considered together, as if recognising the substantial assimilation of such categories in routine, general Regional proceedings. But what allows one to grasp the full innovative significance of the regulation is the fact it was challenged by the Government before the Constitutional Court for allegedly infringing the principle of good public administration (article 97 of the Constitution), by prolonging the decision making process.

The Court ruled (decision no. 379/2004) against the Government declaring the challenge to be groundless and considering the choice of the Region to be legitimate. It noted that such a choice creates a "link" between Councils and private entities, noting moreover that pursuant to Community law the reasons for a decision are also a condition for its lawfulness.

As has been clearly explained (Mangia 2006: 9-10), at least 4 elements make it an innovative institution: it introduces an approach that differs from traditional hearings; it is requested by the persons concerned; it establishes an adversarial process between the Council and Junta on the one hand, and the intervening associations on the other; lastly it imposes motivation.

All these terms are well-known in the case of private entities that take part in administrative procedures, but the fact of having transposed them into the legislative process is no small matter, since what ensues is that popular participation may reach the point of obliging the bodies of Regional governance to change their modus operandi (consider the reasons for the legislative act).

The second innovative and interesting feature can be found both in article 50, paragraph 4, of the Lombardy statute (*Persons residing in Lombardy may address petitions to the Regional Council, either individually or as associations, requesting its intervention on matters of general interest)* and in article 18, paragraph 6, of the Emilia statute, in which entities promoting a legislative initiative may moreover, "*present matters of importance to the Assembly, even if in general terms, and present proposals,. The Assembly shall then have six months to examine the matter".*

The third and most recent institution can be found in the Emilia statute, the Register of Associations, provided for by article 19 as follows:

1. *The Region adopts acts and regulations to put into effect the right of associations to participate in the legislative process and to define general policy and position guidelines, striving for equal conditions in the representation of stakeholders and helping to remove any causes that de facto prevent such a right.*
2. *The legislative Assembly regulates the registration procedures and criteria and the keeping of the general Register, articulated by Assembly Commissions, of all the associations that request participation in regional activities under paragraph 1 and whose aims are based on goals of general interest.*
3. *In order to achieve permanent dialogue with associations on the policies and guidelines of their work, the Assembly defines a protocol for consultation with associations, as referred to in paragraph 2. The protocol is an integral part of the Rules of Procedure of the Assembly.*
4. *On the basis of the consultation protocol, each Commission decides what procedures to adopt to inform interested associations and implement their comments and proposals and to convene them in the event of public hearings.*

The notion of a Register is nothing new, but what is really novel is that the statutory requirement states that Council Commissions should draw up a consultation protocol that consequently becomes an integral part of the Council's internal rules of procedure.

6) The reasonably satisfactory participatory outcome of consultation instruments in general

The 2005-2008 Report on legislation in the Emilia-Romagna Region describes the success of these instruments:

"Since the beginning of the VIII legislature, the report on regional legislation has also intended to monitor the level of actual implementation, over the years, of the main instruments for popular participation in the legislative process provided by the Statute, with the intention of furthering democratic participation in regional lawmaking.

• The data [...] shows [...] that public hearings were the most frequently used popular participation instrument during the years in question (as many as 23 were convened in 2007 and 22 in 2008).

• Article 19, paragraph 2 of the Statute that provides for a general Register for associations has also been fully implemented. During the course of 2008, after having set up registration procedures for the associations which had applied within the time limits, the Register was

compiled (following the Presidency Office resolutions no. 143 dated 10 June 2008, and 182 dated 22 July 2008), and articulated into sections which matched the remits of the Assembly Commissions. It initially included 206 associations. A further 26 associations were subsequently registered during the Register update in December 2008 (with Presidency Office resolution no. 260/2008)"[XI].

The 2009 Report on the legislation of the Region of Calabria proves the importance that these participation instruments may have in the preparation of legislative acts, and generally speaking, in the way territorial administrations work:

Instead, with respect to hearings, not only do they have the advantage of being able to provide in-depth technical knowledge but they can also better achieve the principle of democracy by involving social actors in political and legislative decision making. [...] most Commissions have resorted to hearings and the greater frequency in some cases is to be attributed to their specific remit and consequently to the content and consequences of the provisions that have been adopted.
The First Commission held a hearing with the representatives of ABI regarding a draft act on "The establishment of a register of banks for the Calabria region.

The Second Commission allowed time for hearings not only when the draft budget act was being examined, but also when proposals for other laws or administrative provisions were being discussed. More specifically, during the discussion of the budget, a total of 19 hearings were held with representatives of professional, practitioners', entrepreneurial, trade union and local associations, as well as with the institutional representatives of boards and foundations: they were given the opportunity to express their positions on issues that concerned them.

A total of 15 further hearings were held during the examination of other draft regulations on farm-tourism, mushroom gathering, the protection of firms and economic development.

During the discussion of the 2009/2010 school sizing plan, the Third Commission heard the competent Councillors from the provinces of Cosenza, Reggio Calabria, Vibo Valentia and Crotone. During the examination of the bill on scientific research and technological innovation, a Professor from the University of Calabria was heard. Regional representatives from Cisl and Uil were heard on the bill to balance the 2008 deficit and on the agreement with the State to balance the regional Health Service deficit.

As far as the Fourth Commission is concerned, reference should be made to the above mentioned public inquiry activities [XII].

In amending regional law no. 33 of 29 December 2004 on "Regulations favouring Calabrians worldwide and on the coordination of external relations", representatives of the Regional Council on emigration were heard by the Sixth Commission, whereas representatives from CNA for artisans and small enterprises from Cassartigiani were heard on opinion 67/8^ that the Commission had to provide on resolution 237 of April 24th 2009 of the regional Junta regarding the "Approval of the implementation directives for aid schemes and incentive instruments to provide regional aid"[XIII].

7) Subsumed participation in participatory "organs": CRELs

Another new popular participation instrument, for which we do not yet have much evidence, is the establishment in some of the Regions of a collegiate body to represent economic and social forces: the CREL or Regional Council on Economy and Labour.
In addition to the Council of local autonomies (compulsory under the Constitution) some Regions have also provided for the establishment of such an entity to act as a representative body of what, in Italy, goes by the name of "functional autonomies" (such as the Chambers of Commerce).

The body that represents social forces has been created in Lazio[XIV], in the Marche[XV], in Sardinia[XVI], in Tuscany[XVII], in Sicilia[XVIII] and in the Valle d'Aosta'[XIX].
In Calabria a body representing the social forces was never created, however it was governed by regional law no. 17/2007 which can now be considered as repealed following the repeal of clause 56 of the statute. In Liguria the CREL was established under regional law no. 16/2006, but it has not yet been implemented, whereas in Piedmont, article 87 of the Statute, which provides for the creation of the body, has not yet been implemented[XX].
The Province of Bolzano does not have such a body either, but in the case of reform or other especially important draft legislation, the legislative commissions often invite the main social forces representatives to hearings. No body that represents the social forces has been provided for in the Province of Trento.

8) Summary: Two "models for popular participation": separation; integration and/or consultation

What emerges from this overview is that we have two models, rather than two institutions:

a) the model in which there is a separation between citizens and Regions: this is basically provided for by the institution of legislative initiative;
b) the model of integration/consultation.

9) Conclusions

National case-law has certainly not given much assistance to the brave. The 2004 decisions (no. 372, 378 and 379) greatly diminished the importance of the statutory innovations, leading to the hypothesis of statutory "non-regulations", statements in the statutes that only appear to be mandatory, and are instead substantially declarative (declarative i.e. general and not regulatory, or even "literary" cultural options).

Criticism brought against this case-law is, in my opinion, rather facile (regulations that reproduce others which take precedence are nevertheless regulations, as constitutional case-law has repeatedly asserted, and in fact often declaring them as unconstitutional; the fact of being mandatory is not necessarily in the nature of being regulatory; – a generic status does not exclude being regulatory, etc.); it is no coincidence that much legal theory has been merciless in this respect, (see in particular Anzon). What deserves to be noted here is that it is precisely in the field of participatory institutions that the Court has considered the issue under different terms, so much so that decision no. 379 in 2004 scrutinized the substance (issuing a declaration of groundlessness and not of inadmissibility due to failure of being regulatory of the scrutinized norms), of article 15, paragraph 1 of the Emilia-Romagna Statute which reads "*The Region, within the scope afforded to it by the Constitution, ensures the recognition of participation rights to any person who resides in a Commune located in the Region, as referred in the present Title, including the right to vote in referendums and in other forms of public consultation*". In this case one may notice, despite the broad approach of the statutory provision, the Court was unable or unwilling to question its lawfulness, and hence

did not judge the issue of constitutional legitimacy contained in the governmental appeal as inadmissible.

[I] Cfr.: art. 38, par 1, R. L. no. 44/2007 of the Abruzzo Region, "Discipline regarding the abrogative and consultative referendum and the legislative initiative"; art. 4, R. L. no. 40/1980 of the Basilicata Region, "Norms regarding popular initiative for regional laws and abrogative referendum"; art. 4 R. L. no. 13/1983 of the Calabria Region, "Norms for the implementation of the Statute about popular legislative initiative and referendums"; art. 18, par 3, Statute of the Emilia-Romagna Region; art. 4, R. L. no. 34/1999 of the Emilia-Romagna Region, "Consolidated norms about popular initiative, referendum and public inquiry", as modified by the R. L. no. 8/2008; art. 3 R. L. no. 63/1980 of the Lazio Region, "Discipline regarding the right of popular initiative and of the Local Autonomies initiative toward the making of laws, regulations and regional administrative acts"; art. 4 R. L. no. 44/1977 of the Liguria Region, "Norms for the implementation of the Statute about initiative and popular referendum"; art. 3, R. L. no. 1/1971 of the Lombardy Region, "Norms regarding popular initiative toward the making of laws and other regional acts"; art. 3 R. L. no. 23/1974 of the Marche Region, "Popular legislative initiative"; art. 15, par. 5, Statute of the Puglia Region; art. 3 R. L. no. 9/1973 of the Puglia Region, "Popular participation in the Region's regulatory activity"; art. 4 R. L. no. 51/2010 of the Tuscan Region, "Norms regarding popular initiative of laws"; art. 6 R. L. no. 14/2010 of the Umbria Region, "Discipline of the participation mechanisms to the regional bodies activities (legislative and referendum initiative, petition right and consultation)"; art. 41, par. 1, Statute of the Veneto Region; art. 3 R. L. no. 1/1973 of the Veneto Region, "Norms regarding popular initiative on regional laws and regulations, the abrogative referendum and the regional consultative referendums".

[II] See art. 48-49 R. L. no. 44/2007 of the Abruzzo Region, "Discipline regarding the abrogative and consultative referendum and the legislative initiative"; art. 9 and 30 R. L. no. 40/1980 of the Basilicata Region, "Norms regarding popular initiative for regional laws and abrogative referendum"; art. 9 R. L. no. 13/1983 of the Calabria Region, "Norms for the implementation of the Statute about popular legislative initiative and referendums"; art. 8 R. L. no. 4/1975 of the Campania Region, "Popular and Local Autonomies legislative initiative"; art. 47-48 R. L. no. 34/1999 of the Emilia-Romagna Region, "Consolidated norms about popular initiative, referendum and public inquiry" as modified by R. L. no. 8/2006; art. 12 of the R. L. no. 63/1980 of the Lazio Region, "Discipline regarding the right of popular initiative and of the Local Autonomies initiative toward the making of laws, regulations and regional administrative acts"; art. 9 R. L. no. 44/1977 of the Liguria Region, "Norms for the implementation of the Statute about initiative and popular referendums"; art. 7 R. L. no. 1/1971 of the Lombardy Region, "Norms regarding popular initiative toward the making of laws and other regional acts"; art. 5 R. L. no. 23/1974 of the Marche Region, "Popular legislative initiative"; art. 4 and 40 R. L. no. 4/1973 of the Piedmont Region, "Popular and Local Autonomies initiative and abrogative and consultative referendum"; art. 7 R. L. no. 9/1973 of the Puglia Region, "Popular participation in the Region's regulatory activities"; art. 8 and 11 R. L. no. 51/2010 of the Tuscan Region, "Norms regarding popular initiative on laws"; art. 68-69 R. L. no. 14/2010 of the Umbria Region, "Discipline of the participation mechanisms to the regional bodies activities (legislative and referendum initiative, petition right and consultation)"; art. 27 R. L. no. 1/1973 of the Veneto Region, "Norms regarding popular initiative on regional laws and regulations, the abrogative referendum and regional consultative referendums".

[III] Art. 47 R. L. no. 44/2007 of the Abruzzo Region, "Discipline regarding the abrogative and consultative referendum and the legislative initiative"; art. 39, par. 4, Statute of the Calabria Region; art. 14 R. L. no. 13/1983 of the Calabria Region, "Norms for the implementation of the Statute about popular legislative initiative and referendums"; art. 53, par. 3, Statute of the Campania Region; art. 50, par 6, Statute of the Emilia-Romagna Region; art. 60, par. 2, Statute of the Lazio Region; art. 11 R. L. no. 63/1980 of the Lazio Region, "Discipline regarding the right of popular initiative and of the Local Autonomies initiative toward the making of laws, regulations and regional administrative acts"; art. 7, par. 3, Statute of the Liguria Region; art. 14 R. L. no. 44/1977 of the Liguria Region, "Norms for the implementation of the Statute about initiative and popular referendums"; art. 9 R. L. no. 4/1973 of the Piedmont Region, "Popular and Local Autonomies initiative and abrogative and consultative referendums"; art. 15, par. 4, Statute of the Puglia Region; art. 14 R. L. no. 9/1973 of the Puglia Region, "Popular participation in the Region's regulatory activities"; art. 35, par.

4, Statute of the Umbria Region; art. 38, par. 4, Statute of the Veneto Region.

[IV] See.: art. 45, par. 2, R. L. no. 44/2007 of the Abruzzo Region, "Discipline regarding the abrogative and consultative referendum and the legislative initiative"; art. 12, par. 1, R. L. no. 13/1983 of the Calabria Region, "Norms for the implementation of the Statute about popular legislative initiative and referendums"; art. 10, par. 2, R. L. no. 34/1999 of the Emilia-Romagna Region, "Consolidated norms about popular initiative, referendum and public inquiry", as modified by the R. L. no. 8/2008; art. 10 R. L. no. 63/1980 of the Lazio Region, "Discipline regarding the right of popular initiative and of the Local Autonomies initiative toward the making of laws, regulations and regional administrative acts"; art. 12 R. L. no. 44/1977 of the Liguria Region, "Norms for the implementation of the Statute about the initiative and popular referendum"; art. 9, par. 2 and 3, R. L. no. 1/1971 of the Lombardy Region, "Norms regarding peoples initiative toward the making of laws and other regional acts"; art. 9, par. 2, R. L. no. 23/1974 of the Marche Region, "Popular legislative initiative"; art. 18, par. 2, Molise Statute; art. 8, par. 1, R. L. no. 4/1973 of the Piedmont Region, "Popular and Local Autonomies initiative and abrogative and consultative referendum"; art. 9, par. 2, R. L. no. 9/1973 of the Puglia Region, "Popular participation in the Region's regulatory activities"; art. 15, par. 3, R. L. no. 51/2010 of the Tuscan Region, "Norms regarding popular initiative referring to laws"; art. 12, par. 2, R. L. no. 14/2010 of the Umbria Region, "Discipline of the participation mechanisms to the regional bodies activities (legislative and referendum initiative, petition right and consultation)"; art. 7 R. L. no. 1/1973 of the Veneto Region, "Norms regarding popular initiative on regional laws and regulations, the abrogative referendum and the regional consultative referendums".

[V] See: art. 31, par. 1, Abruzzo Statute; art. 36, par. 1, let. e, R. L. no. 44/2007 of the Abruzzo Region, "Discipline regarding the abrogative and consultative referendum and the legislative initiative"; art. 40, par. 1, Basilicata Statute; art. 2, par. 1, R. L. no. 40/1980 of the Basilicata Region, "Norms regarding the popular initiative of regional laws and the abrogative referendum"; art. 39, par. 1, Calabria Statute; art. 1, par. 1, R. L. no. 13/1983 of the Calabria Region, "Norms for the implementation of the Statute about popular legislative initiative and referendums"; art. 12, par. 1, Campania Statute; art. 5, par. 1, R. L. no. 4/1975 of the Campania Region, "Popular and Local Autonomies legislative initiative"; art. 18, par. 2, let. a, Emilia-Romagna Statute; art. 1, par. 1, let. a, R. L. no. 34/1999 of the Emilia-Romagna Region, "Consolidated norms about popular initiative, referendum and public inquiry" as modified by r. L. no. 8/2008; art. 37, par. 1, Lazio Statute; art. 1, R. L. no. 63/1980 of the Lazio Region, "Discipline regarding the right of peoples initiative and of the Local Autonomies initiative toward the making of laws, regulations and regional administrative acts"; art. 7, par. 1, let. a, Liguria Statute; art. 1, par. 1, R. L. no. 44/1977 of the Liguria Region, "Norms for the implementation of the Statute about initiative and popular referendums"; art. 34, par. 1, Lombardy Statute; art. 1, par. 1, R. L. no. 1/1971 of the Lombardy Region, "Norms regarding popular initiative toward the making of laws and other regional acts"; art. 30, par. 1, let. i, Marche Statute; art. 1, par. 1, let. a, R. L. no. 23/1974 of the Marche Region, "Popular legislative Initiative"; art. 32, Molise Statute; art. 74, par. 2, Piedmont Statute; art. 1, par. 1, R. L. no. 4/1973 of the Piedmont Region, "Popular and Local Autonomies initiative and abrogative and consultative referendum"; art. 15, par. 1, Puglia Statute; art. 1, par. 1, R. L. no. 9/1973 of the Puglia Region, "Popular participation in the Region's regulatory activities"; art. 74, par. 1, Tuscan Statute; art. 1, R. L. no. 51/2010 of the Tuscan Region, "Norms regarding popular initiative referring to laws"; art. 35, par. 1, Umbria Statute; art. 3, par. 2, R. L. no. 14/2010 of the Umbria Region, "Discipline of the participation mechanisms to the regional bodies activities (legislative and referendum initiative, petition right and consultation)"; art. 38, par. 2, Veneto Statute; art. 1, par. 1, R. L. no. 1/1973 of the Veneto Region, "Norms regarding peoples initiative on regional laws and regulations, the abrogative referendum and the regional consultative referendums".

[VI] The Umbria and Abruzzo Regions, for example, do not impose any restrictions on this subject however, they do foresee that the regional Council must have an absolute majority in some of them (see art. 36, par. 4, Umbria Statute and art. 32, par. 3, Abruzzo Statute). On the other hand, Marche and Molise Regions do not foresee any restrictions on this subject.

[VII] Restrictions foreseen only by the Piedmont Region (cfr. art. 2, par. 1, lett. b, R. L. no. 4/1973 "Popular and Local Autonomies initiative and abrogative and consultative referendum"), Lombardy (cfr. art. 2 R. L. no. 1/1971, "Norms regarding peoples initiative toward the making of laws and other regional acts").

[VIII] Restrictions only foreseen by the Lombardy Region (cfr. art. 50, par. 2, of the Statute).

[IX] Restrictions only foreseen by the Liguria Region (cfr. art. 10, par. 1, of the Statute).

[X] The norm foreseen in the special Regions is much less favorable, explained by the fact that the corresponding statutes (except for Friuli Venezia-Giulia) were drawn up previously, even though a short time

ago, when the Constitution came into force. So art. 22, par. 1, R. L. no. 5/2003, "Article 12 of the Statute of the Autonomous Region of Friuli Venezia-Giulia. Norms relating to petitions, summons and exercising the abrogative, propositional and consultative referendum and peoples initiative of the regional laws" foresees that: "*The proposal, on behalf of at least 15,000 voters, registered in the electoral lists of the towns in the Friuli Venezia Giulia Region, shall be presented, supplied with the signatures of the voters proposed, to the President of the Regional Council*". The Sardinia statutory R. L. no. 1/2008, art. 32: "*2. The projects of the popular initiative shall be undersigned by at least ten thousand voters of the Region. 3. The popular initiatives are definitively approved by the Regional Council two years after they have been presented. They are not subject to lapsing at the end of the legislation. 4. The popular legislative initiatives are not permitted by the fiscal laws and financial statements, on the subject of procedures governing designations or appointments and shall not be exercised in the six months prior to the expiry of the Regional Council* ". The Sicilian Statute states in art. 12, par. 1, "*[...] The people exercise the initiative of the laws by presenting at least ten thousand citizens registered in the electoral lists of the Towns in the Region [...]*", whereas in Trentino Alto-Adige the proposal shall be signed by at least 4,000 voters, except for derogations due to provincial minorities (see. art. 2 R. L. no. 15/1972, "Norms governing popular initiative in formulating regional and provincial laws", as modified by the only art. of the R. L no. 7/1974 and by art. 3 R. L. no. 9/1980). Last of all, as regards the Aosta Valley, art. 1 R. L. no. 19/2003, "Discipline governing the people's legislative initiative, and the propositional, abrogative and consultative referendum, according to art. 15, par. 2 of the special Statute states that: "the popular legislative initiative *shall be exercised by at least five thousand voters of the Regional Towns*".

[XI] See the Emilia-Romagna Region - Legislative Assembly - *Seventh report on the legislation in Emilia-Romagna Region. VIII Legislation – Year 2008*, Bologna, July 2009, in *http://elezioni.regione.emilia-romagna.it/wcm/al/astud/pub/legislativo/index/rapporti_leg/par_VII/Rapporto_FINALE_2008.pdf*, 75.

[XII] "In the IV Commission there were no petitions regarding proposals, but going deeply into different issues. [...] the Commission heard the manager of Trenitalia Cargo Sud on the feared closure of the Lamezia Terme goods station; as well as the Head Compartment ANAS, on the strategies that the former intends to carry out as regards the relationship with Fondi Fas 2007/2009, particularly concerning the intersection of the Serre. [...]". See Calabria Regional Council - Committee for quality and feasibility of laws, *Sixth report on regional legislation. VIII legislation - year 2009*, Reggio Calabria, February 2010, in *http://www.consiglioregionale.calabria.it/hp4/index.asp?accesso=2&selez=pubblicazioni*, 125-126.

[XIII] See Calabria Regional Council - Committee for quality and feasibility of laws, *Sixth report on regional legislation . VIII legislation-year 2009*, cit., 126-127.

[XIV] R. L. no. 13/2006, "Institution and the discipline of the Regional Council for Economy and Work. Abrogation of article 22 of the Regional Law 6 August 1999, no. 14 and subsequent amendments"; on public labor contracts, services and supplies; on the implementation regulation of the R. L. no. 4/2009.

[XV] R. L. no. 15/2008, "Discipline of the Regional Council for Economy and Work (CREL)". The body was actually constituted on the 11 March 2009.

[XVI] R. L. no. 19/2000, "Institution of the regional Council for Economy and Work".

[XVII] R. L. no. 20/2007, "Discipline of the permanent Conference of social autonomies". This body, actually constituted on 6 April 2009, expressed its opinion on DPEF, on Planning for social buildings, on integrated social Planning, on regional agricultural planning.

[XVIII] R. L. no. 6/1988 "Planning implementation in Sicily and institution of the Regional Council for Economy and Work".

[XIX] R. L. no. 70/1994, "Institution of the regional Consulta for Economy and Work (CREL)".

[XX] R.L. no. 43/1994 "Norme in materia di programmazione degli investimenti regionali", is still in force and under articles 20-23 it regulates the establishment of the CREL and details its functions. The articles have not however been implemented. Legislative proposal 322 "Nuova disciplina del Consiglio regionale dell'Economia e del lavoro", which was allocated during the 8th legislature to the relevant Council Commission for examination, together with legislative proposal no. 290, ordered the abrogation, or, where required, the amendment of the above-mentioned articles 43/1994. However, both the legislative proposals came to an anomalous end by lapsing.

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Popular Legislative Initiative in the Autonomous Communities

by

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Abstract

The Spanish Constitution has strict regulations regarding direct and participatory democratic mechanisms (referendum, popular legislative initiative). The Constitution has adopted the most restrictive popular legislative initiative (PLI) model (the final decision of Parliament and with no possibility of referendum) compared to other decentralised countries, where referenda may be held either on legislation arising from a direct popular initiative or a PLI rejected by Parliament. The Autonomous Communities have regulated PLIs with the same reluctance as they have had regulating the Constitution and the Organic Act on Popular Legislative Initiative. As a result of this regulation, citizens rarely use a legislative initiative, and when they do, it hardly ever leads to the adoption of an act

Key-words

popular legislative initiative; autonomous communities; participatory democracy

1. Spanish Citizen's Weak Role in Political Decision-Making

We cannot address the issue of popular legislative initiative (PLI) without taking into account the configuration of our State and its political system, including the Autonomous Communities.

In 1978 the Spanish democratic State was clearly established, as has often been stated, as a representative democracy under party rule , i.e., with the intention of channelling the institutional political representation of citizens almost exclusively through the election of representatives in Parliament within a system clearly dominated by parties and their internal apparatus of power (the D'Hondt system, closed and blocked lists, poor regulation of the internal functioning of political parties). It could be that there was no real alternative, which is not surprising because in the 1970s the establishment of direct democracy was not an option .

Hence, in the 1978 Constitution, despite that which is stipulated in Arts. 9 and 23, the institutions of direct democracy are virtually non-existent. Strictly speaking, the only institution created, the "Concejo Abierto", is rather marginal since it is limited to municipalities with fewer than 100 inhabitants. This is logical, since expanding it would have been unrealistic in a large territory and in a complex state in the late 20th century. However, semi-direct democracy mechanisms, in which the individual does not directly manage public affairs, but rather has the opportunity to approve certain decisions, have also been regarded with suspicion. Referendum, as a prime example of a semi-direct democracy mechanism, is excluded from the legislative level and is limited to political, non-binding decisions. A referendum cannot be initiated by citizens' initiative , but rather the process is controlled by constitutional bodies, which has led to the calling of only two advisory referenda in the last 33 years, in 1983, on Spain's withdrawal from NATO and in 2004, on the Treaty establishing a Constitution for Europe .

Regarding the mechanisms of what could be defined as participatory democracy[I], notably PLIs, the main focus of this paper, their regulation in the Constitutional complex, Organic Act 3/1984, March 26th regulating Popular Legislative Initiative (LOILP), the

Statutes of Autonomy and regional legislation has led to its elimination , since it is not very effective in channelling citizen participation and, when it does, it does not result in an act being approved by Parliament. The Constitutional Court case law has been "restrictive and exceptional" regarding direct democracy (Pérez Luño 2003, 74): "Our Constitution in Art. 1.3 proclaims the parliamentary monarchy form of government or political form of the Spanish State and, according to this premise, it envisages a system of citizen political participation in which the mechanisms of representative democracy predominate over direct participation" (Judgment 76/1994, March 14th).

The extreme exclusion or limitation of direct, semi-direct and participatory democracy has been motivated by the decision made in favour of representative democracy and based on the memory of its past plebiscitarian use in authoritarian times. However, it must be said that the existence of representative democracy does not preclude the proper and continued use of semi-direct and participatory democracy, as demonstrated by countries such as Switzerland, Italy and some U.S. states. Moreover, the argument regarding its use by authoritarian regimes , especially of the referendum, should be questioned. It was not the use of referendum that kept the Franco regime in power, nor was it a mechanism continuously used (Franco held only two referenda : one in 1947 on the Succession Act and another in 1966 on the State Organic Act). In any case, it seems that at the beginning of our current constitutional experience it was better not to take unnecessary risks. In addition, we should point out what has happened in the 30 years after the adoption of the Constitution.

In the analysis of the political system, it is better to start with the Constitution, the constitutional conventions, the practices of constitutional bodies and the unique facts of political life (Requejo 2004; Volpi 1997). No political system can be called the best , but "only the most appropriate to the historical moment and to the cultural, political and institutional context in a given country" (Volpi 1997, 253-254).

In Europe, since 1945 non-parliamentary political systems have been excluded, such as presidentialism, because of past memories of monarchies and fascism, and the parliamentary system has been chosen. However, within this parliamentary system, the rationalised system is the best option (absolutely necessary for reasons of legal and political certainty) although it is unable (Germany, France since 1962) or ineffective (Italy, France

until 1962) in creating governmental stability, because what matters most is the existence of a bipolar system that allows for political alternance.

Within this context, and keeping in mind the 18 failed governments in our Parliamentary Republic between April 1931 and July 1936, , a political system was designed, in which the government was the steering committee of the parliamentary majority and the President of the Government enjoyed strong leadership, which generates a natural alternance (electoral system, simple investiture, constructive vote of no confidence). So far this political system has allowed citizens to choose the formula of government because the electoral system establishes parliamentary majorities, which does not prevent, as has happened in some regions (such as Catalonia and Euskadi), the Executive from being decided as the result of post-electoral agreements in which the citizen has not intervened at all. This was a drag on the configuration of European parliamentary systems resulting from the situation created by constitutional monarchies in the 19th century, which, despite revolutionary vagaries, maintained institutional continuity, i.e., the King lost his powers but did not disappear, preventing people's participation in the executive branch. This situation still exists in most countries with parliamentary systems, leading to the presumption that citizens can only vote in Parliamentary elections.

Moving our discussion to Parliamentary elections, the Spanish citizens are faced with a blocked-list electoral system, in which they have no say, since it is the party machinery that decides everything. This happens in small districts where the proportional electoral system is made to resemble a first-past-the-post system without its benefits (closeness, voter identification with their Member of Parliament) , the only difference being that only the two major national parties (PSOE, PP) have obtained a surplus of the system while the deficit has gone to the minor parties (IU, UPD), and has been neutral for the nationalist parties (PNV, CiU, ERC, CC, etc.) . The latter act as "hinges" in the government stability formula if none of the major parties obtains an absolute majority.

In addition, we should point out the lack of internal party democracy[II], fundamental to channel citizens' political and institutional action . Despite recurring comments on the party crisis , they are still the most appropriate mechanism to channel political pluralism and democratically structure the State's political bodies . Hence the need to further deepen the internal democratisation of political parties and the full force of the constitutional rights of their members, since they constitute the first stage in the democratic political

process. This need for internal democracy has emerged since the advent of mass parties. Without recourse to classic writers such as Michels and Ostrogorsky, on the one hand party bureaucratisation was consolidated during the 20th century, and, on the other hand, the single member currently takes a back seat to public officers (numerous in big parties) and the media activity of the leaders compared to traditional membership based on daily commitment (Carreras 2004, 94).

Since discarded direct democracy mechanisms (discarded either due to their absence or to their strict and restrictive regulation) have excluded citizens from participating in fundamental political decision-making processes regarding the appointment of the Chairman of the Executive and also since political parties lack internal democracy, how will citizens be able to actively participate in democratic political life[III]? This is not the time to develop a detailed programme of action to strengthen democracy, but rather the regulation of the mechanisms provided for in the Constitution (referendum, popular legislative initiative) must be less stringent. More than thirty years after the adoption of the Constitution and the establishment of a stable democratic State in Spain, the use of these instruments should not entail great risk . A popular initiative could be established to call for a referendum, and a popular legislative initiative could also lead to a referendum if the Parliament has rejected or modified the popular bill[IV]. This would be accompanied by a much stronger commitment to the adoption of new technologies to facilitate the expression of citizens' will, regarding both the decisions of the State[V] (cyber referendum on significant social issues [VI]) and decisions regarding the political parties (the electronic primaries). We should also mention that according to studies conducted in the U.S., if the ballot is well-written and campaign financing is transparent, citizens are able to decide according to their own opinion; therefore, in the light of citizen's distrust, the debate could be encouraged and political tensions could be alleviated (Bowler and Donovan 2000, 650, versus Aguiar 2000, 75).

In any case, this desideratum is completely naive as no constitutional reform is likely to come about in Spain in the next years.

Therefore, based on this disheartening portrait of the democratic functioning of the Spanish State, I will attempt to analyse the current regulation of popular legislative initiative, focusing on the regional level.

2. PLI in the Autonomous Communities

The 1978 Constitution, as abovementioned, has adopted the most restrictive PLI model (final decision of Parliament and with no possibility of referendum)[VII] compared to other decentralised countries, where it is possible to hold referenda either concerning legislation resulting from direct popular initiative[VIII] or a PLI rejected by the Parliament[IX].
It is outside the scope of this paper to analyse why we have chosen the model to which we have repeatedly been exposed. However, we would like to point out that the constitutional regulation of PLI has been harshly criticised by most authors, because it "seriously hampers its effectiveness, making it a direct mechanism that is insignificant and ridiculous, I would say" (Marco 2009, 2) and that "the middle path we are on leads nowhere, it is an institution that is obsolete, and has been losing the limited functionality that it could enjoy, so it should either be repealed or should advance and give it full effect" (Marco 2009, 3). Another author claims that the constitutional regulation "limits PLI making almost impossible for it to prosper"(Cabrera 1999, 51), and that "the Constitution has failed to regulate this instrument, it has been emptied to the point of being impracticable" and that it is "an ornamental feature of the Constitution intended to remain anonymous" (Arnaldo 2008-2009, 6633 and 6636).

It is a procedure that requires a very large number of signatures and excludes the most important issues for citizens (fundamental rights, taxes, constitutional reform) . Furthermore, when the necessary signatures have been collected the procedure may be initially rejected by the Parliament in the "toma en consideración" vote. Therefore, at the national level, procedures hardly ever culminate in becoming laws, and at the regional level very few PLIs have borne fruit.

All Autonomous Communities have regulated PLIs in their Statutes according to the jurisdiction provided for in Art. 148.1.1 of the Constitution ("organisation of its institutions of self-government") and in the provision of Art. 147.2.c of the Constitution (the Statute must contain the "organisation" of "its own autonomous institutions"). From this we can infer that the only limits to autonomous self-organisation in matters relating to PLIs should be linked to the basic conditions to exercise the right of participation as set out in the LOILP, restricting it to regional matters and respecting the legal nature of PLIs

in the Constitution (mere proposals subject to the discretion of Parliament). In my opinion, Art. 87.3 presents some constitutional limits, for example, taxation[X], although others are binding in that they could never fall under regional jurisdiction, such as, organic acts, the prerogative of mercy, international treaties and constitutional reform[XI]. The procedural requirements are also not binding (signatures, "toma en consideración", causes of inadmissibility). Therefore, in my opinion, the Catalan statutory reform of 2006 (Art. 222.1.a) allowing proposals to reform the Statute to be included in PLIs [XII] is lawful.
The Autonomous Communities have regulated PLIs with the same reluctance as in the Constitution and in the LOILP (1984 and 2006).

2. 1. Issues Excluded from the Regional PLI

Statutes and regional PLI acts have not only excluded issues that have no regional legislation according to the Constitution (organic acts, mercy, international treaties, constitutional reform), but have also blocked PLIs on a number of issues, such as, territorial organisation, taxation and institutional arrangements. In addition, some Acts have excluded the establishment of rights[XIII], the electoral system[XIV] and the reform of the Statute[XV]. Furthermore, in my opinion, restricting a PLI is objectionable when the case regards an issue in which the Autonomous Community should be subject to the basic acts of the State[XVI] (Aragon, the Balearic Islands, Extremadura), when an act or regulation passed by the same Parliament (Asturias, Cantabria, Castilla-La Mancha) is repealed, or in the case of the Balearic Islands, when, in sharp contrast with Art. 87.3 of the Constitution, PLI is contrary to the supreme values enshrined in the Constitution, self-government, the defence of the identity of the Balearic Islands or the promotion of solidarity among the peoples of the Balearic Islands (Larios 2007, 30).

All of these restrictions are crucial because we must remember that the regional Parliament is not required to approve the initiative and to submit it to a referendum, in which case exclusion would make some sense (Biglino 1987, 104; Larios 2003a, 21).
Another cause of exclusion may be patent unconstitutionality or patent violation of the Statute by a PLI (Muro 2007, 30). However, it seems this should not be grounds for initial exclusion by the powers given to the Bureau of the-Parliament (in Catalonia it requires a

report to the "Advisory Council"), and its interpretation should always be narrow (Larios 2003b, 82).

2. 2. Right to Sign a PLI

In regional legislation a citizen of legal age who is resident in the Autonomous Community, and in some regions who is registered on the electoral roll[XVII], is entitled to sign a PLI.

The 2006 Catalan Act is an exception in that it entitles people over 16 years of age who are legally resident aliens to sign a PLI. Therefore, in Art. 23 of the Constitution this Act changes the definition of who is entitled to the right to political participation , this clearly being the competence of an Organic Act as it regards age. In contrast, M. J. Larios (2008, 189) argues that it must be accepted as it is an improvement in the entitlement to this right , but that this is not a question of the restriction or expansion of entitlement but rather of the sources of law, the exclusive prerogative of the organic legislator. Regarding foreigners, they might not be entitled to sign a PLI, as long as Art.13 of the Constitution prohibits foreigners from exercising any of the rights provided for in Art. 23 of the Constitution, except for the right to vote in municipal elections[XVIII]. I do not understand the argument used for the Catalan Act, according to which entitlement to sign a legislative initiative does not affect the exercise of sovereignty, since, on the one hand, whether or not it affects the exercise of sovereignty, Art. 13 of the SC, is definitive. Moreoever, citizens who exercise a legislative initiative are setting in motion a mechanism which may conclude with the adoption of the Act by the Parliament. Therefore, that it does not affect sovereignty whatsoever seems overstated.

Citizens are entitled to sign a PLI but the "Comisión Promotora" (the Promoting Commission responsible for the collection of signatures) plays a crucial role. Therefore, regional legislation should specify much clearly than it currently does things such as the number of members of the Commission[XIX] or which functions they can perform, especially during the Parliamentary process (Marco 2009, 11).

2. 3. Admissibility Requirements and the Bureau of the Parliament

Regional PLI acts often require the presentation of a full text with an explanatory memorandum and the list of the members of the "Comisión Promotora". In this respect, as in the 2006 LOILP, the requirement that a detailed explanation be provided regarding the reasons for the PLI should be removed, since there is already an explanatory memorandum and the Commission can intervene in the "toma en consideración" process.

The Bureau of the Parliament is responsible for advancing the PLI process to the next step, i.e., the collection of signatures.

PLIs may not be admitted not only because they concern issues excluded from PLI, but also due to the failure to file the formal documentation, which is logical . Far more questionable is when PLIs are not admitted for reasons not written in the Constitution or in the Statutes, but that have been included in regional PLI Acts.

These "additional" causes are:

1) The coincidence of a PLI with an existing bill or law (if it is already in the amendment process and concerns the same subject). This seems to be an established restriction added to the Constitution, and may serve to allow those who fear the possible submission of a PLI to block it by the presentation of a bill[XX]. The coincidence in subject of a PLI does not mean the subject is identified in a legal regulation and is not applicable to the rest of the bills (Larios 2008, 193; Muro 2007, 376; Marco 2008, 66 and 2009, 14)[XXI]. In the Catalan case, if the Bureau considers there to be a coincidence in the "same matter", it gives the "Comisión Promotora" 15 days to decide whether to maintain the PLI or withdraw it. If it decides to maintain it, this then leads to the accumulation of bills (Art. 6.3). Another problem is that in Catalonia coincidence paralyses the pre-existing bill during the admissibility stage of the PLI (before the collection of signatures), thus postponing it. Therefore, itwould be good for the Bureau to fix the stay of the bill after the PLI is admited to the House after the collection of signatures (Muro 2007, 377).

The case of Valencia is worthy of mention because if a PLI enters the Parliament prior to the completion deadline for amendments to the parliamentary initiative already in process, it should be accepted as an amendment to the parliamentary bill. This has been defined by Marco as "surprising, if not mind-blowing" (Marco 2008, 67).

2) When a PLI overlaps with other PLIs of the same or substantially equivalent content presented in the current Parliament. The PLI should be required, at least, to have been admitted by the Bureau of the Parliament (Marco 2009, 15; Larios 2003a, 225)[XXII], although this has not been the criterion of the Constitutional Court.

3) When it manifestly concerns different issues with a lack of homogeneity. This may contribute to an improvement in legislative techniques, but is inadmissible in so far as it is not required for parliamentary bills[XXIII]. This cause has now been suppressed in Catalonia.

4) When it corresponds to a parliamentary motion. This is critical both because it is vague (Muro 2007, 375, Aragón 1986, 305) and because it refers to different procedures that lead to diametrically opposed legal results (an Act and a political position). Moreoever, it allows those who fear the possible submission of a PLI to cancel it by the presentation and approval of the motion. In this regard, the elimination of this cause has been welcomed in some autonomous regions like Catalonia (Larios 2008, 192; Muro 2007, 375)[XXIV].

The control of these requirements is the responsibility of the Bureau of Parliament, and, therefore, Constitutional Court case law should be recalled since it notes that the Bureau " controls the legality of the initiative; however, this control would result in the admission or rejection of the initiative, and works, like all those of its kind, according to a strict legal principle, not a political one (that, by contrast, takes place in the "toma en consideración": Art. 9 of Act 2/1985)"[XXV]. "This decision is fully reviewable in the constitutional "amparo" procedure because it affects the very possibility of exercising the right" [XXVI] .

Another issue is " when grounds of inadmissibility are set in response to the material content of the bills, as in the case of popular legislative initiative. The control of the Bureau should necessarily serve that content, without thereby encroaching on the judicial functions reserved for Judges and Tribunals" [XXVII], but "if the law imposes no limit whatsoever to the initiative, the validation of its admissibility should always be formal, only ensuring that the initiative meets the formal requirements established by law (Judgment 124/1995)" [XXVIII].

2.4. Procedure for the Collection of Signatures

The Autonomous Communities have followed in the footsteps of the central State and in most of them "the number of signatures required to submit a PLI has been specified between 6,000 [La Rioja] and 75,000 [Andalusia] signatures, which corresponds to between 1 and 2 percent of the electorate [0.57 in Galicia and 2.51 in La Rioja]. In the Balearic Islands, a PLI may be submitted by 30% of the electoral roll of a constituency (the islands). In the Canary Islands a PLI may be submitted by 50% of the electoral roll of an island, in addition to the absolute numbers" (Larios 2008, 194). In short, with figures that are far from those of comparative law[XXIX], this should be reduced dramatically if we want to revitalise the institution of participatory democracy.

The deadlines for the collection of signatures range from three months (Asturias, the Balearic Islands, Cantabria, Castilla-La Mancha, Madrid and La Rioja with no provision for requesting an extension; in the Canary Islands the three month deadline may be extended for 60 days and in Catalonia the 120 days can be extended for 60 more working days) to four months (Andalusia, Valencia, Galicia and the Basque Country with a possible extension of two more months) and to six months (Aragon, Extremadura, Castile-León, Murcia, Navarre) (Larios 2008, 194-195).

As noted by M. J. Larios (2008, 199), "[t]he practice shows that the deadlines for the collection of signatures are too limited and always need to be extended. Of the initiatives submitted to the Congress, the majority did not reach the "toma en consideración" stage due to the failure to collect the required signatures within the fixed deadline, although extensions are usually granted. The vast majority of PLIs that reach the "toma en consideración" stage or the full vote in the Autonomous Communities, where these processes do not exist, were abandoned at that time. Moreover, the time from the entrance of a popular legislative initiative in the House and its first parliamentary process is usually quite long, which is extremely demotivating for the proponents and causes public interest in the issue the initiative addresses to drop off. Therefore, the reform introduced in the central State Act setting a deadline for initiating the parliamentary procedure must be acknowledged".

Signatures are collected on official paper, but "the reform of the LOILP and of the Catalan Act introduces the possibility of using new technologies in the collection of signatures, although in both cases the possibility of collecting electronic signatures has been opened up (Article 7.4 of the LOILP and first additional provision of Act 1/2006 on the Catalan Parliament)" Larios (2008, 195)[XXX]. A PLI is a good way to test new forms of participation. Therefore, the proposal from Carlos Guadian's K-Government web to use an open source public system should be accepted . According to his proposal, authentication is performed against the census, the launch of initiatives is popular and once a certain number of signatures has been reached, the initiative enters the political agenda. This means that it is binding[XXXI].

2.5. Appeal Against Rejection

The rejection of a PLI should be remedied using the "amparo" before the Constitutional Court[XXXII]. Here we encounter two problems. On the one hand, delays in the Constitutional Court can be discouraging for a PLI. On the other hand, the Constitutional Court understands that any legal violation "does not provide a basis for a claim for protection" [XXXIII] and that legal violation "cannot be assumed, and therefore requires a special argumentative effort in the request, aimed at verifying the presence of a causal relationship between procedural irregularity and the violation of the content of a fundamental right , making it clearly impossible to exercise a popular initiative in the face of unpredictable and insurmountable obstacles" [XXXIV]. Therefore, an ordinary appeal would be more useful than the "amparo" procedure (Larios 2003a, 228-229).

2. 6. Parliamentary Procedure

Once the necessary signatures have been collected, the parliamentary process of a PLI can begin. However, there is one almost insurmountable obstacle, i.e., the "toma en consideración" procedure. This procedure may make sense in those cases where the initiative is attributed to the House, consequently that is when the bill is accepted by the whole Parliament. However, a PLI is openly described as an initiative, which is perfect when collecting signatures and complying with formalities (Santamaría 1985,

1265; Astarloa 2002-2003, 288)[XXXV]. Therefore, this procedure should not be undertaken because, in practice, it serves to dispose of the parliamentary majority without examining the PLI, wasting the efforts and energies of the citizens.

In this regard, the 2005 reform of the Rules of the Parliament of Catalonia is laudable in that it removed the "toma en consideración" procedure for all bills and replaced it with a full debate without a vote, unless an amendment against the complete bill is presented.

One obstacle that all bills encounter is the possibility of Government veto for budgetary reasons. In my opinion this is logical because of the exclusive governmental budget prerogative.

Moreover, some Autonomous Communities have provided for the involvement of the "Comisión Promotora" in the "toma en consideración" procedure (Aragon, the Balearic Islands, Galicia) or in the whole debate (Catalonia), which allows the proponents to explain the fundamental objectives of their PLI.

2. 7. Withdrawal of a PIL

It is clear that the "Comisión Promotora" may always withdraw a PLI before the "toma en consideración" stage. Once the "toma en consideración" has been carried out, no one, except the House itself, can remove the bill (Aragón 1986, 306). However, it makes more sense to withdraw the PIL when the initiative has been changed, insofar as it distorts its original meaning. Therefore, the example of the Rules of the Catalan Parliament legitimising the retreat of the "Comisión Promotora" "before the start of voting in the plenary or in the committee if it is acting in full legislative capacity" should be followed (Section 116). In addition to Catalonia, the only Autonomous Community which specifically includes the "Comisión Promotora" as an entity entitled to withdraw a PIL is Aragon (Art. 12.3 of Aragonese PLI Act), expressly stating that in the case of a PLI, if the "Comisión Promotora" determines that the amendment adopted and introduced undermine the purpose of the initiative, it may request its removal". In both cases, according to the wording of the provision, this right is an application, therefore, it would require approval by the House if the "toma en consideración" had already taken place or if it had passed the whole debate in the Catalan case. However, the purpose and spirit of the

legislation, which is to give special importance to the "Comisión Promotora" throughout the process, increases the likelihood that this rule will be applied, so that, before a request for withdrawal, the House cannot object. Giving the members of the "Comisión Promotora" the opportunity to propose the withdrawal of a PLI implicitly entails acknowledging the importance of ensuring the principles of the initiative and not undermining it with legitimate amendments made by the House.

2. 8. Practice of PLIs in the Autonomous Communities

At the national level only 50 PLIs have been proposed in twenty five years[XXXVI], and it has taken ten years for one of them to pass the "toma en consideración" while only one has gone on to become an Act[XXXVII] .

Up until April 2007, in the Autonomous Communities 127 PLIs had been presented , with an average of 7.47 PLIs per Autonomous Community. In the Canary Islands alone there have been 27 PLIs to date, and six of them have become Acts[XXXVIII]. In Catalonia, up until November 2010, 19 PLIs had been proposed. In Euskadi, up until 2010, only 11 PLIs had been presented, two of which became Acts (Act 10/2000, December 27th regarding the Charter of Social Rights and Act 14/2007, December 28th concerning the Charter of Justice and Solidarity with the Poorest Countries).

[I]"Representative and participatory democracy are not defined as two alternatives, but rather as two complementary systems that intend to give greater prominence to civil society, either individually or through groups in the creation of the will of the State. Participatory democracy does not pursue the participation of all citizens in general, but of those interested in the decision-making process, primarily through organisations representing social interests" (Larios 2008, 186).

[II]The polls project a very negative image of political parties to the Spanish people , nearly 70% of whom believe that political parties only care about their own interests . They also negatively influence citizens' opinion of the political decision-making of politicians (Gómez Fortes *et al.* 2010, 73 ff.).

[III]In Spanish society there is little extra-electoral political participation, with only 36% of the Spanish participating, the most common form of participation being the signing of petitions, which has only been

used by 20% of the population in the last twelve months (Gómez Fortes *et al.* 2010, 129).

[IV] See Catalan Act 4/2010, March 17th, regarding popular consultations via referendum (under appeal by the Prime Minister to the Constitutional Court in December 2010). This Act, among other consultations, enables citizens representing at least 3% of the population of Catalonia "to promote the call for a referendum" (Article 21), except in the case of tax or budgetary issues (Art. 22), provided that its call is approved by an absolute majority of the Parliament (Art. 29) and a referendum is merely advisory (Art. 12.1). In any case, a referendum may be called by the Government of Catalonia with the prior approval of the central State (Art. 43.2). The problem is that Catalonia does not have the jurisdiction to settle consultations via referendum since, according to Constitutional Court judgement 31/2010, June 28th, regional jurisdiction on consultation may include "surveys, public hearings and participation fora" " with the understanding that under the heading other instruments of popular consultation referendum is not included", and "the exception [of Art. 149.1.32 of the Constitution] cannot simply claim authorisation to call for popular consultations via referendum, but rather this must be extended to the entire discipline of that institution, i.e., to its establishment and regulation".

[V]On this issue, see Catalan Act 4/2010, March 17th, regarding popular consultations via referendum (under appeal by the Prime Minister to the Constitutional Court in December 2010), establishing the possibility of using electronic media in consultations via referendum, both in the collection of signatures and voting (Article 56 *et seq.*). However, on the unconstitutionality of the Act on jurisdictional grounds please refer to what is stated in the previous note.

[VI] Some authors refer to *instant-referendum*, permanently open to plebiscite or to the polls. See Pérez Luño (2003, 71).

[VII] Italian and Austrian style.

[VIII] Switzerland, U.S. states.

[IX] German states.

[X]Whenever they refer to the autonomic regulation of taxes, which in some Communities, such as the Basque Country or the Community of Navarre, can be very broad.

[XI] In Judgment 76/1994, March 14th, the Constitutional Court stated that it is not possible for a regional PLI to submit a proposal for constitutional reform to the regional Parliament : "In fact, the bill submitted by the appellants could not be passed since it concerned a matter, i.e., the reform of the Spanish Constitution, that is excluded from popular initiative by Art. 166 of the SC. This article implies that, without it having to appear repeatedly in other provisions, a PLI cannot address this matter in any way, either directly or indirectly, i.e., it vetoes the possibility of requesting, through popular legislative initiative, the exercise of the powers of initiative in this area, which are the competence of the Basque Parliament. (...) If the Constitution has expressly prohibited the initiation of the constitutional reform following the exercise of a popular initiative, it is clear that its purpose is to trigger the exercise of a parliamentary initiative, (…) which means contravening the intended purpose of the makers of the Constitution to provide the aforementioned exclusion".

[XII]I agree with Muro (2007, 370) that, in this case, it would be logical for the Bureau to warn the promoters of a flagrant violation of a Statute.

[XIII] Asturias, Cantabria.

[XIV] The Canary Islands, the Balearic Islands, Rioja, the Basque Country.

[XV] Aragon, the Canary Islands, Valencia, La Rioja, the Basque Country.

[XVI] This has been described as being extremely indefinite, excessively limited, poorly defined, of vague content and difficult to apply in the admission process (Larios 2003a, 250-251).

[XVII] Art. 1 of Basque Act 8/1986 regarding a PLI: "Citizens who enjoy Basque political status , are of legal age and registered on the electoral roll ".

[XVIII] Muro has spoken against it (2007, 372) claiming that the PLI is " non-political participation and does not stand for an ideology or a government programme", but rather it is "a matter of the 'formalised' expression of a social demand, or of a part of society, which is communicated to the popular representative body so that it may act for it, if it fits its "political" assessment". This position is puzzling because in a democratic State political decisions are implemented through laws, which may be imposed on citizens by bodies constitutionally empowered to do so. A PLI forces the Parliament to debate a political decision that may become law. Larios (2007, 30) adds that the makers of the Constitution addressed this in Art. 13.2 of the Constitution on the right to vote, and not other forms of participation.

[XIX] The Valencian Act establishes a minimum of three members and a maximum of five members.

[xx] Santamaría (1985, 1266) defines this cause as unconstitutional.
[xxi] Aranda (2007, 207) has spoken against this claiming that it is "an article that blocks a PLI on the assumption that there is a legislative initiative pending in the Congress or Senate on the same subject in the post-amendment process. I think this is correct as a matter of parliamentary economy".
[xxii] In California there is no obstacle to introducing several popular initiatives on the same issue, even when they have contradictory meanings. On one occasion there were five different proposals submitted to a referendum on the insurance reform (Bowler and Donovan 2000, 646).
[xxiii] See, for example, Act 37/2010, November 15th, establishing a Budget Office of the Parliament. In its First Final Provision, it amended Act 18/2009 of November 23rd, changing the Traffic, Motor Vehicles and Road Safety Act, approved by Royal Legislative Decree 339/1990, March 2nd.
[xxiv] Unaltered in Castilla La Mancha, Extremadura, Madrid, Murcia and Euskadi.
[xxv] ATC 428/1989, July 21st.
[xxvi] ATC 140/1992, May 25th.
[xxvii] STC 76/1994, March 14th.
[xxviii] STC 38/1999, March 22nd.
[xxix] 100,000 in Switzerland, 50,000 in Italy, 100,000 in Austria.
[xxx] Aranda (2007, 210 note 46) criticises the Catalan Act because it allows the Government to defer legislative development.
[xxxi] http://www.k-government.com/2007/06/08/iniciativa_legislativa_popular_electronica/#ixzz14txg7Tp4 (last visit on May 24th, 2011).
[xxxii] The exception "is Article 5.4 of the Aragon Act that, leaving the way open for the Constitutional Court, recognises the power of the 'Comisión Promotora' to complain before the Justice of Aragon. The role of the Justice is, however, limited since its decision is not binding and is forced to abandon the issue if an "amparo" appeal is introduced" (Biglino 1985, 305). In the Canary Islands, a complaint can be filed before the House within15 days of notification of rejection by the Bureau (Larios 2003a, 252).
[xxxiii] ATC 570/1989, November 27th and 140/1992, May 25th.
[xxxiv] ATC 140/1992, May 25th.
[xxxv] Punset (1983, 60) has spoken against it stating that suppressing the "toma en consideración" would "not only supplant the will of the House, which, according to the Rules, is responsible for coordinating the processing of initiatives (Art. 89.1), but it would also give the organs or individuals endowed with the power of initiative, a legislative power that has not been conferred upon them" and that it "does not affect the right of initiative recognised by the Constitution whatsoever, since it does not condition the submission of initiatives, but works as a procedural requirement, freely appreciated by the House". Aranda (2007, 212) has also argued against it claiming that this means that popular initiative serves " to start the legislative process. Therefore, the "toma en consideración" is vital".
[xxxvi] 1.56 PLI per year before the 2006 reform of the LOILP and 2.75 per year after the 2006 reform.
[xxxvii] Act 8/1999, April 6th.
[xxxviii] V. Cuesta López, "Participación directa e iniciativa legislativa del ciudadano en democracia constitucional", Doctoral Thesis, Universidad de las Palmas de Gran Canaria, 2007 (Cabedo 2009, 461-462).

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The revival of the right to petition in the Statutes of Italian Ordinary Regions

by

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Abstract

The right to petition is an instrument of popular participation whereby citizens are allowed to apply to an authority for the purpose of representing certain needs or to seek the adoption of specific actions. While widely regarded as obsolete in current legal theory and rarely applied in the national legal system, it is once again gaining momentum thanks to the second "wave" of Regional Statutes and the greater autonomy of regional legislators, providing for a wide range of applications. The analysis of regional regulations indicates that the right to petition has also found new applications that have turned it into an effective instrument to ensure communication between civil society and regional institutions

Key-words

right to petition, instruments of direct democracy, participatory democracy, Regional Statutes

1. The right to petition in Regional Statutes

The right to petition is an instrument of popular participation whereby citizens "are entitled to apply to an authority in order to call attention to specific needs or to seek the adoption of specific actions" (Orrù 1996: 100).

While no Constitutional provision provides for the inclusion of this instrument in Regional legal systems, it has found widespread recognition in Regional Statutes that, also in their previous forms, have explicitly included it among instruments of popular participation.

Pursuant to art. 123 of the Italian Constitution, Regional Statutes are required to take account of both the initiative and the referendum on matters concerning Regional laws and administrative provisions. The absence of any reference in the Constitution to the right to petition concerning Regions has given rise to some doubts as to its legitimacy. It is generally agreed, however, that Regions are free to include the right to petition among the additional contents of their Statutes, in the absence of explicit Constitutional provisions to the contrary (Spagna Musso 1957: 27; Coccia 1992: 54; Orrù 1996: 130).

With reference to Regional Statutes, it is necessary to make a distinction between the periods before and after the Reform of Title V of the Constitution in that, while art. 123 of the Constitution has not been modified, regional statutory legislators have adopted a different approach to the matter.

In the first phase, dating back to 1971, most ordinary Statutes[I] entailed the possibility for *every citizen* to petition the *Regional Council* to *request action or call attention to common needs*, in forms that were not unlike the national model contained in art. 50 of the Constitution.

Indeed, the Statutes of some Regions stood out in terms of the subjects entitled to file petition, including, for example, also Municipal and Provincial Councils and/or Labour Organisations, as well as entities, organisations and associations operating in the Regional context[II].

Other Statutes differed in that they explicitly referred to Council Regulations for matters concerning the use of this instrument[III]; lastly, other Regions included directly in their Statute part of the procedure subsequent to filing the petition with the Council, thus providing greater guarantees. The Statute of Piedmont Region, in particular, stated that any decision on the eligibility and formal admissibility of a petition would be taken by the

Office of the Presidency of the Council[IV].

In general, however, as regards the legal effect of the petition, the receiving organisation was not under any obligation to take it into consideration, and it was in this aspect that lay the weakness of this procedure compared to traditional popular participation instruments. The Regional regulations confirmed the character of the petition, namely its being a mere request, the discretionary acceptance of which rested entirely with the receiving institution.

Furthermore, the greater statutory autonomy granted to Italian Regions by the constitutional reforms of 1999 and 2001 allowed statutory legislators to better differentiate the contents of their Statutes. As regards popular participation instruments in general, and more specifically the right to petition, the discipline has been innovated compared to constitutional provisions and significant differences can be noted also among Regions.
With the exception of the Statute of Tuscany[V], all new Statutes have continued to recognize the right to petition, in spite of the continuing silence from art. 123 of the Constitution. Moreover, Regional Council Regulations – except for Tuscany and Puglia - have laid down detailed procedures for the submission and the examination of a petition and it is in those Regional Regulations that the greatest discrepancies can be found. Lastly, Region Umbria has not included the right to petition in its Statute and Council Regulations, but it has approved a Law deliberately regulating "instruments to participate in the functioning of Regional institutions", envisaging additional provisions concerning the right to petition in particular (Umbria Reg. Law No. 14 of 16th February 2010, art. 2 and 61).

This scenario leads to the following considerations. First of all, the recognition of the right to petition in Regional Statutes reflects the conviction that the said right is widely regarded as a statutory right, and any changes thereto would therefore require a procedure at a higher level than would normally be required for ordinary Regional laws.
Secondly, the fact that more recent Regional Council Regulations have further detailed the said instrument serves to recognize its relevance and its interest at regional level. Far from having become obsolete, the right to petition remains relevant at least in the regional legal system. Furthermore, the renewed interest towards this instrument may indicate the possibility of new areas of applications, the theory that will be argued in the present paper.

Additional considerations concern the legal nature of the instrument of petition. As some have noted in recent times, it appears reasonable that the legal nature of the right to

petition "cannot be proved in the abstract and definitively, in that it is strongly influenced by the positive laws to which the right is subject in practice" (Orrù 1996: 123). Therefore, particularly after the reform of Title V, the differentiation of the regulation of this instrument at regional level prevents the formulation of an *a priori* definition of its legal nature and for this reason this aspect will not be examined.

2. Subjects entitled to file a petition and subjects entitled to receive a petition

As regards *subjects entitled to file a petition*, substantial differences emerge in the new Statutes compared to the previous ones.

First of all, with the exception of the Statute of Umbria (art. 20(III), Reg. Law 21/2005) that recognizes only *citizens* as holders of the right to petition, and the Statute of Lombardy (art. 50(IV), Reg. Law 1/2008) that recognizes the said right to *residents, individually or in association*, all other Regions recognize the right as applying also to *Local Public Institutions, Municipalities or Provincial Authorities*, in general, or, more specifically, to *Elected Assemblies in Municipal, Provincial and other local authorities*[VI]. This provision represents an additional instrument for greater opening and provides a connection between regional institutions and local authorities. Moreover, the fact that the majority of Statutes recognize "local institutions" as the holders of the right to petition leads to the conclusion that not only locally elected bodies but also all the organisations in the said institutions may resort to this instrument to bring certain needs to attention or seek the adoption of specific measures by the Region.

Some Regions[VII] also recognize *other social entities* as entitled to file petitions, including organizations and associations represented at regional or at least provincial level; organised social subjects, associations, labour unions and trade associations, as well as autonomous functional entities. Therefore it can be assumed that today's Statutes hold the same view of participation that was typical of the Seventies, when "institutions [were encouraged to] promote new and effective channels of democratic participation" (Barrera 2006: 117). The provisions seem to indicate that effective participation in the Region's political, economic and social life can mainly be implemented through social entities in

various forms, to which just as extensive reference is made in the new Statutes as in the former ones.

Lastly, in general, the majority of Regions naturally recognize *all citizens* as holding the right to petition, but in this respect some Regions adopt a different stance: Abruzzo, Liguria and Marche identify both *citizens* and *residents* as entitled to file petition. Lombardy extends this right to *residents*, while Calabria, Emilia-Romagna and Lazio go even further and declare *anyone/everybody* eligible to petition.

The fact that this right is allowed not just to citizens but also to residents in the Region or, even more pointedly, to anyone at all, leads to consider a new function of this instrument. New statutory provisions seem to point towards the conclusion that the right to petition is being extended not only to Italian citizens, but also to those who merely reside there. When the right to petition is extended to everyone, even citizenship appears not to be a requisite any longer.

Opinions differ on this point, given the delicate nature of the matter, particularly at this time of marked social evolution in Italy, as large waves of migrants reach Italian shores and in view of the call for greater participation by migrants in political life and public matters being demanded by immigrants and several political forces (De Mattei 1927: 57; Rossi Merighi 1974: 1703; Coccia 1992: 55).

Extending the right to petition to anyone, even to foreign nationals, whether they are resident or temporarily domiciled in the Region – depending on the statutory provisions applicable – reflects on civic and even political rights, depending on the legal nature that is attached to the right to petition. These rights are not only extended but, in practice, they become a proactive and lobbying instrument in the hands of migrants. Considering that immigrants have not so far been entitled to vote, to undertake legislative action or to participate in a referendum, even at Regional level, the right to petition appears to be particularly relevant because it provides an effective and useful way for bringing to the attention of Regional authorities certain concerns, for seeking the adoption of specific actions, or for simply bridging the gap between immigrants and regional institutions.

Another requisite that is not binding and absent from any of the new Regional Statutes is the age limit. The absence of regulations on this point is particularly interesting for two reasons: first, it allows for further extension of the right to petition to minors. While some doubt remains "about the actual and autonomous capacity to exercise" the

said right "by subjects of a very young age" (Spagna Musso 1957: 115; Rossi Merighi 1974: 1701; Orrù 1996: 118), from a legal perspective, a restriction on a right that is not expressed is hardly justifiable and therefore the majority agree that the exercise of the right to petition is not subject to the same requisites that apply to the right to vote (Meucci 1966: 6; Giocoli Nacci 1979: 68).

The fact that no age limit applies to the right to petition can be regarded positively also from another point of view. In recent years the issue of lowering the voting age to 16 has fuelled debate and until this proposal is put into practice, the right to petition provides an instrument for dialogue and contact with that portion of the regional population that, while being intellectually of an age that allows the expression of their will on some political issues, is not entitled to vote or to exercise other political rights, thus precluding any chance of getting in touch with the relevant institutions.

As regards the *recipients of a petition*, while the majority of new Statutes have not changed the situation that a petition can only be filed with the *Regional Council*, some have introduced an important innovation. The recipients of a petition can either be the *Region* – further specifying that petitions are to be addressed to the *President of the Regional Executive Committee* or the *President of the Regional Council depending on their respective authority*[VIII] - or, more generally, *Regional organisations*[IX].

These provisions require a more detailed analysis. First of all the fact that some Statutes only allow for Regional Councils to be the recipients of a petition does not prevent them from acting as "spokespersons" and addressing the Regional Executive Committee in cases where the petition concerns areas attributable to the Regional Executive Committee. However, in this way the Regional Council undoubtedly operates as a filter – as will be argued below – for the Executive Committee, which leaves no opportunity for the latter to act legitimately on the merit of the petition except through a communication from the Council.

The Statutes that allow for either the Regional Council or the Executive Committee to be eligible recipients of a petition more accurately identify the new role and functions that these bodies have acquired in the Regional legal system. Both organisations have increased their importance, particularly after the constitutional reforms of 1999 and 2001 and, more specifically, following the introduction of a more markedly presidential form of government - which increased the power of the Executive Committee and its President in

the Regional system – as well as the extension of the legislative and regulatory fields in which the Regions are allowed to act. Significantly, petitions can be addressed to either of the two bodies, depending on their respective authority.

Lastly, some statutory provisions are of particular interest in that they identify "any" regional organisation as recipients of a petition, without further conditions. These provisions allow for a broad interpretation wherever possible, enabling petitions to be addressed also to regional organisations other than the Regional Council or Executive Committee. In this way the petition could effectively become an additional and useful instrument – provided that adequate restrictions apply to its areas of application and to its contents – to inform the various regional organisations about the issues and concerns that are of interest to civil society.

3. Object and limits of the petition

Like the earlier Statutes, the more recent ones show little difference in terms of the possible object of a petition. Petitions may be filed to *request* that the recipient *adopts actions* and *for bringing common concerns to its attention*[X], or to *request* that the recipient *takes action* or *seeks to adopt provisions of general interest*[XI]. No substantial difference can be found between the two statements and, on this point, Regional Statutes seem to conform to the national provisions regarding the right to petition. It is therefore generally agreed that petitions should not be of a private nature and that they should be characterised by a general scope (Spagna Musso 1957: 29; Giocoli Nacci 1979: 93).

Clearly, the general nature of the terms used makes it possible to state that "any form of collective good may be pursued through petition" (Giocoli Nacci 1979: 108). This not only refers to the adoption of a legislative or administrative act, but also any other type of action and deed on which the recipient of the petition is able to act, hence the appropriate generality of the term "provisions" that refers to any measure within the jurisdiction of the recipient.

Only one difference in this respect can be found in the new Regional Statutes. Some Regions have introduced an additional limitation to the exercise of the right to petition, so that in some cases the petition must be limited to *matters applicable to Regional*

councils[XII] while, conversely, in other Statutes petitions *shall not be admissible if they do not refer to functions of the Regions, either direct or delegated*[XIII]. However, the last remark is already implicit in the instrument of petition, which aims to secure a provision or an action from the receiving body that it has the power to adopt. It would certainly not make any sense to petition the Regional Council or Executive Committee to adopt a measure that they would not be entitled to approve or to intervene in a matter which would be, for instance, within the national government's sphere. The introduction of such limitations appears rather unnecessary since, in any case, they lie outside of the scope of the petition.

Another aspect requires greater attention, namely the fact that Regional Statutes, unlike other instruments of popular participation (such as popular legislative initiatives and abrogative referenda), do not impose any additional restrictions to the right to petition. Therefore petitions may be filed even if its contents refer to matters that are generally excluded from popular legislative initiatives or subject to an abrogative referendum (Manfredini 1953: 55-56; Meucci 1966: 7; Rossi Merighi 1974: 1731; Coccia 1992: 58; Orrù 1996: 116). For example, while legislative initiatives on regional community law are in many cases reserved to the Regional Executive Committee, it is possible to petition the Executive Committee to seek the adoption of the legislative bill.

This aspect of the right to petition is certainly of particular interest in that it correctly identifies characteristics of this instrument that prevent it from being regarded as entirely obsolete. The fact that petitions are not subject to the same limitations that apply to other instruments of popular participation contributes to making it relevant in the new Statutes and to highlight its usefulness as a means to connect people to regional institutions and to seek action from them.

4. The procedure to file a petition

The usefulness of the right to petition is in direct proportion to the procedural guarantees attached to it in the Regional Statutes. The greater the guarantee that the petition reaches the institution it is addressed to and that it will be taken into due consideration, the more this instrument will be perceived as useful and effective.

First of all, statutory provisions do not set any specific limitation on the nature of the

petitioner(s), unlike other instruments such as popular legislative initiatives and referenda. This aspect ensures greater freedom to use this instrument by any members of the regional community, without any significant restrictions.

As regards the form of a petition, no statutory limitation exists on how written petitions are filed. The fact that petitions should be filed in writing, on duty-free paper and without any particular form, is a logical consequence of the fact that the recipient does not, as a rule, gain access to the petition when it is filed and the petitioner is not always granted an audience by the recipient. Moreover, in general, the petitioner filing the petition (whether the first or the only signatory) is required to provide at least some personal information so that the petition's admissibility can be checked if necessary and, more importantly, so that the petitioner can be informed about its outcome.

Some Council Regulations make specific reference to how a petition is to be filed[XIV] and require the inclusion of information such as the petitioner's place of residence and the name of one of its signatories who will act as the contact person for the Council. In some cases the Regulations also require the signature on the petition to be authenticated, although it can also be certified by the regional officer in charge of receiving the petition.
Secondly, it should be noted that most new Statutes and Council Regulations do not contain any provisions on how the petition's admissibility should be verified by the Regional organisms. This is an additional and more significant difference from regional popular legislative initiatives and referenda. The exercise and the completion of these two methods are subject to greater formal constraints and therefore also to more verification of compliance than a petition (for example, a minimum number of signatures or compliance with the limits of object). Since no particular restrictions apply to filing a petition, this appears to be a more flexible instrument of popular participation than the other two.

On this point, the Statute of Piedmont Region (art. 85(I)) and the Council Regulations of Emilia-Romagna (art. 121(I)), Liguria (art. 112(I)) and Lombardy (art. 53(II)) are set apart in that they require a petition's admissibility and eligibility to be verified by the President of the Council or the Office of the President of the Regional Council. Since no additional regulations are available, it can be assumed that such verifications mostly concern the requisites of the subjects entitled to exercise the right to petition, which – as noted above – are considerably simpler than the requisites applied to other popular participation instruments. If, as laid down in some Statutes, the petition can be filed not

only with the Regional Council but also with the Region's Executive Committee or even any regional institution, it is reasonable to conclude that the petition's admissibility may also depend on the correct recipient being indicated based on the petition's content.

Furthermore, the admissibility of a petition also depends on the scope of its object which should pertain to regional bodies and should not, therefore, lie outside what is believed to be an integral part of regional regulations and functions.

Lastly and most significantly, the Regional Council Regulations of Piedmont Region introduce additional provisions concerning a petition's admissibility by setting a 30-day limit by which the Office of the President is required to take a decision; the possibility to set a deadline for the petitioner to amend the petition in order to make it formally admissible; and, if no unanimous agreement is reached within the Office of the President on the petition's admissibility, the matter is decided by the Regional Council in its next session (art. 112). By laying down such provisions, Piedmont Region has pre-empted situations that may occur when filing the petition while, at the same time, setting a deadline that, although not final, does ensure that the petition will not become "stuck" right from the start.

5. The procedure following filing the petition and the legal effects of the petition

Unlike other traditional popular participation instruments, there is a different procedure for petitions after they are filed with the receiving body.

In terms of the legal effects of the petition, this instrument of direct democracy is generally regarded as ineffective. It is widely agreed that, according to the national framework regulating the filing of petitions, there are no legal obligations for the recipients (Spagna Musso 1957: 21) since they are not legally required to take them into consideration or to take any decision about it.

However, as this paper intends to show, the greater statutory autonomy given to Regions has enabled some of them to breathe new life into this instrument, by laying down stricter limitations for regional institutions, thereby ensuring greater and more effective popular participation through the petition than it is granted by the Regional legal system

alone.

First of all, in some Regions have introduced *deadlines* for the phase following the filing of a petition i.e. they have set a time limit for the President of the Regional Council or the Office of the President to forward the petition filed to the Regional Council[XV]. Other Regions, even more effectively, have introduced a deadline for deciding on the merit of the petition, thus ensuring not only that the receiving organism is informed that it has been filed but also providing for the introduction of what appears to be an obligation to take the matter into consideration. The fact that there is no legal consequence or sanction for not complying with these terms seems to indicate that the terms are, in fact, not final, but they should not be regarded as unimportant either.

As mentioned above, filing a petition does not entail any legal obligation for the recipient, which is not required to act upon the requested measure, for example the adoption of a legislative provision requested by the signatory of the petition. However, several options open up after a petition is filed: in particular, the recipient may have an obligation to receive it or an obligation to rule on its merit and therefore admit the petition; lastly, the filing of the petition may also require the recipient to publish the petition and the resulting decision.

It appears evident that the greater the obligations posed by a petition, the greater is the weight and the power of this right which, from a mere possibility to *file a petition* can become *a claim for the petition to be examined in its merit and to receive a reply on the decision reached*, thus becoming a more "appealing" instrument for social entities. In order for the petition to serve its purpose, and therefore "in order to ensure that the request is brought to the attention of the recipient and that a decision is taken on the matter, it is not enough to accept it merely from a formal point of view but it is necessary to proceed with examining it and taking a decision. It is only by examining the petition that the recipient can become aware of the matter being raised and it is only by taking a decision that the recipient takes a stance on the matter, whether positive or negative" (Spagna Musso 1957: 33; Orrù 1996: 114).

As regards the *obligation to receive*, this can be found in most Regions and particularly in those cases where the Regional Council is required to acknowledge receipt and to examine a petition and even more clearly when the Council is required to rule on the admissibility of a petition. These provisions are even more binding when, in some cases,

they are accompanied by a deadline for taking these actions.

As regards establishing *an obligation to examine the merit of a petition*, very few Regions have decided to break away from the national legal system and to add such limitations. In particular, only Campania included in its Statute the obligation for regional organisations to examine petitions and to provide a written reply to the petitioner (art. 116(III), Reg. Law 6/2009). In this respect, it should be noted that the draft Statute currently being discussed by the Regional Council of Veneto contains an obligation for the competent Council Committee to examine a petition within six months of being received[XVI]. If this draft project is approved, the recipient would be subject to stricter obligations compared to the provisions contained in the Statute of Campania, in that it would be required to comply with the terms by which the examination must be carried out. It would also mean that the provisions adopted in Campania are not a "one-off" occurrence or the result of an oversight, but a trail-blazing experience on the part of "pilot" Regions breaking away from the Constitutional pattern concerning petitions and using their statutory independence to refresh certain aspects regulating popular participation.

Moreover it should be considered that while it may be difficult today to find any such provisions in Regional Statutes, it is not so in Regional Council Regulations. Some Council Regulations[XVII] provide a deadline by which the competent Council Committee in charge of examining the petition is required to complete its examination and to rule on the petition received.

In addition to the legal obligation to examine a petition, several options open up for the recipient of a petition. From statutory provisions and regulations, four main possibilities appear to be available. First, the Regional Council, and more specifically the appropriate Council Committee, examines the merit of the petition and may decide to combine it with a similar measure already under consideration by the Committee, ruling therefore for a joint examination. Alternatively, the Council/Committee, after acknowledging the content of the petition, may decide to transfer it to the Executive Committee or to the appropriate Regional organisation that is then requested to rule on it. The recipient of a petition may, as a third option, decide to approve a specific deliberation concerning the merit of the petition or, lastly, since the right to petition does not entail any obligation to deliberate, the relevant organisation may decide to terminate the petition.
Clearly, in the second case the Council / Committee functions as a "filter" towards other

regional bodies, particularly the Regional Executive Committee. The Council is entitled to rule on the authority of other organisations to deal with a petition and therefore it is entitled to decide when to adopt a resolution aimed to inform the relevant organisms of the contents of a petition.

Therefore the provisions contained in the new Statutes allowing petitioners to file petitions with institutions other the Council, such as the Executive Committee or other bodies, should be regarded positively in that they prevent the petition having to be examined by the Council and any internal conflict among regional bodies.

Moreover, if the Council refers a petition to other organisations because it pertains to them, unless there are explicit provisions to the contrary, these organisations are not subject to a legal obligation to examine and to decide on the petition.

Most interestingly, Piedmont Region (art. 113(III), Council Regulations) allows the petitioner to request to attend the examining of the petition. While the Council is in no way obliged to give an audience to the petitioner, this provision is a token of the importance attached to the right to petition. If its purpose is indeed to acknowledge "a general participation in the institutional activity of the Region" and to open up Regional Institutions so that they "listen to civil society" (Caretti – Tarli Barbieri 2009: 205), the fact of giving the petitioner the possibility to explain the motivations for the petition verbally serves to pursue those objectives more effectively.

Lastly, provided that one of the four options is adopted by the recipient, a further question concerns the provision in Regional legislation by which the recipient is *obliged to inform the petitioner of the outcome of deliberation*.

Most Regions – including those that do not have an obligation concerning the merit of the petition – include an obligation to inform the petitioner of the decisions taken by the receiving organism[XVIII]. Implicitly, it can be concluded that there exists an obligation to examine the petition, without which obviously no decision can be communicated to the petitioner.

This fact also indicates that, unlike the national legal system, Regional legal systems have "renewed" the right to petition in that they have placed the expectations of the petitioner at the centre of attention. If regional organisations are not required to adopt the measure sought (an obligation that would refer to instruments other than the petition), it is essential for the purpose of a petition that it is taken into due consideration and examined

by the recipient, even if the procedure ends with rejecting the petition. The obligation for the Region to inform the petitioner about the outcome of the petition can therefore be regarded as a useful step for bringing civil society closer to public institutions and to ensure more active participation.

6. Conclusions

In conclusion of this analysis of the regional provisions regulating the right to petition, it is necessary to assess the usefulness and particularly the current effectiveness of this instrument of popular participation and consider the actual increase in democratic participation that it may entail, which would mark a difference between Regions and the State, as was anticipated in the 1970s when such public institutions were established (Casetta 1973: 97; Romano 1973: 235).

There is no doubt that, out of all the instruments for popular participation, the petition appears to be one of the weakest because it is not able to *immediately* influence the will and behaviour of regional institutions. The implementation of the content of a petition lies entirely with the institution that has received it, while the petitioner has no power to influence its decision. These legal consequences have also led many to exclude the petition from the instruments that are traditionally regarded as typical of a direct democracy[XIX].

However, the fact that, in their new Statutes, the Regions have introduced changes for the petition – which have proved significant in some cases at least, and which break away from the national legal system – leads to the conclusion that it should not be underestimated and that new applications seem to have been identified.

Today more than ever it is the political effectiveness and consistency of this instrument, rather than merely its legal effects, that attest to its usefulness. While unable to influence the decision-making process, the petition does provide a point of contact between national and regional institutions and civil society at large. There is thus reason to not be excessively pessimistic about the "vitality" of this instrument which has proved to not be terminally obsolete, as shown in recent times also by the innovative approach adopted by regional legislators.

There are two main strengths in the right to petition.

First, "the elementary nature of its legal structure" (Orrù 1996: 100) and therefore the fact that no particular restrictions and constraints apply to file a petition with the relevant organisation, and that it is not subject to the limitations that apply to popular legislative initiatives and referenda. These two elements make it much more flexible than the other two popular participation instruments and therefore more "appealing" for trying to bridge the gap that keeps general society and institutions apart.

Secondly, as previously noted, the petition may become a useful instrument for those not having the right to vote to participate in the life of Regional institutions. Considering the requisites that are necessary to be entitled to the right to petition, it can become a useful instrument to provide a "delayed reply to the growing demand for political participation" (Orrù 1996: 102) coming, for instance, from immigrants and also from other regional population groups. Clearly, collective rather than individual petitions acquire particular relevance, because they can work as effective instruments not only to seek action, but also to react to measures adopted by regional institutions as well as to give voice to new interests issued from the social transformations - at times even disruptive ones - that can be observed in our society today.

The element that is generally identified as a weakness of petitioning – the continuing lack of obligations for the recipient to act on its merit – cannot lead to an entirely negative assessment of this instrument. Some regional legislators have introduced considerable innovations in their new Statutes by including an obligation to examine the petition.

Therefore this instrument appears able to contribute to "accentuating the democratic character of public institutions" (Mignone 2005: 649) thus allowing the community to become fully active, and it seems to have become, like the other instruments of popular participation, an effective bridge between the community and regional institutions.

[I] Exceptions concern the Statutes of Liguria, Puglia and Veneto Regions, even though the internal Regulations of the Regional Council of Puglia allow petitions as "an instrument not exclusive to the national legal system but possessing a general character."
As regards the Statutes of Regions with special Statutes, while they were approved at the same time as the Constitution came into force, they make no reference to the right to petition, although this was regulated by Council Regulations in the Regions of Sardinia, Friuli-Venezia Giulia and Valle d'Aosta (article 100, 85 and 29 respectively).
[II] Art. 61 L. 339/1971 (Statute of Lombardy); art. 33(I), L. 345/1971 (Statute of Marche); art. 41(I), L. 347/1971 (Statute of Molise).

[III] Art. 64(III), L. 350/1971 (Statute of Basilicata); art. 36(III), L. 346/1971 (Statute of Lazio); art. 33(II), L. 345/197 (Statute of Marche); art. 41(II), L. 347/1971 (Statute of Molise), art. 63(II), L. 338/1971 (Statute of Piedmont).
[IV] Art. 63(I), L. 338/1971 (Statute of Piedmont).
[V] While the previous Statute of Tuscany (L. 343/1971) recognized the right of all regional citizens to petition (art. 74), that reference is not contained in the new Statute (art. 72 statute Law No. 12/2005) and only mentions, under Title VIII on "Participation", "the promotion of the participation of citizens, residents and organised social entities, in different forms" on the part of the law (art. 72). However, the current Reg. Law 69/2007, by which the statutory principle was implemented, does not sanction the right to petition in any way.
[VI] Art. 65(I), statute Law of Lazio No. 1/2004; art. 85(II), statute Law of Piedmont No. 1/2005.
[VII] The reference here is particularly to the Statutes of Campania, Emilia-Romagna, Liguria, Marche, Piedmont and Puglia Regions.
[VIII] Art. 12(V), statute Law 2006 of Abruzzo; art. 12(I), statute Law of Liguria No. 1/2005.
[IX] Art. 10(I), statute Law of Calabria No. 25/2004; art. 16(I), statute Law of Campania No. 6/2009. Similar provisions can also be found in the draft Statutes of Molise and Veneto Regions, under articles 11 and 13 respectively.
[X] Art. 65(I), statute Law of Lazio No. 1/2004; art. 50(IV), statute Law of Lombardy No. 1/2008; art. 41(I), statute Law of Marche No. 1/2005; art. 20(III), statute Law of Umbria No. 1/2005.
[XI] Art. 10 (I), statute Law of Calabria No. 25/2004; art. 85 (I) statute Law of Piedmont No. 1/2005;art. 16 statute Law of Puglia no. 7/2004.
[XII] Art. 16 (I), statute Law of Campania No. 6/2009; art. 16 (I), statute Law of Emilia-Romagna No. 13/2005.
[XIII] Art. 12 (V), statute Law 2006 of Abruzzo; art. 12 (IV), statute Law of Liguria No. 1/2007.
[XIV] Cfr. Council Regulations of Liguria (art. 112(I)), Lombardy (art. 53(I)), Molise (art. 82(II)), Piedmont (art. 111(II)) Regions and Autonomous Province of Trento (art. 165(I)).
[XV] For example, art. 118(I), of the Council Regulations of Calabria; art. 35(II), of the Council Regulations of Campania; art. 68(I), lett. *f*), of the Council Regulations of Emilia-Romagna; art. 53(II), of the Council Regulations of Lombardy; art. 127(II), of the Council Regulations of Marche; art. 103(I), of the Council Regulations of Umbria.
[XVI] Art. 13(II), of the text approved by the Commission for the Statute and the Regulations on 6-7 August 2004.
[XVII] Cfr. art. 121(II), of the Council Regulations of Emilia-Romagna; art. 139 of the Council Regulations of Friuli-Venezia Giulia; artt. 113 and 114 of the Council Regulations of Piedmont; art. 165(III), of the Council Regulations of the Autonomous Province of Trento.
[XVIII] Art. 67(III), of the Council Regulations of Campania; art. 36(VI), of the Council Regulations of Valle d'Aosta.
[XIX] Cfr. Enrico Spagna Musso, 1957, 'Note sul diritto di petizione', in Excerpt from the journal *Rass. Dir. Pubbl.*, Jovene Ed., Napoli, 48; Giocoli Nacci, 1990, '1; Stancati, 1983, 602 ff.
Contra Mortati, 1976, t. II, 858, who identifies the right to petition as part of the "instruments of direct democracy, if devoid of deliberative power"; Rossi Merighi, 1984, '1731.
More recently, Orrù, 1996123, who defines petition as "an instrument of participatory democracy" rather than direct democracy.

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Regional electoral legislation in Italy. A short essay on the rise and fall of the myth of territorial differentiation

by

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Abstract

Up to 15 years ago the Constitution entrusted State law with the task of regulating the election system of regional councillors. Since the nineties there have been radical changes in the provisions (constitutional and later sub-constitutional) regarding elections of regional Councils, and the Regions have been given concurring or residual legislative competences, thus authorizing them to autonomously adopt rules concerning their own elections. The electoral laws approved by the Councils of Regions from 2001 up to now are nevertheless substantially uniform in contents. Such substantial uniformity was not required. The single Councils could have made far more differentiated electoral choices. We can say that there has been a sort of institutional conformism. The local political classes handling the institutional change were not able (or did not want) to introduce substantial differentiations and innovations and they have only created systems almost identical to one another. Such a conclusion is only seemingly surprising. We notice in fact how difficult it is for party systems to "regionalise themselves", even when political interests of regional bodies are at stake. Every single regional electoral appointment is seen as the opportunity to once again measure general political consent, not as the time to consolidate territorial consent. We realize how weak the regional party systems still are, in spite of the widespread use of federalist rhetoric, and how scantily independent they appear to be. The effect is that the actual uniformity of electoral systems will cause a further step towards uniformity of party systems.

Key-words

Region, Electoral law, political system, territorial differentiation, right of vote, majority, proportional system, form of government

1. Does a doctrine of regional electoral law exist?

Up to 15 years ago there was no point in talking about the existence of a doctrine of regional electoral law. In fact, up to the nineties, the electoral legislation concerning regional representative assemblies in Italy was a matter of little interest to experts in Constitutional law. The Constitution (art. 122, in the text before the 2001 reform) entrusted the «law of the Republic» with the task of regulating the election system and the number and cases of ineligibility and incompatibility of regional councillors. This choice was based on a clear idea of the institutional relations between State and Regions: the electoral system, closely connected with the form of government, was to represent a unifying element, admitting no derogation for the various Regions. Therefore, it was to be regulated by national legislation, to assure the conformity of all representative regional assemblies with the same model. The only (theoretical) exception was represented by the five Regions under special Statutes; in fact, since their creation, for historical reasons, they have had the possibility to autonomously regulate the electoral systems of their assemblies (although they have not entirely exploited such chance, as we will see later).

We must add that, in the traditional framework which went on up to the electoral referendums of the early nineties, the electoral models were basically similar at all representative levels (local authorities, Regions, State, Italian representatives in the European Parliament), with only minor differences. In short, the electoral legislations at all levels were characterized by the choice of proportional systems, not very selective (that is to say, not distorting the distribution of votes), functional to a parliamentary form of government called «extreme multi-party system» (according to the well-known classification by Leopoldo Elia[1]), that is without the direct election of the leaders of the executive powers. Such systems, at all government levels, reflected the party system as established in the post-war period and they were based on the selection of the elected on the basis of multiple preference vote.

Since the nineties, however, things have deeply changed. The taboo of necessary uniformity to safeguard unitary policies has been given up and there have been radical changes in the provisions (constitutional and later sub-constitutional) regarding elections of

regional Councils. In addition to the reassessment of the constitutional discipline regarding the elections of Regions under ordinary Statutes (const. l. no. 1/1999, introducing an additional legislative competence and giving the Statutes the competence to determine the form of government of the Regions), there has been a continuous adjustment of the rules contained in special Statutes, regarding the electoral discipline of the five Regions with special autonomy (const. l. no. 2/2001, introducing substantially uniform rules for special electoral matters "according to the mechanism of primary competence"[II]).

Lastly, the reassessment in the distribution of legislative competences between State and Regions has also had a considerable impact on electoral matters. In fact, the Regions have been given residual legislative competences, thus authorizing them to autonomously adopt rules concerning their own elections.

Following such constitutional changes, in 2004 a State framework act, introducing the main principles of the new legislation regarding the election system of the Regions under ordinary Statutes, became effective[III]. In the following years, some Regions started to build their own electoral legislation, either making new laws, or modifying specific parts of the transitional electoral legislation which had been planned for all Regions by the constitutional law no.1/1999, together with the ordinary law no. 43/1995[IV].

If we analyse the single electoral rules which Regions have started to work out, together with the principles (of constitutional and sub-constitutional character) introduced by State legislation, we must necessarily conclude that we could theoretically try to build a real «doctrine of regional electoral law»; in fact, the peculiarity of this system, more and more different from the other electoral rules (which have all, in the course of time, become different from one another) has greatly intensified.

From this point of view, Italy is to be considered a comparative exception: in most States, in fact, the same electoral system (or very similar systems) tends to be normally used at all levels of election[V].

But we must wonder whether, after the birth of an autonomous doctrine of regional electoral law, an electoral differentiation, satisfying specific requirements of regional rules, has been effectively carried out. The question is whether, since Regions have acquired legislative competence about elections, single Regions have really adopted different models, as a consequence of different legislative choices made by the regional political bodies entrusted with such competence.

In order to analyse in detail the regional electoral rules and the different degrees of autonomy recognised by the Constitution, we must first of all distinguish the autonomy provided in the five Regions under special Statutes and the autonomy in force in the fifteen Regions under ordinary Statutes. But first we want to clarify some (alleged) common limits, which should be in force for any type of regional electoral system.

2. Common principles regarding the electorate: extension of participation and equal opportunities

Single regional legislations cannot obviously derogate from the constitutional principle of universal suffrage (art. 48 Const.) and freedom of access to elective offices (art. 51 Const.). What we must make clear however is the degree of autonomy given to Regions as to franchise and eligibility requisites (within the constitutional frame) and the source to refer to (the regional Statute, ex art. 123, par. 1, Const., or the regional law ex art. 122, par. 1, Const.?).

On this point, two problems, summing up two political issues widely debated in recent years, must be dealt with.

The first problem is the following: could the Regions themselves lay down franchise and eligibility requisites, enhancing special "links" with the regional territory? In other words, could the Regions reduce the right of vote on the basis of specific subjective requisites, different and more restrictive compared to the mere residence on the regional territory at the moment of vote? And could they reduce eligibility, by demanding requisites wider than those provided for by national legislation (Italian citizenship and residence in any municipality of the Republic)?

Possible limitations of this type could obviously be adopted only if enabled by the Constitution or by a constitutional law: this was the case of the two special Statutes, providing for minimal requisites of residence for admission to vote (Valle d'Aosta and Trentino-Alto Adige) or for eligibility (Friuli-Venezia Giulia, Sardinia, Valle d'Aosta, plus the ordinary regional law in Trentino-Alto Adige and Sicily: the fact that this was an ordinary law, and not the regional Statute, perplexed commentators). In fact, we are talking about the restriction of a right guaranteed by the Constitution, which could not be

admitted without a constitutional decision. Since the Constitution does not provide for anything of this kind for ordinary Regions, the Statutes of these Regions cannot derogate from this rule: all the Italian citizens resident in the Region have the right of vote and all the Italian citizens resident in any municipality of the Republic have the right to be elected.

Let us remember that the Constitutional Court excluded that the notion of «regional people» could be admitted in our constitutional rules[VI]. This means that the «regional electorate body» can only be defined by the mere sum of the Italian citizens resident in the Region[VII].

The second problem is even more relevant and politically difficult: could the Regions establish rules extending the number of the holders of the right of vote beyond citizenship? In this case there is no constitutional restriction. According to Paolo Barile, in fact, «juridical situations are generally awarded to all private constitutional subjects, without considering their citizenship… the exceptions exist where the Constitution expressly excludes non-citizens»[VIII]. In other words, it is advisable to supply an "open" interpretation of the constitutional rules concerning fundamental freedoms, when such rules tend to guarantee rights, not to lay down prohibitions[IX]. Article 48 Const. clearly recognizes the right of vote to citizens i.e. it forbids the law from depriving citizens (or some of them) from this right. But this rule must not be taken as fixing a ban on the extension of the right of vote to non-citizens. Non-citizens might be granted the right of vote if and when the law considers it advisable[X].

We must rather ask ourselves whether the Regions have the power to discipline the matter autonomously, without a national legislative decision. The Constitutional Court has clearly explained that national and regional elective assemblies are both an expression of the sovereignty of the people. Therefore regional elections are to be traced back to political, rather than local elections[XI]. In fact European citizens resident in Italy, on the basis of EU Treaties and following the Directive no. 94/80 CE, can vote in local elections, not in regional elections.

Following such considerations, it seems possible to say that the State law can extend the right of vote to foreigners, both European and non-EU[XII]. On the contrary, it seems impossible to maintain that such choice can be entrusted to single regional legislations.

In fact, according to art. 117 Const., it is entirely the State's competence to decide on juridical condition of foreigners, immigration, electoral legislation of municipalities, provinces and metropolitan cities. On the contrary, a concurring legislation (a regional law complying with the fundamental principles established by a State law) is provided for as to the election system of Regions.

It therefore seems possible to infer that only the State law could establish rules to extend franchise and eligibility in municipal and provincial elections to foreigners, and only the State law could establish fundamental principles to extend the right of vote to foreigners in regional elections.

There are however some authors who, after analysing the meaning of the words «electoral legislation» or «system of election» (art. 117, par. 2, lett. p, and art. 122 Const.), and considering that the extension of the electorate would be part of neither, tried to maintain that regional electoral law could be the Regions' concern[XIII] (while local electoral rules could be directly established by municipalities[XIV]). But the question seems to have been solved once and for all after both the Constitutional Court[XV] and the Council of State[XVI] denied such possibility. The Region seems therefore precluded from any intervention tending to affect the determination of the subjects constituting its electoral body. A statutory competence is to be excluded (in fact it could not be justifiable ex art. 123, par. 1, Const.) and at the same time a competence of the "residual" regional law ex art. 117, par. 4 would be unimaginable. As to the "concurring" legislation, it is obvious that, failing a fundamental principle of State legislation, the single Regions have no possibility to act. And it would also be quite inappropriate to do so. To entrust single regional or local political bodies with the competence on a fundamental right such as the right to vote would represent a violation of the equality principle. An untenable territorial differentiation in this matter would arise, contrasting with the necessary uniformity required by art. 3 Const. with reference to the exercising of political rights. In particular, foreigners would or would not enjoy such right depending solely on where they live.

In this connection, a delicate problem arose when the Statutes of Tuscany and Emilia-Romagna inserted a rule (but only among general principles), according to which «the Region "*promotes*" (or, in the case of Emilia-Romagna, "*guarantees*"), in compliance with Constitutional principles, the extension of the right of vote to immigrants». The Government questioned the constitutional legitimacy of that rule before the

Constitutional Court. The Court "defused the bomb", saving the mentioned rules because they were considered «devoid of juridical effectiveness, as mainly regarding different political sensibilities present in the regional community when the Statute had been approved»[XVII]. In short, the Court, without tackling the general problem concerning the compatibility with the Constitution of a prospective extension of the right of vote beyond citizenship, has made clear that such extension could not be the result of an autonomous decision of a single Region, neither through a law, nor through statutory rules.

As to vote equality, derogations are only admitted to safeguard the linguistic minorities, and only if provided for by constitutional rules. Therefore, the electoral legislation of ordinary Regions is not allowed to introduce differentiations on this matter: only the Regions under special Statutes, which are constitutionally "covered" by their Statutes, could do so.

The question of equal opportunities is different[XVIII].

Since the nineties, Italy has been debating the legitimacy of legislative measures aimed at making effective the duty of promoting equal opportunities between genders, in order to gain access to public offices and elective positions. The Constitutional Court first denied constitutional legitimacy to such measures[XIX], causing a series of political reactions which led to the introduction of new constitutional rules, concerning both regional (new art. 117, par. 7, Const.; l. cost. no. 2/2001) and political elections (new art. 51, par. 1, Const.).

The above mentioned framework law no. 165/2004 has not introduced any sort of principle. This does not prevent the Regions from giving the problem an autonomous answer, on the basis of the powers they have (ex art. 117, par. 4). Up to now, ten Regions have approved measures concerning the obligation to present lists formed with candidates of both genders in a fixed proportion, where the percentages vary from case to case[XX]. The non-observance of the rule is punished with sanctions of different kinds, ranging from a merely economic sanction (loss of public refunding for the electoral campaign) to the inadmissibility of the list.

A quite specific case is that of the electoral law in Campania. Here, the so called «gender preference»[XXI] has been planned. Such measure has been devised because the mere presence in the list of a guaranteed minimum number of women does not in itself guarantee a female presence among the elected. In fact, the majority of "mistrustful" electors continue to vote for male candidates. Besides, male candidates are often favoured

as to sources of finance for their electoral campaigns and anyway they have a visibility which assures them considerable advantages in the competition.

The technique devised to make up for such alleged inequalities (which allows the elector to give two preferences, provided they are of different gender, with the sanction of invalidating the second preference if the two votes are given to persons of the same gender) was questioned by the Government in front of the Constitutional Court. But the Court[XXII] declared the question unfounded, arguing (as it had done a few years before with the Valle d'Aosta electoral law[XXIII]) that the provision only guarantees parity of chances, and does not favour either male or female candidates in getting a seat: the provision has been considered as a mere anti-discriminatory measure, not as a real «positive action».

3. Constitutional and statutory obligations to regional electoral legislation

What are the electoral models which can be adopted by regional legislation?

The State framework law no. 165/2004, which we have often mentioned, only orders Regions to find «an electoral system favouring the building of stable majorities and guaranteeing the representation of minorities». The "minorities" we are talking about are – obviously – the political ones (not the linguistic ones, which are guaranteed ex art. 6 Const.): in fact, the rule expressly connects such "minorities" to the "stable majorities" whose creation must be favoured. In any case, even without such recommendation, clear constitutional constraints (provided for by articles 1, 49, 83, par. II, 123, par. III, 126, par. II, Const.) would not allow the adoption of electoral systems clearly unfit to guarantee representation to minorities, in order to safeguard the pluralism of political representation.

Therefore, not only wholly majority systems would be considered illegitimate, but also barrier clauses or too high majority bonuses, built in such a way as to reduce the representation of political minorities beyond the reasonable requirements of stability and governability. Besides, if regional electoral laws contained electoral rules endangering such principles, the question should be solved by the Constitutional Court, carrying out a reasonable balance between requirements of stability/governability and the principle of vote equality (following the example of the German constitutional federal Tribunal

regarding the *Sperrklausel,* in force both in the law for the election of the *Bundestag,* and in the electoral systems of the single *Laender*[XXIV]).

Other limits could be introduced (by Statutes) to guarantee the stability of the system in the last part of the legislature. At the moment, something of this kind is only established in the Statute of Abruzzo: the regional Council cannot modify regional electoral legislation in the last six months of the legislature. It is a basic principle created to guarantee the rights of political minorities, but, up to now, it has not been adopted by other Regions[XXV].

Besides, although the electoral law is an «ordinary» regional law in itself, the Statutes could establish that it must be approved by a special majority (absolute majority, or majority of 2/3 or 3/5), in order to guarantee (in theory) Council minorities. Actually, many regional Statutes make it compulsory to approve a law with absolute majority. Anyhow, such rules are rather ineffective, as more often than not absolute majority can easily be reached through the votes of the Council majority: in fact, their representation share is guaranteed by the majority mechanisms provided for in most regional electoral laws.

4. The present discipline: a) the Regions under special Statutes

The events that led to the adoption of the new regional electoral laws in the course of the last 15 years are rather complex and politically entangled. By analysing such events, we will clearly see the endless labour of a difficult political season, uncertain and full of problems, which Italy finds it hard to emerge from even today.

We must first make a distinction between Regions under special Statutes and Regions under ordinary Statutes. When the constitutional law no. 1/1999 gave ordinary Regions greater electoral autonomy, special Regions had already enjoyed such autonomy for a long time. Actually, in the original version, they had full autonomy. The Statute of Sicily (art. 3) gave the regional Assembly full competence as to regional elections (later, it was interpreted as a concurring competence). With a few differences, it was the same for the Statute of Sardinia (art. 16) and for the Statute of Trentino-Alto Adige (art.19, par. 1). On

the contrary, the Statute of Friuli-Venezia Giulia expressly inserted electoral legislation among the subjects of concurring competence from the very beginning (art. 5, par. 1). However, the case of Valle d'Aosta was specific because the electoral legislation was given to the State, after advice from the Region (see the original text of art. 16, modified only in 1989).

The problem was, first of all, how to "constitutionalise" the proportional principle, which was considered as the fundamental principle of the electoral matter, although not referring to any specific framework law. Such principle was clearly mentioned in the Statutes of Friuli-Venezia Giulia, Sardinia and Trentino-Alto Adige (indirectly, also in the Statute of Sicily, which mentioned the «principles established by the Constitution as to political elections», referring back to the electoral laws of Parliament[XXVI]). In any case, however, the proportional principle was (politically) standardized and its adoption by the Regions under special Statute did not create any problem up to the nineties. There was instead a real 'standardization effect', which caused the adoption of electoral systems almost identical to the one provided for by the State law for ordinary Regions.

Only in the nineties, following the majority fashion which seemed to have suddenly struck the whole national political system, some Councils of the Regions under special Statute hurried to modify their electoral legislations. At first, this change caused several compatibility problems with their Statutes (they had in fact been written much earlier, when the constitutional principle used to be constitutionalised). The constitutional law no. 2/2001 («Provisions concerning the direct election of the Presidents of the Regions under special Statute and of the autonomous Provinces of Trento and Bolzano»), solved the most delicate juridical problems by introducing some "targeted" modifications of the old Statutes, in order to make them compatible with the new majority rules.

The techniques of changing the different electoral laws towards the majority system are rather similar to one another. Barrier clauses and/or limited majority bonuses have been introduced, bearing similarities to the electoral system which had been outlined for ordinary Regions by the law no. 43/1995 (and later on, by the transitional integrations of art. 5 of the constitutional law no. 1/1999).

It is interesting to note that the introduction of barrier clauses, whose purpose was to consolidate *political* majorities, over-representing its consistency in terms of seats, had the immediate consequence of damaging, or anyhow of making more difficult, the

representation in regional Councils of linguistic minorities, which were the only minorities expressly guaranteed by many special Statutes (the Ladini in Trentino-Alto Adige, the Walser in Valle d'Aosta). The Constitutional Court itself had to intervene, declaring the electoral law of Trentino-Alto-Adige unconstitutional, where it represented «an obstacle to the representation of linguistic minorities»[XXVII].

The constitutional law no. 2/2001, as we said, introduced some careful modifications to single Statutes; for example, it gave special Regions *exclusive* legislative power in the electoral matter (only stating that electoral laws must be «in harmony» with the Constitution and with the general principles of the juridical system). The same law gave such power to a special source, the «statutory law», which is to be adopted through the same procedure established for Statutes: approval with absolute majority and possible subjection to confirmative referendum when this is required by one fifth of the regional councillors or by one fiftieth of the electors of the Region. This should be of help to give greater stability to regional electoral legislation.

The electoral laws approved by the Councils of special Regions from 2001 up to now are substantially uniform in contents. They all (apart from Valle d'Aosta) provide for popular direct election of the President of the regional Board together with the election of the Council, thus creating a direct and indissoluble link between electoral system and form of government. They all adopt a proportional formula with multi-member constituencies (with the exception of Valle d'Aosta, for obvious geographical reasons). They all give a majority bonus to the list or the coalition of lists connected to the winning candidate President. They all provide for preference vote to select councillors and for a barrier threshold (generally low: between 3% and 4%) for the lists not in coalition (that is, not connected to a candidate President who has obtained at least 5%). They all provide for vote splitting between President and party list. There are marginal differences only about how to award the bonus: in some cases the mechanism of the so called regional "*listino*" is adopted, consisting of a fixed number of councillors to be given to the winning list; in other cases the bonus is distributed within the individual provincial constituencies.

Such substantial uniformity was not required. The individual Councils could have made far more differentiated electoral choices. But it is interesting to note that in the only case when a regional council tried to work out a substantially different electoral system, the electoral body, when called to express their opinion on the statutory law through a

referendum, rejected such choice[XXVIII]. In another case, not to make dangerous differentiations, the Council preferred to avoid approving a new law, *a priori* waiving the right to exercise legislative autonomy and accepting to continue to elect the regional Council on the basis of State rules clearly qualified as «transitional»[XXIX].

Once and for all we must remark that the transitional electoral model offered by the State to the special Regions has been perpetuated both formally and substantially, while the regional statutory legislator has proved to be devoid of real innovative capacities; by easily accepting that model, it has confirmed the provisional choices made by the State legislator in his stead. In short, there has been a sort of institutional conformism, made worse by the fact that the electoral system motivating such conformism was of very poor quality, quite unfit to guarantee a balance between representativeness of political forces and stability of executive powers: there was thus heralded a model of «fragmented bipolar system» which was obscure and difficult to understand and apply[XXX].

The local political classes handling the institutional change were not able (or did not want) to introduce substantial differentiations and innovations beyond the chances the rules offered and they have merely created systems almost identical to one another and quite similar to the dreadful national model (with the exception of some marginal details due to territorial requirements).

Such conclusion is only seemingly surprising. We could wonder why Regions with special autonomy (where special electoral rules, based on their specific territorial situation would be justified) have *always* adopted very similar laws. In fact, as we have seen, special Regions had been given wide discretionary powers to establish their electoral legislation and in 2002 they had even obtained *exclusive* powers on the matter. Still, they have constantly made almost identical laws, similar to the ones in force in the other Regions in the same period (all of them were proportional in the first period; all of them were based on the majority system with direct election, majority bonus and barrier threshold in the second period). As we will soon see, there is nothing to be surprised about.

5. The present discipline: b) the Regions under ordinary Statutes

Following the constitutional revision of art. 122, introduced by constitutional law no. 1/1999, the electoral legislation of ordinary Regions is, as we have seen, a matter of concurring competence. The formula used by the constitutional legislator in 1999 seems however so badly worded[XXXI] as to leave space to all possible interpretations. According to the most sensible interpretation, the limit of «fundamental principles established by a law of the Republic» would only operate with reference to the «electoral system» in the strict sense of the word and to the causes of ineligibility and incompatibility (but not to the forms of nomination of the President of the Region and of the members of the regional Board, nor to the so-called «*legislazione elettorale di contorno*» (the set of rules concerning electoral campaigns, electoral financing, media access, etc.). In any case, this was the interpretation given by the State legislator with law no. 165/2004, which introduced just a few rules of principle.

The State framework law requires the same length for the councils of all ordinary Regions[XXXII]. Besides, it gives some brief principles as to the election system in the strict sense of the word (the electoral formula to turn votes into seats), only requiring an electoral system favouring the birth of stable majorities and guaranteeing representation to minorities. Finally, it states the fundamental principles as to ineligibility and incompatibility to the office of regional councillor and of President of the Board (and also incompatibility to the office of member of the Board itself).

But no rule is given as to the relationship between Council and Board or between Council and President. This is quite consistent with the constitutional framework. In fact, such aspects concern the form of government and should therefore be directly and autonomously disciplined by the Statutes ex art. 123 Const., with no intervention "of principle" from State legislation.

The discretionary power theoretically left to regional law appears to be quite wide. Only pure, non-selective proportional systems or, on the other side, some strong majority systems such as the English *plurality* should not be admitted, because they contrast with the principles of State legislation. Between the two extremes, however, there seems to be plenty of room for guaranteeing the widest differentiation of individual systems (from proportional systems with majority bonus, to mixtures of proportional and majority systems, to the different types of systems with barrier threshold, to proportional systems

"after the Spanish model", having very small multi-member constituencies and without reckoning fractional remainders).

Forming no part of concurring competence and which can therefore be autonomously regulated by Regions ex art. 117, par. 4 are:

a) the discipline of the so-called "primary elections", as established by the regional laws of Tuscany and Calabria;

b) the limits of expense for an electoral campaign and, more generally, the discipline of the so-called "*par condicio*" in Regional elections;

c) the administrative organization of elections.

Besides, the Statute can establish special majorities to approve electoral laws, in order to guarantee the political minorities in the Council. This is considered admissible ex art. 123, par. 1, Const. and it has been used by several Regions[XXXIII]. The Constitutional Court, in the famous decision no. 2/2004 regarding the Statute of Calabria, recognized that these procedural weights are the «legitimate example of statutory choices regarding sources of law, which can indirectly influence regional electoral legislation». But the real problem is that (as we have already noticed referring to the «electoral statutory law» provided for in the Regions under special Statute) such "weights" do not generally reach the purpose intended, owing to the nature of the Council representation, which is itself distorted in not perfectly proportional frameworks. These rules therefore guarantee the inside articulations of the Council majority rather than the opposition.

The Statute can also regulate other aspects influencing the regional electoral legislation: we can mention equal opportunities (art. 117, par. 7, Const.), number of regional councillors[XXXIV] and above all the option for direct or indirect election of the President of the Board. In the last case, the choice of the election system of councillors is closely linked to the choice of the form of government in the Region.

According to article 5 of the constitutional law no. 1/1999, up to the coming into force of the whole system of the new regional electoral legislation (and of the new Statutes necessarily connected), a "common" discipline for all ordinary Regions, based on the old State law of 1995, was to be applied. The new feature included in art. 5 consisted of the generalised introduction of direct election of the President of the Region[XXXV] (but only

transitionally, until the single Regions had made their autonomous electoral and statutory choices).

From what we have said so far, we can see that in 1999 also ordinary Regions (as well as special Regions) had a wide range of choices. They could have differentiated their own electoral systems on the basis of the aspects most specific to their territory; they could have made provision for the demographic differences; they could have highlighted possible political-ideological differences regarding elections. Nothing of this sort happened. After a decade, we can conclude that Italian Regions have given up the opportunities which were offered to them.

Up to now, there have been two "rounds" of regional electoral legislation. Soon after the regional elections of 2005, which was soon after the State framework law came into force, electoral laws were passed by Calabria, Lazio, Marche, Puglia and Tuscany. Later on, close to the 2010 elections, the electoral laws of Basilicata, Campania and Umbria were passed. All the other Regions still use the transitional State discipline.

It is surprising that many Regions have actually reproduced, in their new electoral laws, State transitional legislation (this is the case of Calabria and Lazio); other Regions have been slightly more innovative (Tuscany, Marche, Puglia) but they have all adopted a system based on not just a tight but almost a symbiotic link between candidacy to presidency and corresponding coalition of lists, with a majority bonus to the winning "chain"[XXXVI]. There are obviously some details to be evidenced:

a) rise of the barrier clause (in Calabria it is 4% for all lists, without considering the coalition with a candidate President; in Puglia it is 5%, when there is no link with other lists reaching 5% altogether);

b) majority bonus given no longer on the basis of a «regional list» (the famous "*listino*"), but to the groups of provincial lists linked to the elected president, with seats distributed proportionally among the groups of lists entitled (this is the case of Campania, Puglia, Marche and Tuscany); the result is the return of a considerable number of elected – about 20% of the total – to provincial constituencies, that is to territory representation outside major cities (a percentage which, according to the system provided for by the national 'transitional' law, was actually bargained by the regional leaders of the coalitions);

c) provision of a "minimum" share for the opposition (35% in Tuscany and now also in Campania);
d) abolition of preferences (in Tuscany, where the closed list has been introduced, the electoral law provides for the possibility of holding primary elections inside every party, to select candidates and to decide on their position in the list).

In any case, the framework appears to be rather uniform. Despite the extensive freedom to act granted by the rules and the resulting opportunities for local political classes to use the Regions as a training ground where to try out electoral models, perhaps transferable to national level, the Regions seem to have contented themselves with playing on the same plot; so, they have under-exerted, or even not exerted at all, their competences, limiting their activity to the mere application of the national transitional law. None of the Regions has abandoned the model of direct election of the President. None of them has given up the majority bonus to the coalition of lists linked to the elected President. None of them, on the other side, has discarded the scheme of proportional representation (apart from the correction effected with the bonus), with multi-member constituencies on a provincial basis, barrier clause and preference vote. None of them has refused to introduce the "*simul stabunt vel simul cadent*" clause (literally *they will stand together or they will fall together*: if the President suffers a vote of no confidence, resigns or dies, also the Council is dissolved and a snap election is called).

6. Final remarks.

Two remarks are advisable as a conclusion. First, what we have said seems to be, over forty years after the considerations made by Leopoldo Elia on the nature of the forms of government, a further proof of the close interdependence of form of government, electoral system and party system.
The substantial uniformity of regional electoral systems, in a framework which did not theoretically prevent their even significant differentiation, seems to be the result of a clear choice from regional political *elites* who handled the transition stage from the old to the new system: it is therefore the clear example of their relative uniformity. This is further

proved by their common choice to reinforce the so-called "bipolar system", without introducing any serious instrument to avoid or at least limit the natural tendency for *internal fragmentation* of coalitions. Tuscany is a paradigmatic case: there a law has been approved, carbon-copied on the simple requirements of the smallest parties of the (then) majority coalition, containing rules whose clear purpose was to guarantee them a minimum share of representation[XXXVII].

In effect, we notice how difficult it is for party systems to "regionalise themselves", even when political interests of regional bodies are at stake. We find a confirmation *a contrario* to that by analysing the two unique special Regions where the party system is peculiar in itself, owing to the presence of *clivages* of ethnic/linguistic type overlapping the traditional right/left *clivages*: there, different balances have been reached. We refer to Valle d'Aosta and Bolzano Province, where the pattern of direct election - *simul simul* was deliberately avoided.

We must conclude that the so-called «regional parties» (whatever a careless observer from outside might think) are very weak and they are made even weaker by the "leadership obsession" based on the direct election of the President[XXXVIII].

So it is not surprising that in Italy there is a steadfast tendency to read regional electoral results in a "national" key. In fact, every single regional electoral appointment is seen as the opportunity to once again measure general political consent, not as the time to consolidate territorial consent.

We realize how weak the regional party systems still are, in spite of the widespread use of federalist rhetoric, and how scantily independent they appear to be; in fact, each of them carefully avoids adopting a differentiated electoral system, introducing unwanted differences from the common model. The effect is that the actual uniformity of electoral systems will cause a further step towards uniformity of party systems.

A second remark, closely connected to the previous one although more general, seems to be essential. We must probably give up reasoning on the basis (widely misleading) of differentiations based on alleged socio-cultural differences among Regions; we must instead realistically consider the substantial uniformity not only of political classes and their interests (in terms of alignment, alliances and strategies used to obtain consent), but also of the social basis of reference in the Italian Regions in connection with the national context. All that raises a number of doubts as to the strength of the model of "progressive

federalization" which has been extensively gaining credit both in politics and in some specialized printed material. We must therefore mention once more what has been remarked by many: the excess of rhetoric which has surrounded the concept of territorial differentiation over the last few years. In Italy, apart from some strained interpretation due to the need for political visibility, there does not seem to be any "national", "historical" or – even worse – "ethnical" justification to increase such differentiation. There has never been in our country (apart from some recent, coarsely artificial episodes of a folk character, due to electoral considerations) any real regional nationalistic urge (with the exclusion of the remote events of some territories belonging to special Regions). This can be easily understood if we only think that the differentiation rate allowed by society is extremely low, especially when political choices are at stake (and electoral choices are a clear example of that). There is in fact a substantial uniformity of all regional legislations in most sectors. This is a further example of the strongly unitary character of the Italian system, reflecting deep elements of the way of being of civil society and even of the psychology of single people[XXXIX].

Starting from these remarks, we should probably ask ourselves a more general question regarding the incredible investment of political and intellectual resources, recently spent in public debate about the almost prodigious capacities of the (alleged) new federal model of State organization. Such effort may have contributed to build a collective imagination. But it is still to be proved that it has produced any result in terms of institutional efficiency.

I Elia (1970), 634 ff.
II Cosulich (2008), 5.
III L. no. 165/2004: "*Provisions for the Implementation of Art. 122, par. 1, of the Constitution*".
IV Ten of the 15 ordinary Regions have handled up to now their electoral legislation, although only eight of them have regulated the electoral system in the strict sense of the world (that means the so-called "electoral formula").
V According to Giampieretti (2002), 69, «A Nation cannot be kept united without an adequate level of uniformity of its political system», while «the consonance of electoral systems makes it easier to elaborate coalition-strategies of parties, and vote-strategies among electors, bringing remarkable benefits to the good running of democracy».
VI Corte cost., no. 496/2000: see Cuocolo (2000), 3810 ff.; Zanon (2000), 3823 ff.
VII Olivetti (2002), 474.
VIII Barile (1966), 33.
IX On the basis of the well known lesson of the Constitutional Court (cfr. Corte cost. no. 172/1999: see. Grosso (1999), 1705 ff.). Pace (2003), 319, clearly acknowledges the ordinary legislator's power of «extending to foreigners the possession of the rights the Constitution gives to citizens, including those of 'political' nature».
X Grosso (2001), 103 ff.; Grosso (2010), 405 ff.

[xi] Corte cost., no. 29/2003.
[xii] See, also for further bibliographical indications, Grosso (2001), 103 ff.; Grosso (2006), 966; Grosso (2007), 28 ff.; Grosso (2010), 405 ff. It should be up to the legislator to define the requisites required to enjoy such rights (years of residence, possible reciprocity condition, etc.). It should be up to it above all to decide whether such right is to be limited to municipal elections or extended to provincial, regional or even political elections. This opinion was recently shared by Salazar (2005), Rossi – Vrenna (2006).
[xiii] Carli - Fusaro (2002).
[xiv] Angiolini (2004).
[xv] Corte cost., no. 196/2003, 2/2004, 372/2004, 379/2004.
[xvi] C.S., sez. 1 e 2, 6 July 2005, no. 11074/04; sez. 1, 16 March 2005, no. 9771. See Grosso (2007), 40 ff..
[xvii] Corte cost., no. 372 e 379/2004: see Anzon (2004), 4057 ff.
[xviii] For a more complete reconstruction on this subject, see lastly Caielli (2010).
[xix] Corte cost. no. 422/1995.
[xx] In Calabria electoral law provides for «at least one candidate of each gender»; other regional laws establish variable percentages (from 20% to 33%); in Sicily the alternative presence, in every list, of candidates of male and female gender is established.
[xxi] Caielli (2010).
[xxii] Corte cost., no. 4/2010.
[xxiii] Corte cost., no. 49/2003.
[xxiv] Cosulich (2008), 51 ff.
[xxv] It has to be remembered what happened in Calabria, when the barrier clause was increased (from 3% to 4%) only two months before 2005 elections.
[xxvi] Cosulich (2008), 138 ff.
[xxvii] Corte cost. no. 356/1998.
[xxviii] We are talking about Friuli-Venezia Giulia case. The electoral statutory law, approved with a two-thirds majority in March 2002, replaced the usual model of direct election of the President, with a not-constricting indication, to be confirmed by a vote from the Council. The President would have therefore been elected by the Council, and not by the electoral body. Such rule had the aim to avoid the enforcement of the principle «*simul stabunt vel simul cadent*»: in fact the President, elected by the Council, could have suffered a vote of no confidence and been replaced, without the contemporary dissolution of the Council itself.
[xxix] This is the case of Sardinia, where the regional Council is still elected on the basis of the State transitional law no. 43/1995.
[xxx] See in particular, Di Giovine - Pizzetti (1996), 11 ff.; Frosini (2003), 127 ff.
[xxxi] Tarli Barbieri (2007), 44; Cosulich (2008), 212.
[xxxii] In this connection, see Corte Cost. no. 196/2003, according to which this constitutional rule would prohibit an autonomous regulation of the *prorogatio* of Councils, beyond the terms stated by State law.
[xxxiii] Art 32 St. Abruzzo; art. 38 St. Calabria; art. 19 St. Lazio; art. 24 St. Puglia; art. 36 St. Umbria; art. 17 St. Piemonte; art. 14 St. Liguria. This two last Statutes provide for qualified majorities of three-fifths and two-thirds.
[xxxiv] This subject is clearly of statutory competence, as was recently reasserted by the Constitutional Court (Corte Cost., no. 188/2011, where it is pointed out that «art. 123 Const. provides for the existence of real reserves in favour of statutory source in ordinary regional law; it adds that the determination of the number of members of the Council is part of such reserve»: about this decision, see Gabriele (Forthcoming). Such possibility has often been used in an unscrupulous way by regional Councils; this choice has led – with the exception of Piedmont and Abruzzo – to a considerable increase in the total number of regional councillors as to the previous State electoral law of 1968.
[xxxv] It was established that the old head of the list was considered as the «candidate President» of the regional "*listino*": this aimed at obtaining the majority bonus: «Up to the date where there came into force the new regional Statutes and of the new electoral laws approved ex art. 122, par. 1, Const, as replaced by Art. 2 of the present constitutional law, the election of the President of the Board is concomitant with the election of the regional Councils, and it takes place according to the rules established by the ordinary laws in force regarding elections of regional Councils. The candidates to the Presidency of the Board are the heads of the regional lists. The candidate who has obtained the majority of valid votes in the Region is declared the winner".
[xxxvi] Fusaro (2005), 442.

[xxxvii] Fusaro (2005), 442.
[xxxviii] The remark dates back, but it has never changed in the course of time: Fedele (1988); Bartole (2000), 398 ff.; De Martino (2007), 14.
[xxxix] Falcon (2005), 707 ff; Groppi (2008), 22.

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Efficiency as a descriptive variable of autonomous electoral systems in Spain

by

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Abstract

The homogeneity of the regulations governing the electoral systems of autonomous communities derives from their desire to imitate the system adopted for the Spanish Chamber of Deputies, and from their decision to look to countries with multi-level political structures for inspiration. This paper puts forward the hypothesis that the electoral system in communities which form part of the endogenous party system model built up over the last thirty years has been remarkably effective

Key-words

electoral system, Constituency, Subjective National Identification, Eccentric party system model, Endogenous party system model

Preliminary Remarks

According to the second paragraph of the first Additional Provision of the Spanish Organic Law on the *General Electoral Regime* (*Ley Orgánica del Régimen Electoral General* - LOREG), autonomous communities are subject to most of the rules contained in Title I of the law. This mainly defines issues such as active and passive suffrage, electoral administration, the presentation and proclamation of candidates, the election campaign, the exercise of the right to vote, the proclamation of elected candidates, electoral disputes and the definition of offences. In all, elections for autonomous community legislative assemblies are subject to over half of the LOREG (Biglino, 2009, 17-18). Some argue that legislators have unduly restricted the competences of autonomous communities by establishing such wide-ranging and detailed regulations (Gavara de Cara, 2007, 103). However, it should be borne in mind that LOREG's provisions, even on a matter as sensitive as its application to the legislative assembly elections of autonomous communities, have been well-received. Lastly, there is the latest reform of the LOREG, introducing new rules that also apply to the legislative assembly elections of autonomous communities , which has been unanimously approved .

However, the reason why autonomous legislators have little room for action not only lies in the content of the first Additional Provision of the LOREG, but also in how the different statutes of autonomy have framed their communities' electoral systems. Initially, these documents were not unduly detailed, but subsequent statutory reforms have gradually changed this situation. A tendency developed to - introduce provisions that had originally been included in the autonomous community's electoral regulations, and qualified majorities began to be required for regulations developed by the statutes on these matters.

In spite of public consensus on the construction of this electoral framework, the power of autonomous community legislative assemblies to influence this area is very limited.

1. Description of the main variables of the electoral system

The main variables of the electoral system are limited and little used by autonomous lawmakers. In fact, a description of the main variables of the electoral system of all autonomous communities highlights their similarities to state legislation. Briefly, the characteristics of autonomous electoral systems can be summarised as follows:

1) The size of regional parliaments is highly proportional to their population. The number of members oscillates between over one hundred in the Catalan, Andalusian and Madrid Chambers, and below forty in La Rioja and Cantabria.

Table 1. The relationship between number of seats and population by autonomous community

Community	Chamber	Population	Ratio
Andalusia	109	8,202,220	75,250
Catalonia	135	7,364,078	54,549
Madrid	120	6,271,638	52,263
Valencia	99	5,029,601	50,804
Castile-La Mancha	47	2,043,100	43,470
Galicia	75	2,784,169	37,122
Canary Islands	60	2,075,968	34,600
Murcia	45	1,426,109	31,691
Castile-León	83	2,557,330	30,811
Basque Country	75	2,157,112	28,761
Asturias	45	1,080,138	24,003
Aragon	67	1,326,918	19,804
Balearic Islands	59	1,072,844	18,184
Extremadura	65	1,097,744	16,888
Cantabria	39	582,138	14,927
Navarre	50	620,377	12,407
La Rioja	33	317,501	9,621

2) Autonomous electoral systems have adopted the proportional formula used in state Parliamentary elections, known as the D'Hondt method. Their reluctance to move away from this is demonstrated by the unclear treatment of the issue in some autonomous electoral regulations, whether they are statutes or electoral laws, sometimes even making direct reference to Article 163 of the LOREG, the electoral formula of the Spanish Chamber of Deputies (the lower Chamber).

3) The criteria by which constituencies are determined vary slightly in each community. In the thirteen single or multi-province communities, the electoral district is the province. Conversely, Asturias, the Balearic Islands, the Canary Islands and Murcia have opted for sub-provincial constituencies: in the Balearic and Canary archipelagos, for example, every island is a district. All constituencies are multi-member except for the Island of Formentera.

Table 2. Electoral constituencies by autonomous community

Community	Constituency	Number	Average Size
Andalusia	Provinces	8	13.6
Aragon	Provinces	3	22.3
Asturias	Group of municipalities	3	15.0
Balearic Islands	Island	4	14.7
Canary Islands	Island	7	8.5
Cantabria	Province	1	39.0
Castile-La Mancha	Provinces	5	9.4
Castile-León	Provinces	9	9.2
Catalonia	Provinces	4	33.7
Extremadura	Provinces	2	32.5
Galicia	Provinces	4	18.7
Madrid	Provinces	1	120.0
Murcia	Group of municipalities	5	9.0
Navarre	Province	1	50.0
Basque Country	Provinces (Hist. Territories)	3	25.0
La Rioja	Provinces	1	33.0
Valencia	Provinces	3	33.0

The constitutional principle of autonomous territorial representation involves some recognition of internal (territorial) pluralism in the autonomous communities, normally expressed through the corresponding territorial subdivisions (provinces, counties, islands, groups of islands, etc.). Article 152 appears to introduce the criterion of "guaranteed territorial representation", under which proper representation of the territory can be ensured by establishing territorial electoral districts and guaranteeing each a minimum number of seats. By providing this guarantee, the Spanish Constitution also introduces a potential source of voting inequality if the corresponding compensation mechanisms are not put in place, since disproportion in distribution also undermines the principle of equality.

4) If the four autonomous communities with a single district are excluded, pro-rata electoral mechanics can be found in three variations:

a. First, Asturias, Castile-León, Castile-La Mancha, Extremadura, Galicia and Murcia assign a minimum number of deputies to each constituency and the rest are distributed via pure proportionality depending on the standing population. The only exception is Castile-León, where the ratio of one seat per 45,000 inhabitants is applied for the remaining seats.

b. Second, Andalusia, Aragon and the Valencian Community establish a maximum limit for disproportionality among provinces, with the peculiarity that, concerning the latter, the D'Hondt formula is used for the demographic distribution of the remaining seats.

c. Finally, regarding the Balearic Islands, the Canary Islands, Catalonia and the Basque Country, each has its own procedure. Regarding the first two, a set-number of seats is directly assigned to each island; in Catalonia, a limit in the form of a minimum number of deputies is set for Gerona, Lleida and Tarragona and a maximum for Barcelona, while the remaining seats are distributed according to different ratios: one deputy for every 40,000 inhabitants in the first three provinces and one for

every 50,000 in the last. In the Basque Country, the same set number of seats is assigned to each province.

5. Territorial representation in relation to the principle of the effectiveness of decision-making centres has also been used as a factor in the definition and legitimisation of electoral barriers. Therefore, all communities have set legal barriers to prevent excessive fragmentation in the composition of their legislative assemblies. Minimum barriers have been set at 3 or 5% of votes cast in either constituencies or communities. The Valencian electoral system, which takes into account the votes cast, and the Canary Island system, which provides for two thresholds, one insular and the other autonomous, have uniquely differentiating features. The differing percentages of barriers at the autonomous and insular level are justified by the special geographical nature of the archipelago and are designed to prevent fragmentation and ensure adequate representativeness in terms of seats in the smaller islands, where an electoral barrier of 30 percent is applied. In the case of the Canary Islands , this voting inequality is justified in the same way as in the single-member district of Formentera in the Balearic Islands, where global or overall proportionality has been imposed.

The only changes made to the autonomous electoral systems between 1980 and 2000 affected their legal barriers. The communities of the Basque Country, Extremadura, the Balearic Islands and Galicia raised their barriers from 3 to 5% of valid votes cast in each district. Asturias and Castile-La Mancha moved from a barrier of 5% throughout the community in the first legislature to a 3% barrier in the second and successive legislatures.

2. Autonomous legislators' scope of action

Although the space in which autonomous legislators move is limited, this does not mean that they lack capacity for action. In spite of the restrictions imposed by the Constitution, the LOREG and their statutes, autonomous parliaments retain decision-making power over some important issues. In fact, there is an appreciable scope for action

in regulating important aspects of the electoral system such as electoral lists, the voting system, surveys and polls, the electoral campaigns and the composition and working of the autonomous electoral boards.

Regarding electoral lists and voting systems, although all autonomous electoral systems use closed, blocked lists, the Constitution does not prevent them from using open lists as the basis for the vote , or to introduce preferential voting. Similarly, while the LOREG makes no reference to electronic voting, one interpretation shows that there is no bar to possibly introducing it in electoral colleges. Moreover, in Spain, although the central electoral board did not hesitate to "authorise" the holding of electronic voting trials, so far this aspect has only been regulated in the electoral law of the Basque country.

As regards autonomous legislation on electoral campaigns, it would certainly be possible for communities to regulate important aspects, including the role of public authorities, the criteria for distributing free space in the public media and the regulation of surveys and polls, concerning which only the Basque Country has published regulations, echoing the content of Article 69 of the LOREG. Other important issues that can be regulated include the holding of the vote itself, expenses and grants as well as the system for dealing with electoral administrative breaches.

Finally, as regards the composition and functions of their electoral boards, all autonomous electoral regulations have established a similar structure, using the somewhat questionable technique of copying the competences established in state electoral regulations, therefore, adding to the impression that autonomous boards are dependent on hierarchy . When compared to the composition of similar organs –all over the world, this tendency to imitate produces legalisation and over-sizing in Spanish autonomous boards. For example, the Basque Country's electoral board has over three times as many members as its Indian equivalent.

3. Causes and assessment of autonomous electoral homogeneity

Apart from the aspects of the electoral system into which autonomous legislators have not ventured, it is still significant that not even the main elements of the electoral system have been given priority treatment. The fact that homogeneity is a general characteristic is

obviously not enough to justify it, though it certainly should not be seen as entirely negative either.

Traditionally, two possible explanations are given for the homogeneity of autonomous electoral systems:

1) The prevailing principles in the design of electoral institutions have oscillated between a tendency to imitate the system used for the Spanish Chamber of Deputies and the desire to introduce a relatively homogeneous system, following the agreements on autonomy reached between the *Unión de Centro Democrático* (UCD) and the *Partido Socialista Obrero Español* (PSOE). Criteria which range from the use of similar territorial criteria across all electoral processes, the institutional homogeneity arising from the use of the same form of government in the state and the autonomies, and the long-standing nature of the regulations on electoral organisation and procedure (Oliver, 2011, 98-99).

2) Countries with multi-level political structures generally have a common source of inspiration spanning all political levels.

Without detracting from earlier theses, which I am sure have helped explain why autonomous legislators have succumbed to a degree of "regulatory indolence" in the configuration of their electoral systems (Presno, 2007, 130), I think that a third aspect should be taken into consideration , one which the doctrine has rarely addressed. That is, that the homogeneity of the electoral systems may be a result of the limited influence of territorial pluralism on a significant number of autonomous communities, making it insufficiently effective as a mechanism of representation. In this regard, the result of the different autonomous electoral systems in terms of proportionality shows that in most cases a very close relationship is established between the popular vote and seats. Applying Rose's index, it can be seen that in almost all of these communities, this is more than 90%[I]. In the party system, which has developed as electoral history has been laid down, two main territorial models can be distinguished: one general, as developed in twelve of the autonomous communities, and another eccentric, which can be found with some variations in the Canary Islands, Catalonia, Galicia, Navarre and the Basque Country. The

dominant model is characterised by the practically exclusive support given to state-wide parties. As in the state model, party sub-systems have a bipolar structure. This means that by far the majority (over 75 percent) of votes and almost all seats (80 percent) are concentrated in the top two parties. There is low fragmentation and a correspondingly low number of effective parties, both in their electoral and Parliamentary versions. Conversely, in the eccentric models, although allowing for appreciable differences, party systems are more fragmented and polarised, structured in a way that is defined along ideological and nationalistic lines. So there is no dual-party system, state-wide in general elections as well as in all autonomous communities and eccentric in autonomous elections. Conversely, there are several "electoral Spains" (Ocaña and Oñate, 2000) in which the autonomous party system is reproduced across all electoral contexts, admittedly with greater intensity in the autonomous elections.

The arguments used to account for this duality usually refer to the process by which the autonomous state was created. This process has undergone several phases and its pace has fluctuated throughout the various autonomous communities also regarding electoral matters. The autonomous communities which followed the procedure set out in Article 151 of the Constitution (the Basque Country, Catalonia, Galicia and Andalusia) have each undergone their own political-electoral process. Of these, nine autonomous elections have been held in the Basque Country and Catalonia, and eight in Galicia and Andalusia. The political-electoral processes of Navarre and the autonomous communities of the so-called "normal" procedure have coincided over time as a result of the 1981 autonomous agreements . Some authors (Wert, 1998) argue that differences in electoral pace and circumstances enable a more specifically autonomous dimension in the elections of the so-called Article 151 autonomous communities, and a more homogeneous-statised dimension in Article 143 communities. In other words, the dual autonomous configuration is reflected in patterns of electoral behaviour and the configuration of the party system.

Without underestimating the influence that institutional variables may have on the configuration of the party system, we feel that this concept provides a less likely explanation than that of the "national cleavage". This has crystallised into two complementary electoral results: the existence of significant variations between communities in voting distribution , and the presence of nationalist parties in some communities.

Given the process by which the Spanish nation was formed and the existence of sectors which question their inclusion in the Spanish nation, feelings of national belonging have been being studied since the transition (Magre, 2008, 41). A range of instruments have been used to measure them, including the *Subjective National Identification*. This is an indicator of affective feelings which helps to capture individuals' identification with certain communities, and can be used to assess the distribution of these supports throughout the population by grading the comparison between state and rival references.

Table 3 shows the results of this indicator according to the latest autonomous barometer ("*barometro autonómico*") of the *Centre for Sociological Research* (*Centro de Investigaciones Sociológicas – C.I.S.)* carried out in 2010. Autonomous communities are graded by the percentage of citizens whose feeling of regional or national belonging is higher than those who show this feeling towards Spain.

Table 3**.** Self-grading of the electorate on the national identification axis by autonomous community (2010)*

	S>C	S=C	S<C	DK-NA
Basque Country	10.6	36.3	47.8	5.3
Canary Islands	5.4	47.9	45.5	1.2
Navarre	8.3	38.9	41.1	11.8
Catalonia	17.2	41.3	39.2	2.4
Balearic Islands	16.5	56.3	25.5	1.7
Galicia	6.5	68.7	24.1	0.7
Andalusia	12.2	68.9	17.2	1.7
Asturias	21.9	60.8	14.2	3.2
Extremadura	11.1	74.4	12.6	1.9
Cantabria	16.7	68.6	10.8	3.9
Valencia	31.4	56.1	10.5	2.0
Aragon	16.6	67.6	10.3	5.5
La Rioja	15.9	70.2	8.5	5.3
Murcia	14.8	79.1	4.3	1.8
Castile-León	39.2	53.5	3.9	3.2
Madrid	38.9	38.4	2.9	19.8

Castile-La Mancha	27.4	66.7	2.3	3.7

* The question is formulated as follows: "Which of the following statements do you most identify with?" The possible replies for the subjects are: "I only feel Spanish", "I feel more Spanish than (autonomous community: Catalan, Basque, Galician, etc.) "I feel just as Spanish as I do (autonomous community: Catalan, Basque, Galician, etc.) "I feel more (Catalan, Basque, Galician, etc.) than Spanish, "I only feel (Catalan, Basque, Galician, etc.)". I have grouped the responses into three categories to make the table easier to read: the first category contains the responses that show Spain as their choice ("I only feel Spanish", "I feel more Spanish than (autonomous community)"; the second includes feelings of split loyalty: "I feel as Spanish as I do (autonomous community)", and the third contains sectors with feelings linked affectively to the autonomous community.
Source: *Centro de Investigaciones Sociológicas. Barómetro autonómico*. January 2010.

The results identify a first group of autonomous communities, led by the Basque Country, in which the number of citizens with feelings of belonging to the autonomous community oscillates around 40 percent of the total population. There is a second block formed by Galicia and the Balearic Islands where the latter represent a quarter of the population, and a third group of regions (the largest group), in which the percentage of citizens affectively loyal to the autonomous community is less than twenty percent. This long list of communities with a more diffuse profile and less intense regional feelings should come as no surprise. In most cases, their borders had not yet been defined when the autonomous process generated by the 1978 Constitution began, and had no specific ethno-territorial basis.

The "national cleavage" measured by the *National Subjective Identification* is particularly important since it explains the territorial differences that mark the Spanish case. In fact, national identity and the appearance of nonstate-wide political parties embodying this feeling may explain the territorial differences referred to. In this respect, the relationship between national identification and political behaviour, expressed through voting and party allegiance, demonstrates how communities with more intense national awareness have sub-systems of political parties with particular characteristics which are especially evident in autonomous elections, and more diffuse at the state level.

We can therefore establish an explanation which will require corroboration in future work: i.e. that the electoral system has been markedly effective in the twelve autonomous communities which subscribe to the territorially dominant party system model. The two-party system, low fragmentation and a low number of effective parties participating in both general and autonomous elections provide no incentive for changing

the main components of their electoral system. Conversely, as regards eccentric models with more fragmented party systems and greater polarisation, structured along ideological and nationalistic lines, the fact that their regulations coincide with other communities may seem surprising.

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[I] Rose's index is calculated based on the following formula: $MR=100-\frac{1}{2}\sum|v_i-e_i|$, where *v* and *e* are the percentage of votes and seats of party *i*. The index varies between 0 (minimum proportionality) – and 100 (maximum proportionality).

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The referendum and popular consultations in the Autonomous State

by

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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 Cataluña 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[XL].

Not only are municipal popular consultations not provided for in the Constitution, LODMR itself excluded them from its area of application[XLI]. 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)[XLII]. 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 autonomico 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 surpressed, 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 269/2005of 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 EAIIBB.* 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: 27ª 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 149.1.32ª 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: 15º 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.

[XL] On local referendums *see:* J.L. Martínez-Alonso Camps (2010, 447-486).
[XLI] 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"*.
[XLII] Act 7/1985of 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)
[XLIII] 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.
[XLIV] 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
[XLV] Resolution no. 1618/2010 of 16 September, already noted.
[XLVI] 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" (FDº 1º, 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" (FDº 3º, *in fine*).

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The Regional Construction of a Citizen Participation Model: Experiences and Elements of the Debate on Participatory Democracy

by

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Abstract

This study offers a reflection on the current developments in participatory democracy at the regional level. Besides providing a descriptive analysis of the instruments put into practice through different legal formulas (hard law or soft law), it intends to analyse the key features of a singular and interesting model of citizen participation using the Spanish and Italian experiences as the main focus of this study, from a perspective of the commitment to democratic regeneration and taking into consideration parameters such as control, responsibility, evaluation, dialogue and the transparency of public authority accounts.

Key-words

Participatory Democracy; Democracy; Multilevel Constitutionalism; Regional Government; State of the Autonomies; Governance; Responsibility; Transparency

1. Origins and state of the issue: The suitability of the "regional" level for the development of public policies on citizen participation

Participatory democracy as *tertium genus* between direct and representative democracy emerged in the 1960s with the aim of actively asserting citizens' opinion in the decisions that concern them. It arose from an idea of democracy that goes beyond unidirectionality to bi-directionality, so as to build a relatively effective dialogue between the citizens and the political authorities, which, otherwise, would not allow the corresponding decisions to be made based on the first concept of democracy[I].

Recent experiences have shown that participatory democracy provides the local entity with indubitable leadership, and even serves, on occasion, as an inspiration for other territorial entities, far different from the leadership of state entities[II]. However, the precautionary regulations of instruments of citizen participation in regional decision-making have been quite recently and interestingly developed, especially with reference to the intermediate level between the central State and the local government. In recent years, conditions have arisen creating a suitable climate for the implementation of citizen participation policies, as evidenced by the models that we will use as references: Italy and Spain. In this regard, we should highlight the pioneering initiatives of some Spanish Autonomous Communities, such as those of Valencia[III] and the Canary Islands[IV], and more recently the singular experience resulting from a local (foral) law in Guipuzcoa[V], or the foral laws launched in regions and decentralised entities by other States, as in the Italian regions of Tuscany[VI] and Emilia-Romagna[VII]. However, the Foral Law on transparency and open government tabled by the Government of Navarra in January 2012[VIII] is particularly important, though it is still a draft bill. These regulations constitute a unique framework and innovative point of reference, since, apart from elevating participatory democracy to the status of law, they seem to recognise the doctrine of the Spanish Constitutional Court, which establishes that the *interpositio legislatoris* will go on to determine the particular mechanisms of participation (see SSTC 25/1990 and 8/1985) in accordance with the content and philosophy pervading these regulations. In other cases, however, the development of *soft law* has been chosen in matters such as the possible elaboration of a Law on Participation, as in Catalonia (*Pla interdepartamental de participació ciutadana 2008-*

2010), or in the most recent case of *Llibre verd de la qualitat democrática* and the debate arisen in 2009 and 2010 concerning the strengthening of citizen participation. Finally, it is also possible to follow the path undertaken in the experiences of participatory democracy in Aragon. In any case, this is a recent trend which is worthy of the attention of theorists of democracy.

However, at the same time, this is an unexplored field, the most recent results of which have occasionally allowed a rough outline of a participation model to be created that aspires to develop the concept of participatory democracy itself, although sometimes it has not proven to be fully effective in the measures adopted. Its suitability, however, is reflected in the following premises:

- The large shortage of "social capital" and "social wealth", which are typical of regional entities, bearing in mind the European conception of civic citizens[IX] and satisfying in this way the need for social cohesion typical of European constitutionalism.

- The actions at the regional level in favour of citizen participation, which constitute strategies to overcome local diversity and heterogeneity, which are even more striking in Italy than in Spain.

- Furthermore, in connection with the previous premise, this concerns guiding participation with respect to the local entities, applying the principle of vertical subordination (i.e., from the regional level to the European supranational level) and horizontal subordination (i.e., from the citizens to the public authorities).

- This suitability is in accordance with increasing regional leadership, if the level of competences of these entities and their potential in terms of administrative resources for citizen participation are considered.

- Moreover, it is true that the regional level offers the opportunity to configure participation in the form of a subjective right, and also possibly the opportunity to configure a "participatory model"[X].

- However, above all, the regions are configured as a sufficiently close-knit territorial level, making a viable participatory democracy possible, with sufficient authority to self-govern or decide as to the design of a particular participatory model that is relatively stable.

In short, it may be said that the legal development of citizen participation at the regional level transforms it into an advantageous instrument that can make these public

policies a reality, while, at the same time, contributing to its promotion at the local level as a space that is and has been very important for citizen participation. It is obvious that instruments of *hard law* and *soft law* are adopted, as local experience has demonstrated, which allows a model of participatory democracy to be built in both cases according to its own distinguishing features. Without going into detail about the successful efforts that have been made so far at the local level, and, what is more, about its mission, the regional perspective offers the opportunity to provide support as well as contribute to its spread throughout the municipalities, to establishing regulations for this model to the point of constructing real subjective rights of citizen participation and to achieving participation at the regional level where, bear in mind, it can gradually bring together a rather important block of competences in the most varied matters.

After this illustration of the "participation fever" which developed over the last 20 years of the past century, attention should be drawn to one final point, i.e., how paradoxical the minimization of participatory practices is, deriving from globalisation and the fact that priority is given to economics instead of democratic politics[XI]. On the contrary, especially in this time of economic distress, the latter should be wisely considered and weighed.

2. Influences: From "local" experiences to The "European reference"

Since the last decades of the past century, local experiences have been and continue to be a reference for the configuration of participatory democracy, uniquely highlighting the Anglo-Saxon experience. As a result of being pioneers in technological innovation, it should be acknowledged that in Anglo-Saxon countries factors such as greater localism, the deeply rooted practice of *self-government* and greater flexibility in the party system undoubtedly favour an attitude of openness to citizens' opinions. Since the organised citizen juries in Germany and the United States in the 1970s, the notion of participation in the Anglo-Saxon context, in the relevant experience of Porto Alegre in Brazil (1989) and even in the putting into practice of the diverse forms of the Anglo-Saxon court, such as the *town meeting,* deliberative polls, the *electronic town meeting* and *deliberative polling* (opinion polls after informative discussions, also experimented in Denmark and Australia), refers in any

case to joint instruments of citizen participation, accurately tested by the local entities that support these public policies. As a consequence, they are not generalised throughout the totality of the local entities and are less likely to create a stable legal framework, but are absolutely decisive in the debate on the need to proceed towards democratic regeneration[XII].

As has occurred in other thematic areas, the European framework also seems to provide a sort of "guide" for citizen participation policy at the regional level in regions that seem receptive to–integrating this idea, born at the heart of the Union, of opening up to new participatory experiences, with a relative amount of fortune.

In particular, attention should be drawn to the impulse provided by the White Paper on European Governance, approved by the Commission on July 25th, 2001, already backing the greater involvement of citizens in the construction of a productive social dialogue and in making the administration of the political authorities more transparent.

In fact, it refers to using regional and local democracy to reach citizens, a strategy whereby the Commission proposed that the same associations of local bodies participate in the elaboration of European policies, promoting their cooperation with the Committee of the Regions. Meanwhile, the Committee would ensure these European measures through the observation of their local and regional impact. At the same time, the States themselves also had to collaborate in the involvement of the regional and local levels in European matters. It also aimed at increasing flexibility in the application of European policies with strong territorial impact for those in direct contact with the various different levels of government. Lastly, the Commission requested policy coherence that went beyond the typically dominant sectoral logic to identify the territorial impact these policies could have.

On the other hand, it stressed the need to involve civil society, which is necessary to increase its role as a leader, albeit only at a general level, taking into consideration specifically non-governmental organisations and other social interlocutors. Therefore, adherence to the principles of governance is why it has been proposed that the Union itself promote civil society which must also act with transparency and responsibility, in addition to efficacy and with the aim of establishing links with social networks[XIII].

At the level of original law, the Treaty under which the 2004 Constitution for Europe was approved (a *non nato* text, however) would have to be abandoned. The 2004 Constitution for Europe mentioned participatory democracy for the first time, in addition

to representative democracy (Art. I-47), until the current Treaty of Lisbon (the consolidated version), by which the Treaty on the European Union was modified. While this did not expressly mention participatory democracy, its Title, dedicated to the Provisions on democratic principles, stipulates in Article 11.1 that: *"The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action"*. While it refers to a rule that responds to the need to address the known European democratic deficit, considering also the weakness of representative democracy at the heart of the Union, the elevation of participatory democracy itself to a "fundamental principle" of the Union should be noted. In this regard, Art. 10.3 of the Lisbon Treaty (The Treaty on the European Union, TEU) should also be mentioned, which states that: *"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen"*. Throughout the text, a general principle of EC law is affirmed that responds to a participatory dimension, overcoming the limited vision of representative democracy. However, this does not hide some weaknesses in the system. On the one hand, there is the still privileged position of representative democracy and its triumph in the representative-participatory debate. Yet, the functioning of the Union continues to be based on political representation while, in the meantime, participatory democracy is still only an ill-defined complementary effort to promote a democratic culture. On the other hand, when participatory democracy is applied, the predominance of lobbies and interest groups acting at the European level reveals one of the shortcomings of participatory democracy, i.e., its professionalisation[XIV].

3. Decisive stimuli: statutory reforms and citizen participation as a "personal trademark"

Democratic purposes have always been significantly mentioned in the main regulations of the Spanish Autonomous Communities and have been undoubtedly strengthened with the new wave of statutory reforms initiated in 2006[XV]. In fact, the scarcity of the matters under regulation in the first Statutes is in particular contrast with the generous mention of democratic purpose in these regulations.

To this regard, for example, the wording of Art. 15.1 of the Statute of Aragon should be mentioned as one of the *Estatutos* (Regional Statutes of Autonomy) of the so-called "latest generation", which aims at establishing the right to citizen participation, stipulating that *"The Aragonese people have the equal right to participate in public matters, under the terms established by the Constitution, this Statute and by Law"* (*"Los aragoneses tienen derecho a participar en condiciones de igualdad en los asuntos públicos, en los términos que establecen la Constitución, este Estatuto y las leyes"*). Arts. 20.a)., Articles 15.3 and 11.3 also address citizen participation in the form of a mandate directed to the public authority: *"The public authorities of Aragon, without prejudice to state action and within the scope of its respective competences are responsible for: a) ... facilitating the participation of all Aragonese people in political, economic, cultural and social life"* (*"Corresponde a los poderes públicos aragoneses, sin perjuicio de la acción estatal y dentro del ámbito de sus respectivas competencias: a)… facilitar la participación de todos los aragoneses en la vida política, económica, cultural y social"*) (20.a); *"The public authorities of Aragon will promote the necessary measures to effectively guarantee the exercise of these rights" ("Los poderes públicos aragoneses promoverán las medidas necesarias para garantizar de forma efectiva el ejercicio de estos derechos"*) (Art. 11.3); and *"The public authorities of Aragon will promote social participation in the design, execution and evaluation of public policies, as well as individual and collective participation in the civic, political, cultural and economic fields" ("Los poderes públicos aragoneses promoverán la participación social en la elaboración, ejecución y evaluación de las políticas públicas, así como la participación individual y colectiva en los ámbitos cívico, político, cultural y económico")* (Art. 15.3).

Likewise, Art. 9.4 of the Statute of Valencia establishes the "right" to individual and collective participation in the political, economic, cultural and social life of the Community of Valencia of all the Valencian people. At the same time, it establishes the governing principle for the *Generalitat*, which is to promote the participation of social agents and civil society as a whole in public matters. Furthermore, Art. 1.2 of Title I stipulates that *"The Valencian Community is the expression of the democratic will and the right of self-government of the Valencian people (...)"* (*"La Comunitat Valenciana es la expresión de la voluntad democrática y del derecho de autogobierno del Pueblo Valenciano (...)"*),which must be combined with that foreseen in paragraph 3 when it emphasises that *"The Valencian Community pursues the objectives of attaining self-government under the terms of this Statute, strengthening democracy and guaranteeing the participation of all citizens in the fulfilment of its aims"* (*"La Comunitat Valenciana tiene como objetivo*

la consecución del autogobierno en los términos de este Estatuto, reforzar la democracia y garantizar la participación de todos los ciudadanos en la realización de sus fines").

On the other hand, Art. 29.1 of the Statute of Catalonia more specifically stipulates that *"The citizens of Catalonia have an equal right to participate in the public matters of Catalonia, either directly or through their representatives, under the circumstances and terms established by this Statute and by Law"* (*"Los ciudadanos de Cataluña tienen derecho a participar en condiciones de igualdad en los asuntos públicos de Cataluña, de forma directa o bien a través de representantes, en los supuestos y en los términos que establecen el presente Estatuto y las leyes"*). Whereas Arts. 43.1 and 43.2 contain a mandate directed to the public authorities, according to which *"1. The public authorities shall promote social participation in the design, provision and evaluation of public policies, as well as individual and associative participation in the civic, social, cultural, economic and political fields, in full respect of the principles of pluralism, free initiative and autonomy. 2. The public authorities shall facilitate citizen and political participation and representation, giving special attention to the less populated areas of the territory"* (*"1. Los poderes públicos deben promover la participación social en la elaboración, prestación y evaluación de las políticas públicas, así como la participación individual y asociativa en los ámbitos cívico, social, cultural, económico y político, con pleno respeto a los principios de pluralismo, libre iniciativa y autonomía. 2. Los poderes públicos deben facilitar la participación y representación ciudadanas y políticas, con especial atención a las zonas menos pobladas del territorio"*).

Lastly, the Statute of Andalusia includes citizen participation as a fundamental objective of the Community (Art. 10.1), the right to political participation in different areas (Art. 30) and the governing principle of public policies when referring to the strengthening of civil society and association (Art. 37).

In Italy as well, regional regulation development has been linked to a new statutory reform process that took place at almost the same time as the Spanish reforms, for example, the Statutes of Tuscany (Regional law, February 11th, 2005, Arts. 4, 11, 58, 59 and 72), Latium (Regional law, November 11th, 2004) and Apulia (Regional law, May 12th, 2004).

In the case of Spain, in our opinion, the aforementioned Statutes so far have not adequately pursued the regeneration of autonomous politics, which has been at the core of the abovementioned statutory reform process. In any case, eventually the Autonomous Communities seem to use the Spanish Constitution as an example in their insistence on

participatory democracy, considering the well-known scarcity of democratic instruments in the Magna Carta, in addition to the predominance of direct representative democracy[XVI]. Therefore, only indirect participatory democracy is mentioned as a "principle", without the possibility of referring to it as a "right to participation" to object to the action of the political authorities, as in Art. 9.2 of the Spanish Constitution. Moreover, although an indubitable "interpretative dynamism" pervades the text, the Constitutional Court does not even seem to have especially stressed the issue of participation, which could have been deduced from the parallel interpretation of Arts. 9.2 and 23 of the Spanish Constitution. Short and concise references to participatory democracy can be found in constitutional jurisprudence, although, on some occasions, it recognises the existence of a "participatory democratic principle" (SSTC 85/1988 and 67/1985), which is not further developed. Consequently, we do not know whether the Court intended to configure a constitutional principle or not, or maybe it was referring to a democratic principle, since the consequences have not been assessed. However, in a recent 2008 judgement[XVII], the Court briefly mentioned participatory democracy for the first time to allow for the constitutionalisation of a general mandate directed at the public authorities to promote participation.

Furthermore, the Italian Constitution seems to have adopted the same logical approach in Article 3.2, which is similar to Art. 9.2 of the SC. In addition, with a similar dynamic, some Italian regional Statutes seem to oscillate between the generic right to participation (the Statute of Emilia-Romagna) and the declaration of "principles" for participation (the Statute of Tuscany).

Therefore, the Spanish Autonomous Communities and the Italian Regions seem to participate in the local experience regarding citizen participation in a way that is different from the example offered by the European Union. In fact, it seems as if participatory democracy provides them with an area where they can develop their own distinctive features that are different from those of the State, for whom it would otherwise be more difficult, to bring about comparatively acceptable and efficient results (given its area of action). This is the kind of politics addressed in this study. Likewise, think of how even in some cases of participatory democracy these entities have come to convert it into a "personal trademark" or a "sign of identity", as in the French region of Poitou-Charentes under the government of Ségolène Royal, where it seemed to want to replace the lack of

capacity for self-government with the means and abilities necessary to convert participatory democracy into its own unique personal trademark, while remaining impossible to obtain regulations concerning citizen participation through legislative power. Although it is obvious, as local experience has demonstrated, that legislative power is not required to build a citizen participation model, the above-cited French case goes above and beyond, in that it attempts to seek its political identity through something as unique and impacting as participatory democracy, instead of creating cross-cutting public policies that have great legitimising weight.

4. The pillars of a citizen participation model at the regional level

In order to assess the possible contents and issues of citizen participation at the regional level, we should consider the diverse elements that must be included in a comprehensive and somewhat stable participatory model, such as, aims, principles, instruments and guarantees.

The regions seem to have opened up a debate regarding the possible large blocks or elements of a regional/autonomous model of citizen participation, which entails the simultaneous configuration of their own orientation and model. In this way, the "bases" of participation at the regional level will lead to reflections on the matters of concern, i.e., the significant features related to both form (a *soft law* or *hard law* regulation and the possibility of a participatory model) and content (the great central themes).

A) Hard law or soft law

The discussion about the development of a Law on citizen participation, the intermediate option of a Plan or Programme or simply putting into practice experiences of citizen participation seem to be the first great debates arising from the initiative to promote citizen participation[XVIII] at the regional level. One option is connected to a kind of regional government practice that is somewhere between creating regulations with a certain permanency (taking into account that decentralised entities do not always rely on legislative

power, as in France) and simply putting it into practice. Also, bear in mind that sometimes the practice of citizen participation has been attempted through statutory regulations dictated by the Spanish local entities, which has sometimes influenced the legislative regulation subsequently dictated by the Autonomous Communities. Conscious of the enormous possibilities that may be opened up in this area, so much so that the Regions' "head regulation" seems to drive the latter to configure participatory democracy as an authentic right, the content debate seems the most likely option of the two diverse models for the regulation of citizen participation[XIX]:

- A *"my hands are tied approach"*, since, ultimately, it is a question of "establishing" a commitment outside the realm of government concerning a certain law that enriches democracy itself. This model tends to "delegate" tasks that at first should be performed by the institutions (in short, legislative initiative, regulation initiative or citizen initiative).
- Or a *"wash your hands of it approach"*, in which the government governs and exercises its mandate "in the general interest" of the citizens. For this reason, citizen participation may be considered an excessive "surrender of sovereignty", which, precisely to avoid going to such extremes, could constitute a shift in the direction of regulations that have "little to do" with participation, considering to what degree participation is then effectively "conceived". The regulations of Valencia and the Canary Islands seem to aspire to this last model, now that the configuration of participation has become dependent on the development of regulation.

The intermediate and more balanced model, which is more suitable to the need to reconcile democratic regeneration and the government's responsibilities, seems to be a *"hands free"* model, based on constant dialogue and interaction between society and authorities. This is a regional participatory model in which, although the representative institution (Parliament and/or Government) has the last word, this is only after it has simultaneously taken into consideration all the actors involved through a deliberative process that surrounds, commits and holds the relevant authority responsible. Some Italian regional experiences, and even the most recent local regulation of Guipuzcoa in Spain, may

be situated in this dynamic.

On the other hand, regarding the legal instrument utilised, although, as we have pointed out, the construction of a participatory democracy model is possible through various legal manifestations, the Italian experiences and some Spanish experiences highlight the possibilities offered by legal regulation. With the exception of statutory mandates, which, in our opinion, seem to be inclined to configure citizen participation via legal regulations, or by legally establishing it, without it being solely the "politics of legislature", citizen participation can essentially be realised through an "authentic subjective law" via a regulation with the status of law and via channels of participation (from an "instrumental" perspective). Likewise, diverse possibilities and actions for its promotion can be realised (from a "formative" perspective). In this way, it is converted into a "Law-Code", with a clear cross-cutting effect due to its impact on a number of public policies. This question is connected to the issue of its legal effectiveness and to the likelihood that the regulation will be truly and effectively developed and applied, while, although it may not be capable of establishing authentic "obligations" and "legal prescriptions" regarding those public policies, this also does not help its inefficiency. In addition, perhaps regarding these types of regulations, as evidenced by the Tuscan Law[XX], it would be sufficient, or rather "natural" for participatory democracy itself, to opt for a system of "institutional incentives", as evidenced by the rule of Guipuzcoa, which is closer to Italian regulation in this regard. This is because if the law does not establish incentives for participation, its content may become plagued with rules that are "principles" or excessively "generalised", i.e., too many principles and few effective and real actions of citizen participation[XXI]. Consider, the regulations of Valencia and the rules of the Canary Islands, whose potential lies in the development of regulations regarding citizen participation[XXII].

The option of using *soft law* instruments (White Papers, Plans, Programmes) does not imply the degradation or minimisation of its legal efficacy *per se*. On occasion, as international and Community *soft law* demonstrates, it may even be more effective and precise, because of the "weak obligation" that it entails, and also more innovative, as it may also contain para-constitutional regulations that ultimately imply an authentic constitutional change. In this way, the *soft law* instruments would pave the way for the future and the genuine legal action of *hard law* instruments[XXIII]. In any case, this has to do with supporting a document that truly lays a foundation that is effectively engaged, the opposite of concrete

government (consider the experience of Catalonia). It seems the logical tendency is that this *soft law* instrument serves as a test and advance for a future law on participation.

On the other hand, regarding its content, it should contain a regulation that attempts to better specify the channels and principles facilitating and promoting participation. Remember, White Papers are adequate to establish "general guidelines" and "forms" should be a process democratically legitimised by "dual" actors: the Parliament and society itself, by means of an "active process".

B) The "participatory" model

In keeping with the outline of these public policies, it seems correct that a regional participatory model be initiated "with" citizen participation itself, but also that public actors be involved. Bear in mind that participation is achieved throughout the whole political governmental design, and the elected authorities are responsible for the "direction and administration" of regional policies when they try to influence citizens' opinions regarding the documents directly affecting them. Moreover, greater involvement is expected when they themselves have contributed to their elaboration. This is why collaboration with the local entities is not mentioned which may be advisable - or necessary - to "commit" to the objective of elaborating a citizen participation model that is equally "homogenous" and "expansive" for the entire regional territory.

From this perspective, experiences such as those of the Canary Islands or Tuscany can be used as a reference[XXIV]. In addition, even once the rule is passed, the Law of Tuscany itself provides for a period of five years, after which it must be "monitored" in order to be confirmed, revised or abolished. In a similar vein, the local regulation of Guipuzcoa provides for participation in the *Juntas Generales* (General Assemblies) to proceed with the global evaluation of the system of citizen participation, through hearings with entities and the technical assistance of professional experts in participation processes, producing and determining the corresponding agreements regarding the preservation, abolition and reform of the rule.

C) Principles and objectives: the configuration of a "unique" model of citizen participation

The main themes of a participation model should be shaped based on a premise that is sometimes inexcusably ignored by laws and plans on citizen participation: the option or definition of a suitable concept or model of citizen participation, and this does not mean merely adding more instruments. Consider how the local regulation of Guipuzcoa establishes the objective and aim of citizen participation, referring to the promotion and impulse to participation, the development of democratic rights, the promotion of the consolidation of a culture of participation, the equal involvement of men and women, the increase in the transparency of government action, the creation of needs and social dynamics favouring the efficacy of political and administrative action, guaranteeing the highest levels of solidarity and social integration, the promotion of networks of associations and the diffusion of the culture of participation and participatory habits, along with the necessary collaboration with the local entities on all of these aspects.

The regional experiences highlight the great diversity and heterogeneity of participatory models, even within the same State. In fact, take the "strict" model of Catalonia, clinging to the participatory process as a "space for assembly, debate and discussion", or the Aragon model as well as some Italian models. Likewise, the model of Guipuzcoa, while it contains a "flexibility clause", it also allows the Local Directorate for Citizen Participation to request that a participatory process be carried out by means of other methods or instruments (Arts. 23 and 24). There are also "broad" models, such as the model of Valencia or the Canary Islands, which also include phenomena such as associating, volunteering, outside communities and consulting in some cases.

In any case, it should be clarified that the Region, through its instruments and public policies on participation, specifically formulates the main guidelines and lines of development. Perhaps, for this reason, it is useful to reflect upon the "management of participation"-in order to find out whether this envisages only one direction or acquires a "bi-directional" nature[XXV]:

1) Participation is unidirectional when it is built by the entity in the direction of the citizens: information, websites, etc.

2) Likewise, it is also unidirectional when it is configured by the citizens in the

direction of the entity: consultations, citizen initiatives.

3) However, in our opinion, more interestingly is that what makes participatory democracy authentic is its bi-directionality. When participation is bi-directional, it is active and generates a sense of obligation, including the negotiation, deliberation, reception and proposal of political actions, taking into consideration or rejecting citizens' opinions with the necessary motivated justification. In this last case, there is greater participation by both participants (citizens and public authorities), linking a common administration to aspects of public interest. However, this orientation should not be confused with that stated later on, since the ultimate objective of authentic citizen participation is interaction, the exchange of and agreement on ideas between the citizens and public authorities, going beyond the idea of participation as a simple procedure that has hardly any impact on the decision adopted. In fact, the risks of the "instrumentalisation" or "manipulation" of citizen participation are well-known and not infrequent and they seem to intend to legitimise decisions that have already been adopted or whose adoption has been attempted[XXVI]. In our opinion, these pernicious effects are in part counteracted when democracy emphasises uni-directionality and is able to clearly show if citizens' concerns are being well-channelled or not.

It is important to affirm that the Italian regional regulations focus their attention on this last concept,–as well as the delimited model of Catalonia, developed, in particular, within *Plan Interdepartmental*[XXVII] (abandoning other instruments in favour of differentiated regulation, as with consultations[XXVIII]). Within the Spanish legal system, the approach of the regulation of Guipuzcoa is equally innovative in that the Local Council is obligated to explain its motivation for shifting away from what was agreed upon by the citizens (Arts. 4.3 and 16). The fact that the regulation of Guipuzcoa configures an administrative act (in the form of a motivated resolution containing the conclusions reached in the participatory deliberation process which affects the political decision to be adopted) susceptible to appeal, is certainly worthy of positive evaluation. However, we believe that its development could still be further improved, making participatory democracy an authentic subjective right, if the legislator created a specific appeal, something more than the traditional administrative appeals and those foreseen in the regulation of the jurisdiction of adversarial

legal proceedings. In fact, this would not be unusual in a system like the Spanish one, where in the area of representative democracy there are specific appeals, like the one foreseen to appeal the decision of the Congress Board when not admitting a popular legislative initiative (Art. 6 of Organic Law 3/1984, March 26th, regulating popular legislative initiative).

In addition to the previous considerations, it is certainly very important -and above all convenient-, to outline, among the principles and objectives highlighted by the regional regulation, those concerning the two sides of the citizenry and institutional perspective.

With respect to the citizenry, a citizen participation model must reflect and address the following issues:

- Those who are entitled to or subjects of participation: individuals and groups (in the latter case, bear in mind that for citizen associations and entities a registry may be authorised), public and private actors, nationals, residents and foreign nationals[XXIX]. The participation of the latter is established by state regulation within the framework of the rights and freedoms of the foreign population (Organic Law 4/2000, January 11th, concerning the rights and freedoms of foreigners in Spain and their social integration).

- "Passive" participatory democracy, by providing new instruments for the development of "group" decisions and institutional support through personal resources (organisation, mediation, etc.) and material resources (areas, financing, etc.).

- "Active" participatory democracy, which entails concentrating on the (individual and collective) promotion of participation, and not only refers to "consenting" to the exercise of the right of citizen participation, but also to demonstrating a "proactive" attitude. To this end, particularly suitable instruments are, for example, citizen juries and panels (for which members are selected randomly), campaigns, websites, and precisely the leadership of local entities to which the regulation of Guipuzcoa aspires[XXX].

- The commitment to disadvantaged sectors and equal participation seems to be a fundamental challenge according to the principle of equal opportunities and especially regarding primary equality, i.e., the equal rights of men and women, which the regulation of Guipuzcoa pays special attention[XXXI]to.

On the other hand, from an institutional perspective it seems obvious that the Regions tend to be - and need to be- "involved" along with the institutions of autonomous government, which may also be good for the local entities. Therefore, for this reason, it is

necessary to continue to pay attention to the following issues.

- Good practices and good administration with reference to transparency, impartiality, publicity, maximum diffusion and information, which implies constant and direct communication among the subjects of participation.

- By correctly defining political responsibility within the system of government, organised since it is the only way, according to representative democracy, participatory democracy clearly leads to the "enrichment" of democracy itself. Also, by seeking out complementary channels for the reassessment and improvement in the quality of democracy. This results in the absence of the "obligation" or "prescription" of participation for the public authorities. Conversely, participation is the result of commitment, political responsibility and transparency and can be achieved through institutional incentives. The objective is to "motivate participation" by setting requirements and terms with an institution or authority acting as mediator, or even providing for a "return phase" (from the public authorities to the people) or a taking into consideration phase, as foreseen in the regulation of Guipuzcoa. In the Italian case, this can occur through the regulation of public debate on large interventions, or through initiative and participation in participatory processes with regional support (see the regulations of Tuscany and Emilia-Romagna).

- Participation at the most basic level of government, i.e., the local level, is another key aspect of regional public policies on citizen participation. For obvious reasons, here participation is more feasible as it moves down to the level of government, in which the citizenry is closer to the public entities. That local autonomy should not be affected does not imply that the Regions must shift their attention away from local phenomenon[XXXII]. For that reason, some Regions attempt to reflect on and establish the role that regional governmental authorities can play in the matter, through the aforementioned system of institutional incentives. This way, they motivate, coordinate, promote and even "ensure" these local entities a model of citizen participation which is supported by the region. Incentives established through a Pact with the local entities to adopt the principles and processes of the regional regulation of citizen participation, or even the search for local entity involvement in a participatory process to be initiated, are options that have been developed in Italy (in the Law of Tuscany and Emilia-Romagna, in particular), thereby breaking away from the obligations that do not befit the autonomy of the local entities.

Likewise, the foreseen agreements of collaboration, providing technical assistance to local entities and even allowing the initiative of the participatory process, as provided for in the regulation of Guipuzcoa, can be adequate ways of encouraging and contributing to participatory democracy at the local level.

In general, how this involvement can be attained has been set out in the same basic regulation, (as in the case of Italian Law or the inter-departmental plan of Catalonia) which, in our opinion, is particularly appropriate, however, also the possibility of disseminating a Code of Good Practise among the local entities (in the case of Valencia) is befitting.

From this perspective, it is a question of overcoming the idea that local entities must establish participatory practices in an isolated and purely voluntary way that is within the capacity of manoeuvres that their autonomy allows for, which, in one way or another, are based on the support of the autonomous government (subsidies, good practises, etc.) to achieve a higher level of commitment and involvement within a model of participation "led" by the autonomous government itself (as in the case of the Italian Laws or, to a lesser extent, the regulation of Guipuzcoa). In this way, they adopt not only the content of the basic regulation of citizen participation for their initiatives, but they would also be able to convert themselves into "subjects" as well as "recipients" of a participatory process coordinated, motivated and supported by the autonomous government.

D) Instruments, activities and channels of participation

The development of instruments and channels depends, to a large extent, on the technical regulation utilised to configure participatory democracy. In this way, the simple implementation of participatory instruments can vary according to the needs of the authorities regarding the concrete tools. Instruments such as White Papers, Plans and Programmes could be enough to establish a series of generic principles and guidelines without needing to develop concrete instruments, activities and institutions. In addition, when there is a vocation of regulating citizen participation, the commitment is undoubtedly more advanced and defined (however, the same happens, for example, when White Papers are expected to be a kind of "alternative" to a law). As we have underlined although the risks of a law are also evident, some laws? could serve as purely "principle" rules.

Assuming that the will of the regions is to establish participatory democracy as an

authentic right, the instruments by which they can achieve this should be assessed from a triple perspective, i.e., taking into consideration the "promoter" subject of participation, the suitability of the instruments used to "mobilise" citizens and the concrete "channels" observed. In any case, it is about stressing the idea of opening up the greatest number of and the most varied channels of participation, searching for dialogue and collaboration between public authorities and society.

1) The "promoter" subject of participation or anyone who promotes participation. In this respect, we should distinguish between participation "by" public entities and participation by private subjects

- Participation "by" public entities allows them to gain significant leadership, based on principles such as public responsibility and the management of matters of general interest, for which the administration is a necessary guide. This implies assessing instruments such as information, initiative foresight, or the channelling, support and "return" of the proposals put forward within a participatory process. In the same way, or perhaps, above all, it implies the idea of "bi-directionality", the commitment to "taking into consideration" or motivating the rejection of citizens' proposals, as well as combining channels such as citizen audience, the possibility of anticipating the notification of juries, panels, fora or public debates, the notification for the promotion of activities that give rise to participation through subsidies, the configuration of a registry of citizen entities, training and consultation (polls, surveys, etc.).

- Participation "upon the initiative" of private subjects implies that it is developed through channels such as the proposal of citizen initiatives in the participatory process, the proposal of fora or public debates and regulation or legislative initiative.

This double category deserves a series of critical reflections, in light of the obvious "limited practical effect" of private legislative initiative, the history of which might otherwise cause us to be sceptical. In our opinion, the achievement of real participatory democracy, which is effective and above all in accordance with the key elements of the functioning of the political system, such as representative democracy as the configuration priority of democracy, which is not a substitute for participatory democracy, the form of

Parliamentary government and its strict party system, requires supporting two complementary strategies. One strategy is the configuration of authentic procedural channels that support participatory processes of action proposals. The other entails foreseeing authentic possibilities of participation in processes that are engaging and promoted by the political authorities.

2) The suitability of instruments to "mobilise" the citizens

It seems obvious that the mere existence of some instruments established for citizen participation do not guarantee real and effective participation *per se*. In addition, the purpose of a citizen participation model which is consistent with its aim cannot only be to "provide" instruments, but also to "motivate" their use, generating a culture of democracy and promoting active citizen participation (an argument that must also involve the local entities, which should also motivated)[XXXIII]. These circumstances are assessed at the regional level, regarding both the selection of instruments and channels of participation, and their concrete development.

Instruments such as citizen juries, workshops and panels, anticipated in the regulations of Valencia and the Canary Islands and developed in France, have not been properly emphasised in that only one concrete aspect of participation has been stressed, i.e., assessing a measure, doing a consultation and requesting information, which is slightly "biased" in nature. However, despite it all, it is true that from our current perspective, i.e., the possibility of "motivating" citizens, these instruments deserve rather positive judgement, since to determine their composition they randomly select people in order to correct the bias of other participatory channels, which are, nonetheless, monopolised by professional groups of participation[XXXIV].

In light of these experiences, it is true that in a participatory process (as has been chosen by Italian law and the models of Catalonia, Aragon or Guipuzcoa) or a citizen initiative (resulting from a regulation or action, like in Valencia and the Canary Islands), they tend to be used mainly by the aforementioned professional groups, which is why they require foreseeing incentives for participation.

In short, in the Regions the challenge is to authorise conditions and areas that extend these channels to the "unmobilised" citizens (who are the norm). For this reason, participatory processes should be properly developed taking into account different elements, such as notification ability, institutional support (financial, organisational, etc.), the correct management of information and the transparency of political administration in general, as Italian laws and the regulation of Guipuzcoa have done.

3) The "channels" of participation, from their form to their basic features beginning with the following categories, in the establishment of a concrete model of citizen participation, from its definition to its consequences

- "Accurate" instruments of participation. This seems to be the dominant trend in Spanish autonomous law (the regulation of the Canary Islands states that "participatory processes" will be carried out and that, nonetheless, they will have to be devised through regulations). Within this dynamic, there is also the option of using tested instruments in comparative experiences and in autonomous regulations themselves, such as citizen juries, panels, fora or public debates (also foreseen in Italy, in the Law of Tuscany), deliberative polls (the *Electronic Town Meeting)* and citizen initiatives. However, in contrast with the abovementioned, the regulation of Guipuzcoa opts for a different model, perhaps recalling Spanish autonomous development and the debates arisen both in the tested models and the comparative perspective.

- "Comprehensive" processes. This is undoubtedly one of the most significant features of the citizen participation models foreseen in the Italian Laws. This is something that is only outlined in the regulation of the Canary Islands is being tested in the Plan of Catalonia, and that the local regulation of Guipuzcoa, paradoxically, has better developed.

Comprehensive participatory processes can be initiated by citizen initiative, by the regional entity or by public entities such as the local entity. Their most characteristic feature originates from the fact that they imply the development of a procedure completed in part by the definition of a reference mark (through precedents, agendas and guidance for the

process), by providing for locations and mechanisms for the discussion and collection of contributions (either physically and/or by telephone) and concludes with systematised proposals, their reception by the entity involved, and their return to the citizens, i.e., of a commitment to taking it into consideration and providing motivation in the event it is rejected. All this clearly requires the mediation and coordination of the authorities (either the independent authorities, as the Italian Laws seem to believe or the regional government itself, as in the case of Guipuzcoa, where their management is in the hands of the General Council). In addition, on occasion, these processes are developed through the previous work or the foundations that have already been elaborated by a committee of experts; in the case of the local regulation of Guipuzcoa, the Committee anchors itself in the Local Council, although without hierarchical submission to it. The idea is, as reflected in the regulation of Guipuzcoa, to legally outline a "protocol" that sets out citizen participation and implies a commitment that is more or less real and feasible.

- Promotion of participation. It is unlikely that citizens will be involved in participatory processes and make use of the instruments provided if there is not adequate understanding, publicity and a series of incentives. It is a question of the public authorities supporting and developing, in particular, pro-active policies on citizen participation. For this reason, it is important that the model also includes different channels, such as information, campaigns of public awareness, education and subsidies for activities to promote participation.

E) Institutions "facilitating" and "promoting" participation

The effective practice of citizen participation requires institutions that make the different participatory instruments a reality, including the right to citizen participation itself. For this reason, institutional intervention is essential, without ever letting it reach the point of interfering or manipulating.

The Spanish autonomous experiences are based upon the effect of the central point that is adopted in the confirmation of a citizen participation model by the administrative organisation determined by the General Directorate, without ignoring the role that other

institutions play regarding participation, such as the Inter-Departmental Councils or Commissions.

These experiences should be compared with those offered by the other regions from the perspective of comparative law. In this regard, recall the "Regional authority for the guarantee and promotion of participation" in the Tuscany Region, configured as a kind of "parliamentary commission", or in the case of the Emilia-Romagna Region the "Expert as a guarantor of participation", i.e., a leader of the Regional Parliament, or the "Technical nucleus of integration with the local autonomies". Currently, the existence of these institutions within the Italian regional models does not directly imply their automatic replication in the Spanish Autonomous Communities, with the *ex novo* creation of similar bodies. It rather involves taking into consideration the role such institutions play, which could easily be ascribed to other pre-existing institutions in the Autonomous States. All differences aside, consider the "Local technical assistance for participatory practices in the local area" which Art. 43 of the regulation of Guipuzcoa refers to, an assistance that is offered by the Local Directorate for Citizen Participation itself.

On the other hand, it is impossible to raise a debate on the suitability of each and every one of these institutions without taking into account the form of government of the political system at issue. Bear in mind that not long ago the Italian regions adopted a "neo-parliamentary" form of government, with separate elections in the electoral processes of the Presidency of the Region and the Legislative Assembly. This implies that the connections among political forces could vary and that the Executive looses autonomy in the direction of the government, which could dissolve its monopoly. In addition, this is a possible explanation why the institutions "for" participation foreseen in the Italian Laws are more separated from the regional government than in Spain, where the connection is established in accordance with the parliamentary form of government, which incorporates the Autonomous Communities.

In any case, setting aside the previous debate, rather than immediately incorporate the institution and later grant it specific competencies, if they want to develop a coherent model of citizen participation, they must consider the roles these institutions should play in

participation. All things considered, any attempt to balance these aspects will only serve to avoid, aside from this, the directionality typical of the form of parliamentary government in which the central role of the executive is clear. Later on, this is the only possible way to determine the most suitable institution, according to its nature and its ability to prove itself efficient in this duty. In this way, it can comprehend the diverse "participation tasks" that might or might not be assigned to a single institution.

- The "leadership" of participation. Like the participatory model at the heart of parliamentary government, it is clearly the opposite of a determined Government, because its implementation, to a great extent, depends on the entity managing the autonomous policies. In the case of Spain, the General Directorate of citizen participation fits this task, as does the Local Directorate in the case of Guipuzcoa, where its management is assigned to the Local Administration and in particular to the Cabinet of Representation or General Representative or to the competent department in matters of citizen participation. Although it is not integrated in its hierarchical structure, it exercises its functions with full autonomy (Art. 39). The configuration of the Italian regional model is different, however, in which leadership is not exercised by government direction (in the case of Tuscany). Moreover, while in the case of Emilia-Romagna leadership was given to the executive, it actually took place via the mediation of a Manager with a background in Parliament, where predominance over regional government is common.

- "Coordination" and "guidance" of participation. A commitment to defining organised planning to implement the instruments of citizen participation is necessary, for example, as in the role played by the "Authority" of Tuscany, the General Directorate in the cases of Catalonia and Valencia, the Local Commission of Guipuzcoa, and the Technical Nucleus of integration with the local autonomous communities in the region of Emilia-Romagna[XXXV].

- "Mediation" in participation. On occasion, it may be advisable or necessary to combine efforts so that the citizen proposals are supported, obtain commitment or are taken into consideration, which does not result in complete acceptance, by the public authority. This is a task that stands out because of its absence in the Spanish autonomous

communities, perhaps due to the logical predominance of the executive, which affects the role of the autonomous authorities with respect to local entities. As a mediator *par excellence*, Managers can be appointed as guarantors in matters of participation in Emilia-Romagna.

- The "monitoring" of participation. It is well-known that the defence of public interest and government action are the responsibility of the public authorities. For this reason, as long as support needs to be provided for and coherence needs to be sought in the functioning of each and every participatory instrument, the kind of "governance" promoted in the actual process is important for implementation. Consider the Steering Committee in the case of France (the Juries and Workshops) or the Law of Emilia-Romagna, or the Citizens Council in the case of Spain (the Social Council in Guipuzcoa).

- The "evaluation" of participation. Like all public policies in general, its reassessment as well as the evaluation of the legal regulation which protects it, should experiment with a process of evaluation that would, in this case in particular, allow the degree to which citizen participation has been effective to be measured, as much *ex ante* (through a diagnostic and a mediated analysis of the different actions) as *ex post* (to assess to what extent it has responded to the objectives initially set out). Take, for example, the efforts of the Citizen Council in the regulation of Valencia, the case of the Canary Islands or the Parliament itself via its annual session in the Law of Emilia-Romagna. The regulation of Guipuzcoa has undoubtedly provided the most detailed evaluation, with authentic processes that are accurate as well as complete, as in Art. 4 of the Local (Foral) Regulation, which refers to the *"Efficacy of citizen participation"* with an express regulation regarding the Council's obligations as to the results of the participatory processes, specifically pointing out that when the Council does not receive them, totally or partially, *"it will be obligated to explain the reasons for its decision"*. It is undoubtedly a new and committed legal precaution.

5. Conclusions: Rethinking democracy from a participatory democracy perspective

The design of regional instruments of citizen participation still have more weaknesses than strengths. Inertia due to the traditional predominance of representative democracy and some initial attempts at the heterogeneous regional configuration of participatory democracy, occasionally weighed down by excessive wilfulness and with rules that risk misinterpreting the general or principle proclamations or that contain excessive references to other regulations (whether to regulate a concrete instrument, or to clarify it in future regulations), create suspicion as to whether or not participatory democracy is really appropriate at the regional level.

However, this does not prevent us from recognising that the possibilities for a regional participatory model are promising at this territorial level, which, because it is an intermediary between state and local levels, it provides opportunities for proper democratic development. This area is dominated mainly by the notion of the proximity of the citizens to the institutions, and at the same time by an acceptable level of self-government, essentially expressed through its legislative authority.

The noteworthy experiences of *hard law* and *soft law* in the cases of Italy and Spain offer elements for debate, but above all invite us to reflect upon the conditions and central points of a citizen participation model that strives to meet concrete democratic parameters.

In recent years, the number of voices calling for democratic regeneration have significantly increased, as has been evidenced in many different States, for instance, our 15-M movement. The point is that the response to the democratic crisis must be "more democracy", but not at any cost. The increase in quantity must be linked to better democratic quality, which obligates us to take into consideration other parameters, such as, control, responsibility, evaluation, dialogue, the transparency of public authority accounts and democracy as an authentic "bilateral process". Consequently, it is only from this perspective that participatory democracy can be built, satisfying the need for democratic regeneration that, otherwise and in our opinion, has always been the central issue since its original configuration as a complement to other democratic channels.

The changes that participatory democracy can bring about in the theory of

democracy will not alter the basic premises. Representative democracy will continue to be at the heart of the system because it implies that it is the political representatives' responsibility to defend public interest. However, this does not mean that this decision-making cannot be enriched, according to the nature of the issue and whether or not the geographic scope makes it feasible, so that the instruments developed can generate responsibility and transparency, so that the citizens can verify the matters that concern them.

It is not at all easy to coordinate public policies regarding citizen participation via regulations with legal status. However, for this reason it is advisable, as this study has aimed to demonstrate, to carefully reflect upon which model to configure and the consequences that will result from it. If the established strategies and instruments are taken into consideration, true, egalitarian citizen participation will be achieved with the aim of not "dissolving" democracy itself. When faced with excessive principles and remission in the laws of citizen participation, we support focusing on institutional incentives. In addition, faced with uni-directionality or the monologue of participation (from the citizenry or from the public entity), we support the development of rights and institutions that are more and more committed to the dialogue between society and the public authorities, i.e. bi-directionality.

I In this study, we recall the definition of participatory democracy elaborated by Pizzoruso, who referred to citizen participation, in either an individual or collective form, in matters that directly or indirectly affect the citizens and that, articulated in a process, concludes with the final decision adopted by the public authorities. See Pizzoruso, 1973, 1473. Regarding democratic regeneration, see also the monograph "Repensando el Estado democrático", *Revista Catalana de Dret Públic*, No. 37, 2008; Allegretti, 2010 and Bifulco, 2010 and 2008; Reyes Alberdi, 2008; Roussopoulos – Benello, 2005; Blondiaux, 2008; Robbe, 2007.

II In this regard, consider the familiar experience of participative premises at the local level. Cf. Della Porta, 2005. See also note 12.

III Act 11/2008, July 3rd, of the *Generalitat* (Government), regarding Citizen Participation in the Valencian Community, and the Action Plan for Citizen Participation 2008-2011; http://www.cic.gva.es/index.php?option=com_content&task=view&id=6&Itemid=3.

IV Act 5/2010, June 21st, of the Autonomous Community of the Canary Islands regarding the Promotion of Citizen Participation; http://www.gobcan.es/participacionciudadana/.

V Foral Law 1/2010, July 8th, on citizen participation; and its Management Plan 2007-2011; http://www.gipuzkoapartehartzen.net/.

VI *Regional Law 69/2007, December 27th, regulating the promotion of participation in the formulation of regional and local policies.*

VII *Regional Law 3/2010, February 9 th, regulating the establishment, re-organisation and promotion of consultation and participation procedures in regional and local policies.*

[VIII] The content of this regulation is extensive and includes among its basic objectives the promotion of ethics and transparency in government action and the right to access information, as well as the modernisation, rationalisation and simplification of administrative action and the improvement of the quality of the Administration (Open Government). However, in addition, the pillar of citizen participation and collaboration (Title IV of the Draft Bill) has also been included, providing for instruments of active citizen participation in decision-making (consultation fora, citizen panels and citizen juries), and allowing for channels of bi-directional telematic conversation as well as for participation in social networks. Likewise, the regulation refers to its future development and to the implementation of the right to participation and collaboration in the definition and evaluation of public policies. With this choice by the Government of Navarre, the regulation shifts away from the precision of the regulation of Guipuzcoa regarding the direct regulation of real participative processes. However, its major result is the provision of a report on participation and collaboration, that obligates the Administration to provide the results of participatory process, the means used and the evaluation of how this participation could have conditioned or influenced administrative action, detailing the emphasised idea of bi-directionality, which we endorse. For the purpose of this study, it is important to highlight that in the preliminary elaboration phase of this draft bill the process of participation was carried out in various different citizen participation fora. 54 suggestions were submitted, of which 33 have been taken into consideration (many of them from the 15-M Movement). Therefore, citizens have had the possibility to make their contributions through a forum.

[IX] The concept of "civic citizenry" was introduced in the framework of the Tampere Agreements (1999), when the Commission used this expression to refer to *European Denizenship*. What is most interesting for this study is that this notion established how a necessary, although singular, channel to integrate the immigrant population that which interests this study is that it should imply a holistic approach to integration, considering more than the mere economic and social aspects but also, and above all, the problems related to cultural and religious diversity, citizenry, participation and political rights, encouraging a sense of belonging to a community. See COM (2001)387 final, July 11th, Communication of the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions about immigration, integration and employment. See R. Zapata-Barrero, 2005, 61.

[X] In this regard, see the Italian law of Tuscany, which emphasises that it is not a matter of creating a new form of democracy, but of updating the current form and its institutions, and integrating it with practice, processes and instruments of participatory democracy. In a similar vein, see the Foral Law of Guipuzcoa 1/2010, July 8th, on citizen participation, whose Preamble opens with the following: *"The solid consolidation of the representative democratic systems in our environment and the full normality in which its institutions are developed has not prevented the need to confront its limits, opening the democratic experience to other forms of participation that, in a complementary way, enrich the democratic system, reaffirming its fundamentals"*.

[XI] See de Vega, 1997, 719.

[XII] See Santomer - Ganuza, 2008; Ferreboeuf, 2011, 113 *ff*.; Genro, De Suza, 1998; Gret, Sintomer, 2002; Sintomer, Bacqué, Rey, 2008; Koebel, 2006; Allegretti, Herzberg, 2004.

[XIII] Without going into exhaustive detail, this has been carried out according to many different initiatives from derived law and Community *soft law*. Consider, for example, the Communication from the Commission of December 11th, 2002 *"Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission",* as well as other initiatives on environmental matters or the *"Europe for citizens programme 2007-2013"*. On the other hand, of similar interest is the Recommendation Rec(2001)19 on citizen participation in local public life, July 2001, at the heart of the European Council, directed to Member States, which has analysed experiments in progress in some Member States, such as, citizen panels and juries, interactive websites, focus groups and workshops.

[XIV] On this issue, raised above all in the debate on the *non nata* European Constitution, see Moreiro González, 2004;Ridola, 2005, 21 *ff*.; De Miguel Bárcena, 2005, 213 *ff*.; Greenwood, 2009, 9 *ff*.

[XV] See Pérez Alberdi, 2008.

[XVI] Regarding the discussion about and the practice of participatory democracy in Spain, See Rubio Núñez, 2007, especially 96 *ff*.

[XVII] STC 103/2008, concerning the unconstitutionality appeal presented against Law 9/2008, June 27th, of the Basque Parliament, calling and regulating a popular consultation to request the citizens' of the Autonomous Community of the Basque Country opinion on the initiation of a negotiation process to achieve peace and political standardisation.

[XVIII] The Spanish Autonomous regulation of the citizen participation model is, above all, sufficiently different

in terms of the legal instrument utilised to that effect: *hard law* rules in the cases of Valencia, the Canary Islands and Guipuzcoa, compared to the *soft law* rules of other Communities, especially Catalonia.

[XIX] On this matter, see the thought-provoking contributions of Floridia, 2008; and by the same author, 2007, 629 *ff.*

[XX] Cf. *ibid,* 621.

[XXI] Consider the debate about the construction of a regional participation model that took place in the Autonomous Community of Aragon in 2009 through the "Mesa de expertos para la definición de la política normativa del Gobierno de Aragón en materia de participación ciudadana - Panel for the definition of the normative policy of the Government of Aragon on civil participation", which led to the publication of the first issue of *Revista Deliberación*, No. 1, 2010.

[XXII] On the subject, see Opinion 306/2009, June 25th, of the Consultative Council of the Canary Islands.

[XXIII] On occasion, due to the influence of the system of European sources, the elaboration of White Papers could be preceded, as in Catalonia (2009/2010), by Green Papers or documents claiming to promote the citizen debate about public action and consultations on certain proposals regarding determined material. At the same time, the subsequent White Papers can result in the elaboration of a text that could be presented to Parliament with the aim of passing it into law, or to the Government itself with the aim of preparing a draft bill or to agree to a particular plan.

[XXIV] See Pizzanelli, 2008, 138 *ff.*

[XXV] Mori, 2006.

[XXVI] See Ruano de la Fuente, 2010, 104 *ff.*

[XXVII] See how Art. 56 of Law 12/2007, on social services in Catalonia defined an authentic "process of participation":

"The competent administrations must establish processes of participation in the planning, management and evaluation of social services. The term process of participation is understood, for the purpose of this Law, comprehensively including the following three phases:

a) Information phase, in which citizens are informed of the project for which they intend to request participation.

b) Citizen debate phase, through which, using the appropriate methods, the debate among citizens and the collection of proposals is promoted.

c) Return phase, during which the participants are notified of the results of the participation process".

[XXVIII] In our opinion, citizens are a way to separate the nucleus of participatory democracy, which we defend (highlighting bi-directionality, dialogue and economic transparency) and include it in direct democracy; obviously, in such cases, it is up to entities other than the citizens to decide. This is a matter of "shaping", and more often than not of "legitimising", decisions adopted by the public authority. This, however, does not prevent another regulation, which is appropriate for bi-directionality, from bringing consultations closer to the above-mentioned referents of participatory democracy. This would be true if the regulation foresaw public authorities' obligation to draft some type of memorandum after the consultation containing the reasons that have led them to accept as appropriate or to reject it, or to generally justify the impact the consultation has had on the decision finally adopted.

Some Autonomous Communities have a broader and sometimes less clear concept of participatory democracy, bringing together its various different forms. Others, however, regulate it differently, and, in some cases, enter into conflict with the instrument of the State referendum. See Law 4/2010, March 17th of Catalonia, regulating popular consultations by means of referendum, challenged by the President of the Government, whose appeal overruled the referendum of the municipality but not the autonomous community, due to a coincidence in the subject of the consultation – the electoral body – which foresees a referendum at the state level. In fact, the Government of Catalonia has recently passed (on December 26th, 2011) the elaboration of a bill resulting from a popular consultation, in this way avoiding the possible unconstitutionality of the rule, also in light of constitutional jurisprudence (STC 103/2008, in which the Court establishes the elements of the referendum: electoral body, electoral proceedings and concrete judicial guarantees). Paradoxically, the subject of the consultation cannot raise problems of unconstitutionality, for which the bill has no need to mark out a boundary beyond a generic reference to the matters of interest of the Autonomous Community or a similar formula.

Regarding popular consultations at the autonomous level vid, for all, Castellà Andreu, 2011.

[XXIX] To this regard, observe how the Foral Law of Guipuzcoa establishes a rather strict set of rules for resident citizens.

[XXX] See Vila Ramos, 2008, 7 *ff.*

[xxxi] Ultimately, it is a question of not ceasing to consider that citizen dedication to political participation depends on such a limited resource as time, which as is well known, it is not utilised in the same way by both sexes. Cf., among other works, J. Font, "Participación ciudadana y decisiones públicas: conceptos, experiencias y metodologías", in Ziccardi 2004 (available at www.iis.unam.mx/pub_elect/zic/joanfont.pdf); Lousada Arochena, 2005; Carrasco Bengoa, 2002, available at: http://www.inmujer.migualdad.es/mujer/mujeres/estud_inves/2002/577.pdf

[xxxii] Remember that autonomy, which is always limited, is also advocated by local entities; and that the fact that they do not have a legislative authority, does not give them a different degree of autonomy in terms of quality. In short, the autonomy of local entities is also political and, therefore, they can make their own public policies - even in the area of participatory democracy - unlike the State and the Autonomous Communities. See Álvarez Conde, 2008.

[xxxiii] As Joan Font reminds us, this is because the "perfect citizenry", which is informed, active and coherent, is "a minority expression in Western societies". Font, 2004.

[xxxiv] We cannot stress enough that the above-mentioned professionalisation leads to another classic problem in the debate on participation: the rare representation of those who participate and the consequent expansion of its prominence. *Ibid.*

[xxxv] Regarding its composition, it is a body presided over by the Guarantee Expert in participation and integrated likewise by the Leader of the *Giunta Regionale* and two experts belonging to the local administration, designated by the Council of the Local Autonomies.

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A First Important Experience in Participatory Democracy in Italy: Region of Tuscany Law No. 69 of 27 December 2007

by

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Abstract

Participatory democracy is a theme of growing interest in Italy, in both cultural debate and administrative practice. Some Regions have felt a need to provide a legislative framework in order to facilitate and finance these experiments. The first to do so was the Region of Tuscany which, in December 2007, approved a law that lays down "rules concerning the promotion of participation in the elaboration of regional and local policies." The law regulates two principal typologies of participatory processes, namely: 1) public debate; 2) the Region's support for such processes. In order to guide and manage these processes, the institution and regulation of a Regional Authority designed to guarantee and promote such participation has been provided for, in the form of a monocratic organ to be held by a person competent in the field of public law or political science or of proven experience in participatory methodologies and practices.

Public debate assumes the form of an articulated discussion on major measures with possible significant impacts of an environmental, territorial, social and/or economic nature, but it must be emphasised that, during these years when the law has been in force, no request for public debate has been submitted and therefore, to date, this process of participation has never been put into practice.

The support of the Region concerns smaller participatory projects that have to do with "the allocation of public resources"; the law does not specifically define or actually circumscribe the effective ambit of the support of the Region, but limits itself to stating that participatory projects other than public debate are involved. During these years since the law has been in force, many projects have been supported by the Region of Tuscany and with objects varying greatly.

Regional Law 69/2007 has been an important driving force: it will suffice to consider that half of the participatory processes completed in these years in Italy took place in Tuscany pursuant to this law; much, however, must still be done to fulfil the principles regarding participation. Above all, the fact that no public debate procedure has been initiated cannot be left unsaid. We are at the beginning of a process which, if it is not to be halted, needs to be supported by the political class, which should be the first to recognise it as an

instrument for making emerge and for reconciling so many different and sometimes opposing interests involved in public policies

Key-words

participatory democracy, participatory processes, budget processes, public debate, support of the region, local authorities

1. First profiles of Region of Tuscany Law No. 69 of 27 December 2007

Participatory democracy is a theme of growing interest in Italy (Allegretti 2010), in both cultural debate and administrative practice (Valastro 2010). Participatory democracy is a general category which includes new and different practises to which common citizens and public institutions take part to reach, jointly, a public decision (Allegretti 2011b)[I].

The first such experiences (Allegretti 2011a) predominantly arose on the initiative of local authorities, signally involving the introduction of participatory budget processes (Canafoglia 2010: 129 et seq.), even if sometimes concerning important town planning works, among which the Genoa motorway variance (Bobbio 2010)[II] and the Castelfalfi tourist complex (Baldeschi 2010: 161 et seq.)[III] deserve mentioning. These experiments, mostly undertaken on the initiative of certain administrators, have spread here and there in the absence of a general normative framework of reference (Pecoriello-Rispoli, 2006).

However, some Regions have felt a need to provide a legislative framework in order to facilitate and finance these experiments. The first to do so was the Region of Tuscany which, in December 2007[IV], approved a law that lays down "rules concerning the promotion of participation in the elaboration of regional and local policies."

To begin with, it must be pointed out that the text involved was itself the result of a participatory process that lasted one and a half years, during which roughly 1,000 people contributed to the genesis of the law; the decision to take this approach, which proved to be fruitful, made it possible for the process of elaboration of the bill to intersect various widespread participatory experiences in the regional territory (Floridia 2007: 619-620). Moreover, this law was designed as an instrument to be used for introducing a series of institutional incentives to encourage the spreading of new participatory practices since it was inconceivable to force local authorities to make use of such processes.

The law is innovative in the Italian panorama and explicitly makes manifest its experimental features: in fact, it contains an explicit self-abrogation clause. Art. 26 provides that the law shall be abrogated on 31 December 2012, with the proviso that the participatory processes already begun by that date shall be completed. This decision made by the legislators of Tuscany is certainly to be agreed with, "because it takes into account the natural difficulties that stem from the innovative nature of the subject matter and of

the lack of precedents to draw on for designing an organic law, because it guarantees a high degree of flexibility to procedures that make elasticity their strong point" (Ciancaglini 2008). And, as provided pursuant to the same law, in the first three months of 2012, the Regional Executive, together with the Regional Council, will have to promote and engage in participatory processes in order to assess: a) the effectiveness, the diffusion and the benefits of the participatory processes promoted pursuant to the law; b) the advisability of confirming or amending the law. Actually, the Executive has decided to anticipate the time of verification: already in the early months of 2011, a phase of analysis and debate began over the normative framework, its application and the processes carried out to date, with the aim of possibly reaching agreement on proposals for amendment to be submitted to the Regional Council.

The *ratio* of the law lies in the attempt to deal with the strategic uncertainty of the institutions, namely the difficulty for the decision-maker: 1) to single out the public interest to be achieved in concrete terms; 2) to evaluate the more complex choices to be made and then to guard them against the paralysing objections of "non-institutionalised actors," i.e. of the concerned populations that act through protest movements (Ciancaglini 2008). This clearly emerges from the first articles of the law, beginning from Art. 1, which starts out by stating the objectives and purposes that the legislator has set out to accomplish, among which we can mention: a) to contribute to renewing democracy and its institutions by supplementing it with practices, processes and instruments of participatory democracy; b) to promote participation as a routine form of administration and governance of the Region; c) to strengthen the capacity to build, define and elaborate public policies through the participation of the inhabitants; d) to create and favour new forms of exchange and communication between the institutions and society; e) to contribute to greater social cohesiveness through the spreading of the culture of participation and the valorisation of all forms of civil commitment.

It is therefore understandable that the law defines in broad terms those who may rightfully take part in a participatory process (whether it involves a public debate or a process supported by the Region), namely:

a) resident citizens and foreigners or stateless persons regularly residing in the territory affected by participatory processes;

b) persons who work, study or stay in the affected territory;

c) Tuscans residing abroad when they are in Tuscany;

d) other persons who have an interest in the territory in question or in the object of the participatory process, and who the person in charge of the debate deems useful to allow to take part in the same participatory process.

It is significant that the right to take part is recognised to those who work, study or stay in the affected territory, regardless of formal residency; finally, as regards those who do not have a physical tie to the territory, but do have an interest in it or in the object of the participatory process, there is still a possibility of participation, albeit subject to screening by the person in charge of the process.

In order to guide and manage the participatory processes promoted on the basis of the law, the institution and regulation of a Regional Authority designed to guarantee and promote such participation has been provided for, in the form of a monocratic organ to be held by a person competent in the field of public law or political science or of proven experience in participatory methodologies and practices. This figure is appointed by the Regional Council, which provides the same with means and staff. In particular, it is the duty of the Authority to evaluate and admit proposals for participatory processes; to elaborate approaches for the management of participatory processes; to define criteria and typologies for the implementation of forms of support (cf. *infra* for the institution of support); to assess the benefits and effects of the participatory processes; to prepare the annual report on its activity; to ensure, including via IT, circulation of the documentation and knowledge of the projects presented and experiences gained, including final reports on the participatory processes.

This involves a whole set of very important duties that the law assigns to a monocratic organ independent of the regional government which, in order to perform its functions in the best possible way, would need a greater investment by the Region in administrative support staff.

Finally, I point out that, in this initial phase of verification of the functioning of the law, there is discussion over the advisability of maintaining the monocratic nature of the Authority (initially thought to provide a greater guarantee of independence) or to begin thinking in terms of a collegial Authority, just as there is discussion of the relations (and of the possible unification in a single organ) of this Authority with the Guarantor of

Communication instituted pursuant to Regional Law No. 1/2005,[V] which lays down rules for the governance of the territory.

2. Participatory processes: the public debate

The law regulates two principal typologies of participatory processes, namely: 1) public debate; 2) the Region's support for such processes.

Public debate assumes the form of an articulated discussion on major measures with possible significant impacts of an environmental, territorial, social and/or economic nature.

The request to organise a public debate may be put forward by:

a) the proponent of the major measure, whether public or private;

b) a subject that contributes to the realisation of the measure;

c) the local authorities involved territorially;

d) at least 0.50% of the citizens, of the foreigners or of the stateless persons who are 16 years of age or older and are regularly resident in the Region, including on the initiative of associations and committees.

The Authority decides on the admissibility of the request after having heard the opinion of the public authorities concerned and of the delegates of the proponents. For purposes of the acceptance of the request, the Authority evaluates whether the impact of the measure is significant and verifies that no administrative act pertaining to the preliminary project has been approved. These two conditions established by the legislator do not clearly circumscribe the scope of applicability of the public debate: on the one hand, the assessment of the impact of the measure leaves wide margins of discretion; on the other hand, it is not easy to establish that no administrative act pertaining to the preliminary project has not already been approved (Ciancaglini, 2008).

With the same act that accepts the application for public debate, the Authority orders its opening and establishes how long it shall remain open which shall not exceed six months, barring extensions not exceeding three months; establishes the phases of the debate in such a way as to guarantee the maximum information among the inhabitants involved and to promote participation, and to ensure the impartiality of the proceedings, the full parity of expression of all viewpoints and equal access to the places and times of

debate; and appoints the person in charge of the public debate, choosing the same from among experts in participatory methodologies and practices, defining their specific duties.

The opening of the participatory process entails the suspension of the approval or implementation of administrative acts of the competence of the Region connected with the measure forming the object of the same process.

At the end of the public debate the person in charge of it delivers a report to the Authority specifying the process adopted, the issues that were raised during the debate and the conclusive proposals that it gave rise to. The Authority, after having verifying that the participatory process was properly carried out, takes note of the report and makes it public.

Within three months of publishing the report, the proponent subject publically declares whether it intends:

a) to abandon the project or submit an alternative one;

b) to propose changes in the project, specifying those that it intends to make;

c) to continue to back the same project that formed the object of public debate, explaining the reasons why in a convincing manner.

If these are the normative provisions applying to an important typology of participatory process, it must be emphasised that, during these years when the law has been in force, no request for public debate has been submitted and therefore, to date, this process of participation has never been put into practice. Up to now the institution has remained a dead letter and the fact that it has not even been tried risks undermining the very framework of the law, where public debate is one of its pillars. It is therefore understandable that in recent months the Regional Executive, together with other interlocutors, is weighing the advisability/need to carefully review the legislative provisions, even if the failure to try out this institution is mostly attributable to a lack of political will and to the wariness of many administrators rather than to legislative shortcomings. If anything, at the time of reform of Regional Law No. 69 it would be advisable to consider the possibility of making it mandatory in certain cases.

3. Support of the Region

The other participatory process introduced by the law of the Region of Tuscany is the support of the Region, which concerns smaller participatory projects that have to do with "the allocation of public resources"; the law does not specifically define or actually circumscribe the effective ambit of the support of the Region and it does not formalise participatory modalities, but limits itself to stating that participatory projects other than public debate are involved (Art. 14).

Before proceeding to examine the regulations, it is important to me to point out at once that, during these years when the law has been in force, many projects have been supported by the Region of Tuscany and, as we shall see, with objects varying greatly.

Eligibility to apply for support is as specified below:

a) the following minimum percentages of residents in territorial ambits of one or more provinces, municipalities and/or municipal districts, within which it is proposed to carry out the participatory project, which may be reached including on the initiative of associations and committees:

1) 5% for up to 1,000 inhabitants;

2) 3% for up to 5,000 inhabitants;

3) 2% for up to 15,000 inhabitants;

4) 1% for up to 30,000 inhabitants;

5) 0.50% for over 30,000 inhabitants.

b) local authorities, single and/or associated, including with the support of citizens, residents and associations;

c) educational institutions, single and/or associated, by resolution of the collegial organs, including with support as per letter a).

A business may apply for support for a participatory process only as regards its own plans or measures having a significant impact of an environmental, social or economic nature on the territory of reference and with the support of subjects as per paragraph 1, letter a).

The law establishes eligibility requirements,[VI] so that the Authority may approve support for projects meeting those requirements, also establishing criteria for determining

preferential treatment, owing to which the Authority, when processing applications, gives priority to projects that:

a) provide for the involvement of weak or disadvantaged subjects, including those with disabilities;

b) take place in territories with particular situations of social or territorial hardship;

c) have as their object works or measures potentially having a significant impact on the landscape or environment;

d) take the responsibility, through suitable venues, times and places, for the participation of both genders on equal terms;

e) have a better ration of total costs of the process to own resources;

f) adopt innovative forms of communication and interaction with the inhabitants, allowing them to have an active say in the different phases of the process;

g) are sustained by a considerable number of applicants, exceeding the minimum percentages specified in Art. 14(1) a).

When the application is submitted by local authorities, the Authority considers as priority projects those that, in addition to the above-mentioned criteria:

a) propose to provide continuity, stability and transparency to processes of participation in the practices of the local authority or that, with the same aims, constitute application of local regulations on participation;

b) have an integrated dimension cutting across sectors;

c) are submitted in associated form by more than one local authority;

d) utilise the IT network of Tuscany, including the assisted access points it provides for and any forms of IT interactivity with the participants;

e) make available via IT all documentation important for the participatory process, including concise and popular versions;

f) offer free of charge periodic forms of communication, including via IT, concerning the activities of the local authority and the participatory processes in progress;

g) propose to contribute to local development that is equitable and respectful of the environment, including by proposing a local plan of action defined in the ambit of an Agenda 21 process.

Since up to now the funds made available by the Region have not sufficed to cover all admissible requests,[VII] the Authority has felt the need to indicate additional criteria of priority, in particular:

a) the need to distribute available resources in the different provinces of the Region both for reasons of territorial equity and to promote the diffusion of the culture of participation throughout Tuscany;

b) the need to apply participatory approaches to diversified themes and policies; this decision, too, is justified by considerations similar to those just stated: promotion of the culture of participation and learning from a variety of experiences;

c) the need to promote processes promoted by a variety of subjects – by educational institutions, by citizens and by businesses.

In January 2011, faced with a growing number of requests, the Authority deemed it necessary to define more specifically the priorities in the grant of regional support, making explicit additional, more cogent criteria, and decided to give preferential treatment to:

1- the need of the larger municipalities to replace the districts – abolished due to the effect of national rules in all of Tuscany's municipalities except for Florence – with other "mechanisms" intended to foster the "closeness" of the Administration;[VIII]

2- local processes concerning the matter of waste (reduction, modalities of collection, modalities of disposal and disposal systems)[IX];

3- a greater diffusion of participatory budgeting practices.[X]

Consequently, beginning from the deadline of 31 March 2011,[XI] the Authority decided to give special attention to requests for support regarding the three themes described, including on the part of authorities that have already received funding pursuant to Regional Law 69/2007, even if "crossing them" with the criteria followed up to now.[XII]

Actually, the relationship is not crystal clear and, therefore, neither is the "cross" between the first general criteria established by the Authority and the subsequent ones of January 2011, since, for example, the *ratio* of criterion b) (of the first set of criteria) is at loggerheads with the channelling of funds to finance certain thematic areas.

If we take a look at whom, in actual fact, has taken the initiative in these first years of application of the law, we observe that over 80% of the projects funded were proposed by local authorities, of which municipal authorities accounted for the lion's share,[XIII] while about 10% were proposed by educational institutions and only a small percentage by

residents. This latter datum indicates that the organised groups (with a few exceptions)[XIV] formed around highly controversial local issues have been wary of the procedures contained in the law and have judged it to not hold out a significant possibility of making their positions count.

The Authority attends to the admission of the participatory projects with a justified act within 30 days from the time of application. When examining projects proposed by citizens, residents, educational institutions and businesses or by local authorities if the results of the participatory process involve competencies of other bodies, the Authority takes into account the opinion of the competent administration and ascertains its willingness to consider the results of the participatory processes or else to justify their rejection or partial acceptance.

Wanting to provide a panorama, albeit concise, of the issues that up to now have given rise to a participatory process, we find that about one-third had to do with matters of town planning (e.g. structural plans, town planning regulations, etc.), one-third had to do with urban requalification projects, and the remaining one-third involved participatory budgeting, environmental policies, waste treatment policies, social policies and educational projects.

The participatory modalities in these processes are not formalised nor can they be in a normative act; instead, they can vary widely (Bobbio 2004: 54 et seq.) because they must be chosen from time to time depending on the object, the applicants, the arrangement of the underlying interests, etc.; it is a delicate task that can affect the outcome of the process, whether successful or not. Among the requirements for eligibility for support, Art. 15 of the same law requires that the projects shall provide for participatory instruments and methodologies in keeping with the purposes of the process and the context of reference.
And as it turns out, the promoters of participatory processes have so far made use of outside consultants for help in elaborating appropriate participatory methodologies.

If we go on to examine in detail the modalities chosen to date in such processes that have taken place over the years in Tuscany, we find a wide variety of methodologies: focus groups, workshops, world cafés, open spaces, public meetings, forums, interviews, listening posts, questionnaires, role playing and forms of IT communication.

Furthermore, the law provides that the management of the process shall be assigned to a neutral and impartial subject or that in any case provision shall be made for modalities

for the management of such process that ensure neutrality and impartiality. More frequently, this involves boards of guarantee, therefore formed by a plurality of subjects, the composition of which varies considerably depending on the type of process involved.

Finally, Art. 17(3) of Regional Law 69/2007 makes the support of the Region subject to the submission of periodic and final reports on the relevant process, in addition to the itemised documentation of the costs.[XV] As stated on the Authority's website, the aim of the final report is the sharing of experiences, so that other subjects and the community in general can become aware of the experiences that have taken place in the Region, benefit from them from the standpoint of "collective learning" and thus progressively improve the quality (in the sense of dialogue/deliberation where applicable) and the effectiveness of the participatory processes. The report therefore constitutes an important contribution to the creation of a "practising community" among all the subjects (citizens, administrations, political and technical/administrative staff, scholars and consultants) involved in various ways in the reflection on and practise of participation in Tuscany.

The matter of the impact of the participatory process is obviously more complex. First of all, it must be pointed out that some of the participatory experiences to date have not so much been directed toward the execution of certain works or the approval of certain decisions and therefore did not fit into a preliminary investigative phase possibly leading to a decision, but have reflected a value and a purpose intrinsic to the deliberative/reasoning process itself. I refer, for example, to projects promoted by educational institutions whose common trait is the valorisation of moments of confrontation/comparison, of dialogue among all parties that rotate around a school; the characterizing feature of these participatory processes, above and beyond their respective singularities, is precisely the utilisation of a method of reasoning to rediscover together values and a sense of community, as well as to bring to light critical points and to make possible solutions emerge.

Moving on to the matter of processes that have been included in the preliminary investigative phase of a decision, unfortunately a lack of surveys must be reported, after an interval of months or even several years (as regards the more complex issues), on the part of the Regional Authority, which was also because the resources made available do not make it possible to monitor the results of the process beyond the end of it. I believe that this is a point which, in this phase when the regional law is being re-discussed, is worth

reflecting on, possibly strengthening the structures of the Authority to enable it to keep track over time of the results of the processes funded.

4. Relations with local authorities

A further question that the law had to deal with regards the relationship with local authorities; since the Region could not impose the acceptance of methods of participatory democracy, it mainly resorted to mechanisms involving incentives and collaboration (Corsi 2009). The instrument singled out by the legislator is the protocol of understanding between local authorities and Region, the signing of which[XVI] mean that participating authorities must share the law's principles, voluntarily accept the procedures it provides for, and suspend the adoption or implementation of administrative acts of its competence whose adoption or implementation may foreshadow a decision anticipating or compromising the outcome of the public debate or other participatory processes.

Moreover, the signing of the protocol is a condition for being able to submit a request for the support of the Region[XVII]; in particular, applications for support submitted by local authorities are admitted if they meet, in addition to the general requirements for admission, the following additional requirements:

a) declaration committing the authority to take into account the results of the participatory processes or in any case to justify the failure to do so or their partial acceptance;

b) participation in the Region-local authorities protocol as per Art. 18;

c) accessibility of all documentation relevant for the participatory process;

d) making available its own financial and organisational resources in support of the process;

e) when territorial planning instruments and acts of governance of the territory are involved, the opinion of the local guarantor of communication, instituted pursuant to Art. 19 of Regional Law No. 1/2005.

To date the protocol has been signed by about 90 local authorities and has proved to be an effective instrument for encouraging participatory practices, as well as a good instrument for coordination among territorial authorities. It cannot be overlooked that, in recent years, the majority of the participatory projects have been submitted by municipal authorities. If, in fact, forms of participatory democracy can be conceived and regulated at

any level of government, there is no doubt that the local level lends itself more than any other when it comes to conceiving, experimenting with and providing for processes of participatory democracy. And Regional Law 69/2007 has been an important driving force: it will suffice to consider that half of the participatory processes completed in these years in Italy took place in Tuscany pursuant to this law; much, however, must still be done to fulfil the principles regarding participation sanctioned *in primis* by the regional charter and made his own by the legislator in 2007. Above all, the fact that no public debate procedure has been initiated cannot be left unsaid. We are at the beginning of a process which, if it is not to be halted, needs to be supported by the political class, which should be the first to recognise it as an instrument for making emerge and for reconciling so many different and sometimes opposing interests involved in public policies.

[I] To investigate the differences between participatory democracy and other forms of participation, see Allegretti 2011b.
[II] This was the first public debate held in Italy over a major infrastructure; it took place in Genoa between 6 February-30 April 2009 over a new stretch of motorway about 20 km long between Voltri and Genoa, known as *Gronda di Ponente*.
[III] Deserving of mention in Tuscany is the process, promoted by the Town Council of Montaione in application of Regional Town Planning Law No. 1/2005, concerning the project for a huge tourist complex promoted by a German company in the village of Castelfalfi.
[IV] Regional Law No. 69 of 27 December 2007. With Regional Law No. 3 of 9 February 2010, the Region of Emilia-Romagna also laid down "rules for the definition, reorganisation and promotion of the procedures for consultation and participation in the elaboration of regional and local policies" (Ciancaglini, 2011). In the same period the Region of Umbria approved a new law (Regional Law No. 14 of 16 February 2010) on the institutions of participation that provides in a very generic way for the institution of consultation, whose features remain rather undefined, so that doubts arise as to whether they can be considered institutions of participatory/deliberative democracy.
[V] Regional Law No. 1 of 3 January 2005 instituted the Guarantor of Communication for the purpose of facilitating the participation of the citizenry in every phase of the procedure for the forming and approval of the instruments of territorial planning and of the acts of governance of the territory.
[VI] Cf. Art. 15 of Law No. 69/2007.
[VII] The available resources amount to less than 700,000 euros per year, divided on the basis of three periods. As stated in the Authority's website, the experience gained since the beginning of the implementation of Regional Law No. 69/2007 reflects a growing interest not only among local administrations but also on the part of citizens and educational institutions in the funding made available by the Region, but the current resources available have made it impossible for the Authority to satisfy everyone.
[VIII] Law No. 42/2010 suppressed the municipal decentralisation districts, except for municipalities with a population exceeding 250,000 inhabitants, which have the right to organise their territory in districts with an average population of no less than 30,000 inhabitants.
[IX] The Authority has taken into account that the Department of the Environment has expressed a willingness and need to promote in the near future a participatory process on a regional scale directed toward the

preparation of a new Waste Plan; it might be useful for this regional process to be accompanied or preceded by some local processes funded pursuant to Regional Law No. 69 (a pertinent case is already currently in progress in Castelfranco di Sotto; another request in this sense was received at the deadline of 30th November from the Municipality of Pontedera).

[X] As stated in the Authority's communiqué, the reduced financial means of the local authorities, due to the national government's budgetary policies, obviously are creating significant difficulties for the same. One response to this difficult situation ought to be to involve the citizenry in the ranking of priorities, to allow the same to make an informed assessment of the situation and to develop a "sense of propriety" about the difficult solutions and decisions.

[XI] Art. 14(2) of the law provides for three deadlines per year for the submission of applications for support (31st March, 31st July and 30th November).

[XII] www.consiglio.regione.toscana.it/partecipazione/documenti/domanda/ComunicatoModificaprioritàGenn11.pdf.

[XIII] In addition to municipalities, which account for about 70% of the projects submitted, proposals were made by provinces, mountain communities, health companies and unions of municipalities.

[XIV] For example, the process promoted by a committee formed to channel protest against the project submitted by the Port Authority of Carrara for the realisation of a new waterfront in the harbour area.

[XV] In addition, the decree by the Authority granting support makes mention of other documents (in paper and IT format) that must be sent in for purposes of the payment of the third quota of the same grant-in-aid. Specifically, the following must be enclosed:
- results of the questionnaire for evaluating the project administered to participants at the beginning and at the end (where applicable) of the participatory processes;
- the audio, video and photographic material created during the project;
- two copies of all paper documentation produced in the course of the project;
- itemised documentation of the costs.

[XVI] The protocol may also be signed at a later date.

[XVII] The signing of the protocol is not a requirement for eligibility to apply for public debate. Art. 9 specifies that for administrative acts of competence of local authorities, suspension of approval or implementation of administrative acts connected with the measure forming the object of debate takes effect if the authority concerned has signed the protocol pursuant to Art. 18 or in any case in the event that the authority so decides. Such suspension concerns acts whose approval or implementation may foreshadow a decision that anticipates or compromises the outcome of the public debate.

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Participation and Decentralisation: The Case of Andalusia

by

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Abstract

In the Bill of Rights of the Andalusian Statute of Autonomy, right to participation is extremely well-developed and is not restricted to the traditional rights to political participation, but rather is extended to all relationships between individuals, groups, citizens and public authorities. In this paper, we will outline the different forms of participation established in the Andalusian Statute of Autonomy and the development legislation and evaluate their implementation

Key-words

political decentralisation; self-governments' Bills of Rights; right to political participation; participatory democracy

1. Introduction

The reformed Andalusian Statute (hereinafter, EAAnd – Estatuto de Autonomía de Andalucía) adopts a participatory view of society; therefore, participation pervades the contents related to the relationships between individuals and groups and the various public authorities, and among themselves. In the light of this, participation is one of the basic principles that make up the Statute's political programme. This principle is reflected, on the one hand, in the Bill of Rights in Title I of the Statute - among these principles, the rights to political and citizen participation are particularly evident and, on the other hand, in the powers conferred to the Autonomous Region regarding the required competences to fulfill that objective and those citizens' rights.

However, I would like to begin by underlining our dissatisfaction with a situation in which the necessary legislative development has not been carried out in these four years of statutory reform validity period. In addition, the constitutional interpretation of the various forms of direct political participation is restrictive and seems to exclude popular consultations by referendum from the competences of the Autonomous Communities. This is particularly evident in the STC (*Sentencia del Tribunal Constitucional* – Constitutional Court Judgement) 31/2010, regarding its interpretation of Article 122 of the Catalonian Statute of Autonomy. According to this Judgement, direct political participation must also be excluded from the competence of the Autonomous Communities, as stated in Article 78 of the Andalusian Statute of Autonomy.

In this paper, we will outline the various different forms of participation established in the Andalusian Statute of Autonomy and the development legislation, and evaluate their implementation.

2. The right to participation in the statutory framework. Political democracy vs participatory democracy

As above-mentioned, within the Andalusian Statute of Autonomy, participation is defined as one of the mail goals of the political programme of the Autonomous Regioni.

This is reflected in its Title, including a whole range of rights to participation, and in the required competences conferred upon the Autonomous Region to achieve these goals.

Therefore, Article 10 provides the axiological and programmatic framework for the new interventionist function of the Andalusian Autonomous Region, which can be summarised as: a) material equality b) parity between men and women and c) participatory democracy. This provision almost literally restates the so-called social or change clause in the first section of Article 9.2 of the SC (Spanish Constitution)[II], adding that, in order to make the notions of freedom and equity contained in this provision effective, all the required positive action measures must be taken. It goes on to state another relevant principle pervading the Statute of Autonomy , i.e., the principle of parity democracy or, similarly, effective equality between men and women, which has already been generally applied in the public policies of our Autonomous Region, aimed at establishing this principle in its related public policies and the Administration of the Autonomous Region[III]. Moreover, it concludes by stating that, to fulfill this objective, the Government of the Autonomous Community will exercise its powers with some basic purposes in mind, in particular number nineteen, i.e., "Citizen participation in the design, implementation and evaluation of public policies as well as individual and collective participation in the civic, social, cultural, economic and political fields towards an advanced social and participative democracy".

From this declaration of intent, it may be inferred that the implementation of the social state clause is fundamental element of the statutory contents. However, this has resulted not only in the establishment of some general contents -as in the previous Statute[IV]- but also in their reflection in a Citizens' Bill of Rights[V], which mainly include social rights. All this proves what Professor Antonio Porras has rightly stated. He identifies three types of regulatory scopes, with their own specific requirements, in the new social rights' system included in the Andalusian Statute of Autonomy. He also argues that the rights in Title I include regulations of a very different structure and nature, each with a different level of legal effectiveness. First, there are programmatic regulations which establish what type of finalistic objectives are priorities for the Autonomous Region; second, there are declaratory rights' regulations whose scope must be to make sure subjective legitimacy presides over public powers, whatever the case may be; and, finally, there are regulations regulating public policies which, due to their greater level of difficulty

of implementation, have simply been created as governing principles reporting on the public powers' actions, and which require the appropriate legal development to be used before the courts[VI].

Of the rights included in Title I, the right to participation, which fits this same pattern, may be identified: in Article 10 the notion of participation is presented, on the one hand, as a general objective of the Andalusian Statute and, on the other hand, as a subjective right with direct effectiveness over Articles 26, 27, 30 and 31. In Article 37 it is a mere governing principle, guiding the public policies of the Autonomous Region, although it is in need of the appropriate legislative development.

Now, we will start analysing the contents of the right to participation in the Charter of Social Rights included in the Andalusian Statute of Autonomy. To this end, we will use the classification system derived from the jurisprudence of the Spanish Constitutional Court in STC 119/1995, incorporated into the Statute, which distinguishes between the right to political participation —included in Article 30 of the statutory regulations— and other rights to citizen participation before the Public Administration, which may be included in the formula of Participatory Democracy (Articles 26, 27, 30, 31 and 37).

a. Article 30 in the Andalusian Statute of Autonomy: beyond the right to political participation

The traditional right to political participation is recognised as one of the rights of the Andalusian Statute of Autonomy, and has its own subjective contents, included in Chapter II. Article 30 of the Andalusian Statute paraphrases the contents of the basic right, as stated in Article 23 of the SC. It states that all Andalusians — defined in Article 5 as any Spanish citizen with administrative residency in an Andalusian municipality, including Spanish citizens living abroad whose last administrative residence was established in an Andalusian municipality and their descendants— have the right to take part in all Andalusian public affairs on equal terms under the Spanish Constitution, Andalusian Statute and the Spanish laws.

In addition, Article 30 lists the contents of this right, moving away from the notion of political participation set by the Spanish Constitutional Court, and adding some contents which do not adhere to the definition of the fundamental right according to Article 23 of

the SC. In fact, the Spanish Constitutional Court considers the notion of political participation to be defined by its subject: the subject of sovereignty, i.e., citizens who belong to the electoral body; and by its object: its contribution to the creation of the general will. Therefore, the contents of this right should consist of participation by vote (active and passive), popular legislative initiative, referendum, and the open council system[VII] as well as the inherent rights to representatives for the appropriate exercise of their parliamentary office[VIII]. In contrast, there are other forms of participation which do not imply the exercise of the people's will but rather an appeal to certain groups or citizens to protect their own collective or diffuse interests, and which could be included in the formula of Participatory Democracy[IX].

However, let's see how these different forms of Political Democracy and Participatory Democracy are combined in the provision under discussion. According to Article 30 of the EEAnd, the right to political participation includes:

a) The right to select the members of the representative bodies of the Autonomous Region and the right to present themselves as candidates for these bodies.

The first section creates no problems. It refers to active and passive suffrage. The development of these rights is included in the Spanish Electoral Law (hereinafter, LOREG Ley Orgánica del Régimen Electoral Español) and in the Andalusian Parliamentary regulation, the Andalusian Statute of Autonomy just reasserts the traditional principles of universal, equal, free, secret and direct suffrage (Article 101), and regulates the exercise of these basic concepts, which are fully developed under the Andalusian Electoral Law (Articles 104 and 105). A law which must be passed by an absolute majority and must also meet gender equality criteria when drawing up the electoral lists, an innovation introduced by the Andalusian Statute.

b) The right to promote and propose legislative initiatives before the Andalusian Parliament and take part in the law-making process, directly or by means of collective entities under the terms established by the Parliamentary Regulations.

The first of these competences creates no problems, because the Spanish Constitutional Court also considers popular legislative initiative one form of direct participation in public affairs. The Court has also spoken out in its favour when it has been

exercised before the Spanish Chamber of Deputies and the Parliaments of the different Autonomous Regionsx. Therefore, Article 111.2 of the EEAnd initiates the legislative proceedings in order to refer its regulation to an act issued by the Andalusian Parliamentxi.

However, in our opinion, the right to take part in law-making by means of collective entities, an issue —which is addressed more extensively in Article 113 EEAnd— does not fit the notion of political participation recognised by the Constitutional Court, and should have been included in the different methods of participation before the Administration, as one of the forms of Participatory Democracy.

c) The right to promote the calling of popular consultations granted by the Andalusian Autonomous Government or the City Councils under the rules of the laws. These methods of popular consultation, granted by the Autonomous governments and local governments, should be regulated by the Autonomous Government through laws (Article 111.3 of the EEAnd). However, some doubts have been raised regarding these forms of participation.

What type of consultations do they refer to? Do they include referenda or are they limited to other forms of popular consultation, such as surveys, public audiences and participation fora?

The systematic location of the provision leads us to think that, since it is included in the right to political participation, it refers to referenda. However, if we compare this Article to Article 78, which addresses the competence of the Autonomous government with regard to popular consultations, we reach the opposite conclusion. Article 78 of EAAndxii actually excludes referenda from popular consultations, which are the exclusive competence of the Andalusian Autonomous Government.

Is it possible for another type of competence not to be exclusive? The interpretation of this article according to legislative precedents and the recent jurisprudence of the Constitutional Court on competences regarding popular consultations seem to exclude this possibilityxiii. In fact, if we refer to the legal proceedings of the statutory provision, it is evident that this article included two types of competences regarding popular consultationsxiv.

On the one hand, in the first section, the competence concerning legal development was established according to the concepts agreed upon by the State regarding

popular consultations in Andalusia and according to the laws enacted in the exercise of the competences provided for in Article 149.1.1 of the Spanish Constitution (regarding basic conditions guaranteeing the equality in the exercise of rights) and 149.1.32 (regarding state authorisation for referenda). Therefore, it implied giving the Autonomous Regions the competence for the legal development of autonomous and local referenda. On the other hand, there was a second section that is similar to the current Article 78, establishing its exclusive competence regarding surveys, public audiences, participation fora and other forms of popular consultation, except for referenda, which was addressed in the first section.

However, during the parliamentary proceedings in the Spanish Parliament concerning the reform of the Autonomous Statute, the first section was removed without further debate due to an amendment tabled by the Socialist Group. From this, we can also deduce a general desire to exclude referenda from the competences of the Autonomous Governments.

On the other hand, since its first decisions, the Spanish Constitutional Court has insisted on a restrictive interpretation of the notion of direct participation, which has led it to deny any possibility of implicit competence regarding popular consultations in its STC 103/2008[xv]. Similarly, it denies Autonomous Governments the possibility to call or regulate popular consultations, even by referendum, unless they are specifically entitled to that competence by State law, including the Statutes of the Autonomous Regions[xvi]. In light of this, the Autonomous Regions' Governments are prevented from regulating this matter within the exercise of the generic competence to regulate their self-government institutions as a part of the doctrine suggested[xvii].

Finally, the STC 31/2010 excludes any possibility of autonomous regulation regarding this matter since the State's competence includes not only referenda and the authorisation to call them but also "the entire discipline of that institution", including the establishment and regulation of its legal system[xviii].

d) This Article also includes the contents of the right to political participation and the individual and collective right to petition, in the way and with the effects established by law, and, therefore, within the framework established by Organic Law 4/2001, November 12th, regulating the right to petition.

e) Finally, it regulates the right to actively take part in Andalusian public life. To this end, the required mechanisms of information, communication and the receipt of proposals are established.

The vagueness of this rule and its originality make it impossible to relate it to any of the contents defining the right to political participation. We can intuitively infer that it refers to citizen participation in the design of public policies and when referring to the mechanisms of information, communication and the receipt of proposals, which seem to indicate the instruments of administrative participation[xix]. This intuition is confirmed by the Statute's Parliamentary proceedings. This section is based on amendment 455, proposed by the *Izquierda Unida* Parliamentary Group before the Andalusian Parliament to introduce Article 30bis, recognizing the citizens' right to take part in the design, determination and management of public policies. Their proponents justify this based on the need to "turn Representative Democracy into Participatory Democracy"[xx]. Therefore, we may conclude that this section of Article 30 refers to citizen participation in the design of public policies, and, as such, we do not understand why it is not included in the right to good administration ex-Article 31 of the EAAnd.

Moreover, we wonder whether the Andalusian Statute of Autonomy is able to redefine the contents ascribed to the right to political participation, or whether it can only reiterate the contents of this right as stated in the Spanish Constitution. We are forced to select the second option. Since the definition of competences according to the contents of the fundamental rights is part of the notion of the development of fundamental rights, consequently, it requires an organic law, in a material sense, for its development. However, in our opinion, the Andalusian Statute of Autonomy does not involve the principle of legal reservation.

b) Additional citizens' rights to participation before the Public Administration

In other statutory articles some other participation formulae are included which fulfill the basic objective of the exercise of the competences of the Autonomous Region concerning "citizen participation in the design, implementation and evaluation of public policies as well as individual and collective participation in the civic, social, cultural,

economic and political spheres, towards an advanced social and participative democracy" (Article 10.3.19 of EAand). They are specific forms of citizen participation before the Public Administration which, without further discussion, we include as one of the various forms of Participatory Democracy.

Therefore, Article 26 of the EAAnd recognises the institutional right to participation of the most representative trade unions and business associations in the Autonomous Region as one of the rights related to labour. Likewise, one of the governing principles of public policy also includes the "encouragement of agreements with economic and social actors" (Article 37.12 of the EAnd), an agreement that will follow a privileged participation channel in the Economic and Social Council (Article 132 of EEAnd).

On the other hand, Article 27 of the EAAnd also establishes the lawmaker's duty to regulate the instruments of consumer participation and its list of rights.

Finally, Article 31, the so-called right to good administration[XXI] which includes all citizens' right to take part in the decisions affecting them and, therefore, receive truthful information from the Administrations in order to do so[XXII]. It is only in this last article that citizen participation intends to reach a subjective dimension and begins to take the shape of a truly statutory right[XXIII]. The contents of this right are completed by what is stated in Article 134 of the EAAnd, which also includes the legal duty to regulate citizen participation, either directly or by means of associations or representative organisations of interest in the administrative proceedings or in the design of the provisions that may affect them. On the other hand, it establishes the right to access the Public Administration, including its files and records[XXIV], an essential instrument to obtain the truthful information mentioned in Article 31 of the EAAnd, necessary to prevent participation from becoming a mere formality in the Administrative proceedings instead of being a real way for public opinion to participate in the decisions of public authorities[XXV].

Initially, we may consider this statutory article unoriginal, since it simply reiterates what is stated in Article 105 of the SC, which seems to refer to the formulae of public information and procedural, functional and organic participation[XXVI]. However, this provision must be linked to Article 78 of the EAAnd, which establishes the competence of the Autonomous Region regarding "surveys, public audiences, participation, fora and any other means of popular consultation", thus adding new forms of citizen participation which have already been regulated in other Autonomous Regions[XXVII]. This is why we

think that the statutory mandate will be properly fulfilled when a broad range of forms of citizen participation is integrated into the public powers decision-making process.

Furthermore, Article 84.2 of the EAAnd regarding the scope of the provision of public services establishes that the Autonomous Region must meet the democratic participation criteria of the interested individuals, trade unions and business associations when exercising its competences regarding health, education and social services.

To conclude with the analysis of the Bill of Rights included in Title I of the Andalusian Statute, we must mention Chapter III, Article 37 which provides for the participation of certain groups as governing principles for public policies the elderly (Article 37.1.3) and young people (Article 37.1.8), in addition to the promotion of associations (37.1.18), an essential condition for the implementation of participatory democracy, usually organised by a very strong network of associates[xxviii].

3. Legislative Development and the practice of participatory institutions in Andalusia

Since the approval of the Andalusian Statute of Autonomy, the statutory provisions regarding citizen participation institutions have hardly been developed.

a) Electoral Participation

Therefore, we can argue that Law 1/1986, January 2nd, regarding the Andalusian Parliamentary elections has not been modified since its approval and certainly will not be modified. It is not unusual for the doctrine to ascertain the stability of electoral regulations[xxix] and if we add to this the mimetic effect the electoral system of the Spanish Chamber of Deputies has had on that of the Autonomous Governments well as the very broad interpretation constitutional jurisprudence has given to the general electoral regime regulated by the State through an organic law, the result is a set of rather traditional electoral regulations[xxx] which maintain their central structural elements: the province as the constituency and the proportional character of the electoral system, though this has been corrected by territorial criteria[xxxi]. This occurred despite the changes introduced by Article 105 of the Andalusian Statute of Autonomy, which removes references to the D'Hondt electoral formula, required by the previous statute, and requires the respect of

gender equality criteria when drawing up electoral lists and that electoral debates be held in the public mass media.

Moreover, the new Andalusian Statute of Autonomy makes regulatory change difficult since it requires, as aforementioned, an absolute Parliamentary majority to change electoral regulations.

In the last 25 years that the law has been in force, there have been 7 elections. In all of them, the average participation rate has been 69.87%. Of these 7, in the 1990 elections —the only one which did not coincide with other electoral processes— the participation rate hardly reached 55.32%, and in the 1996 elections the rate was higher at 78.42%[xxxii]. The party system has been very stable, and the Spanish Socialist Party (PSOE), the People's Party (PP, until 1990, the coalition AP-PDP-PL), the Izquierda Unida Party (IU) and the Andalusian Party (PA) have been in the Andalusian Parliament, the Socialist Party being the most voted by the Andalusian citizens, though between 1994 and 2000 it only obtained a relative majority and the People's Party achieved substantial growth. In the year 2004, however, the PSOE again obtained the absolute majority and has held it ever since[xxxiii].

Elections	Participation	SEATS			
		PSOE	PP	IU	PA
1986	70.67%	60	28*	19	2
1990	55.32%	62	26	11	10
1994	67.68%	45	41	20	3
1996	78.42%	52	40	13	4
2000	69.74%	52	46	6	5
2004	74.67%	61	37	6	5
2008	72.64%	56	47	6	

(Source: Self-made from the CAPDEA and BOJA data)

* At that time AP-PDP-PL

TABLE 1: Andalusian Parliament Elections

b) *Citizen participation in legislative proceedings and in Government Parliamentary control*

On the other hand, the Andalusian citizen participation in the design of Andalusian legislation may be achieved, as aforementioned, through two main instruments: popular

legislative initiative and the participation of organisations and interested associations in its development procedures.

Popular legislative initiative is regulated by *Law 5/1988*, June 27th *regarding popular and City Councils' legislative initiative,* which —as in most autonomous legislations— adopts the guidelines set by *Organic Law 3/1984*, March 26th *regarding popular legislative initiative* before its 2006 reform. Therefore, there is no reason to highlight any innovations in either the procedures or the matters excluded from its objective[XXXIV]. Its exercise requires the signatures of 75,000 citizens with the political status of Andalusian citizens, which —according to Articles 5 and 6 of the EAAnd and as was previously acknowledged in the article of the *Statute of the Andalusians abroad*[XXXV]— includes all Andalusian people abroad. The timeframe for the collection of signatures is 4 months and can be extended for another two months in the event that there are some objective and properly justified reasons. On the contrary, the involvement of the Promoting Commission in its Parliamentary procedure is not provided for[XXXVI].

Few popular legislative initiatives have been carried out by the Andalusian Parliament, and, specifically, only 11 popular legislative initiatives have been introduced. From their analysis, it may be deduced that the greatest difficulty lies in obtaining the minimum number of signatures required, since only one of these initiatives —dealing with the creation of a support network for pregnant women— has been discussed before Parliament (though it was rejected) and another five expired because the signatures had not been collected within the stipulated timeframe.

Legislature	Non-admitted	Retracted	Expired	Passed	Rejected	Being processed	TOTAL
II(1986-1990)	-	1	-	-	-	-	1
III(1990-1994)	-	-	-	-	-	-	-
IV(1994-1996)	-	-	1	-	-	-	1
V(1996-2000)	-	-	1	-	-	-	1
VI(2000-2004)	-	1	1	-	-	-	2
VII(2004-2008)	-	-	1	-	1	-	2
VIII(2008-)	2	-	1	-	-	1	4
TOTAL	2	2	5	0	1	1	11

(Source: Self-made from Andalusian Parliament Web data)

TABLE 2: Popular legislative initiatives in Andalusia

Regarding the audiences of citizens and representative associative entities during legislative procedure, as stated in Articles 30 and 113 of the EAAnd, the corresponding adaptation of the Andalusian Autonomous Parliament Regulations has not been carried out yet.

In this respect, we must point out that, despite the fact that in 1995 the Regulations in Article 112 introduced audience proceedings for social actors and organisations that might have been affected by the regulations and even, exceptionally, for individuals through so-called "informative appearances" before the corresponding legislative Boards, these regulations do not meet the requirements established by the new statutory regulations. This is because so far these audience proceedings have only been of a discretional nature and have taken place only when requested by Deputies and Parliamentary Groups.

Apart from the expression "The citizens will participate in the legislative proceedings…", it can be clearly deduced from Article 113 that the citizens' audience proceedings must become an essential and compulsory element of the legislative proceedings[xxxvii], the holding of which cannot be left to the will of Parliamentary bodies.

Finally, the citizens' initiative has been included in the Andalusian Parliamentary Regulations since 1995. These questions are not limited to the Andalusian citizens, since they can be submitted by any natural person or legal entity living in the Andalusian Autonomous Region. Their unique nature lies in the fact that, in order to be formulated, they must be accepted by a Member of Parliament who will be responsible for their presentation before the Plenary Session or the corresponding Committee for the response of the Andalusian Government.

From the analysis of the questions set out, it is clear that this resource has been the most used by citizens, with the proposal of 77 questions. The greatest activity took place during the two terms in which the Government had a simple majority with 75.32% of the questions. It is surprising that this instrument of political control over the Government has hardly been used during the two last legislatures.

Legislature	Committee Questions	Plenary Questions	**Total**	Answered
IV(1994-1996)	8	5	**13**	4
V(1996-2000)	21	17	**38**	21
VI(2000-2004)	17	3	**20**	11
VII(2004-2008)	4	-	**4**	1
VIII(2008-)	2	-	**2**	2
TOTAL	52	25	**77**	39

(Source: Self-made from Andalusian Parliament Web data)

TABLE 3: Citizens' initiative Question in Andalusia

c) Popular Consultations in Andalusia

The previous Statute established the competences of the Autonomous Government on the legislative development of the local popular consultations system in Andalusia, in accordance with the organic law regulating the different referendum modalities and reserving the authorisation to call referenda to the State. In compliance with this Constitutional mandate, *Law 2/2001* May, 3rd *regarding the regulation of local popular consultations in Andalusia* was passed, stipulating that a consultation may be submitted not only by City Councils but also by the inhabitants, and introduced as its main innovation the possibility for promoters to express their preferences through the distribution of free informative advertisements on the referendum[XXXVIII], even giving them priority over political groups with political representation.

In the 11 years that this law has been in force, only three popular consultations have been processed. The first one was held on June 9th, 2002 in Montellano (Sevilla) to decide on its incorporation into the Water Consortium of Huesna. The second was not held because the Government refused its authorisation by agreement on November 12th, 2004 on the grounds that it was not the competence of the Municipality. It was a popular consultation on the building of a correctional facility in Morón de la Frontera (Sevilla). This is also why authorisation for a popular consultation was refused in Almuñecar (Granada) regarding the initial approval of the General Municipality Urban Plan. However, the High Court Judgement of September 23rd, 2008 repealed the Council of Ministers' agreement and the popular consultation took place on February 28th, 2009[XXXIX].

However, the new statutory regulations on the competences regarding popular consultations also lead us to wonder if local popular consultations, which so far have undoubtedly been the competence of the Autonomous Regions, still belong to the

Andalusian Autonomous Region; this implies questioning the legitimacy of these types of popular consultations.

At this point, we must remember the above-mentioned jurisprudence on the referendum. If we consider what was established by the STC 103/2008, the referendum as a consultation addressed to the electoral census on a political matter that follows the regulations and guarantees of the electoral proceedings, and what is stated in the STC 31/2010, i.e., that all competences regarding referenda are reserved for the State, and, moreover, that Article 78 of the Andalusian Statute excludes referenda from autonomous competence, we must reject the autonomous competence of local popular consultations.

However, if we consider other legal arguments in favour of our interpretation, we come to the opposite conclusion. The first argument is that both *Organic Law* 2/1980, April 2nd, *on the Referendum Modalities* (hereinafter LOMR, *Ley Orgánica reguladora de las modalidalidades de referendum*)[XL] and the LRBRL[XLI] include local popular consultations within local competences. In addition, the Andalusian Statute of Autonomy establishes the shared competence between the State and the Autonomous Government regarding local regimeXLII. Furthermore, the Spanish Constitutional Court sometimes considers local elections and local autonomy merely an administrative issue, denying their political character[XLIII]. All this would lead the Spanish Constitutional Court to consider local popular consultations instruments of *participatory democracy* and, thus not subject to the reservations contained in Article 53.1 of the Spanish Constitution (the development of political participation rights), Article 92 (modalities of referendum) and the competence of Article 149.1.32 (authorisation of referenda) and, in the STC 31/2010 (regulations of the referendum legal system).

d) Participation before the Administration

The adequate legislative development of the citizen participation institutions before the Administration[XLIV] has not been carried out. Therefore, the new and promised Citizen Participation Law[XLV] has not been passed yet. Therefore, the current legislation on volunteering is the only general regulation that has been passed by the Andalusian Autonomous Government concerning citizen participation, even *Law 9/2007* of 22nd October, *on the Andalusian Public Administration*, passed just nine months after the reform of the Andalusian Statute, does not establish citizen participation as one of the organisational

and running principles of the Andalusian Public Administration[XLVI]. In fact, despite the different deductions that may be made from the Statement of Purposes, only a couple of articles (20 and 32) are devoted to citizen participation bodies, and they are given a mere advisory character, even denying them the possibility of creating citizen participation administrative bodies with decision-making powers and referring their regulation to their creation regulations. On the other hand, *Law 6/2006*, includes the traditional audience procedures and/or public information procedures in the design of the administrative provisions[XLVII].

Regarding local matters, *Law 5/2010* of June 11th, *on the Andalusian Local Autonomy*, has also given up trying to create a regulation regarding citizen participation institutions, referring its regulation to the internal organisation regulations of each Local Entity. However, it is precisely in this local scope that the most interesting participatory experiences have been had in our Autonomous Region. To this regard, the experience of participatory budgets in Seville and Cordoba and in some other municipalities such as Las Cabezas de San Juan (Seville), Casabermeja, Campillos and Salayonga (Málaga), Puente Genil (Cordoba) and Jerez de la Frontera, Puerto Real and Algeciras (Cadiz) are worthy of mention[XLVIII].

In conclusion, it should be mentioned that the Andalusian Statute of Autonomy is rich with respect to the incorporation of citizen participation institutions, and acknowledges, though not always with the appropriate technical adjustments, not only the traditional objectives of political participation, but also a large representation of citizen participation formulae before the Administration.

However, in these four years of statutory validity period the development and adaptation of the current legislation to the statutory provisions have not been carried out. Therefore, much work still remains to be done to create the advanced and democratic society advocated by the Andalusian Statute of Autonomy.

I On the definition of the basic objectives of the Statute of Autonomy see: Terol Becerra, 2008a, 87-103.
II Article 10.1 of the Andalusian Statute of Autonomy: "The Andalusian Autonomous Region will promote the conditions required to achieve the real and effective freedom and equality of individuals and the groups

they belong to; it will remove the obstacles that come in the way of and prevent the fulfillment of this goal, and will foster the quality of democracy, making it easier for the Andalusian people to participate in political, economic, cultural, and social life. In order to meet these objectives, it will take all the required positive action measures."

III See also, for instance, Article 2 of *Law 5/2005,* April 8th which modified *Article 23.1* of the *Andalusian Electoral Law* and introduced the so-called "zip-lists" when drawing up the lists of candidates, the constitutionality of which was confirmed by the *STC 40/2011*, March 31st; Article 6 of *Law 4/2005,* April 8th on *the Andalusian Consultative Council* and Article 18 of *Law 6/2006*, October 24th on *the Andalusian Autonomous Government.*

IV See also, Lucas Murillo De La Cueva, 1993.

V On the contents of the Bill of Rights in the Andalusian Statute of Autonomy and its extension to other types of non-social rights see Terol Becerra, 2008b, 184-195. The Constitutional legitimacy of these Bills of Rights and Duties has undoubtedly become one of the most controversial matters when passing these new Statutes of Autonomy. Díez Picazo has spoken out against it in: ""¿Pueden los Estatutos de Autonomía declarar derechos, deberes y principios?", 2006, 63-75. Though considering it is not really appropriate from a tecnical and legal point of view, Ferreres Comella has spoken out in favour of it in: "Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña", 2006, 9-37 and Biglino Campos, 2006, 39-61. Carrillo, 2006, 63-88 and Carrillo, 2007, 49-73 - Caamaño Domínguez, 2007 33 -46 have been both unconditionally in favour of it.

VI See Porras Nadales, 2008, 107-123. This quotation is taken-from p. 110.

VII Regarding the Constitutional Court Judgements see: STC 119/1995, July 17th. For a more detailed analysis of the jurisprudence of the Spanish Constitutional Court regarding the contents of Article 23, see Martín Nuñez, 2008, 315-342.

VIII Regarding the Constitutional Court Judgements see: SSTC 5/1983, February 4th (right to sit as a member of Parliament); 81/1994, March 14th (resignation) and 118/1988, June 20th (representative function).

IX Regarding the Constitutional Court Judgements see: STC 119/1995, June 17th and the Constitutional Court Writ: ATC 25/1998, January 26th.

X See SSTC 76/1994, March 14th and the AATC 26/1985, January 16th; 592/1985, September 18th; 428/1989, July 21st; 40 /1992, May 25th and 304/1996, October 28th.

XI In reference to Law *5/1988*, October 17th on popular legislative initiative and the City Councils which will be addressed in the next section.

XII Article 78 of the EAAnd establishes that "The Andalusian Autonomous Region has the exclusive competence to determine the legal system, modalities, procedures, their organisation and call, either itself or through the local authorities, within its competence in matter of surveys, public audiences, participation fora and any other means of popular consultation, *except for referenda".*

XIII See also Bueno Armijo, 2008, 777-789.

XIV Article 71 on the Bill for the reform of the Andalusian Statute of Autonomy: "1. The legislative development of the popular consultations system in Andalusia is the responsibility of the Autonomous Region Government, according to what is provided for by the laws to which Articles 149.1.1 and 32 of the Spanish Constitution refer".

XV In this paper, we are not doing an in-depth analysis of the Spanish Constitutional Court jurisprudence regarding popular consultations and the possible doctrinal debate on the reach of this competence in other Autonomous Regions. I have addressed this issue in Pérez Alberdi, 2008, 197-198. For a further analysis see, López Basaguren, 2009, 202-240, Pérez Sola, 2009, 433-454 and Castellá Andreu, 2011, 197-234.

XVI STC 103/2008, September 11th, Legal Foundation 3.

XVII See Gutiérrez Llamas, 2000 and Aguiar de Luque, 2000.

XVIII STC 31/2010, June 28th, Legal Foundation 69.

XIX See Porras Nadales, 2009, 112-114.

XX This amendment did not raise further debate within the Andalusian Assembly and was not included in the final text of the Reform Bill of the Andalusian Statute of Autonomy, passed by the Plenary Session on May 2nd, 2006 and submitted to the Spanish Parliament. In its amendment tabled to the Parliament, the *Izquierda Unida* (the Spanish Left Wing Party) reasserts, this time with amendment 14, that it is to be included in the Commission Report as a transactional amendment and drafted as it appears in the final text of the Andalusian Statute of Autonomy, leaving aside the fact that a better conclusion may be drawn by the

Commission.
XXI On the due interpretation of this right, see Ávila Rodríguez, 2009, 289-326 and, more generally Tomás Maillén, 2004.
XXII The content of the right to good administration included in the Andalusian Statute of Autonomy is three-fold. First, citizens' right to take part in the decisions that may affect them, obtaining truthful information from the Administration in order to do so. In addition, the right to receive impartial and objective treatment in all matters, the right to have these matters resolved in a reasonable period of time and, finally, the right to access public files and records, except for those indicated by law.
XXIII Although with a limited scope granted by the STC 247/2007 to the Bills of Rights recognized in the Statutes of Autonomy. We cannot go into detail on the nature of the statutory rights, as it is a controversial topic which has recently been dealt with by Prieto Sanchís, 2010, 125-150.
XXIV. Article 134 of the EEAnd on Citizen Participation: "The law will regulate: a) citizen participation, directly or by means of the associations or organisations representing them in the administrative proceedings or in the design of the regulations which may affect them.
b) Citizens' access to the Andalusian Autonomous Government Administration, including access to their files and records, whatever the case, with no detriment to the constitutional and statutory guarantees, by making the necessary technological means available to them.
XXV Specialized doctrine often formulates participatory practices and institutions using "participation ladders" featuring steps representing the various techniques, depending on the more or less active role carried out by the individuals and the groups. First step: *receiving* information from the Administration, a process which must be governed by the principles of transparency and veracity; intermediate step: *influencing* the decisions of the public powers by means of public information procedures or consultations with ad hoc citizen participation bodies; third step: *deciding* directly. This representation is attributed to Arnstein, 1969, 216-224, and has been compiled and restated by, to name only a few Parry, Moyser and Day, 1992 and in our doctrine by Alguacil Gómez, 2003, 136 and Font - Subirats, 2000, 72.
XXVI As stated by Escribano Collado, 2008, 905-925, and specifically 921. On the administrative participation formulae see Sánchez Morón, 1980, and Castellà Andreu, 2001.
XXVII See, for instance, *Law 11/2008*, July 3rd, on citizen participation in the *Comunitat Valenciana*, also developed by *Decree 76/2009*, June 5th and *Law* of the Canary Islands *5/2010*, July 21th, on *the promotion of citizen participation*.
XXVIII I have already addressed the role of associations in citizen participation institutions and the possibility of including them in the contents of the association, see Pérez Alberdi - Fernández Le Ga, 2005, 489-532.
XXIX Montero, 1997, 9-46. This quotation is taken from p.10.
XXX See also Gavara De Cara, 2007.
XXXI Regarding Andalusian Electoral Law see Ruiz Robledo, 2005, 135-151.
XXXII Participation data have been taken from the Andalusian Analysis and Political and Electoral Documentation Centre (CAPDEA), http://cadpea.ugr.es/Consultas_simple.aspx .
XXXIII During the publication of this paper, there were Andalusian elections in March 2012 and our hypotheses have been confirmed. General and Autonomous elections did not coincide and as usual under these circumstances, the participation rate has been really low with a 62.23%. The PP has notably increased their votes and seats, being for the first time the most voted party in Andalusia with 50 of 109 seats. However, the probable coalition between the left-wing parties –PSOE (47 seats) and IU (10 seats)- leads us to foresee the socialist José Antonio Griñan as President of the Andalusian Government again.
XXXIV Unlike other Autonomous Regions, in which the excluded matters have been notably increased by popular legislative initiative, in Andalusia the only matters are those that cannot fall within the competences of the Government of the Autonomous Region: taxes and budgets, economic planning and those related to the management of the self-government institutions.
XXXV See Article 6 of *Law 8/2006*, October 27th, *regarding Statute of the Andalusians Abroad.*
XXXVI Unlike other Autonomous Regions, such as Aragon and Catalonia, and in the popular legislative initiative before the Chamber of Deputies after its 2006 reform. However, it must be highlighted that, as announced by the Andalusian Autonomous Government Prime Minister in the Debate on the State of the Autonomous Region last June 28th, the regulations of the popular legislative initiative will be modified in order to introduce the participation of the Promoting Commission in the legislative proceedings and reduce the required number of signatures to 41,000. See the article "Griñán propondrá el 'escaño 110' para poder

defender las iniciativas legislativas populares", published in the electronic version of the newspaper *El Mundo*, June 28th, 2011, http://www.elmundo.es/elmundo/2011/06/28/andalucia/1309289155.html.
XXXVII See Carmona Contreras, 2009, 343-354, and specifically p. 351.
XXXVIII Article 20 of *Law 2/2001*, May 3rd *regulating local popular consultations in Andalusia*. The Catalonian and Navarre Laws also consider this possibility regarding popular consultations. See Article 19 of Foral Law 2/2002, October 28th *regulating local popular consultations*, and Article 50 of *Catalonian Law 4/2010, March 17th on consultations through referendum*.
XXXIX Before *Law 2/2001* came into force, three popular consultations were proposed applying Article 71 of *Law 7/1985,* April 2nd, *regulating the basis of the local system* (hereinafter, LRBRL, Ley Reguladora de las Bases del Regimen Local): the first two were held in 1997, by the mayors of Torredonjimeno (Jaén) to change the date of the annual festival, and in Tarifa (Cadiz) related to the design of the interconnection electrical cable between Spain and Morocco, and the third in 1998 by the mayor of Algeciras (Cadiz) to create the ninth Andalusian province in Algeciras and the surrounding area. The Council of Ministers only authorized the first one because it considered the objective of the other consultations outside municipal competence.
XL Additional Provision of Law in the LOMR: "The provisions of this Law do not include in its regulations popular consultations that may be held by the Municipalities, related to relevant local issues, in their respective territories, *according to the local legislation system*, however, it reserves the exclusive competence of its authorisation for the State". (The italics are ours)
XLI Article 71 of the LRBRL: "In accordance with the State and the Autonomous Region legislations, when this last has been granted the statutory competence to do so, the mayors, with the consent of the absolute majority of the Plenary and the State Government authorisation, will submit to popular consultation those matters within its own municipal competence and with local character which are particularly relevant for the residents' interests, except for those related to the Local Exchequer".
XLII See Article 60 of the Andalusian Statute of Autonomy.
XLIII See also the SSTC 4/1981, February 2nd, Legal Foundation 3, 25/1981, July 14th, Legal Foundation 3 and 32/1981, July 28th, Legal Foundation 3 and the Constitutional Court Decision 1/1992, July 1st. However, we would like to underline that we do not share this opinion of the Spanish Constitutional Court.
XLIV This situation was denounced by the Andalusian Ombudsman himself in his 2009 and 2010 reports. See also the Special Report "Regulations on citizens' participation in the Andalusian County Councils and large Municipalities" submitted to the Andalusian Parliament on December, 29th, 2009, BOPA, No. 410, March 10th, 2010, especially p. 47, which suggests the regulation of the general participation system, at least at a local level, (the scope is covered by the report) by the Autonomous Ministry of the Interior. Later reasserted in the 2010 Annual Report of BOPA No. 667, April 28th, 2011, p. 427.
XLV In this respect, see the statement of the Minister of the Interior from the Andalusian Autonomous Government, Clara Aguilera, on the Future Citizen Participation Law during the opening of the VI Andalusian Volunteering Congress, on February 13th, 2009 (Source: Europa Press: http://www.europapress.es/andalucia/sevilla-00357/noticia-junta-anuncia-creacion-ley-participacion-ciudadana-cuyo-borrador-podria-estar-redactado-2011-20090213123023.html).
XLVI See Article 3, Law 9/2007.
XLVII See also Article 45 of Law *6/2006*, October 24th, *on the Government of the Andalusian Autonomous Region.*
XLVIII A study of these experiences in participatory budgets can be found in Vilasante - Garrido 2002 and Ganuza Fernández - Álvarez De Sotomayor, 2003.

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Civil participation policy and democratic innovation in the autonomous community of Aragon

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Abstract

The increasing complexity of our society requires mechanisms of democratic innovation that enrich the system of representative democracy to increase citizens' knowledge and experiences, thus improving the quality of democracy and the efficiency of public decision-making. It is necessary to assume that governments cannot face these complex transformations without taking into account all voices and interests. In the face of this reality, over the last few years civil participation has been promoted in the Autonomous Community of Aragon, a strategy aimed at extending the spaces of active participation, and stimulating its own instruments of a participative democracy, allowing citizens to influence decision-making processes. In this paper, the main aspects of this experience will be analysed

Key-words

Autonomous Community of Aragon; citizen participation; participatory democracy; democratic deepening

1. Reflections on the Autonomous Policy of Democratic Innovation: the Statute of Autonomy of Aragon

The aim of this paper is to analyse the civil participation policy promoted over the last few years in the Autonomous Community of Aragon from a legal-political perspective. This autonomous policy, whose aim is to incorporate the citizens' voice and opinion in decision-making processes, is founded on and validated by the democratic principle of the 1978 Spanish Constitution (1978 SC), in addition to the current economic, social and political context. In this respect, it is worth mentioning that due to the complexity of our society, democratic indifference and the multi-faceted reality of public matters, the stimulation of authentic participatory democracy through a process that is able to incorporate innovative mechanisms of civil participation is needed to complement the representative system[I].

The search for instruments that increase the opportunities for participation and complement the exercise of electoral rights is based on many different arguments. It is beyond the scope of this paper to address them all, however, it is worth emphasising, without exhausting all the possibilities, the arguments based on the ideal of democracy as a way to make better public decisions. In this respect, it should be highlighted that democratic deepening is based upon spaces of active and deliberative participation that enrich public decision-making. In this way, the current multi-faceted situation may benefit from the intervention of interested parties, who represent positions that are different from that of the Administration, by incorporating their experiences and abilities, and allows for the integration of other points of view that enrich public decisions-making and improve its democratic legitimacy[II]. Greater support by those who are affected by these rules or public decisions, based on their participation, is another acceptable argument. When it is possible for those affected to intervene and issue opinions in the design of a rule, the deliberations generated and the motivated exclusion of some civil proposals, brings about greater internalisation and comprehension of the public decision eventually adopted[III]. Finally, the justification of this model of participation lies in administrative efficiency. The 1978 SC created a Public Administration that, in its unbiased service to the general interests, must

act in accordance with the principle of efficiency (Article 103 of the 1978 SC), with the understanding that this principle does not exclusively refer to an economic criterion - since it is observed in the private sector-, but also to adequate public action to meet social needs and demands. The authorities will be more effective if they manage to better satisfy and respond to these needs. The active participation of citizens, who define these demands - and put forward possible proposals through their debates with the authorities-, can contribute to fulfilling this constitutional requirement. Therefore, civil participation implies not only the exercise of a right, but also a key factor in connecting government action with citizens.

The recent Statutes of Autonomy, within the constitutional framework of a modern democratic society, have incorporated the legal-political trends based on participatory democracy[IV], establishing a political framework that must promote the democratic principle that had justified, among others, the process of political decentralisation proposed for the 1978 SC[V]. In this context, the approval of Organic Law 5/2007, April 20th, on the reform of the Statute of Autonomy of Aragon (EAAr), is a normative milestone for the development of a democratic deepening process in the Autonomous Community. The innovation of the EAAr regarding participation does not lie so much in its content –already assembled-, but in the extension and intensity of its recognition, which denotes that the law-making process aims at promoting the participative nature of the institutions of Aragon, in order to favour stronger citizen participation in public policy-making. This is undoubtedly one of the most important legal-political innovations of the current EAAr[VI].

Civil participation is present throughout the whole EAAr. This Statute does not offer a complete and unitary treatment of this matter, but regulates it in its diverse manifestations. On many occasions and without clear distinction, the statutory regulation refers to participation and the promotion of participation. According to the cases (see SSTC 119/1995 and 103/2008), it is a matter of a political participation (direct or representative democracy), and of a participation in the Public Administrations' actions (participatory democracy). Some statutory provisions envisage generic citizen participation, while others limit its recipients to concrete categories of individuals (the elderly, Article 24; the disabled, Article 25; immigrants, Article 29). Some rules take into consideration the participation of individual citizens, while others coordinate participation through representative associations (including, consumers' and users' association, Article 17.2).

Therefore, there is no consistency in the systematic order, and civil participation is regulated using a variety of different means. Nevertheless, there is still one common denominator: the obligation of the authorities to promote civil participation.

In this respect and regarding the study under discussion, the most significant legal-political innovation is the mandate included in Article 15.3 ("right to participation"): "*the public authorities of Aragon will promote social participation in the design, execution and evaluation of public policies, as well as individual and collective participation in the civic, political, cultural and economic fields*"[VII]. Here, two essential points must be highlighted and interpreted. First, the imperative nature of this declaration must be noted, i.e., the authorities of Aragon *will promote* participation; and second, the definition of its recipients is broad -all *the public authorities of Aragon*-, not only the autonomous institutions, but also the local authorities. All this is within the context of a culture of "*democratic values*", recognising the obligation of the authorities of Aragon to promote the culture of peace, by incorporating values such as "*participation*" (Art. 30). In addition and from a legal perspective, the new regulation regarding two classic instruments of participation stands out: popular consultations and popular legislative initiative. Regarding the first one, the Statute attributes competence in matters of surveys, public hearings, participation fora and any other instrument of popular consultation to be called by the Autonomous Community or local authorities, with the exception of the regulation of referenda[VIII]. Therefore, this rule allows for the approval of a specific legal regime, within the assumed competences and taking into account the recent judgements of the Constitutional Court concerning popular consultations (see SSTC 103/2008 and 31/2010) and without forgetting the forecast of a referendum on the reform of the Statute of Autonomy (Article 115.7)[IX]. The statutory provisions regarding popular legislative initiative also deserves special attention. As in the previous text, Title II of the current EAAr ("Institutional Organisation of the Autonomous Community of Aragon") only includes popular initiative among the different modalities of legislative initiative[X]. The innovation lies in Article 15.2, under the Title dedicated to citizens' civil rights which recognises the right of the Aragonese people to present legislative initiatives to the Parliament and participate in the law-making process, in accordance with that which has been established by the Law and the Parliamentary Rules of Procedure. This new systematic article is a unique expression of the civil right of the Aragonese people to participate in public matters, and of the mandate of the authorities to promote their

participation in political, economic, cultural and social life. Ultimately, the new Article 15 is the normative foundation for the definition and development of a real autonomous policy of civil participation.

After the 2007 autonomous elections, in keeping with this statutory spirit, the Government of Aragon (the *Partido Socialista-Partido Aragonés* coalition) encouraged a policy of democratic innovation, hoping that the new government would continue with it after the 2011 elections (the agreement between the *Partido Popular-Partido Aragonés* coalition). This policy can be defined as a set of processes, institutions and strategic actions created by the autonomous government to pave the way for the promotion of active citizen participation in the decision-making processes that affect them. Therefore, its goal is to improve democratic quality by creating a new way of governing and managing public matters, listening to the citizens' voice and opinion. Starting from this concept, it might be argued that the Aragonese policy of civil participation is characterised by an *integrationist trend or dual nature*, in that it integrates not only the coordination and management of the classic mechanisms of semi-direct democracy, -i.e., popular legislative initiative or popular consultations-, but also the instruments of a participatory democracy that are based on the deliberative principle, -i.e., participative processes-. Starting with these arguments, the study of the global nature of Aragonese policy must be analysed on the basis of three fundamental pillars: its administrative organisation, relational action and normative policy.

2. The Administrative Organisation of Civil Participation Policy

The autonomous policy of civil participation needs organisation to manage its material content. This primary decision -administrative organisation- is extremely important. The structure of this organisation, its functions and instruments, as well as the criteria connecting it with other administrative units, determine what sort of policy it intends to develop. From this perspective, Aragonese policy rests on two principles related to its organisational design: its integral vision and its cross-cutting nature. The impulse to design measures that integrate this policy requires an specific administrative unit that is exclusively responsible for democratic innovation. In addition, the location of this unit within the Executive must possess a vision of the Department that is strategic and allows

for cross-cutting action throughout the whole governmental structure. This is the first characteristic of the administrative organisation of the Autonomous Community of Aragon, i.e., its location within the Department of the Presidency, an issue which is extremely important. Its implies the definition of a global policy of civil participation that is a proposal on behalf of the whole Government, a new way of public decisions-making that involves all the Departments[XI].

Along this same line, in 2007 the *Dirección General de Participación Ciudadana* (Department of Civil Participation, DGPC) was created within the Department of the Presidency, which is responsible for coordinating a strategy that includes the whole autonomous Executive and allows for the establishment of quality participation based fundamentally on the principle of deliberation[XII]. In concrete terms, by means of Decree 224/2007, September 18th, of the Government of Aragon, on the Organic Structure of the Department of the Presidency, the DGPC was assigned the following competences (Article 10.1): "*a) to promote the values and practices of civil participation that enrich the quality of democratic life; b) to promote spaces and processes of civil participation in the design, execution and follow-up of public policies; c) to favour experiences of civil participation among institutions, entities and citizens which collaborate to prevent conflicts and improve the efficiency of decision-making; d) to promote the creation, research and awareness of society within a culture of democratic participation*". After the 2011 autonomous elections and the change of government in the Autonomous Community of Aragon, the current Department of Civil Participation, Exterior Action and Cooperation continues to be under the authority of the Department of the Presidency (currently the Departament of the Presidency and Justice). The line of continuity in this matter is clearly reflected in the competences attributed by Decree 315/2011, September 27th, of the Government of Aragon, on the organic structure of the Department of the Presidency and Justice (Article 18.1): "*a) to promote the values and practices of civil participation that enrich the quality of democratic life; b) to promote and coordinate spaces and processes of civil participation in the design, execution and follow-up of public policies; c) to stimulate projects that provide advice on and support to the civil participation initiatives of the local authorities; d) to study and propose a normative framework for the promotion of civil participation; e) to favour experiences of civil participation among institutions, entities and citizens which collaborate to prevent conflicts and improve the efficiency of decision-making; f) to favour the creation, research and awareness of society within a culture of democratic participation".*

The exercise of these competences has led to the development of a policy based on five major goals, which are divided into sets of lines of action. These goals aim at favouring, advising and accompanying processes of participation for the design and evaluation of public policies, both at the autonomous and locals level; at promoting the values, education, practices, research and social awareness to generate a shared discourse on participatory democracy; at favouring suitable and accessible channels of information and participation throughout the network; at announcing and updating legislation concerning civil participation; and at creating a structure of support to DGPC action to offer quality, congruity and transparency in the development of its actions.

3. The Autonomous Government and its Intervention for a New Political Culture

The fulfillment of the objectives of this policy of democratic innovation requires intense administrative intervention. In this respect, we should take into account that this public policy does not base its action on the classic forms of administrative intervention proposed by Presutti and adopted in Spain by Jordana de Pozas: administrative police, promotion and public service[XIII]. The special nature of its objective -to promote quality civil participation- has directed this intervention to the area of promotion, development and education, launching an important action that can be analysed according to an administrative-territorial criterion: i.e., the autonomous and the local criterion.

A) Towards a Relational Autonomous Government

The policy developed within the autonomous government aims at the *promotion* of innovative spaces of civil participation and the construction of a new *politico-administrative culture* based on deliberation. Regarding the first aim –the promotion of spaces of participation-, there have traditionally been two main models of civil intervention in Spanish Law: the organic and the procedural model. Nevertheless, inflexibility, bureaucratisation and the low-profile of these models have led to their re-examination from the viewpoint of participation inspired by the principle of collaboration, responsibility

and deliberation[XIV], i.e., active, quality participation that shifts from the formal organic model to an open and dynamic system.

The Spanish Administrative Law (Law 30/1992, November 26th, on the Legal Regime of the Public Administrations and the Common Administrative Rules of Procedure, as well as on sectoral administrative legislation) recognises a number of consultative organs with a mixed and plural composition that are meant to guarantee the representation of the economic and social interested actors, paving the way to stable and formalised participation. Nevertheless, these spaces have a composition and way of functioning that generate serious malfunctions, and prevent quality deliberation and effective participation. In order to improve the quality of these organic models, a methodological proposal has been elaborated to evaluate the functioning of the different bodies of participation, identifying their weaknesses and strengths in order to improve their internal democratic quality.

Besides the evaluation and review of the organic model, Aragonese policy has provided the stimulus for innovative instruments of participation. The DGPC *promoted* fourteen participative processes in its first legislature, where participative process is understood as a process whose objective is to fully involve citizens in the decision-making process related to a concrete matter, in three procedural phases: a) the information phase, i.e., informing the entire affected citizens about the matter or project that is to be developed; b) the debate and civil proposal phase, i.e., where citizens' assessment, debate and proposals are promoted using the appropriate methodologies; and c) the return phase, in which the results of the process return to the participants and the citizens. These processes have allowed the voice and opinion of the citizens to be taken into account on important issues such as: the Panel for the Mountains, the Law on Social Services, the Climate Change and Renewable Energy Strategy, the Plan for Intercultural Coexistence, the Decree on Students' Rights and Duties, the Master Plan for Development Cooperation, the Reform of the Regulation on Protected Housing, the Second Plan for the Prevention and Eradication of Violence against Women in Aragon, the Integral Road Safety Plan in Aragon, the Catalogue of Social Services, the Second Plan for Childhood and Adolescence in Aragon; as well as advice on planning participation in the Plan for Youth, the Model for Participation in Health and the Law on Public Employment in Aragon[XV]. This line of action has been a fundamental feature of the Aragonese policy of civil participation, not

only because of the number of the participative processes above-mentioned, but also because they have facilitated the creation of a new political culture based on the experimentation of relational Government and deliberative Administration[XVI]. In order to assure the effectiveness of this strategy and the right to participation, transparency and advertising must be guaranteed, defining an advanced form of *transparent Administration*. New technologies can contribute to this purpose as channels that facilitates the flow of information and complements classic citizen participation. To this end, the website *aragonparticipa* was created. *Aragonparticipa* is an interactive website that opens up new channels of participation, connects citizens with public policies, and illustrates the activities developed in this area by providing access to all the draft documents of each meetings in the participative processes[XVII].

The creation of a *politico-administrative culture* based on openness, participation and deliberation is the second pillar. One of the problems identified by several internal and external reports is the existing ignorance concerning the conceptual framework of civil participation, namely, what civil participation is and what it is not, its strengths and risks, as well as the existing channels and possible areas of innovation. For this reason, a training programme has been encouraged to promote civic education, to advance in towards a shared discourse on the need to develop quality civil participation and promotes a new culture among politicians, technical staff and citizens[XVIII]. Undoubtedly, this training policy contributes to the process of democratic deepening with the emergence of three key actors, offering them tools for fostering greater involvement and better relations among all of them.

B). Civil Participation and Local Authorities

By the 18th century, John Stuart Mill had already referred to municipalities as schools of citizenship, spaces of proximity between governors and the governed, and a way of spreading authorities out over the territory. From this perspective, municipalities are useful not only because of their contribution to administrative efficiency but also because of their ability to stimulate and improve democracy[XIX]. Today, bringing public matters and citizens closer together has become an essential building block to stimulate civil participation at the territorial level, with the local government acting as a mediator between

society and the political system, precisely in a moment when there is tension between local and globalised movements. From this perspective, it is necessary to form local relational Governments that facilitate the shift from managerialism -a City Hall like public services supplier based on technical and managerial principles- to politicisation based on participation as a response to diverse and complex demands. Local Government should be based on transparency and a direct relationship with its citizens, through processes of renovation that improve the quality of participation, stimulating participatory democracy as a complement to local representative democracy[XX].

By recognising the importance of local authorities in this matter, the Aragonese policy of civil participation is developing a specific action geared to support local authorities in the promotion and consolidation of participatory democracy, in accordance with the directives resulting from a process of legal reform which has been stimulated over the last years, especially the Recommendation (2001 19) on citizen participation in local public life approved by the Committee of Ministers of the Council of Europe on December 6th, 2001 and Law 57/2003, December 16th, on the measures for the modernisation of local government. Therefore, during its evolution, the support to the local area has been characterised by three important phases of intervention. In the first phase (2008 and early 2009) an assessment of the innovative strategies developed in comparative Law and the state of civil participation within the local entities of Aragon was carried out. Once the initial demands of some municipalities and regions had been registered, and starting from this previous study, all local authorities directly involved in this issue were summoned to define the *Aragonese Strategy for the promotion of local civil participation* in collaboration with the DGPC. In respect of the constitutional principle of local autonomy, this Strategy includes, on the one hand, the lines of support offered by the autonomous Government to meet the demands proposed by the local authorities[XXI] and, on the other hand, the basic lines that must inform local action to stimulate the process of democratic deepening[XXII] in the territory.

Once this Strategy was defined, from 2009 to early 2010 the second phase was developed with the intention of initiating in the territory the first quality experiments aimed at evaluating the available opportunities and progressively internalising this political culture. During this phase, support from the autonomous Government was channelled through the shared financing of participative processes developed in the local area; advice on the

approval or reform of local Regulations and Programmes of civil participation[XXIII]; and subsidies granted in competition regime in order to carry out training courses aimed at improving the relevant local authorities' capacity of intervention and proposal as well as devising technical tools and developing experiences.

This experiment and the learning that ensued opened the way for the third phase: the progressive design of real local policies of civil participation. The heterogeneity of the local reality required every entity to designs its own policy of promotion, so that the DGPC could develop a general and adaptable path for every entity by means of an pedagogical exercise to facilitate participation in this complex process. According to the model proposed, every local authority was to constructs its own path based on *political Commitment with the participation of the citizens in public policy-making*, approved unanimously in the plenary session, which includes a political attitude that stimulates civil participation by establishing diverse measures of promotion[XXIV]. In February 2011, the consolidation of this strategy led to the creation of the *Aragonese Forum for Local Civil Participation*, a meeting place between the autonomous Administration and the local authorities of Aragon defined as a working tool designed for the exchange and sharing of experiences with the aim of enriching local policies on participation[XXV].

4. Normative Policy: Legislation as a Mechanism for Change

A particularly important element of the new civil participation policy is its regulation, the definition of a normative framework that arranges organises this process of democratic innovation and institutionalises the methods of participative democracy. The debate focuses on the role played by legal norms in the promotion of civil participation. In this respect, the idea that the legislative formalisation of participative practices could replace a culture based on the concept of governance has been rejected. It is true that legislation is an important mechanism for change in the organisation of a relational Government and a deliberative Administration, but it is also true that the nature of the matter leads us to bear in mind one fundamental premise: civil participation has many different manifestations, every process is different and every context is singular. A Law -as a legal norm- does not guarantee effective, quality and real participation per se: there can be

a Law without participation, and participation without a Law. Nevertheless, some studies have concluded that although the existing share capital and the culture of the political authorities are relevant factors, the degree of openness of the legal-political system and the institutional opportunities it offers play a decisive role. Whether or not it is likely to work is probably dependent on these factors[XXVI]. Therefore, it is fundamental to understand that although the normative framework is an useful instrument for policies that promote civil participation, it must be accompanied by political leadership, and a pedagogic spirit, as well as be flexible enough to adjust to the situation in the territory to be fully effective.

These reflections define Aragonese policy in the context of autonomous normative strategies, which bring together normative policies referred to as "*experimentation*" policies, as opposed to those that use "*juridification and codification*" of the matter based on the enacting process of a Law on civil participation[XXVII]. The normative policy of experimentation does not initially pursue the approval of a legal text, but rather the implementation of innovative mechanisms and processes of participation, so that the experience, interiorisation and appropriation of deep cultural change take root throughout society and in its politicians and public employees. Therefore, normative Aragonese policy has been based on "non-regulation".

After this first phase of learning, the normative framework must be approved so that the initiated model becomes institutionalised, assuming that the dual-nature of civil participation policy requires the normative strategy to pursue an dual objective: to renew the legal regime in order to facilitate the access to and use of the classic channels of participation, and to introduce the normative framework for an advanced democracy based on deliberation. In this respect, at the end of the previous legislature, the need to reach an autonomous Agreement on civil participation arose. This led to the subsequent draft of a White Paper. This agreement should establish the right and duty to promote participation, be adopted by all the autonomous institutions and political parties, and define a global policy for the Autonomous Community with an interdisciplinary body which is competent to coordinate the actions of the various different departments of the Government at that moment. In this respect, it is worth listening to Weimer and Vining when they claim that electoral cycles are "failures of the public sector" and a problem inherent in representative government: many political actions require periods that last longer than a legislature, whose future costs or insufficient benefits can be used by competitors in the polls to gain

votes[XXVIII]. It is necessary to assume that since civil participation is an essential question in the political structure of the Autonomous Community and must not be affected by the current *legislative "motorisation"* a significant autonomous agreement among all interested parties is needed. Along this premise, a Motion (*Proposición no de Ley*) has recently been approved by the Plenary session of the Parliament of Aragon regarding Law 20/11-VIII, on civil participation, which reminds us of the following: "The Parliament of Aragon urges the Government of Aragon to present a normative model which develops Article 15.3 of the Statute of Autonomy of Aragon for debate and approval within no more than eighteen months, resulting from an active participation process involving all Parliamentary Groups, starting with the initial entities and citizens, and which coordinates the promotion, practice and necessary instruments to facilitate citizen participation in public policy-making".

This is a challenge that must provide answers to the questions raised by the legal-political theory, whose in-depth analysis is outside the scope of this paper. The answers fall into three broad areas[XXIX]. First, the need for a Law on civil participation, bearing in mind the aforementioned premises concerning the potentials and weaknesses of legal regulations in the promotion of participation[XXX]. In addition, there is no doubt that the legal regulation of civil participation poses great difficulties, and that a complex normative is required that restricts the analysis of the main difficulties of its definition: the need to approve a Law of principles or a procedural norm; the convenience of gearing the normative policy to processes of a deliberative advanced democracy, or a codifying rule that also includes the regulation of instruments of direct or semi-direct democracy; the possibility of fixing rules that are common for all or, in order to account for territorial differences, giving every governmental department a margin in which to define its participative tools; or the definition of a policy that promotes the interest of the citizens in their participation in public matters and allows the economic costs implied by this participation to be met[XXXI]. The normative debate arises only when it is preceded by the possibility of regulating it by law. There are alternatives such as the adoption of autonomous legislation that establishes a very loose obligation of participation for the design of particularly significant sectorial policies -such as the Water Framework Directive- or soft law legislation that involves all the political groups, a text that inspires "the methods" of public policy-making. The latter option would allow the experimentation phase to be overcome and would usher in the

adoption of protocols on voluntary and open action and the formation of a precedent, a right obtained.

The normative model of civil participation also requires the analysis of the legal reform of the mechanisms of semi-direct democracy. This is the case of popular legislative initiative, whose current regime recommends reforming its regulation[XXXII]. The principle of political autonomy and the new statutory predictions regarding popular legislative initiative (Article 15.2) lead to the re-definition of this instrument with the aim of innovating its legal arrangement[XXXIII]. It is necessary to analyse the real nature of this mechanism of participation, assuming that popular legislative initiative is far from being an instrument of direct- or semi-direct democracy in order for it to be used in the Parliament's decision-making procedures. What should be done: reform the current Law or create a new regulation, with the ultimate aim of eliminating obstacles to its free exercise and facilitating its use by the citizens? Or should we go beyond this and develop a new philosophy, so that this instrument does not merely represent the right to present propositions of Law for their approval, but a right on which a debate arises concerning the presented proposition[XXXIV]. Another important instrument of participation that deserves special attention is popular consultation. The effective exercise of the right to participation entails providing this instrument with juridical protection, although in order to provide this the possibilities it offers must be analysed beforehand. Regarding the exercise of the competence of the Autonomous Community of Aragon (Article 71.27 of the EAAr), it is necessary to create distinctions among consultations, referenda, hearings, fora and surveys, considering the conceptual limitations established by the STC 103/2008[XXXV], and respecting the area of competences assigned to Autonomies after the STC 31/2010[XXXVI]. It is necessary to think not only about what regime will inform future regulation, but also about the purpose and meaning behind each of these instruments of consultation. For example, the obligatory nature of certain matters or the possibility of raising a deliberation-information summoning organisers and citizens to clarify the fundamental points of the question raised, since the mere formulation of a question does not allow citizens to express the intensity of their concerns and limits the possibility of affecting real change in the decision that is to be adopted. Undoubtedly, deliberation-information allows the possibilities regarding the issue to be clarified.

The last major pillar in the normative debate is focused on the introduction of new forms of participation in order to create a deliberative Government and Administration. The participation of citizens in the normative process of the Executive is regulated by Law 2/2009, May 11th, of the President and of the Government of Aragon, that provides for citizen audience and public information regarding the process of designing regulations, with an open clause that allows other innovative instruments of participation (Article 49) to be applied[XXXVII]. However, this Law does not recognise instruments of participation in the formulation of draft Law. At the Parliamentary level, the Regulation of the Parliament of Aragon does not recognise the specific channels of participation, for example, the parliamentary hearings provided for in the Regulation of the Parliament of Andalusia, Catalonia, Cantabria and Asturias. Undoubtedly, the new draft of Article 15.2 of the EAAr, which includes the right "to take part in the law-making process, in accordance with that which has been established by the Law and the Regulation of the Parliament", leads to the reform of the regulation in force in order to create new instruments of participation at the parliamentary level. In addition, trends in the new public management, based on participation, transparency and the right to good Administration, have led to re-designing the normative formulae that allow for deliberative Administration. A normative process needs to be created that updates the functioning of the Administration, turning civil participation into an inspiring principle[XXXVIII]. In addition, we must not forget that every area of public intervention is unique, every sector requires individual treatment to guarantee quality civil participation, and that *specialisation* is required to design specific mechanisms in the sectorial legislation to satisfy the needs of every economic and social area.

In conclusion, it is true, as part of the Spanish doctrine indicates, the system's failure to represent the citizens along with the socio-political and socio-economic circumstances have caused political disenchantment that has been reducing the role of society in politics, a weakening the legitimacy of the system that was organised according to the concept of national sovereignty and political representation[XXXIX]. This affirmation makes the search for channels that improve and perfect the representative model possible, with strategies of civil participation that complement its shortcomings and inaccuracies in such diverse and complex societies as the current one, however, it does not justify its substitution. One of the axes in this process of democratic deepening is the regulations and

institutionalisation of the instruments that allow for more active participation in the current, complex political processes. In this respect, the regulation of the right to participation in public matters has undergone a deep transformation over the last years, with the approval of rules meant to make the principles and mechanisms of participative democracy more concrete. These normative trends go hand-in-hand, the legal reform of traditionally recognised participation channels in order to facilitate access to them and improve their functioning and normative innovation to adopt the instruments that have been internalised through experimentation.

[I] In this respect, Archibugi argues that "democracy is an endless journey, and, therefore, it may be more appropriate to speak, not so much about total democracy, but about the democratic route, that is, a progressive evolution of political systems to meet citizens' demands for participation", Archibugi, 2000. In the same spirit, the extension of participative spaces in the evolution of the democratic systems has also been defended by Jáuregui: "democracy does not exist without democratization, that is to say, without a constant renewal of the forms of participation", Jáuregui Gurutz, 2000, 13.

[II] It has already been pointed out that modern Administration, due to its extensive growth and strong determination in the definition of public interest, is suffering a "crisis of democratic legitimacy", and what the administrative side of civil participation is trying to do is offer an outlet for the expression of social demands that can give citizens some control in the decisions that administrative authorities adopt within their discretionary power. However, this is not a question of taking the place of political representation and the primacy of law; the citizen, as the depository of sovereignty, is not ready to leave the definition of the general interest solely in the hands of the Administration, especially when decisions are solved in terms of opportunity. Muñoz, 1977, 528-534.

[III] Cuesta, 2008, 34-35.

[IV] For a detailed analysis of the right to participation in the latest Statutes of Autonomy, see Aparicio, Castellá, and Expósito (eds.), 2008.

[V] Three decades after the approval of the constitutional text and the beginning of the autonomous process, it is possible to affirm that although the consolidation of the Autonomous State has made some public policies more efficient, this closeness has not favoured real and effective citizen participation in public matters, apart from the classic right to political representation. Once consolidated the political and territorial system -without prejudice to the debates that define the current agenda-, it is necessary to improve the democratic quality of the autonomous State via a process that consolidates the functioning of participatory democracy. The recent statutory reforms have been drafted in line with this, including not only issues related to competences or inter-administrative relations, but also to the organisation of the authorities and the form in which these decisions must be adopted, making citizens participants in the decision-making process. Castel, 2011, 187.

[VI] For a specific study of the Statute of Autonomy of Aragon see Sáenz and Contreras, 2008, 267-286. On

civil participation in the Statute of Aragon, see also Castel, 2010, 831-860.

[VII] This is one of the common notes of the latest Statutes: Articles 9.4 EA Comunidad Valenciana; 43 EA Cataluña; 10.3.19 EA Andalucía; and 15 EA Islas Baleares.

[VIII] Article 71.27 EAAr: The Autonomous Community has exclusive competence in the following matters: popular consultations, which, in any case, entail the establishment of the legal regime, the modalities, the procedure, the accomplishment and the way in which the Autonomous Community or the local entitiescan, within their realm of competences, can hold surveys, public hearings, participation fora and any other instrument of popular consultation, with the exception of the regulation of referenda and of what is provided for in Article 149.1.32 of the Constitution. It is here that one of the principal differences in the latest Statutes in the Aragonese text takes root: the extension of assumed competences -the Statute of Aragon expressly excludes the regulation of popular consultations through referendum referenda, though this exclusion is generalised after the STC 31/2010-, and the absence of a rule expressly including the citizens' right to promote the organisation of popular consultations on issues of general interest related to the competences of their Community (Art. 15.2 EA Baleares, Art. 29.6 EA Cataluña, Art. 11.5 EA Castilla-Leon, Art. 30.1 EA Andalucía). In any case, this silence -also in the Statute of Valencia- does not prevent the future legislation on popular consultations from determining the right of the Aragonese people to promote the organisation of popular consultations.

[IX] Article 115.7: The approval of the Parliamentary reform, by means of an Organic Law, will include State authorisation for the Government of Aragon to hold a referendum on its ratification by the voting population of Aragon no later than six months after the final voting in the Parliament. The Government of Aragon will hold the referendum if it is approved by the Parliament of Aragon by a two-thirds majority of its members.

[X] In this way, Article 42.2 establishes that the Law enacted by the autonomous Parliament regulates the form and the conditions of the exercise of this right. In concrete terms, Chapter I ("The Parliament of Aragon"), having regulated the legislative legal authority, establishes that popular legislative initiative will be regulated by the Law of the Parliament of Aragon.

[XI] The need to guarantee this integral and cross-cutting vision of civil participation is shared by the majority of the Autonomous Communities. Therefore, while in the 2007-2011 legislature only the Canary Islands and Aragon were integrating the matter in the Department of the Presidency, nowadays, Andalusia, the Valencian Community, Navarre and the Basque Country have also adopted this strategy. Catalonia locates civil participation in the Department of Government and Institutional Relations, while the Balearic Islands locates it in the Department of Public Administrations. In both cases, these Departments also allow for cross-cutting action.

[XII] According to Bohman, deliberative democracy is broadly defined as any set of opinions according to which the public deliberation of free and equal citizens is the core of legitimate political decisions-making and self-government, Bohman, 1998, 401. Therefore, political legitimacy is not based exclusively on the polls or majority rule, but rather on providing reasons, explanations and defensible motives to public decision-making, Saward, 2003, 120-124.

[XIII] Jordana de Pozas, 1949, 41-54.

[XIV] On the malfunctioning of organic and functional participation, see Sánchez, 2008, 223-245.

[XV] These participative processes have developed with considerable success, as seen in the following findings: 2.063 participants, 576 entities, 551 hours of debate, and 2.747 civil contributions, of which about 70 % has been adopted.

[XVI] The fulfillment of the objectives of civil participation policy requires the creation of political culture through learning and experimentation. Regarding deliberative democracy, reconnecting some citizens to politics makes it possible to promote a broad network that could give rise to a wide-ranging culture of civic participation, Ackerman and Fishkin**,** 2003, 25.

[XVII] This webpage has 350 registered users, has received more than 500.000, hits and citizens have consulted 10 million pages (information retrieved in June 2010).

[XVIII] On the need for a programme of civic education, see Gutmann and Thompson, 1996.

[XIX] Stuart Mill, cited by Brugué, Font and Gomá, 2003, 109-132.

[XX] For a study of the importance of participation in local areas and a comparative analysis, see among others: Colino and del Pino, 2008, 247-283; Gomá and Font, 2007, 61-76; Pindado, 2009.

[XXI] The lines of support can be organised along three broad axes: a) *Technical advice*: for the implementation and development of participative processes, the reform and production of local Regulations on civil

participation, the design of a participative website, the review and creation of deliberative bodies, etc.; b) *Financial assistance*: economic support for the implementation of participative mechanisms; c) *Training*: in order to internalise local participative culture.

[xxii] The general axes of local policy are: a) *Organisational action*: to develop a structure inside the local Administration to promote participation and focus on the demand for participation by the citizens, through an ad hoc Councillorship or by having the Mayor take over formal political leadership in the competent area of human and economic resources; b) *Normative action*: to design a normative framework that it favours, regulates and establishes stable and formal mechanisms of participation, and that can consist of the approval of a local Regulation of Civil Participation, or a normative policy based on non-regulation; c) *Relational action*: to facilitate instruments and initiatives to intensify the relationship between the government and citizens through participative processes and other channels of participatory democracy.

[xxiii] According to Article 70.bis.1 of Law 7/1985, of April 2nd, regulating the basis of the local government, the municipality must establish and regulate, via organic rules, procedures and organs suitable for the effective participation of the parties involved in matters relating to local public life, in the municipality as a whole and in the districts, with the implication that the abovementioned local government organisations exist within the municipality. This new rule has resulted in the approval of numerous local Regulations on civil participation, though a deeper interpretation of this article suggests a different conclusion. The mandate proposed by this rule envisages procedures and organs of participation via organic rules, and not the approval of specific Regulations on civil participation. This interpretation stems from a break with the traditional regime, stipulated by Law 57/2003, December 16th, on the measures for the modernisation of local government, that has traditionally characterised the local Spanish regime. From this perspective, there is not consistency in the need for local Regulations on civil participation in all the municipalities, considering the different sizes and characteristics of our local reality. The second factor concerns the analysis of local Regulations on participation. The normative flexibility contained in the 2001 Recommendation adopted by the Spanish legislation on local regimes, allows for the adjustment of and innovations in the mechanisms of participation according to the requirements and needs of every local authority. However, one of the characteristics of the local regulation of our country is its mimetism. Local authorities have the option of forgoing a good part of the legal regime, thereby, facilitating and introducing the exercise of the right to participation in their territorial area. Castel Sergio, *op. cit.*, 189-192.

[xxiv] In 2010, seventeen local authorities of Aragon undertook the *political Commitment with citizen participation in the construction of public policies*. These agreements, based on a preamble that justifies its adoption within the current, complex political and social context, include many different measures that must progressively shape local policy on democratic innovation: assessing the state of civil participation in the local entity; training authorities and citizens; experimenting with participative processes; collaborating with the autonomous Government; designing a specific normative framework; locating the policy within the local organisation; creating participative budgets; and creating a citizen support office.

[xxv] The other participants in this Forum are the DGPC, the *Federación Aragonesa de Municipios, Comarcas y Provincias* (FAMCP) and the local authorities of Aragon that have formally committed to civil participation policies. The functions of the Forum are the following: a) to share, analyse and evaluate the strategies of the civil participation policies promoted by the local governments; b) to analyse, define and share the mechanisms of information and civil participation implemented by local governments, making the exchange of experiences as source of information in order to improve the efficiency of the relevant actions; c) to think about policies, techniques and practices of civil participation from a comparative perspective, analysing the most innovative trends in quality and their application by the local authorities of Aragon.

[xxvi] Colino and del Pino, 2008, 261-262.

[xxvii] Castel, 2009, 418-419. The Autonomous Communities of Catalonia and Aragon have adopted a policy of experimentation: they have not approved a legal norm for participation, but have chosen to experiment through participative processes. The Communities of the Canary Islands and Valencia have developed policies of juridification and codification: they have approved a Law on civil participation (Law 5/2010, June 21th, on the Canary Islands Promotion of Civil Participation, and Law 11/2008, July 3th, on the Valencian Community Promotion of Civil Participation), whose application should allow for the development of participative instruments.

[xxviii] Weimer and Vining have identified the problems inherent in direct democracy, i.e., the paradox of the vote, the intensity of preferences, and those inherent in representative government, i.e., the influence of interest groups, territorial clienteles, the limited, short-term prospects of electoral cycles and restricted

agendas, as well as problems related to bureaucracy and decentralisation. Weimer and Vining, 1999.

[xxix] In 2009, the "Panel for the definition of the normative policy of the Government of Aragon on civil participation" was established. The purpose of this panel was the study and discussion of: a law on civil participation; popular legislative initiative; participation in Parliament; popular consultation; administrative legislation and participation; as well as local civil participation. See *Revista Deliberación*, 2010, Departamento de Presidencia del Gobierno de Aragón, 1.

[xxx] For an analysis of the potentials of and need for a Law on civil participation , see Tur Rosario, 2010, 19-41.

[xxxi] This debate requires an exhaustive analysis of the content of the Law. A comparison with autonomous Laws on civil participation allow the importance of the participative process as a predominant means of citizen intervention to be verified. Nevertheless, there are many different things that can improve the functioning of this instrument: recognising civil initiative to stimulate the participative process, based upon the interests of society and that cannot be addressed by the government; the obligation to adopt the participative process in certain matters; or the obligation to approve an annual plan of participation for the processes that are to be started, as an instrument of information and advertising to increase awareness of the opportunity for participation.

[xxxii] This mechanism of participation is regulated by Law 7/1984, December 27th, on popular legislative initiative before the Parliament of Aragon. Since its entry into force, in Aragon nine bills have been presented; however, only one has finally been approved: Law 2/1992, March 13th, on the creation of the Council of Protection of Nature. As Víctor Cuesta indicates, the autonomous legislation of the civil legislative initiative has reproduced the model established in the state regulation. The reproduction of the subjective, formal, procedural and material conditions goes far beyond the due observance of the essential content of the state legislation, and is a clear sign of the apathy of the autonomous legislator, in Cuesta, 2008, 309. Maria Jesus Larios considers this desirable and more suitable for the participative requirements of a few decentralised entities that are closer to the citizens. Therefore, the autonomous Parliaments have made innovations so that it is easier for citizens to access parliamentary institutions, in Larios, 2003, 246.

[xxxiii] Traditionally, according to Spanish doctrine the regulation of popular state legislative initiative is linked somehow to autonomous regulation, either regarding material limitations or other aspects of the development of the right to participation. Regarding material limitations, see Viver i Pi-Sunyer, 1981, 105; Aragón, 1987, 597. Regarding the development of the right to participation, see Larios, 2003, 244-245.

[xxxiv] On the re-definition of popular legislative initiative and the possibilities of creating new relevant regulations in Aragon, see Tudela, 2010, 71-87.

[xxxv] For an analysis of the STC 103/2008, see Uriarte, 2008, 227-257; López, 2009, 202-240; and Tajadura, 2009, 363-385.

[xxxvi] Regarding the STC 31/2010, see Castellá Andreu, 2001, 197-236.

[xxxvii] Article 49.2: "By law, citizen *participation will be able to take place using any admissible means including telematics* ".

[xxxviii] In Spanish Law, a process of normative renovation may be observed that promotes the creation of innovative channels of participation. Here we may mention the right to a regulation of civil initiative (Article 31 of Law 5/2010, June 21th, on the Canary Islands Promotion of Civil Participation); the presentation of proposals concerning draft regulations and the Administration's obligation to respond as a phase of return (Article 9 of Law 4/2006, June 30th, on transparency and good practices in the public Administration of Galicia); to promote civil participation in administrative actions, in order to collect the offers, suggestions and initiatives of the citizens by means of a previous process of information and debate (Article 22.2 of Law 26/2010, August 3th, on the legal regime and procedure of the public administrations of Catalonia); or the obligation to promote participative or consultative processes in the processing of draft Laws and in the evaluation of public policies (Article 6 of Law 4/2001, March 31th, on the good administration and good government of the Balearic Islands).

[xxxix] Rubio Rafael, 2007, 81.

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Regulatory Framework of Local Citizen Participation: Instruments of Direct and Participative Democracy in the Municipal Field

by

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Abstract

This article focuses on the analysis of the regulatory framework of citizen participation in the local government, which organises direct and participatory democracy at the local level, and identifies the laws and mechanisms through which the constitutional requirements for participation are accomplished. Municipalities, the authority closest to citizens, are the best level of government since they directly involve civil society in the decision-making process experiencing the scope and appropriateness of the instruments by which it is channeled

Key-words

local citizen participation, local autonomy; direct democracy, participatory democracy, local regulations, participatory rights

Preliminary Remarks

The coming into force of the 1978 (SC) Spanish Constitution had immediate and very significant consequences at the local level, conceived until then as a mere ramification of the state administration and subject to its direction, supervision and control. In keeping with this spirit, the regulations contained in the local government Law, whose draft revised text was approved by government decree on June 24th, 1955, stipulated that the government presided over by the Head of State is to nominate the heads of all provincial and municipal authorities, i.e. the civil governor in provinces[I], the chairman in provincial councils[II] and the mayor in municipalities[III]. This system was modified by Act 41/1975 of November 19th, the basic law regarding the status of local government, which provided for the elected nature of both municipal mayors and provincial council chairs. Members of the local corporation (councillors in municipalities and deputies in provinces, representing family, trade union and corporate sectors in equal parts) elected the corporation's governing body via secret ballot[IV]. This arrangement culminated with the new principles of decentralisation and participation being expressly recognised in the Constitution. Here municipalities and provinces, like autonomous communities, were conceived of as territorial bodies into which the state was organised and their autonomy "for the management of their respective interests" (Art. 137 of the SC) was recognised. However, above all, they became democratic bodies. The requirement of participation as an inherent element of the democratic state and of the assumption of democracy itself, involved the local, and particularly the municipal, field. Town councils were now entirely elected by universal suffrage under a proportional electoral system, or occasionally made up of all electors, forming a "*Concejo abierto*" [open council] system, envisaged in Article 140 of the SC[V]. In short, municipalities were no longer mere administrations but bodies representing civil society exercising political power and therefore accountable to the citizens who elected them[VI].

These very few constitutional provisions, intended only to ensure the election of municipal organs of government, were complemented and extended at the infra-constitutional level, an area in which both state and autonomous legislators were involved, following the distribution of competences in Articles 148 and 149 of the SC. This meant

that in the case of local corporations as public administrations, it was up to the state to adopt the basic legislation on their legal conditions (Art. 149.1.18 of the SC), and to each autonomous community to adopt the law implementing these state conditions and bring them into effect.

In this context, this paper focuses exclusively on the analysis of the regulatory framework of direct citizen participation in the local (specifically municipal) area, which organises what is known as direct or participative democracy, and identifies the laws and mechanisms through which the constitutional requirements for participation are satisfied. Certainly, as territories able to exercise the power closest to the citizen, municipalities are obviously the best nuclei for directly involving civil society in the decision-making process, therefore, experiencing the scope and appropriateness of the instruments by which it is channelled. Given the above definition, any reference to institutions like the *Concejo abierto* is excluded, since despite its being a form of direct citizen participation in municipal government and administration, it is in fact an anomalous form of representative local government. The following issues will also be dealt with in this analysis: the right to vote as the vehicle for representative participation and, finally, consultations, which have been examined in detail in E. Martín Núñez's paper, also published in this volume.

1. Participation in State Regulations on Local Government

Seven years after the enactment of the Constitution, the Spanish state Parliament approved Act 7/1985 of April 2nd, regulating the bases of local government (LBRL), implemented by the government in the subsequent year by way of Royal Decree 2568/1986 of November 28th, regulating the organisation, operation and legal framework of local authorities (ROFRJEL). Among the various reforms introduced by the 1985 Act, the most important for the purposes of this work is Act 57/2003 of December 16th, on measures for the modernisation of local government, which, as indicated in its stated purpose, is intended to strengthen participation as an instrument for encouraging civil society to become more deeply involved in public life[VII].

In this regulatory area, it is highly significant that the first requirement of state law defines municipalities as the "basic entities in the state territorial organisation and the

immediate means by which the civil population participates in public affairs, given that they have the autonomy to institutionalise and manage the interests of the various social groups" (Art. 1.1 of the LBRL). According to this definition, the law envisages participation from two different but complementary perspectives.

The first and most important is that participation in its various forms is defined in Article 18 of the LBRL as the right of residents (i.e. every person who lives in the territory of the Spanish state and is recorded in the "*padrón*" [electoral roll][VIII] of a municipality (Art. 15 of the LBRL). Under the Title "Citizen information and participation", Chapter 4 Section V of the LBRL specifies the different laws and instruments which in their own right formulate this right to participation. In addition, complementing this configuration as law, the state law also envisages participation as a principle which affects the organisation and the exercise of the municipality's competences. Therefore, to facilitate and improve citizen participation "in the management of local affairs", Article 24 of the LBRL provides for the creation of decentralised territorial administrative organs to which town councils can devolve functions and competences. Article 27.1 of the LBRL makes any delegation of the exercise of state, autonomous or local competences to the municipality and the achievement of greater administrative efficiency conditional on their achieving improved and increased citizen participation.

However, here state legislators wish to introduce only basic regulations. This means it is up to the municipal authorities themselves, within these prescriptive minimums and in the exercise of their competence over local rules, to establish the autonomous regulations which can extend and at their discretion regulate other forms of participation or create new instruments, other than surveys or consultations encouraged by the interactive use of the new technologies referred to in state law (Art. 70 *bis*.3 of the LBRL).

1.1. Prerequisites and limits to participation in local affairs

1.1.1. Prerequisites and limits to participation in local affairs

Pérez Alberdi identifies three phases in all participative processes: reception, influence and decision[IX]. While the last two phases are actively participative, the first

determines the framework within which all participative phenomena of any kind must occur, provided that what is received is information. Information thus becomes the pre-requisite of participation.

If this premise is accepted, it is clear that the way state regulations treat participation goes beyond a merely objective vision and incorporates the recognition of a subjective right to receive.

The addressees of and/or holders of rights of access to information are both individual residents. Moreover, local associations created for the defence of general or sectoral interests which act as channels for resident participation, whose formation must be encouraged by local corporations themselves, award the use of public means and access to grant aid (according to Art. 72 of the LBRL and Arts. 232 to 233 to 236 of the ROFRJEL).

a) Objective perspective: the duty to inform. The state legislator establishes a mandate for local corporations to "facilitate the most complete information on their activity" (Art. 69.1 of the LBRL). This overall obligation is defined in the general requirement to advertise plenary sessions and to publicise and report on the agreements adopted by the local corporations' decision-making bodies (Arts. 70.1 and 2 of the LBRL[X]). There are also provisions which complement the ROFRJEL (Art. 229) by specifying the circumstances involved (plenary sessions, plenary and governance committee agreements and resolutions of the mayor and his/her delegates) and the means by which this general information is to be made known (notice boards, regular information reports and publication in the social media). Similarly, an information office may be created to channel the entire corporation's publicising and information activity.

b) Subjective perspective: the right to receive information[XI]. This is a right which the LBRL ascribes to a range of contents: the right to be informed "on prior request, giving reasons" regarding all municipal proceedings and documentation as provided for in Article 105 of the SC (Art. 18.e of the LBRL) and also the right to obtain copies and certifications accrediting agreements adopted by local corporations and their antecedents, and to consult archives and registers as set out in legislation (Art. 70.3 of the LBRL).

With respect to associations for the defence of general or sectoral interests of residents, Article 234 of the ROFRJEL recognises a series of specific rights which,

however, condition an express prior request: the right to receive summons to attend municipal organs and their decisions and resolutions at one's registered address as well as the right to receive regular or occasional publications issued by the town council at one's registered address, provided they are of interest to this entity.

1.1.2. Limits

Although various mechanisms and instruments are expressly envisaged by the state legislator, the common denominator is their restricted scope: none empowers the citizen to replace the competent municipal body in adopting a decision. The law facilitates purely deliberative participation, with no effective power of decision.

This implicit determining factor in the regulations on the scope of each right addressed in the state regulations occurs expressly and unmistakably in two situations. First, referring to the freedom of local corporations to determine or regulate participation in their territorial area –also by legal mandate (*ex* Arts. 24 and 70 *bis* 1 of the LBRL). In this case, Article 69.2 of the LBRL stipulates that "the forms, means and procedures of participation established by corporation councils in the exercise of their power of self-organisation may under no circumstances diminish the powers of decision of representative organs regulated by law". Second, when the ROFRJEL (Art. 235) recognises the rights of residents' associations to participate in a range of municipal organs, it limits such participation in all cases and as a general rule to organs of a deliberative or consultative nature. Only under circumstances expressly authorised by the law may they participate in decision-making organs. The type of participation which they may enjoy therein is not specified. However, in the light of how the state legislator restricts the scope of these rights, it is easy to conclude that such participation may be necessary, but never decisive, in the adoption of a decision.

1.2. Participation as a right

Article 18 of the LBRL lists among the rights of municipal residents the right to vote and be eligible to vote in local elections; participation in municipal administration; the right to information; the right to request popular consultations; and popular initiative and

petition for benefits and services, when these fall within the compulsory municipal competences.

Without detracting from the state legislator's intention to specify the legal requirement for citizen participation, it must be recognised that there is some confusion in the above list. There are two reasons for this: first, it treats the context in which participation takes place like a subjective right, i.e. municipal administration, requiring the establishment of a series of mechanisms to provide it (Art. 70 *bis*.4 of the LBRL). Second, and most importantly, rights of participation are mixed with the instruments through which the exercise of citizen participation is formulated in local government. Furthermore, within the former, references are made to different types of rights of participation which refer to different subjects according to the area in which they are envisaged. With the exception of the right to vote in local elections, which is excluded from the analysis proposed in this work, and the right to information which is referred to above, this means that while the rights of popular initiative and to request a consultation are only attributed to residents with a recognised right to active suffrage in municipal elections (therefore requiring either Spanish nationality, or citizenship of an EU member country or another state with which Spain holds a treaty of reciprocity)[XII]; remaining rights are attributed to all persons who are considered residents of the municipality, a condition for which, as has already been indicated, Spanish nationality is not an essential requirement (Art. 15 of the LBRL).

a) *Popular initiatives* (Art. 70 *bis* of the LBRL) allow residents to present proposals for agreements or actions as well as draft regulations on matters within municipal competence. Their exercise must be endorsed by a percentage of residents, depending on the number of inhabitants of the municipality (20% in municipalities with up to 5,000 inhabitants; 15% for municipalities with inhabitants ranging from 5,001 to 20,000 and 10% for municipalities with over 20,001 inhabitants).

   In all cases, these initiatives must be submitted for debate and voting at a plenary meeting, without precluding their resolution by the competent body on the matter. They are also subject to prior monitoring on legality by the

Secretary, and a report from the council's auditor is required when the initiative affects the town council's economic rights and obligations.

b) *Popular consultations* (Art. 71 of the LBRL) on matters of local interest which are particularly important for the residents and fall within the competence of the municipality. Consultations may not, under any circumstances, raise questions relating to local taxation. Consultations may also be proposed by residents, provided that they meet the requirements for the exercise of the right of popular initiative and are accompanied by a proposal to create an agreement, take action or draft a regulation as referred to in the previous right.

Notice thereof must be given by the mayor of the municipality, subject to the prior agreement of the plenary meeting by absolute majority and after its authorisation by the state government.

c) *Hearings*. Residents do not have the right to hold hearings during the council's plenary meeting, but the mayor has the discretionary power to require the residents in attendance to express their opinions on one or several issues being dealt with at the plenary meeting. However, concerning associations, they are one of the specific contents of the right to participation. This means that associations may participate in several areas through a hearing:

(i) At the town council's plenary meeting (Art. 228.1 of the ROFRJEL), provided the association intervenes as an interested party in the administrative processing of the resolution or agreement to be adopted at the meeting of municipal representatives, as stated in the agenda accompanying its announcement, and provided this has been requested by the mayor before the start of the session. Participation must occur before discussion of and voting on the proposal concerned, and is limited to the statement of the association's opinion on the proposal.

(ii) in Advisory Committees (Art. 227.2 of the ROFRJEL), which normally do not hold public sittings , to whose meetings

associations may be called "with the sole purpose of hearing their opinion or receiving their report on a specific subject".

(iii) in Sectoral Councils in the collegiate organs of decentralised administrations and the collegiate organs of the decentralised administrations of municipal services (Art. 235 of the ROFRJEL). This participation, which must be allowed under applicable legislation and structured according to the specialisation and representativity of the associations, is conditional to the express provision in corresponding municipal regulations or agreements, and must be in line with the terms of and within the scope envisaged therein.

d) The *right to petition* (Art. 231 of the ROFRJEL), through which residents may request explanations or actions from the town council of their municipality. These petitions must be presented in writing.

2. Local Participation from the Autonomous Legislator's Perspective

2.1. References to the local system in the Statutes of Autonomy

A common denominator of all the Statutes of Autonomy approved between the late 1970s and early 1980s is that while the local system was within the competence of the autonomous communities, there were different types of statutes with varying scopes. Beyond the issue of competence, the relevant statutory provisions basically only reiterated the constitutional definition of municipality and province and in some cases indicated the presence of other local bodies (for example, counties).

The reform of the Statutes of Autonomy, which began in mid- 2008, led to the replacement of texts approved in the early years of the Constitution by new texts with new wording and expanded contents, some of which dealt with the local system[XIII]. Specific statutory sections were devolved to its regulation, which were not the only sections

containing provisions relating to the local bodies comprising the autonomous community; however, the Statutes of Autonomy themselves determined its competences and how it related to the autonomous institutions. The new statutory provisions also incorporated participation as a defining element of the municipality. Therefore, in addition to the classical conception of the municipality as one of the bodies into which the autonomous community is territorially organised, the adoption of the basic statement contained in Article 1 of the state LBRL was agreed upon, identifying the municipality as the "essential" or "most direct" instrument of participation by the local community in public affairs[XIV]. Nevertheless, the new Charter of Rights in the new statutes also included the right to participation in the local government area (in particular, the right to petition and the right to instigate consultations).

2.2. Local participation in autonomous regulations

In exercising their competences as regards the local system contained in all the Statutes of Autonomy, the autonomous communities have approved their own regulations for local bodies, which have in turn implemented the provisions of state law in the autonomous territory.

In this context, three different regulatory situations must be distinguished. The first includes autonomous communities which (apart from a reference to the competence of local municipal councils to establish and develop structures for citizen participation) have not introduced any regulations regarding the right of local participation. This is the case of Murcia (Act 6/1988 of August 25th), Castile and León (Act 1/1998 of June 4th) and Andalusia (Act 5/2010 of June 11th). The second group is made up of autonomous regulations whose wording includes to a greater or lesser extent the regulation of participation in local authorities: Navarre (Act 6/1990 of July 2nd), Galicia (Act 5/1997 of July 22nd), Aragon (Act 7/1999 of April 9th), La Rioja (Act 1/2003 of March 3rd), Madrid (Act 2/2003 of March 11th), Catalonia (Legislative Decree 2/2003 of –April 28th), the Balearic Islands (Act 20/2006 of December 15th) and Valencia (Act 8/2010 of June 23rd). Finally, a third group includes autonomous communities which have approved laws - that also regulate citizen participation in general terms in the Autonomous Community of Valencia (Act 11/2008 of July 3rd), the Canary Islands (Act 5/2010 of June 21st) and the

historic territory of Guipuzcoa ("*ley foral*" [Regional Law] 1/2010 of July 8th); or that regulate one of the instruments of participation in the local area, specifically popular consultations - Andalusia (Act 2/2001 of May 3rd) and Navarre (Regional Law 27/2002 of October 28th).

Looking at the second and third groups, it is clear that autonomous legislation has introduced very few innovations to basic state regulations on local participation. All seem to consider local participation one of the defining elements of the municipality, and a structural principle for the exercise of their own or delegated competences, as well as a competence in its own right.

In terms of organs, local corporations must commit themselves to creating decentralised administrative organs, especially in fields such as health, sports and culture, to facilitate and channel resident participation, mainly in sectored organs. In all these cases, organs are given powers of proposal, reporting and consultation. In this area, there is one new factor regarding state legislation: the provision in Act 20/2006 regarding the municipal and local system of the Balearic Islands. When the council's plenary meeting so agrees, a consultative government body, a kind of social council, with participation by residents and the most representative bodies in civil society, can "guarantee citizen participation in municipal administration, whereby they may study and propose issues related to economic and social development, municipal strategic planning and major urban projects" (Art. 24.2 of this Balearic Islands Act).

Finally, as regards the right to participation, only the Galician Act 5/1997 concerning local administration envisages a provision similar to Article 18 of the state LBRL in establishing the generic framework in which the right to participation must be represented in the law. Article 57 of this Act recognises the following residents' rights: to vote and be eligible to vote; to participate in municipal administration; to use public municipal services; to be informed: to petition; to request popular consultations and demand the performance and establishment of a public service when it corresponds to a compulsory municipal competence. This last right, which does not appear as such in any other autonomous regulation, also includes the option of lodging claims against the initial approval of the municipal budget when it does not allocate the funds required to put these services into effect (Art. 58.2 of the Galician Act).

More specifically, all regulations included in this second group govern the right to information in terms which are very close to those of the state law. The main difference is the express provision of a range of rights broadly related to information: the identification of authorities, knowledge of the stage of processing of a procedure, access to registers, etc. Most of these are the result of the conversion into rights of participation of rights already recognised under Article 105 of the Constitution[XV] and the law governing the legal system of public administrations and common administrative procedure, Act 30/1992 of November 26th (Arts. 35 to 46), on the relationship -between administrated persons and the administration, or in some circumstances, contents of the right to good administration, which are included in the Charter of Fundamental Rights of the European Union (2000)[XVI]. This is confirmed in the laws governing the local systems or administrations of Galicia, Aragon, La Rioja, the Balearic Islands and Valencia.

In relation to other rights, autonomous regulations merely "import" provisions already contained in the LBRL, in particular all matters concerning residents' associations and their preponderant role in participation in local organs and the holding of local consultations. Although, as already indicated, Martín Núñez has already addressed the issue of consultations in the paper published in this volume, so far these have been subject to individual regulation in the Autonomous Communities of Andalusia, Navarre and Catalonia (Act 4/2010 of March 17th[XVII]).

Aside from slight differences in the content of the above regulations, one common element is their limited scope of participation: they may promote, inform or complement municipal action, but none of these instruments may diminish the powers of decision of the municipality's representative organs.

As regards the third group of regulations, if for reasons already discussed autonomous laws governing popular consultations are discounted, there are some other specific regulations that regulate participation in the autonomous territory. Up to now, only two autonomous communities have regulated this matter: Valencia and the Canary Islands. In addition to these, there is also the "*norma foral*" adopted by the Guipuzcoa Provincial Council. This is a series of provisions intended to condense into one organised regulatory and systematic text the main rights regarding the participation of civil society in the public sphere, the mechanisms that can be activated to channel this participation, and the associated duties of public powers to bring it into effect. Their content is instrumental to

the concept of citizen participation as a "mechanism of cooperation in the action of governors"[XVIII] which "brings public powers closer to civil society"[XIX].

Some of the rights pertaining to the local area are the right to information, hold hearings, access archives and registers, and petition (discussed above). Apart from these, regulations may specify other original rights such as the right to the collaboration of public powers on the not-for-profit activities of civil society which encourage participation, or the right to statutory initiative. In addition to rights, there is also a detailed regulation concerning the associations of civil society, establishing their legal systems and their due rights, as well as the duty to foster them. As regards the instruments which channel citizen participation, both regulations allude to mechanisms for citizen consultation which influence the process of adopting the corresponding decision, either in a permanent form (consultation fora) or temporarily (citizens' panels), or after the event, by evaluating the action or decision adopted (citizens' juries).

3. Municipal Participative Experiences

Under state or autonomous regulations, municipalities may not only adapt instruments of participation envisaged under their own special conditions, but also adopt additional mechanisms and formulae to foster citizen participation. Article 24 of the LBRL establishes the obligation of local bodies to create decentralised territorial administrative organs, for which the councils themselves must provide organisation and functions to enable participation. This is a mandate which Article 70 *bis*, Section One of this law reiterates and extends, by requiring that besides possessing these organs, town councils must be active in adopting regulations which govern appropriate procedures for effective citizen participation in local life. In compliance with the latter, town councils have progressively adopted either regulations regarding the organisation and operation of citizen participation, some sections of which regulate and specify the requirements for exercising various mechanisms of participation, or directly regulate it.

As regards organs, municipalities have also – established general and sectoral consultative organs with citizen representation, to provide advice on the actions of the local corporation. In Spanish local government, variously-named municipal councils (the

most common being the *Consejo de la Ciudad* [City Council], or in Cordoba, for example, the *Consejo del Movimiento Ciudadano* [Citizens' Movement Council]), are set up as the highest participative organs in the municipal administration, whose role is to inform, study, debate and advise to determine the main lines of municipal policy in all fields (economic, social and cultural). These are also seen as the organs that coordinate sectoral councils created to facilitate citizen intervention in specific areas of municipal policy. There are many types, depending on the area of municipal action in question: educational or student councils; municipal or local social services councils; councils for the elderly; disability, gender and women's equality; youth and health; sports; sustainability; trade and consumption; immigration; cooperation and solidarity; security, and many more. In some municipalities, it is common for these sectoral organs to coexist with other territorial organs like the *Consejos de Barrio/de Distrito* [neighbourhood or district councils].

As regards specific participation mechanisms, *citizen panels* and *juries* are infrequent, while *participation workshops and fora* are much more widespread. In 2011, for example, the most significant panel was formed in a municipality in the province of Alicante to deal with urban mobility. Juries have been used since the late 1980s in several Andalusian cities (the provincial capitals, Almeria, Huelva, Malaga, Cadiz and Granada) to evaluate how water resources are administered. Municipalities in the Andalusian province of Almeria and the Basque city of Vitoria have held participation workshops on heritage conservation and urban mobility, respectively. Of the fora, many have been involved in municipal budgets: the so-called *presupuestos participativos* [participative budgets][XX]. This tool for participation in municipal administration is half-way between mere consultation and co-decision, and residents can make proposals and take general decisions on the municipality's expenditure, prioritising investments or local policies.

4. Some Final Conclusions

The analysis of the state and autonomous regulatory framework within which local participation functions clearly demonstrates the consolidation of the vision of citizen participation in the democratic state, which distinguishes the 1978 Spanish Constitution. In fact, through the constitutional regulation of participation as well as specific instruments

and their scope, the constituent fathers confirmed their decision to set up a constitutional democracy in the form of a representative democracy, in which participation is channelled through representatives freely chosen in periodic elections, to the detriment of direct democracy and people's participation without intermediaries. Moreover, as already shown in other works published in this volume, this doctrine has been maintained by the Constitutional Court since its earliest judgements on the matter. In this context it is relevant to recall an extract from constitutional case law on representative democracy, which states that it must "as a general rule, be complemented by instruments of direct democracy, which must operate logically and as constitutionally required, not undermining or replacing but reinforcing representative democracy" (for all, STC 103/2008, FJ 2 [judgment of the Spanish Constitutional Court]).

This has been the aim that has guided the work of both state and autonomous legislators when establishing the regulatory framework for citizen participation in the administration and action of local corporations. The absolute limit to citizen participation expressly included in several legal precepts has already been indicated: i.e. decision-making capacity is always the competence of the representative organs. This relegates participation to an incidental but still important role: that of acting as a source of greater legitimacy of public decisions and an instrument which contributes to the transparency of the adoption and efficiency of the execution of such decisions.

In spite of the restrictive regulatory configuration of all the above-mentioned participative instruments, real life offers some examples in which it is difficult to separate the propositive, informative and consultative nature of participation from decision-making power. This has been demonstrated through the experience of "participative budgets" in the many municipalities where they have been used, even though limitations to the material field of participation with respect to very specific issues of the municipal budget ensure that it has little effect.

Lastly, and leading on from the last paragraph, I believe that the aims indicated can only be achieved if the final decision adopted by the competent representative organ in the local corporation accepts the outcome of the participative process. Therefore, although it is true that replacement is never an issue, activating any participative process implies promoting the public authority's commitment so as to wholly or partly adopt the resulting

majority opinion. This is more obvious in the local area, where the proximity of decision-making bodies to civil society encourages not only participation, but also close contact between local representatives and the persons represented/participants, enabling the former to be held politically accountable for their administration more intensively and directly than in any other area, whether autonomous, state or community.

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

I According to Article 212 of the 1995 local government Act, this was "the first authority of the province as the representative of the government and permanent delegate of the central power" designated by the Council of Ministers (Art. 213). The Statute of Civil Governors approved by decree on October 10th, 1958 envisaged their direct nomination by the Head of State.

II Despite assuming the representative nature of the provincial corporation, chairmen were appointed directly by the Minister of Governance (Art. 222 of the 1955 Act regulating the bases of local government).

III Article 62 of the 1955 Act stated that mayors of municipalities of more than 100,000 inhabitants were to be appointed directly by the Minister of the Interior. Mayors of other municipalities were designated by the civil governor, after communicating with the Minister of the Interior.

IV Fourth rule (section two) and fifth rule (section one) of said law of 1975 for mayors, and fourteen and fifteen (section one) for the chairmen of provincial councils.

V The *Concejo abierto* [open council] is a system of local government whereby citizens participate directly in municipal government and administration: the plenary meeting of the town council is replaced by an assembly of all the residents of legal age of the municipality. This used to be the form of government of municipalities with less than one hundred inhabitants, traditionally operating with this singular regime, or whose geographical location suggested it for a better management of municipal interests or other circumstances. This particular form of local government, envisaged in the Constitution and implemented in the 1985 basic law of the status of local government, to which reference will be made in the text of this work, has been recently modified by Organic Law 2/2011 of January 28th, which reforms several aspects of the 1985 organic law on the general electoral system. At present, after the municipal elections held in May 2010, some municipalities with a *Concejo abierto* system have gone back to government by a system similar to other municipalities: in addition to a mayor, the plenary meeting of the town council consists of councillors elected by a proportional system. The special characteristics of these municipalities stems from the fact that the number of councillors is limited to two. The institution of the C*oncejo abierto* remains in municipalities where it has been expressly agreed—to deal with occasional matters considered appropriate by the municipal corporation. For a more detailed study of direct government, I refer to the works of García Álvarez, 1978, and Orduña, 1988. Also a range of studies written by Cosculluela, 1987, 1989 and 2011.

VI In the words of Francisco Caamaño (2004, 177): "democratically legitimated political centres directly answerable to citizens, capable of designing and implementing public policies in the area of their own interests".

VII See the comments on the reform in Carro Fernández, 2005, and more specifically, Rodríguez-Arana Muñoz, J., 2004.

VIII For the purposes of the LBRL, the *padrón municipal* [municipal census] is a register of an administrative nature containing a list of the residents of a municipality. The data contained in this register are proof of residence in the municipality and of a person's normal registered address (Art. 16).

IX In addition to the paper that Pérez Alberdi has published in this volume, I refer to the studies of 2008.

X Article 70 *ter* of the LBRL specifies these provisions for the sector of territorial ordination and town planning.

XI A more detailed treatment of the law is contained in the work by Sánchez Morón, 1993-1994.

XII As of December 2011, the states with agreements of reciprocity signed by Spain and in force are: Norway, Ecuador, New Zealand, Colombia, Chile, Peru, Paraguay, Iceland, Bolivia and Cape Verde.

[XIII] See Salazar, 2009, and Salvador Crespo, 2010.
[XIV] With the exception of the Statute of Autonomy (SA) of Andalusia, see Art. 86.1 of the Statute of Autonomy of Catalonia; Art. 82.1 of the SA of Aragon; Art. 75.1 of the SA of the Balearic Islands; Art. 44.1 of the SA of Castile and León and Art. 54. 1 of the SA of Extremadura.
[XV] Castellá has carried out a wide-ranging and exhaustive study in 2001.
[XVI] See Exposito and Castellá, 2008, 76-91.
[XVII] The state government appealed the Catalan Statute before the Constitutional Court. To date, the appeal of unconstitutionality is pending resolution.
[XVIII] Quotation from the stated purpose of the Canary Islands Act 5/2010.
[XIX] Quotation from the stated purpose of the Valencian Community Act 11/2008.
[XX] For further information on the form taken by this experience in different Spanish municipalities, please refer to www.presupuestosparticipativos.com and Ganuza Fernández, 2006.

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CENTRO STUDI SUL FEDERALISMO
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Empowering Local Democracy In Catalonia: Tools And Policy Domains To Implement a Top-Down Solution

by

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Abstract

This article is the result of an ongoing research into a variety of features of Spanish local government . It aims, in particular, at providing a profile of the tools implemented by local authorities to improve local democracy in Catalonia. The main hypothesis of the work is that, even though the Spanish local model is constrained by a shared and unique set of legal regulations, local institutions in Catalonia have developed their own model of local participation. And the range of instruments like these is still now increasing. More specifically, the scope of this research is twofold. On the one hand, different types of instruments for public deliberation in the Catalan local administration system are identified and presented, based on the place they take in the policy cycle. On the other hand, we focus on policy domains and the quality of the decision-making processes. Researching the stability of the participation tools or whether local democracy prefers more "ad hoc" processes allows us to analyze the boundaries/limits of local democracy in Catalonia. The main idea underlying this paper is that, despite the existence of a single legal model regulating municipalities in Catalonia, local authorities tend to use their legally granted self-management capacities to design their own instruments which end up presenting perceivable distinct features, stressing democracy in different policy domains, and in diverse policy cycles. Therefore, this paper is intended to identify such models and to provide factors (variables) so that an explanatory model can be built

Key-words

local democracy, participation, public policies, local self-government

1. Introduction

Democracy is a vast and complex concept. It includes a lot of features that need to be reduced if we want to make it useful for our purposes. In this paper, local democracy refers basically to those political processes that incorporate the participation of citizens or local associations in the local policy-making process. This article is organized as follows: the first part focuses on the subject with some definitions and key concepts; the second part explains the institutional and legal framework in which political participation is embedded at local level, and also points out the theoretical basis of how participation has been treated by scholars; the third part describes the situation in Catalonia and identifies the relevant variables to be analyzed. And finally, results are shown and a discussion made.

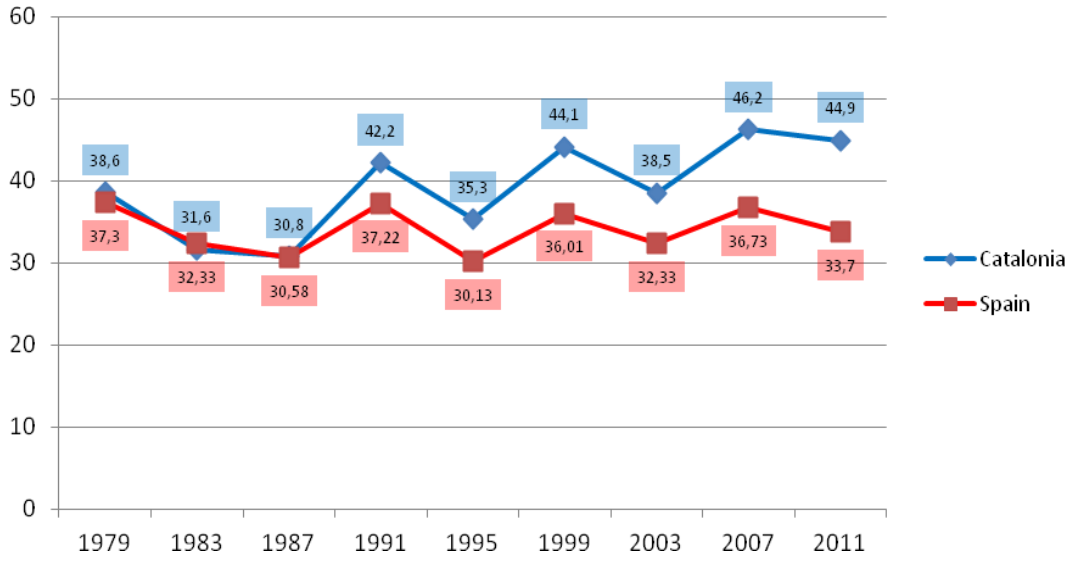
Our research topic is not related to "non conventional" ways of participation (such as non authorised public demonstrations, boycotts, violent protests, resistance to public obligations...), nor to "classical" ways of participation, more related to the question of creating and promoting democratic representation (through elections, party affiliations, having meetings with elected and institutions, advocacy...)[I]. Our article is focused on the "macro" level (aggregated data), regarding administrative structures and the institutionalisation of participation processes. We are facing here a sort of "third way" in that benefits are not exclusively related to create and promote democratic representation, nor to express political wills far away from an institutionalised political channel.

Following Mendelberg's position concerning local participatory processes, the theory of deliberative democracy starts from the state that "egalitarian, reciprocal, reasonable and open exchanges among citizens about public issues will lead to a number of individual and collective benefits". And she highlights "among these (*benefits*) greater empathy and tolerance, a better understanding of one's own views, and those of others, the building of consensus, a more engaged, active citizenry, and decisions that are more reasoned and attuned to the larger public good" (Mendelberg, 2002; Shapiro, Delli Carpini, & Shapiro, 2002).

This paper addresses several topics which have particular significance in the changing world of local government, but one of the most important is related to the growing

pressures to incorporate participatory and direct forms of democracy within local governments (Blanco & Gomà, 2002; Bucek & Smith, 2000; Font, McLaverty, 2003; Subirats, 2001). Much of the time, the aim of these pressures is to revive the limited electoral participation in elections (especially local elections). In fact, the turnout at local elections in Catalonia is decreasing fast and deeply, becoming structurally low compared to the rest of Spain[II].

Graph 1. Abstention (%) from local elections in Spain and Catalonia



Source: data from Ministerio del Interior, Spain.

In this increasingly complicated scenario, it would seem logical to initiate strategies to encourage citizens to return to democratic participation and real involvement in public affairs.

The main questions that the article aims to treat are closely related to the classic problems in political science and local government studies: how do local governments encourage local participation? What are the intentions of it all? Are citizens ready to participate? Under what terms? In any case, the core question remains: elected politicians are responsible for making decisions in representative democracies, so why would they

want to share the power that the law gives them and thus limit themselves? (Font et al., 2003; Font, 2003)

As Font remarks, the debate is still about the reaction of any local players towards citizen participation. Those reactions will represent a combination of beliefs and instrumental motivations (Font, 2003) Politicians (like other local players) will be in favour or against each citizen participation proposal depending on what they gain from it. Wherever the process starts, the key players accept it as a legitimate process. The justifications for participatory experiences come basically from two main arguments: they are either done to get better policies or to get better polities (Font et al., 2003). In fact, institutional structures are important because are the vehicle through which the basic purposes and values a society wishes to pursue through local governments are carried out (Judge et al., 1995).

In this paper we are focusing on the institutionalisation of participatory processes at local level. We are going in depth into the creation of better polities, because we do not yet have data regarding the quality of the participatory processes. The main hypothesis of the paper is that, even though the Spanish local model is constrained by a shared and unique set of legal regulations, local institutions in Catalonia have developed their own model of local participation; but to what extent we are facing a "top-down" directed process but largely dominated by local strategies?

2. Brief description of a unique legal framework

As a case representing the classical Napoleonic structure of local government, the Spanish, and also the Catalan local systems, are constrained by a shared and unique set of legal regulations. Moreover, fragmentation and smallholdings are also relevant features of the local system. Catalonia numbers up to 947[III] municipalities – Spain has up to 8,115 –, four provinces (Barcelona, Girona, Lleida and Tarragona) and a regional government (Generalitat de Catalunya).

Table 1. Distribution of municipalities in Catalonia by population

Population size in inhabitants	Barcelona		Girona		Lleida		Tarragona		TOTAL Catalunya	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Up to 500	16.752	72	25.359	97	28.912	117	17.213	67	88.236	353
501-1.000	23.170	31	29.081	41	35.233	50	24.442	35	111.926	157
1.001-5.000	213.957	88	133.732	57	107.419	53	128.401	58	583.509	256
5.001-20.000	777.415	80	199.969	20	88.040	10	165.422	17	1.230.846	127
20.001-50.000	621.193	21	150.331	5	0	0	103.188	4	874.712	30
50.001-100.000	752.809	12	81.220	1	0	0	94.407	1	928.436	14
100.001-500.000	1.064.632	6	0	0	118.035	1	121.076	1	1.303.743	8
More than 500.000	1.582.738	1	0	0	0	0	0	0	1.582.738	1
Total	5.052.666	311	619.692	221	377.639	231	654.149	183	6.704.146	946
(1): Total number of inhabitants; (2): Number of municipalities										

Source: Innovacio democratica, 2007 and MUNICAT.

The legal bases for local participation are scattered through multiple norms[IV]. In any case, local governments are considered from a legal point of view as "immediate channels for citizen participation in public affairs" (art. 1 LBRL).

Basically, local councils in Catalonia could engage three main instruments for public participation:

- Consultations
- Participatory organisms
- Participatory processes

Each of these instruments fulfils some of the needs to activate public participation, and allow citizens to express several points of view. Besides that, there are other procedures that include public hearings and consultations to stakeholders, but we are not taking them into account in this paper because they are compulsory following administrative laws.

Consultations are like referenda, but at local level and related to local issues. They need to be approved and authorized by the Spanish government (art.71 LBRL). Participatory Organisms are conceived as stable mechanisms that allow regular participation of citizens in different topics, and in different stages of the public policy process. Participatory procedures are non-stable mechanisms (or "ad hoc" processes) that allow public participation during a delimited and restricted time; like organisms could be associated in any stage of the public policy process. These two last instruments could be binding or not and depend only on the political will of the council[V]. The city council allows the decisions made by citizens to be binding at the decision stage. Besides all this regulation, each local council has the autonomy to decide what kind of instruments it is going to implement, in which stage of the policy process, in which domain, and can limit the political effects. In short, we have a widespread regulation and a wide scope of decision for the local governments in order to promote local democracy.

To try to counteract this potential chaos, some "top-down" solutions have been proposed in recent years. The most important one is the creation by the Catalan Government, in January 2004, of an agency called "Direccio General de Participacio Ciutadana" (DGPC) with the mission of promoting public participation in the design, implementation and monitoring of government policies (either of the Regional Government and Local Governments in Catalonia). Its main goals are encouraging, studying and disseminating the positive values of political and social participation with the final objective of enriching the quality of democratic life. Its creation was an important issue for the new leftist government in place (starting from may 2003) after 23 years of rightist governments.

As an organism of the Regional Government (the Generalitat) the role of this organism is quite complicated regarding local governments, due to the restriction attached to the autonomy of local governments. The Generalitat can only offer support regarding

participation in local policies. The DGPC offers economic aid (through grants, credits, and public subsidies), formation and an institutional recognition of initiatives being carried out locally. It cannot impose decisions, or regulate in a homogeneous way for all local governments, except by parliamentary law being completely respectful of local powers and the autonomy established by the Constitution.

2.1. Theoretical assumptions and conceptual frameworks

The scientific literature regarding local democracy is divided into two main groups of approaches or conceptual frameworks[VI]. Some are more attached to a normative conception of the need to empower local democracy (Blanco, Lop, 2004; Blanco, 2008; Font et al., 2003; Pares, 2009; Subirats, 2001;Putnam, 2000). Others are more analytical, and mostly attached to effects and limits of local participation in both individuals and institutions (Aars, 2007; Font et al., 2003; Salisbury, 1975; Shapiro et al., 2002; Wolman, 1995; Zafra Victor, 2003; Zittel, 2007a; Zittel, 2007b). In a correlative way, there are critics and partisans of local participation.

For the believers on the necessity of a renewal of the decision-making process at local level, Putnam –and its notion of social capital- is a prompter leader. Concerning benefits for the community, Putnam has argued that the efficiency of a local government and the economic development of an area may be strongly influenced by the active engagement of the local citizenry in community affairs (Putnam, Leonardi, & Nanetti, 1993). Following Putnam's ideas, the community's social capital will increase as people bring deliberation to their civic activities (Putnam, 2000). In general the main arguments in favour of public participation are that: it leads to an improvement of the decision-making processes; it represents pluralism in a better way; it helps legitimise public decisions; it allows more control over elected representatives; it increases accountability and political culture; and finally builds up a better perception of politics (Chaques & Palau, 2006; Marti Marmol, 2010).

Contrarily, those who are not so optimistic regarding public participation argue that: there is a high complexity in terms of implementation of good processes for having only simply and partial solutions; these processes are economically expensive; public opinion could be easily manipulated; low rates of participation could affect the process itself, and

even the classical democratic representative system; polarization in deliberation could increase social divisions; and users become engaged in single issues and devote little attention to common public good (Aars, 2007; Marti Marmol, 2010; Zafra Victor, 2003). In conclusion, and following Zittel's "Critics of participatory democracy claim that it is solely driven by normative concerns without opening itself up to empirical inquiry and to empirical testing of its claims. Proponents are pictured as utopian dreamers obsessed with the question of how things should be rather than how things can be in real world settings" (Zittel, 2007b).

In any case, theories of political participation are characterized by a certain ambivalence regarding popular participation. Theories of democracy do not agree on how much participation is healthy for democracy. The defining idea of democracy is that the people govern their own affairs. Participation thereby reflects a population's self-government. In this scenario some projects aim to strengthen traditional representative channels of participation, whereas others promote more direct participatory forms. (Aars, 2007).

In general terms, the analytical approach focuses on the fact that it is not self-evident that more possibilities for participation automatically result in an improved local democracy. In fact, more channels of involvement certainly do imply a greater choice of means by which citizens can express themselves politically. However, if democratic arenas are being fragmented into a greater diversity of forms one must assume that the individual has the resources to orient him or herself in a complex landscape (Aars, 2007). In this sense, "more channels of influence do not necessarily lead to more people becoming involved in political work, but simply that those who were already active acquire more ways to make their influence felt" (Aars, 2007).

One of the first and most important analytical approaches was an article that Robert H. Salisbury published in the American Journal of Political Science in 1975. The article, named Research on Political Participation, opened the way to the analysis of public participation as a phenomenon far larger than election: "participation is understood to involve several quite different types of activity and of activists, and also to vary according to the institutional setting in which it occurs" (Salisbury, 1975).

Salisbury (1975) distinguishes up to three lines of intellectual usage of political participation, which are part of the theoretical foundations in our times:

1) Political participation is regarded as a legitimizing act.
2) Instrumental participation. Here participation is seen as a necessary way of gaining political power.
3) Participation as a solvent of social conflicts.

After Salisbury's article, other models to explain the uses of political participation had been created. However, regarding local politics we are taking as a referent the distinction made by Zittel (2007a; 2007b), Font (2003) and Salisbury (1975). Following these scholars, four strategies of empowering local democratization had been identified:

1. **Integrative democratization**: In this model institutions are a factor that shapes goals and perceptions of individuals. Democracy must be learnt and this can be ensured only through relevant institutional frameworks that empower people by educating them. Here participation is regarded as a "democratic school" for citizens (Zittel, 2007b).
2. **Expansive democratization**: This strategy aims to increase the utility of political participation by expanding rights to participation. Expanding rights to participate has qualitative rather than quantitative connotations. It cannot increase solely by increasing the number of opportunities or channels to participate but rather increases by allowing for certain forms of participation in contrast to others (implement direct democracy or making binding decisions, more than consultative and deliberation instruments).(Zittel, 2007b)
3. **Efficiency oriented democratization**: Here Zittel stresses a conception of political institutions as incentive systems that patterns the player's strategic behaviour. The basis being that political apathy is a result of a negative cost-benefit effect. So the strategy of efficiency-oriented democratization sees the solution as lying not in increasing the benefits of participation, but rather in lowering costs (Zittel, 2007b).
4. **Instrumental participation**: Participatory processes are implemented to legitimise or strengthen either local elected or local stakeholders. This model usually attracts citizens who are most interested in participating, fostering the participation of

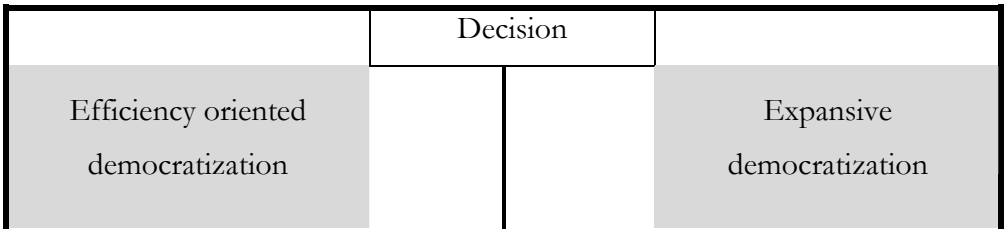
organised groups to the detriment of the capacity of non-organised citizens to participate (Font, 2003; Salisbury, 1975).

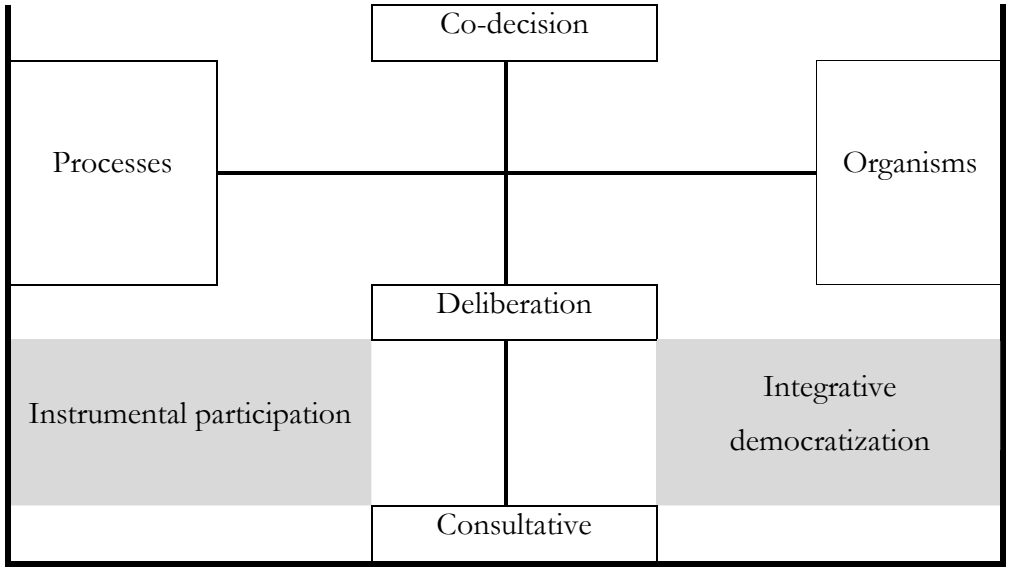
Whereas we want to follow analytical approaches, trying to avoid as much as possible normative ones, we are focusing on those four strategies mentioned above. These four strategies of democratization could allow us to define some models of local participation, having always in mind that they include components or categories without assuring relation among variables (Judge et al., 1995). In this sense, even if our work has a strong empirical basis, the model construction in this stage of the work tends to be deductive, more than inductive[VII] , and with limited effects.

Because this is a preliminary exploration, simple models of analysis were chosen to allow future further study on the material. To classify the data, models were constructed to classify the data using the categories of commitment envisaged by 611 municipalities[VIII], both for organisms and processes. Nevertheless, we must emphasize that models "are representations or stylized and simplified pictures of reality. They include the most important components or categories, but they do not posit relationships among variables" (Judge et al., 1995).

As analyzed in the theoretical assumptions, we are particularly taking two main axes in order to create models of local participation. In the vertical one we find the degree of public involvement in the decision-making process, from consultation (low coercion) to decision (could be binding). In the horizontal axis we can find the stability of institutions (in the left wing we find processes, in the right wing we find stable organisms). As can be seen in the figure below, the modelisation of the democratization of policy-making processes at the local level -according the data we count with-, can be presented as follows:

Figure 1. Models of democratization





Source: own creation.

Obviously, it would be impossible to fit each of our 611 municipalities clearly in one or another model. For correctly adapting models and municipalities we need qualitative analysis and to go in depth into the reality of each municipality. Moreover, not all of 611 had created participatory processes.

3. Identification and characterisation of a heterogeneous reality

In order to have in mind a wide landscape of what we are talking about, it seems necessary to make some general descriptions concerning the participatory processes in Catalan municipalities. If we assume that one of the most important topics in local governments is related to the growing pressures to incorporate participatory and direct forms of democracy, we must analyze its evolution and present situation.

In absolute numbers we count up to 874 instruments of public participation at local level from 1978 to 2008. As Table 2 shows, these instruments are distributed following these patterns: 156 municipalities that had engaged a stable organism of public participation; and up 206 municipalities had engaged some kind of participation process. In disaggregated terms (classifying municipalities by having a single instrument, both of them or without an instrument), 90 municipalities had only created stable organisms, 140 municipalities had only created processes and 66 municipalities had created both types of

instruments. That means that almost a half of the Catalan municipalities of more than 500 inhabitants have already created some kind of participatory instrument by themselves.

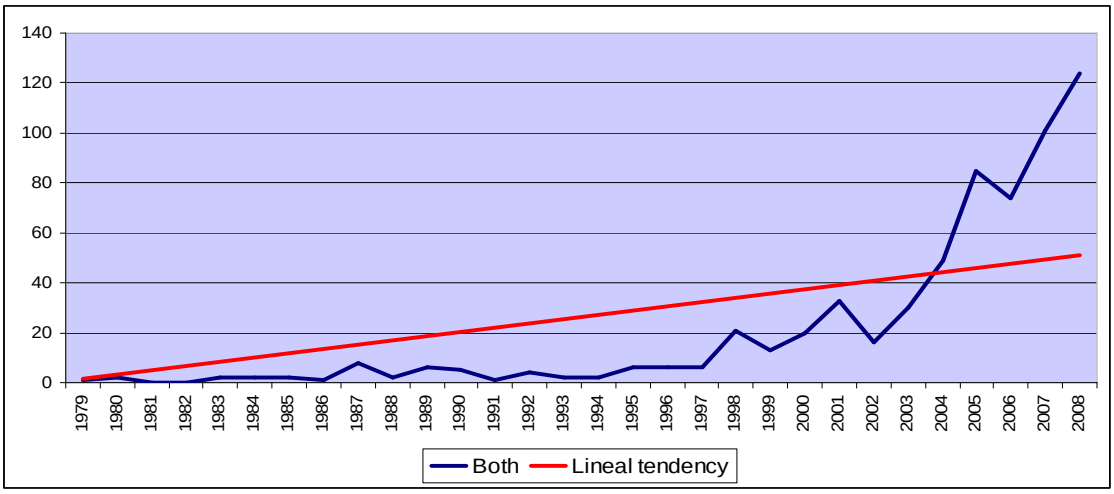
Table 2. Distribution of instruments by municipality

Total 1978-2008		**Number of municipalities**
Organisms	549 (62'8%)	156
Processes	325 (37'2%)	206
Total	874 (100%)	
Instrument	**Municipalities**	**% over 611 municipalities**
Only Organisms	90	14,80%
Only Processes	140	22,90%
Both instruments	66	10,1%
Total	296	48,4%
Without instruments	315	51,6%

Source: own treated data from Pi i Sunyer Foundation

Regarding the evolution in time from 1978 to 2008 the increase of these instruments has really been, in general terms, impressive in absolute numbers. The evolution by year shows a kind of participation euphoria starting from late 90s.

Graph 2. Evolution in absolute numbers in time from 1978-2008, both instruments added



Source: own treated data from Pi i Sunyer Foundation

As graph 2 shows, the creation of participatory instruments really began in the late 90s. Until that moment, participatory processes were not part of the local political agendas. In fact, if we take from 1978 to 1997 years, a mean of 1.52 participatory processes were created each year. However, if we take the mean from 1998 to 2008, the mean increases up to 25.8 participatory instruments created each year. Another relevant pattern of institutional behaviour, but not shown in the previous graph, is that the increase is not distributed in a homogeneous way among instruments. The first instruments that show an increase are the more stable ones (organisms), while the increase of processes began later, but seems stronger.

Regarding the degree of public involvement in the decision-making process, first we have to consider a methodological point. All organisms and processes could include several own degrees. For example: the first stages of an education plan could consist of consultation, and afterwards there would be some phases related to the decision itself. It means that the same process could include first a deliberation stage, and afterwards a co-decision stage[IX]. In general terms, the large majority of both instruments are embedded in the consultation and deliberation stages of the policy-making process, while co-decision and decision are real laggards. So, in a broad sense, the public involvement in the policy-making process has a low political impact on decision-making process.

Table 3. Level of involvement in policy-making process

		Organisms	Processes	Total
N	Valid	524	313	837
	Missing	25	12	37

Both instruments							
Involvement		N	%	Involvement		N	%
Consultative	no	140	16,7	**Co-decision**	no	662	79
	yes	**697**	**83,3**		**yes**	**175**	**21**
Total		837	100	Total		837	100
Deliberation	no	547	65.3	**Decision**	no	813	97,1
	yes	**290**	**34.7**		**yes**	**24**	**2,9**
Total		837	100	Total		837	100

Source: own treated data from Pi i Sunyer Foundation

Taking all the instruments together, 83.3% of them are of a consultative nature in one or another phase; 34.7 % are of a deliberative nature; 21% allow citizens to decide with elected; and finally, only 2.9% have an exclusive decisional nature.

If we divide the analysis by instrument, we find some significant differences. The distributions of the percentages mentioned above are somehow influenced by the type of instrument. The main differences we find are focused on the co-decision involvement. Processes seem to be used in a different way than organisms. In fact, deliberation and co-decision are exchanged. Only 10.9% of processes are created for deliberation, while 34.5% of them are created for co-decision processes. Inversely, 12.7% of organisms are devoted to co-decision, while 48.9% of them are created to deliberate. So, processes seem to be more used as instruments for helping elected decisions than organisms, which are more related to deliberative and consultative issues.

We are focusing now in the distribution of instruments by policy domains. Here we find that there is not a pattern of similarity in the use of instruments by policy domain. As table 4 shows, heterogeneity is the dominant factor, and the use of these instruments does not seem to have any clear pattern of specialization, except urbanism -which is strongly

related to processes, up of 52.2%-. None of the other policy domains follow any clear pattern. But, there is still another fact that makes difference. From the total of policy areas that are affected by those instruments, processes have a mean of 1.65 policy area per instrument, while organisms have a mean of only 1.04 policy area per instrument. That means that processes are more all-purpose oriented, whereas organisms are closely focused on a unique domain.

Table 4. Policy domain* by instrument

Processes	%	Organisms	%
Urbanism and territory	52,2	Education	15,1
Public spaces	21,7	Global	12,6
Strategic planning	13,2	Culture	10,7
Sustainability	11,3	Environment	8,3
Young people	11,3	Aged people	6,2
Others	11	Young people	5,8
Women	6,9	Welfare	5,6
Budget	6,6	Urbanism	5,1
Education	6,3	Health	3,2
Living together	6,3	Women	3
Social cohesion	5	Immigration	2,4
Aged people	3,8	Others	25,8
Childs	3,8		
Equality	3,1		
Immigrants	2,5		

N	Proc.	Org.
Valid	318	531
Missing	7	18

**the % does not sum up to 100 because each instrument could have more than one policy domain.*

Source: own treated data from Pi i Sunyer Foundation

Despite this ambiguous distribution, it is possible to notice that, on one side, organisms had four policy domains that reached the barrier of 10%: global approach (12.6%), culture (10.7%), education (15.1%) and others (25.8%). On the other, processes had six policy domains with more than a 10% of presence: Strategic planning (13.2%), public spaces (21.7%), Urbanism (52.2%), sustainability (11.3%), young people (11.3%) and others (11%). Given this fact, we can deduce that both instruments are somehow dedicated to different topics: processes slightly more devoted towards everything concerning urban planning and development, while organisms are slightly more committed towards topics related to fundamentals of living together (education, culture, and global approaches of the city).

Another important factor, besides policy domains and public involvement, is the territorial scope of these participation instruments. Our territorial scope is divided into three possibilities, going from the whole city to the neighbourhood. Here we are focusing our attention on the dimension of problems that face participatory instruments[x]11. In other words, it is not the same being demanded to participate to "solve" or discuss something related to your neighbourhood (whether we should plant cork oaks or only green grass in the main square), than something related to the whole city (something like, where and how to place the rubbish incinerator).

Table 5. Territorial scope of policy instruments

Processes		N	%	Organisms		N	%
City	no	52	16,3	**City**	no	36	7,1
	yes	**267**	**83,7**		**yes**	**472**	**92,9**
	Total	319	100		Total	508	100
District	no	313	98,1	**District**	no	499	98,2
	yes	**6**	**1,9**		**yes**	**9**	**1,8**
	Total	319	100		Total	508	100
Neighborhood	no	285	89,3	**Neighborhood**	no	493	97
	yes	**34**	**10,7**		**yes**	**15**	**3**

	Total	319	100		Total	508	100

N	Organisms	Processes
Valid	508	319
Missing	41	6

Source: own treated data from Pi i Sunyer Foundation

The territorial scope of the Catalan participatory processes is mainly focused on a large territorial scope, the whole city. Possibly to prevent the NIMBY effects. NIMBY could be defined as: "the protectionist attitudes of oppositional tactics adopted by community groups facing an unwelcome development in their neighbourhood" (Dear, 1992). Obviously, it is possible to find NIMBY effects affecting the whole city (big infrastructures with a general impact), but having more dissipated interests in an extensive participatory process could avoid disputes and quarrels among close neighbours. However, discussing and participating in terms of the whole city could discourage individual citizens from participating in it, whereas big associations and organised stakeholders could have more incentive to take part[XI].

3.1. Relevant variables

Arriving at this point, after a preliminary description of the complex landscape of participatory instruments created by local governments in Catalonia, we want to analyze some other relevant variables that may affect the increase of these political phenomena. We want to test some exogenous variables that may affect the process of institutionalisation we are analyzing, focusing on those identified in the scientific literature. They are mainly grouped around three concepts: classical ways of participation; size and population variables; and political and institutional factors.

First of all we will take some classical participation variables (elections) as potentially explanatory of the increase of participatory processes. Several scholars pointed to the dramatical decrease of participation in local elections, and the absence of a local political clear interpretation of these results in aggregated terms (Botella, 1992; Capo Giol, 1991). In this respect, other scholars claim that this lack of classical participation needs to be

compensated and complemented by other participation channels (Blanco & Mas, 2008). Even "The introduction of formulas of citizen participation beyond elections should not only preserve but also foster the capacity of representation of the diverse interests in public decisions" (Font, 2003). So, the decreasing rates of participation should have an influence on the rise in participatory instruments.

Another set of relevant variables regarding local politics are still those related to size and population. The discussion about size, efficiency and democracy is a "perpetual" ongoing debate (Keating, 1995). Regarding specifically democratic issues, the key point is "what structures can best secure citizen control over government and proper accountability" (Keating, 1995). In other words, smaller units will enhance local democracy, while larger units -being remote from the citizen- discourage active participation and empty the concept of local democracy of its content (Keating, 1995). In this set of variables we want to analyze whether the size of the Catalan municipalities has an impact on the institutionalisation of participatory processes. If Keating's assumptions are correct, larger municipalities should have more participatory processes than smaller ones.

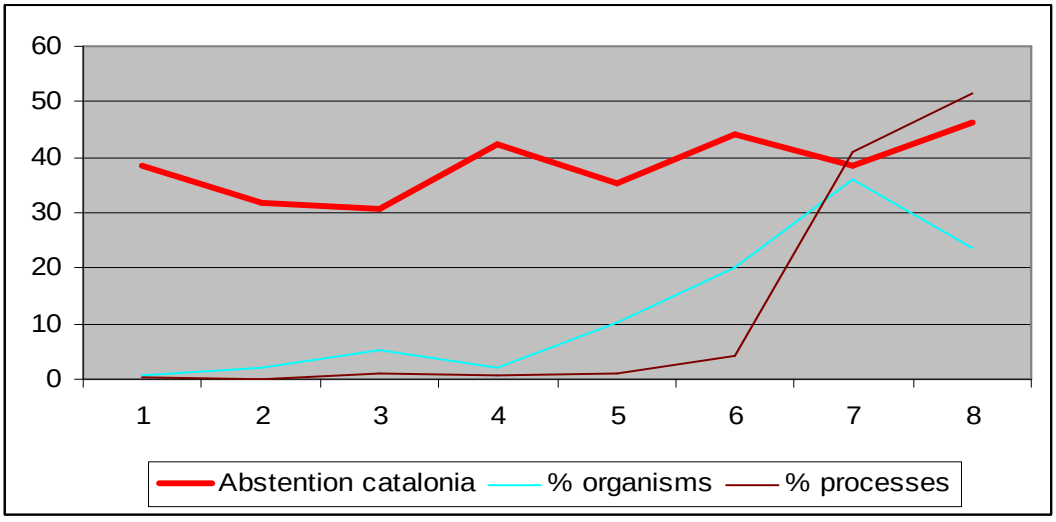
The last packages of endogenous variables we want to test are those related to political factors. First, we are going to analyse whether the political tendency of the mayor has any relevance. We suppose that municipalities directed by Mayors belonging to left parties are more prone to establish such mechanisms, while Mayors belonging to right parties do not. The second variable we are going to analyze is the top-down processes engaged by the regional government. Basically we are trying to find out whether the creation of the "Direccio General de Participacio Ciutadana" has been somehow relevant in the institutionalisation of participatory processes at local level. Some scholars wonder if it is possible to promote bottom-up involvement by means of top-down strategies. The danger being always: "Is democratization policy a program for strengthening popular political participation or for controlling it?"(Aars, 2007)

4. Results and discussion

To what extent is abstention a main variable for understanding the increase of participatory instruments? The analysis of correlations illustrates that there is not a correlation between the percentage of abstention in electoral processes and the creation of participatory instruments in absolute numbers. In fact, none of the variables gives a significant or moderate correlation (except organisms and processes among them). However, the fact that we count with a small N -only eight elections- could introduce some bias, and maybe we will have to wait for some more.

These results allow us to tentatively assert that normative pressures coming from stakeholders have been probably more effective in the creation of participatory processes than the real fact of abstention. As graph 3 shows, abstention as a percentage remains almost constant, while the percentage of creation of participatory instrument by legislature increases during the sixth local election period. So changes in the creation of participatory instruments are not related to electoral abstention in aggregated terms. If abstention does not change in a spectacular way, it may mean that the real change is based on the perceptions of it. Scholars and politicians may analyze now abstention as a problem, while 20 years ago they did not, and it was not necessary to do anything about it.

Graph 3. % of abstention and % of creation of participatory instruments by legislature



Source: own treated data from Pi i Sunyer Foundation

As mentioned above, the number of inhabitants could appear as a variable affecting participatory processes. Following Keating's assumptions, probably smaller units do not need to empower local democracy. By contrast, large units will need more participatory instruments to involve citizens in politics and democracy.

We have used the same division as is envisaged in the Basic Law on Local Government, but we have incorporated additional sub-divisions into the lower ranges to avoid the accumulation of cases in one type. As mentioned above, the Catalan municipal map is full of smallholdings and really fragmented. This accumulation of town councils in the lower bands made it preferable to introduce an additional division to ensure a more detailed approach. The municipalities were therefore divided as follows: 500-1000, 1001-5000, 5001-10000, 1001-20000, 20001-50000 and more than 50000.

As table 6 clearly shows, population matters. There are main differences among instruments and due to the size of the municipality. Taking all 611 local governments together, the % of those that engage participatory processes vary by size and instruments. In general terms, larger populations tend to use more stable organisms than processes, while small municipalities tend to use more processes than stable organisms.

Table 6. % of use of instruments within population

Localities by population	Processes	Organisms
	% of localities having at least one	% of localities having at least one
500-1000	30,7	9,2
1001-5000	35,5	17,9
5001-10000	42	45,9
10001-20000	56	52,9
20001-50000	55,2	78,1
over 50000	84,2	100

Source: own treated data from Pi i Sunyer Foundation

One of the most significant data is that 100% of local governments of over 50,000 inhabitants have at least one stable organism of participation, and it is also relevant that a 78.1% of those between 20,001 and 50,000 do so. In general, the percentage increases with population bands. Regarding small municipalities, it is important to note that they prefer processes rather than organisms. So, there's a kind of specialisation of instruments according to population. Indeed the public involvement tends to increase the more the number of inhabitants diminishes. Big cities tend to use stable organisms with low public involvement, while small cities use more processes with "stronger" local involvement.

Regarding political and institutional variables, in Catalonia there are up to five main political parties. Two of them could be classified as "right" parties (CiU and PP), and three of them could be classified as "left" parties (PSC, ERC and ICV). For the issue of participation we are not taking into account the other "cleavage" that affects the political parties in Catalonia, which is "Catalan nationalism" and "non Catalan nationalism". We believe that any relevant relation will be focused on the "right-left" axis.

There is no relevant relation between political party and the engagement of participatory processes. The only parties that seem to have special characteristics are those placed in the extreme of the "right-left" axis: ICV (green and post-communist party) is very engaged in participatory projects while the Partido Popular is very reluctant to engage in participatory processes. However, they have a very small N in comparison to the other three parties. This fact could introduce some bias in interpretation.

In general terms we cannot identify clear patterns of behaviour, but it's possible to deduce that the PSC (the party which governed Barcelona City Hall and the Regional Government in 2008) had the "equilibrium" among the two extreme cases (PP and ICV) while the other two parties (CiU and ERC) were more sceptical about participation. It is also relevant that processes are better accepted than organisms, in terms of a higher percentage of implementation, all parties considered.

Table 7. % of municipalities by political party having at least 1 instrument

Political party of the Mayor	Processes %	Organisms %	Mean of %
ICV	85,7	50	67,9

PSC	45,3	42,7	44
CiU	37,4	24,9	31,1
Others	35,6	23,9	29,7
ERC	37,8	16,2	27
PP	0	25	12,5

Source: own treated data from Pi i Sunyer Foundation

The last political variable we want to take into account is the creation of the "Direcció General de Participació Ciutadana" (DGPC). We must remember here that it was created in January 2004, only a few months after the victory of a coalition of three left parties (PSC-ERC-ICV) for regional government, after 23 years of government by the same party, CiU. This change represented a political shift in several topics, and one of them was the idea of promoting large and extensive participatory processes. This General Direction is conducted by ICV, one of the most engaged political parties in these issues (and as well their local Mayors, as shown above).

By analyzing the role played by this governmental agency, we want to take into account whether the evolution of the institutionalisation of local participatory instruments is somehow conducted by a "top-down" policy. In order to understand the impact of this governmental agency, we are focusing on the year of creation of the first participatory instrument engaged by each municipality. So, as graphic 4 shows, the distribution of "newcomers" to participatory engagement has clearly risen since 2003. Before 2003, participatory mechanisms were not in the local government's agenda. This figure allows us to consider that there is a relationship between the creation of the agency and the political will to promote local democracy at local level. Moreover, if we take the mean (both processes and organisms) of "newcomers" from 1979 to 2003 and the mean from 2004 to 2008, the numbers speak for themselves. In the last 5 years, almost 43 new municipalities –each year- engaged for the first time a process or an organism empowering local democracy.

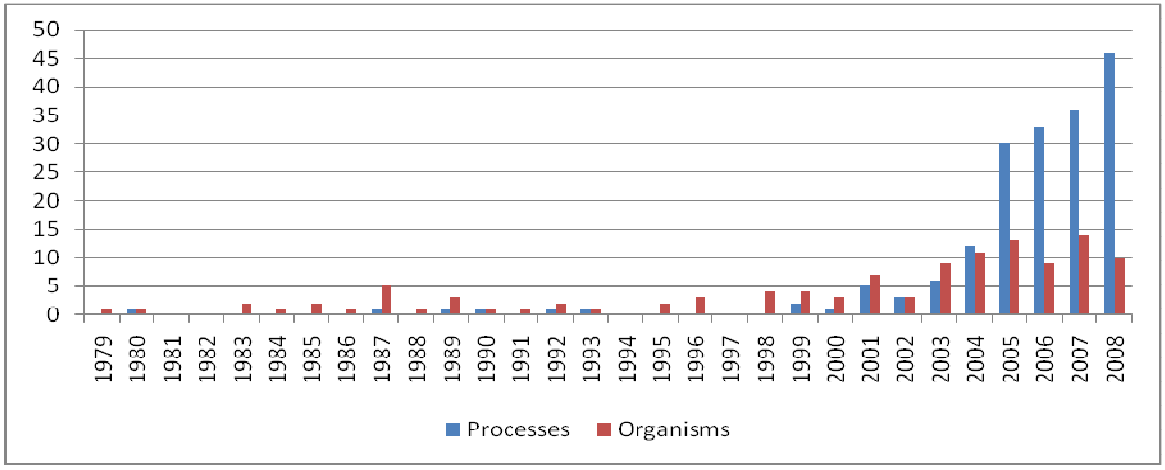
Table 8. Number of newcomers per period and instrument

	1978-2003	2004-2008

	Processes	Organisms	Processes	Organisms
New comers	23	57	157	57
Mean	1,0	2,38	31,4	11,4
Total mean	3,3		42,8	

Source: own treated data from Pi I Sunyer Foundation

Graph 4. Absolute numbers of first participatory instruments created by year



Source: own treated data from Pi I Sunyer Foundation

These data speak for themselves but the final proof of the impact of the Catalan government's top-down policy is the correlation analysis. As table 9 shows, there is a significant, and very strong, correlation among the presence or absence of the DGPC and the creation of new instruments. It is necessary to note that the statistical correlation is strongly positive: 0.849 for organisms and 0.'923 for processes. That means that there's a very strongly positive linear dependence between the presence of the DGPC and the arrival of newcomers.

Table 9. Correlations between year of creation of first participatory instrument and presence of DGPC.

		Year of creation Processes	Year of creation Organisms	Presence DGPC
Year of creation Processes	Pearson Correlation	1	,826**	,923**
	Sig. (2-tailed)		,000	,000
	N	30	30	30
Year of creation Organisms	Pearson Correlation	,826**	1	,849**
	Sig. (2-tailed)	,000		,000
	N	30	30	30
Presence DGPC	Pearson Correlation	,923**	,849**	1
	Sig. (2-tailed)	,000	,000	
	N	30	30	30

**. Correlation is significant at the 0.01 level (2-tailed).

4.1 Discussion

The main objective of the paper was to study how participation in local Catalan Governments is being institutionalised. To what extent institutional processes conducted and created by local governments show common patterns of behaviour. We decided to take a picture of the state of the process up to 2008, following the models and variables identified by the literature. Summarizing briefly, the main findings of our introductory research allow us to identify some patterns of local institutional behaviour regarding the democratic empowering process carried out in Catalonia.

Is it possible to fit our data within the theoretical models mentioned above? Obviously the response is going to be partial and incomplete, because we are analyzing aggregated data. Rigorous "micro analysis" could partially confirm, or even deny, some of our conclusions. Recognition of municipal autonomy extends to what is known as the

principle of self organisation, which reinforces the freedom of municipalities by letting them set up their own organisational structure. This opens the door to a plurality of forms that is difficult to embed in any of the models previously distinguished. Nevertheless, following the two main axes we have identified (see figure 1), we can tentatively assume that the model of democratization that is being implemented by local governments is somewhere in between the "integrative democratization" and the "instrumental participation model".

After the statistic analysis of data, it is now clear that the participatory tools created are more stable than precise interventions, and require little public involvement. In total we count 62.8% of organisms, of which only 2.9% and 12.7% are embedded in decision or co-decision stages of the policy-making processes. Moreover processes (representing 37.2%) are embedded largely in a consultative stage (83.3%). Even so, processes are more used in the co-decision stage than organisms, allowing more qualitative participation of citizens. In other words, very few organisms are involved in the decision stage. The figure of processes involved in the co-decision stage is only slightly higher.

Despite the larger number of existing organisms, processes are expanding faster. The use of "ad hoc" instruments seems to be more accepted in recent years, and further analysis is needed in order to determine if its adscription to the co-decision level of public involvement is also increasing.

Regarding policy domains, we cannot conclude any solid pattern of use in general terms. We can deduce that processes are more all-purpose oriented, whereas organisms are focused on a unique domain. Besides, organisms and processes are dedicated to slightly different topics: processes are slightly devoted to urban planning and development, while organisms are more related to fostering social groups and creating social capital. Moreover, both kinds of instruments focalize participation on the whole city, avoiding small units (and also small interests) like districts or neighbourhoods.

We were also willing to interpret some other political variables that could affect the institutionalisation of participatory processes. Firstly, abstention. According to some scholars, the decrease of "classical" participation will create the necessity of promoting other participatory channels. Our findings tend to contradict this vision. Abstention in local elections does not seem to be related to new participatory instruments. We are more inclined to consider that what has really changed is the perception of abstention in

politicians and governments. Scholars and politicians see now abstention as a problem, whereas 20 years ago it was not. Trying to justify the political need to empower democracy, abstention is used more as a normative argument, than a real causal argument.

Population matters. The bigger the city, the more stable and more consultative are the instruments implemented. A large majority of big cities have more organisms than processes, and more related to consultative and deliberative stages. Contrarily, small cities use fewer organisms but more processes, and are slightly related to co-decision stages.

Finally we found out that politics (in terms of party affiliation) does not really matter. Local factors, more than the general political mood, could explain the institutionalisation of participatory processes. Related to party affiliation, we find the establishment of one particular top-down process to empower local democracy as a relevant explanation. In fact, the apparition of the "Direcció General de Participació Ciutadana" has been important in terms of the enlargement of number of municipalities involved in creating participatory instruments. We can affirm that the DGPC has been determinant in the increase of municipalities offering new channels of participation. The question remaining is what kind of participation has been encouraged by it?

Local autonomy prevents very intrusive top-down policies. The DGPC only has promoting capacities; and within this framework, the DGPC has promoted the creation of more processes than organisms -less expensive and with smaller bureaucratic needs, than stable organisms-. The DGPC has legal and political barriers to impose a vision and a direction over local governments. The final decision over contents and effects of participatory policies created by municipalities belong only to its political wishes. To find out the reasons why the institutionalized model created until now lies somewhere in between the "integrative democratization" and the "instrumental participation model", we need to explore further both the top down processes engaged and the adaptation of those policies to the reality of each local government.

In any case it seems that the question of why elected politicians want to share the power, and thus limit themselves, needs to be reformulated. It's true that local elections are increasingly creating participatory processes; but what is the sense of all that if low impact on the policy-making process is the norm?

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[I] As the classic distinction among "conventional" and "non conventional" political activities recognizes (Vallès, 2006).
[II] Local elections all take place at the same time throughout Spain. It is true that participation in local elections is decreasing in aggregated terms, but it's nuanced by the size of the municipality (in small municipalities we find high rates of participation whereas abstaining prevails in large cities).
[III] Note the difference with the total number of municipalities in Table 1. This is because the last municipality, which raises the sum to 947, was created in May 2010
[IV] The Spanish Constitution (arts. 9.2, 6, 23, 29, 87.3 and 92), the Autonomous Statute of Catalonia (arts. 29 and 122), the Spanish law of basis of local government (known as LBRL arts. 1, 18, 24, 69, 70bis, 71, 72). Moreover, Barcelona has its own regulations, and the government of the province of Barcelona encourages the creation of participatory processes
[V] And, of course, it only affects local competencies.
[VI] By conceptual framework we mean "ways of looking at or conceiving of an object of study. They provide a language and a frame of reference through which reality can be examined and lead theorists to ask questions that might not otherwise occur"(Judge, Stoker, & Wolman, 1995)
[VII] "Empirical theory can also be deductive, starting from a premise or set of premises and deducing conclusions about causal relationships and behaviour from these premises. The premises may or may not be empirically valid, but utilizing them produces plausible results about and an understanding of (that is, explains) reality" (Judge et al., 1995).
[VIII] The universe of our study covers municipalities with more than 500 inhabitants. That means 611 Catalan municipalities.
[IX] This is because data shown in most of the tables changes in comparison to the total number of instruments.
[X] Again here we can find processes or organisms that have several territorial scopes.
[XI] The costs of information are higher for individuals than organized associations, which in fact is Font's main argument: "the predominant participation model has fostered the participation of organised groups to the detriment of the capacity of non-organised citizens" (Font, 2003).

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Regional and Local People Consultation through Referendum

by

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Abstract

The Author analyses the normative framework and the use of the referendum in Italy, at regional and local level. According to the Author, this level of the analysis could even be used as a preliminary phase for studying people's 'consultation' in general. For this reason, the article contains a brief digression on the development of local referendums in Italy, before and after the beginning of the Republican regime. The article also contains a brief description of three particular types of referendum, i.e. the regional referendum, the referendum for territorial modifications and the local referendum. The conclusion reached is that local and regional referendums are midway between the principle of representative democracy and the needs for direct democracy, and can therefore be a useful means in the study of the functioning of the referendum as a whole. This makes it crucial that the authorities take into account the results of the referendums when taking decisions. It is also concluded that the scenario of different referendums in Italy at local and regional level is very heterogeneous and requires clear rules and more widespread information among the population

Key-words

Italy, local/regional, referendum, direct democracy

It is to be preliminarily noted that the present issue develops between the traditional conflict between the direct and the representative democracy. In fact, it has been traditionally submitted that small local contexts could represent an ideal testing ground for the use and implementation of certain institutes of direct democracy. In particular, the first proposals in this direction have been submitted by the progressive movements, between the 19th and the 20th centuries.

1. The first legislative provisions

The first legislative provisions relating to the introduction of such institutes were contained in the norms by which the public services were attributed to the Municipalities and the Provinces. Art. 13 of the Law No. 103/1903, in particular, initially provided for a mandatory referendum for such attribution of services to the Municipalities (no referendum was, on the contrary, provided for the attribution to the Provinces). In any case, this provision was later modified by art. 10 of the Royal Decree No. 3047/1923, which provided that the referendum could only take place if there was opposition to the proposal of the Municipality Council, either by one-twentieth of the electors or by one-third of the members of the same Council.

A few years later, Royal Decree No. 2578/1925 (the Consolidated Law on the direct assumption of public services by the Municipalities and Provinces) provided a different procedure. After a favourable decision by the Provincial Government, when opposition is raised either by one-twentieth of the electors of the Municipality or by one-third of the members of the Municipality Council, the Resolution of the Council is subject to the vote of the electors resident within the Municipality, called to vote by public notice (published by the Municipal Government at least 15 days before the first call).

The constituents, according to the above provision, were called to vote either "YES" or "NO" on the issue relating to the direct assumption of the service by the Municipalities (again, the assumption of services by the Provinces was not subject to any referendum). If the result of the consultation was in opposition to the Resolution of the Municipal Council, the proposal for that direct assumption could not be made again for

three years, unless one-quarter of the electors requested to do so, following the specific procedures provided (in any case, the proposal could not be submitted again for one year after the voting).

2. The Constitutional Assembly

The members of the Constitutional Assembly mainly discussed the issues relating to the national abrogation referendum and agreed on the idea that the referendum in general – when used carefully and in specific circumstances – would have represented a very useful means for the direct expression of the will of the people. Other members underlined that it was useful and acceptable when local problems were at issue, because they were of direct concern for the citizens.

Nonetheless, doubts arose during the debate on how to regulate such means, and the solution finally selected was to delegate such choice to the Regional Statutes. The Constitution (art. 123), in fact, provides that the Regional Statutes regulate the referendum on laws and administrative measures and provides for popular consultation on the modifications of the territories of local entities.

3. Regional Referendum

During the 1970s, the Regional Statutes provided for the use and the discipline of the referendum, but substantially repeated what was stated in art. 123 of the Constitution. They introduced abrogation and consultative referendum, but the latter institutes were used very rarely.

The Constitutional Court, on the other side, provided an important clarification in relation to the binding nature of such institutes and relating to the types of issues which could have been submitted to the referendum; in fact, it was clarified that they could only relate to matters of local and territorial concern, not to national interests.

In this respect, the main case to which we must refer is the one concerning the referendum in Sardinia on the location of foreign military bases.

The Court clarified, in its Judgment No. 256/1989, that consultative referendums

are not binding from a formally legal point of view and are not part of the process for the expression of the will of the authorities that organize them. Nonetheless, they shall be considered as an expression of the political participation of the people, based on articles 2 and 3 of the Constitution. Such expression possesses, according to the Court, a strong political nature and is relevant for evaluating the strength of the public authority's will compared to that of the community. In addition, such expression is also relevant for evaluating political responsibility, in relation to the decisions that the authority is willing to carry out.

The results of the referendum could, moreover, influence the decisions to be taken in the future and the discretional choices of the central bodies. In any case, it is necessary that the whole national electorate is called to decide on the main issues relating to general interest. The regional consultative referendum cannot have the same importance of the national consultative referendum, considering also that it only involves the regional population.

For the same reasons, specific limits are applied to the regional consultative referendums, in order to avoid the risk that they negatively influence the constitutional and political order of the State.

It is to be considered, furthermore, that after 1999, the new regional statutes provided a substantial widening of the role of the referendum.

The Constitutional Court, in its judgment No. 372 of 2004, clarified that the referendum is – according to the explicit provision contained in art. 123 of the Constitution – part of the mandatory content of the regional Statutes. Therefore, Regions are allowed to regulate the use of the referendum provided for in the Constitution, also modifying such institute, because the Regions can freely choose forms, ways and criteria for the participation of the people in the mechanisms of democratic control on the regional decisions and resolutions.

However, Regions have only made limited use of this power. In some cases, they have called abrogation referendums substantially identical to the national ones, with a modification of the validity quorum in order to grant a higher effectiveness (see the case of Tuscany). In other cases, regional Statutes have provided for consultative referendum, while only in the case of Lazio Region has a referendum been created by which the population can submit proposals to the Council, that the Council is then obliged to

examine.

Art. 62 of the Lazio Regional Statute provides that the same subjects which have the power to propose a referendum for abrogation can also submit a proposal for a regional law to be subject to a referendum. If the regional Council does not vote on the proposal within a year of declaring the admissibility of the referendum, the Presidency of the Region shall use its own decree to call a referendum on the proposal submitted.
Therefore, the Statute only allows the use of the referendum where the regional Council has been inactive, while it does not regulate cases in which the Council votes on a proposal submitted by the population, but with (possibly major) amendments. This *vacuum* makes it difficult to consider such institute as a proper form of *popular initiative*.

Anyway, a general look at the new regional statutes reveals a quite interesting scenario, especially in relation to the abrogative referendum. Concerning the acts, which can be subject to referendum, it is possible to see that in some regions they are administrative measures or regulations (Abruzzo and Marche), while in almost all the others it is also possible to ask for the abrogation of regional laws. As regards the subjects enabled to file a request for a referendum, they are generally a certain percentage of the population (e.g., 3.5% in Liguria or 4% in Calabria) or certain number of inhabitants (e.g. 10,000 in Umbria, 20,000 in Marche or 60,000 in Piedmont), or alternatively a certain number of local (provincial or municipal) governments (e.g. 2 in Calabria, 10 in Emilia Romagna and Lazio), while in some cases they represent a certain percentage of the regional population (as it is, e.g., in Marche, Piedmont and Abruzzo). Each regional statute provides for specific exclusions from the scope of referendums, such as the provisions of the statute itself (in all the regions), financial and budgetary laws, elections, and regulations concerning the functioning of the regional bodies, etc. The quorum to be reached is usually the majority of the citizens possessing the right to vote, while in some cases (Tuscany) it is the majority of the number of citizens who participated at the previous elections.
In relation to the consultative referendums, on the other hand, they are usually provided for creating new municipalities or for combining existing ones (Abruzzo, Lazio and Marche), while in other cases they relate to "proposals of specific interest for the local population" (Tuscany, Umbria and Calabria). Also in these cases, the subjects enabled to present proposals are, again, a certain percentage of the regional population and/or a

certain number of local governments, or the majority of the members of the Regional Council.

4. Referendum on territorial modifications

Art. 132 of the Italian Constitution regulates the procedure for the internal modifications of the Italian territory. In particular, it provides that the combining of existing Regions or the creation of new Regions (with a minimum population of 1 million inhabitants) can be decided through a Constitutional Law (i.e. a law approved through the special procedure provided by art. 138 of the Constitution), after the consultation of the Regional Councils, when it is requested to do so by a number of Municipal Councils which represent at least one-third of the population concerned and when the proposal is approved by the majority of such population through a referendum.

Similarly, Municipalities and Provinces willing to be separated from a Region and aggregated to another Region, can do so when such change is approved – through a referendum – by the majority of the population of the Provinces and Municipalities concerned, by means of a national law, after consultation of the Regional Councils.

According to art. 133, the modification of the provincial territories or the creation of new Provinces within a Region can be decided through a national law, after the proposal of the Municipalities and after consultation of the Region. The Region itself, after having consulted the population concerned, can create new Municipalities within its territory and modify their territories and names.

As regards the provision contained in art. 132 of the Constitution, it should be noted that the implementation law (see articles 44 ff. of the Law 352 of 1970) has made the procedure substantially more difficult by interpreting the concept of "population concerned" – which shall be consulted in order for the modification to be approved – as meaning the whole population of the Region.

The Constitutional Court, in its judgment No. 334 of 2004, stated as follows. Considering that the referendum provided by art. 132 aims at verifying that the population of the local authorities concerned actually approves the modification, it shall be concluded that the proposal for the referendum can only be approved by that population and not by

representatives of other population. The reform of the discipline aimed at avoiding that the majority of a population, which is not directly concerned by the territorial modification, could oppose or void the intention of the communities willing to become independent or to be aggregated to other Regions.

In any case, the will of other populations is adequately and sufficiently protected and represented in the following phases of the procedure. Considering that the positive outcome of the referendum only has a merely consultative nature, it does not bind the national legislator, which has discretion on the decision relating to the territorial modification. Furthermore, considering that the procedure for the approval of the national law includes consulting the Councils of the Regions concerned, this is a phase that will allow for evaluation and for local interests to be represented, whereas they conflict, entirely or partially, with the decision taken on the modification. Therefore, the acquisition and the examination of the opinions of the regional Councils have a strong influence on whether the law on territorial modification is approved.

As regards art. 133, relating to Provinces and Municipalities, a referendum is provided as mandatory but not binding (note that the article also provides for Municipalities to change their name). See in particular the case of the Municipality of Ascea, in Campania Region. The Constitutional Court clarified, in its judgement No. 237/2004, that, even if the principle concerning the change of the name of the Municipality has never been tested in court, the wording of art. 133, second paragraph, does not allow the exclusion of the referendum procedure in such an hypothesis (because it is regulated together with other cases of modifications, where the referendum shall apply). According to the Court, this happens because such hypothesis relates to the name of the Municipality, which is one of the main elements of a local community's identity.

5. The local referendum

The local referendum was substantially developed in the late 1970s, in relation to very important local issues, thus causing the evolution of the so-called *atypical referendum*. In this phase, very important referendums took place, such as the one relating to the location of the Italian-Yugoslavian industrial zone in Trieste, the location of the major energy plants

(Muggia and Lodi), the construction of the incinerator of Cengio, the closure of the historical centres of Rome, Milan and Bologna and for the master plan of Pavia.

What shall be underlined, in relation to such referendums, is that the procedures substantially varied from one case to the other, though all of these referendums only had a consultative nature.

The Regional Administrative Court for Lazio, in its judgment No. 824/1986, stated that the Municipal Councils have the standing to call a consultative referendum on general issues concerning the citizens, in order to assess the will of the electorate and to use the outcome as one of the elements for the decisions of the Council itself. In such way, intervention by private citizens is allowed in the administrative process, an intervention that shall be favourably considered by the administration because it allows a more careful assessment of the interests concerned, through the consultation of the community.

The general provision relating to such referendum is contained in art. 6 of the Law No. 142/1990 (now art. 8 of Consolidated Law No. 267/2000), which states that the Statutes of the Municipalities shall provide for methods of consultation of the population and procedures for citizens to file applications, petitions and proposals aimed at better protecting the collective interests and shall provide the guarantees for their prompt examination. Referendums can also be called after being proposed by a sufficiently high number of citizens. It is nonetheless clarified that such consultations and referendums can only relate to matters forming part of the exclusive competence of the local Authorities and cannot be held simultaneously with local elections.

It can therefore be noted that in the wording of the law of 2000, the legislator demonstrated more *favour* towards the institute, by providing that the referendum shall not only be of consultative nature and by referring to the Statutes for the regulation of the referendum. The types of referendum allowed, therefore, are the ones with consultative nature, referendums containing proposals, and deliberative, abrogative, territorial, confirmative and oppositional referendums. In addition, it is only stated that referendums cannot be held simultaneously with local elections, thus allowing them to be held together with national, regional and European elections (in order to encourage the participation of the citizens). Nonetheless, the referendum can only refer to matters included in the local Authorities' competences.

A very interesting referendum is the one regulated by the Statute of the Municipality of Perugia (art. 20), which provides that the Mayor is obliged to call the referendum (whether it is consultative, propositional or abrogative) on Municipal measures, when he or she is required to do so by a) the absolute majority of the Municipal Council, for the consultative referendum; b) the majority of two or more Councils of District or c) five thousand citizens.

The propositional or abrogative referendums can only be proposed on measures within the competence of the Municipal Council and cannot relate to the following subjects: appointments or decisions relating to individuals, contributions and subsidies, budget, loans, taxes, administrative sanctions and measures relating to the employees of the Municipality, the Statute, the Regulation of the Council, and administrative acts bound by national or regional laws.

The consultative referendum cannot be called on measures relating to taxes and tariffs and cannot take place together simultaneously with provincial, municipal or district elections.

The Statute provides that, after the referendum is called, the Municipality shall abstain from deciding on the same issue as that of the referendum, unless it makes substantial modifications to the subject in the same direction expressed by the proposed referendum.

The abrogative and propositional referendums are valid if the majority of the electorate takes part in the voting and are considered to be passed if gaining the majority of favourable votes

If the consultative referendum has a positive outcome, the Municipal Council is obliged to discuss the issue of the referendum in the course of its first session. If the propositional or abrogative referendum has a positive outcome, the Municipal Council is obliged to adopt the measures for the implementation of the will of the constituents. The assessment of the legality and admissibility of the referendum is carried out by the Institutional Affairs Committee, which shall decide within 30 days.

In lieu of the analysis of the Statutes of the Italian Municipalities it is possible to conclude as follows. There are many different types of referendum but most of them (more than 90%) are of a consultative nature. The initiative is usually attributed to a certain quorum of the members of the Councils or a percentage of the citizens. The constituents

are the residents of the local territory (age limits are set at 16 or 18 years) and the subject of the referendum is limited to local matters, while taxes and appointments are excluded.

It shall be noted that very (too) often the assessment of the admissibility of the referendum is attributed to political bodies (the Municipal Council) and only in some cases to specific guarantee bodies.

As regards the effects of the referendum, it shall be noted that they usually only create a political influence, while attempts have been made to create an obligation on the Municipal Council to decide on the issue.

In any case, the local referendum has not acquired an important role yet, probably due to its lack of binding nature, the lack of interest and participation by the population. Nonetheless, some referendums have had a very important significance in the last decades, for example the one in Rome (15 June 1997) in relation to the privatization of the Centre for the Production of Milk, or the one in Bologna, in 1997, when the issue was the relocating of the main station. In any case, while the referendum has been used several times, the participation of the population was very low (see also the case of the referendum in Livorno, of November 2010, concerning the construction of a new hospital).

Participation of 28/11/2010 H 22,00			
Summary	Males	Females	Total
Registered	66,256	74,234	140,490
Voting	13,880	14,437	28,317
% of the Registered	20.94%	19.44%	**20.15%**
Aged 16-18 years	Males	Females	Total
Registered	1226	1081	2307
Voting	304	271	575
% of the Registered	24.80%	25.07%	**24.92%**

Foreigners	Males	Females	Total
Registered	3736	4736	8472
Voting	117	226	343
% of the Registered	3.13%	4.77%	**4.05%**

6. The future role of the local referendum: conclusive remarks

In conclusion, it is possible to observe that the local and regional referendums may have a very important role in the study and analysis of the relationship between the citizens and the public authorities. This happens because they are located – together with the institution of referendums in general – midway between the principles of representative democracy and the needs for direct democracy. In other words, the local level is very useful for studying how a referendum works because it can represent a very important instrument for the dialogue between the citizens and the institutions. For this reason, it is of crucial importance to guarantee that the results are followed by the authorities; therefore, in order to make sure that local and regional referendums are working and effective, it is necessary that the public institutions that organize them pay attention to the will expressed by the population when consulted by means of referendums.

Secondly, it is possible to note that Italian authorities at all levels have paid much attention to the discipline of regional and local referendums, thus creating a wide set of rules, mechanisms and requirements, which are different from one system to another. Nonetheless, it is necessary to note that, despite a much more massive use of computer systems in the last years, the visibility of "local" referendums is still too low, as is – consequently – the participation of the people. A valid example is the referendum relating to the new line No. 8 in Rome. The voting procedure was online. 83% of the constituents voted "Yes" but only 3,600 inhabitants, out of 2½ million, took part in the vote i.e. 0.15% of the electorate. Therefore, it seems also important to reinforce the role of such instruments through a more thorough and extensive involvement of the population when they take place.

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Instruments of Participatory Democracy in Italy

by

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Abstract

Participation is a fundamental principle of the Italian Constitution (art. 3). Nonetheless its enforcement was rather weak in the first decades of Italian Republic. Only from the nineties on – especially after many Italian authorities and citizens had direct knowledge of the Participatory budgeting of Porto Alegre – the simple participation evolved into various forms of Participatory Democracy. Many Italian municipalities of various dimensions developed it, creating a number of original experiments on a new model of administration. The fact is all the more remarkable as Italy in the last decade has been dominated by populism of the Berlusconi variety. This study analyses the leading principles of participatory democracy as it is now practiced in Italy and clarifies their principal purposes, hoping for their development as a means to "democratize democracy"

Key-words

participation, participatory democracy, democratization, ordinary citizen, inclusion, deliberative process, influence on decision-making

1. Participation as a fundamental principle of the Italian Constitution

There is no doubt that Participatory Democracy, as a special kind of participation, has its legal framework in the Italian Constitution itself. Art. 3 of the Constitution provides that: "It is the duty of the Republic to remove the economic and social obstacles that limit liberty and equality of the citizens, that hinder the full development of human being and the effective participation of all workers in the political, economic and social organization of the country".

Many important features of participation are mentioned in this fundamental principle. First of all, participation is a purpose of the whole action of the State as well of the citizens (the term Republic referring to both). Being a purpose, participation is at the same time a means: one can participate just by participating. In the second place, participation must be "effective". Third, it is bound to social justice, as is the primary scope of article 3 to assume the transformation of the Italian community with the aim of realizing a more fair society. Fourth, workers, that is to say the underprivileged citizens (as nowadays we say in a more enlarged sense) are the most important subjects whose participation should be guaranteed. Fifth, its scope is the political as well as the economic and the social field: in this respect, participation is still mentioned in art. 49 (participation in the political parties), in the trade unions (art. 39), in the management of firms (art. 46). And it is strictly connected to art. 1 ("Italy is a democratic Republic[…]. Sovereignty pertains to the people and is exercised by them […]") and to art. 2 and 3.1 (fundamental rights and dignity of every person) as well as to many other paragraphs of the Constitution.

In short, participation is a part of the inner circle of the principles that rule Italian Republic as well as being an essential part of theory and practice of Democracy itself [I].

2. Participation in the seventies (20th century)

Notwithstanding these clear foundations, participation in its true sense is rarely considered in the commentaries of art. 3 and of the Constitution in general and is not a

normal and general characteristic of the Italian theory and practice of democracy. These are focused on the institutions of representative democracy, in the eventual role of direct democracy and on the hegemony of political parties conceived as the very actors of participation[II].

It was in the sixties and in the seventies of the 20th century that participation became a focus of political attention, if not of real political life. This was not principally due to legal and political progress, but was the product of the growing complexity of civil society, the increase in its consciousness and capability, the dramatic technical progress and the crisis of the attitude of the political parties and the public institutions to face up to the new dimensions of those problems. We arrived to the point of making participation an absolute icon of legal advance.

Nevertheless, the outcomes of this aspiration were tiny; if you compare the various institutions that were put in place and, all the more, their practical performances, you must place them at the lowest rungs of Arnstein's (1969) famous ladder of citizen participation. Most cases, unless they are classified as manipulation or therapy, are to be ranged as information, consultation, placation, and just on rare occasions do they reach the rungs of partnership, delegated power or citizen control.

As to their structure, they can be divided into two categories. The first one is a kind of organizational participation, located inside the administration, where representatives of the citizens take part in an administrative body, generally consultative in character, much more rarely decision-making. This should be a channel for genuine participation, but generally it is encumbered by three alternative or cumulative failings: 1) it represents corporate groups of society rather than ordinary citizens, so that it is a form of "pluralistic" democracy (in the American sense of these words) rather than citizens participation[III]; 2) strong groups prevail over representatives of general society and of less strong groups; 3) these representatives are generally subordinate to the representatives of the administration in the same body, as their participation is consultative not decision-making[IV].

The second category refers to procedural tools, like adversary procedures where single citizens and representatives of corporate interests can be part of a hearing. They are a rarer but perhaps more efficient form of participation, though generally participation is restricted to a single stage of the process, already advanced so that its incidence is tiny, as it is the case in town and country planning proceedings.

Some of those tools, organizational or procedural in character, are more ancient; the new most celebrated cases of participatory institutions of that period were the creation of 1) under municipal councils (*Consigli di circoscrizione*): they were born as such but they were developed into elected decentralized bodies, ruled by the political parties, provoking much disappointment in the general public; and 2) school boards, formed by representatives of teachers, students and parents, provided with very small authority in minor problems of school administration; they too rapidly missed their reputation as true participatory bodies.
But, to understand the whole intellectual and political climate in which the experiences of institutional participation took place, it is important to consider that they were surrounded by many different instruments which can be themselves pointed out in a broad meaning as ways of participation, whose practice became at that time fairly widespread: spontaneous mobilization of citizens for or against choices of public policies, grassroots movements, voluntary associations, self-management of special social services etc.; and, with a different value, the participation in the administrative process by interested persons or bodies, sometimes legally provided for, but that in Italy – notwithstanding proposals by many law scientists - were a matter of general legislation for the first time in the nineties.

3. The true concept of Participatory Democracy

Generally in those times, the word Participation was employed to show those experiments; but sometimes the expression Participatory Democracy was also employed in various improper contexts[V]. Properly speaking, participatory democracy shows a set of experiences that took place in the course of the nineties or after, whose nature may be outlined as follows.

Without any doubt, the most decisive source of these new instruments of participation was the practice of Participatory Budgeting in the great town of Porto Alegre, Brazil, which was initiated in 1989 and is still operative, as well as the town planning of the same metropolis. Although there had been some original experiences in Italy earlier (the small town on Grottammare, from 1994 on), the real drive to participatory democracy in our country, and in all Europe, came from the influence of Porto Alegre, later followed by similar practices in Brazil and other Latin American countries, whose knowledge reached

Europe by means of the first Global Social Forums of 2001 and 2002. A number of Italian local authorities were most impressed by their presence at those forums and decided to apply the techniques of participatory budgets and other participatory instruments to their municipal or provincial governments.

Generally speaking, participatory democracy is a set of proceedings (a family of processes, as one might say) - in which Participatory Budgeting is at the top of the ladder – that possess this common character: to implement the voluntary collaboration, institutionally ruled, of ordinary citizens with public authorities in the deliberative process of a public (administrative or even legislative) decision, so that citizens can be influent actors of the same decision.

In Italy, there have been and still exist many experiments of participatory budgeting, at the level of small towns (e. g. Grottammare, Pieve Emanuele and other towns in Milan's outskirts, several Lazio towns and villages), of provincial capitals (Modena, Reggio Emilia, Parma, Arezzo) and of big cities (Rome, above all), not always involving the whole city but most frequently just one "circoscrizione" or several of them.; as well as (for five years) the Lazio Region[VI].There are also many kinds of participatory proceedings, elementary or more advanced, in town and country planning processes, some citizen juries and two known cases of public debate French style[VII] on big public or private works (in Genoa and in the small municipality of Montaione[VIII], Tuscany[IX]). On the contrary no public debate process, on a number of important occasions, has taken place in the Region of Tuscany, in spite of being allowed by a regional statute[X].

The purposes of participatory democracy are multiple: to give expression to the various viewpoints reflecting the complexity of modern societies, to implement the knowledge by administrative and technical officials of the relevant elements of the public choices, to strengthen the efficacy and efficiency of public decisions, to increase the capability of citizens in the field of public affairs and the growth of inclusion of the public in public policy, to assure a higher degree of social justice in a highly differentiated society etc. In a word, it is a question of "democratizing democracy" in a world that tends to restrict it to the empire of oligarchies and of supremacy of economy over politics. All these purposes are present in Italian experiments to a greater or lesser extent.

4. Leading principles

In Italy, the ruling principles of participatory democracy are consistent with international theory, based on various experiences but implemented to different measures from case to case. They can be summarized as follows[XI].

1) *Flexible institutionalization*. Participatory process must be attentively ruled, but an excess of regulation would destroy the empirical and creative role that participatory democracy must have in this stage of its development. It is essential – besides a general legitimization which is guaranteed by the constitution itself – that the procedure be framed by some rules that can be previously established either generally or case by case and proposed by the institution in charge with the help of participants and periodically modified on the basis of experience. Statutory or other equivalent regulatory provisions are not strictly required and, if adopted, must have a purpose of promotion more than of ruling. So, Tuscany, Emilia-Romagna, Umbria and Lazio regional laws – the only ones existing in Italy - dictate promotional and financial rules rather than regulating ones. Consequently, the task of judges should moderate, except probably in questions of legitimising the process and its conclusion. As to our knowledge, no judicial controversy has been promoted up to now on the matter.

2) *Inclusion*. It is perhaps the principle most unanimously declared. Participatory democracy processes are by their nature open to all persons wishing to participate, without having to prove any particular interest or a particular residence (except in the eventual stage of voting). The purpose of assuring participation of the poorest and of other underprivileged people legitimises the adoption of means of promotion by the institutions, as in the case of young people, of women, of foreigners and so on. Nonetheless, the level of participation of young people and of foreigners in Italy seems to be generally low and the participation is normally an affair of the middle classes.

3) *Corporate participation*. It is frequent and generally useful, considering the skill provided by all kinds of associations, but it is recognized that no privilege should be allowed to them, as they would sometimes demand.

4) *Institutional engagement*. The necessity of participation by institutional levels – political authorities, bureaucracy, experts and technicians – is recognized, but may vary a lot and is not always effective in practice. Their presence in physical processes (assemblies, forums and so on) must be preceded, accompanied and followed by the maximum possible level information, provision of documents, communications and transparency. A similar degree of engagement is desirable on the part of the citizens. But it is not effectively present in all Italian experiences.

5) The principle of *mutual confidence* is a prerequisite of the entire process. Still, it can be critically observed that the institutional milieu – political, bureaucratic and technical – is often hostile to genuine participation. Conversely, a great part of the public – grassroots movements and associations included – do not trust the institutions and their relations with the general public and are very suspicious about how genuine they are in promoting or accepting a participatory process.

6) *Continuity* of participation in each stage of the process must be assured, from the start of proposals and projects up to decision and monitoring. Continuity is not always practiced; often participation takes place in a single stage of the procedure.

7) *The setting* of the occasions of participation (forums, conferences, assemblies) is another prerequisite for the success of the initiatives; although generally paid attention to, it can be improved. Vocational training of persons e. g. competent in conducting a forum or an assembly suggest a number of initiatives by town councils and other authorities throughout the country.

8) *Deliberation*: the very heart of a participatory process. Here participatory democracy crosses the deliberative democracy, which in itself may be created by citizens and civic organizations without explicit authority or substantial public influence[XII]. Rational

approach, arguments, openness to others' viewpoints and frank admission of alternative approaches to the matter to be discussed are necessary in order to reach clear if not necessarily common positions. Habermas' reflections are most useful for clarifying this point

9) *Who decides?* This is perhaps the most controversial principle. Generally speaking, in Italy it is admitted that the decision is wholly reserved to institutional authorities and they are very protective of this right. But a number of devices place constraints on them when engaging in a participatory process: if not a political engagement to pass a decision conforming with the prevailing opinion expressed in the deliberative stage, at least an obligation to justify the reasons for departing from it.

10) *Monitoring* the development of the procedure, as well as its result and the implementation of the decision; a point not frequently present in practice, but essential because failure to implement decisions produces disappointment and loss of all confidence in the method of participation.

5. Prospects

Which are the prospects of participatory democracy in Italy? The difficulty in assessing this is considerable. One could say that the trend is to expansion; others may affirm the opposite. The same person might assess the situation in different ways even over a short period of time. This variability depends on many circumstances. Political above all: it is definite that the long era of Berlusconi was characterized by a climate decisively hostile to this kind of development: participatory democracy and populism are clear opposites. Nonetheless, the first decade of this century, dominated by this climate, also saw a major development of experiments of participatory democracy. The trend of this expansion grew because of a push at local and sometimes at regional level, partially dominated by left-wing majorities. In recent years, the difficulties have been increasing. The deep economic crisis, with all the difficulties in the field of public finance, is being decisive: much of the burden of saving on public expenditure has been placed with local authorities, extremely

diminishing their capacity to exercise their own discretion. Where the leading majority has changed, moving from left to right, most frequently the experiences of participatory democracy have been closed, as in the Lazio Region or in some municipalities in the outskirts of Milan. As an exception to the rule, the city of Parma developed an experience of participatory budget under a right-wing majority.

So, a number of advanced municipal experiences (Modena, for example, or Reggio Emilia) have recently changed their models of participation, from the more ambitious ones such as participatory budgeting to processes of participation in small operations or current services (improvement of the fruition of a park, problems of urban security etc.) and to initiatives of training, pointing to the creation of a new generation of citizens and public officials.

There is, at a deeper level, a problem of culture. The culture not only of the political class, but also of bureaucracy and the intellectual milieu. Lawyers appear to be less permeable, even at an academic level, than urban, social and political scientists. Hence, the importance of training the new generations. Anyhow, the hope for further development must be maintained, if democratization of democracy is to advance.

[I] See among American authors Verba et al., 1995; Putnam, 2000, 336. Among Italian political scientists, Sartori, 2007, 80; Raniolo, 2007; Pasquino, 2007 a), p. 9, as well as Pasquino 2007 b), 155; in the law theory, Allegretti, 2011 c), 301 ff.

[II] A valuable exception is V. Atripaldi, 1975, 20 ff..; more recently, Valastro,2010.

[III] See Gastil - Levine, 2005, 13 ff.

[IV] See Albanese, 2010, 352 ff.

[V] E. g. Zampetti, 1969.

[VI] For the Lazio experience see Lewanski, 2010.

[VII] As well known, the "débat public" in France is an adversarial procedure regulated by statutory law and managed by an independent authority, the "Commission Nationale du Débat Public", publishing every year an excellent report on its activity. See Revel et al., 2007.

[VIII] On the Genoa case see Bobbio, 2010.

[IX] On the Montaione case see Baldeschi, 2010.

[XX] The Tuscan statute 69/2007 contains two kinds of participatory procedures: the French style "dibattito pubblico sui grandi interventi" (major public woks) and the "sostegno (support) to participatory processes".

[XI] See in general U. Allegretti 2011 a) e 2011 c); With special reference to Italian experience U. Allegretti, 2011 b). .

[XII] See Levine – Fung - Gastil, 2005, 277.

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The Legislative Hearings as a Mechanism of Participation

by

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Abstract

The mechanisms of citizen participation in lawmaking can be considered as mechanisms of participatory democracy. These institutions enable citizens to submit proposals or opinions in the process of decision-making by governments, so they must be taken into account, even if not being bound by them, ranking them among the institutions of representative democracy and those of direct democracy. These activities are developed by citizens, individually and especially through representatives of social formations, in order to influence the actions of public authorities. The mechanisms that citizens have at their disposal to take part in the legislature are usually citizens' initiatives that are presented to the parliaments. However, this article is concerned about other forms of participation in the development of bills when they are being handled by the legislative chambers. These instruments, in Spain, are taken into account by citizens or associations being heard in the legislative committees, initially in some autonomous standing orders and more recently in Statutes of Autonomy.

The legislative hearings of citizens or associations are not provided at national level because the standing orders of the Spanish Parliament, the Congress and the Senate, only provide hearings of authorities or experts. This article analyzes these mechanisms and their most recent reforms as ways of opening the legislative process to persons and groups outside the chamber, as an additional form of pluralism

Key-words

citizen participation, representative democracy, public hearings, pluralism legislative process

1. Introduction

The mechanisms that citizens have at their disposal to take part in the legislature are usually citizens' initiatives that are presented to parliament. However, we should also refer to other forms of participation in the development of bills when they are being handled by the legislative chambers. These instruments, in Spain, are taken into account by citizens or associations being heard in the legislative committees, initially in some autonomous standing orders and more recently in Statutes of Autonomy.

It is interesting to note that legislative hearings of citizens or associations are not provided at national level. The standing orders of the Spanish Parliament, the Congress and the Senate, only provide hearings of authorities or experts. Therefore, progress in the participatory rights in Parliament has come from the regulations of the autonomous regions.

Next, we analyze these mechanisms and their most recent reforms as ways of opening the legislative process to persons and groups outside the chamber, as an additional form of pluralism. The intrinsic purpose of the legislative process, regardless of the specific procedures, is the performance of political pluralism and openness, which are a counterweight to the rule of the majority decision and are essential principles for the functioning of democratic Parliament. The legislative procedure expresses the political pluralism because it allows involvement in the development of the rule by various political forces present in the House; this adds further legitimacy as it implies that there has been a deliberation, where there has been the integration of different interests, understood as the possibility of different political forces to express their views, proposals and participate in the deliberation and final vote. Enabling the participation of citizens most directly affected in this discussion is to increase the pluralism that is characteristic of the institution of parliament.

The mechanisms of citizen participation in lawmaking can be considered as mechanisms of participatory democracy as described by Italian doctrine, as they are defined as procedures that give citizens the opportunity to participate in public affairs by themselves or by groups. These institutions enable citizens to submit proposals or opinions

in the process of decision-making by governments, so they must be taken into account, even if not being bound by them, ranking it among the institutions of representative democracy and those of direct democracy. These activities are developed by citizens, individually and especially through representatives of social formations, in order to influence the actions of public authorities. The relationship between representative and participatory democracy is not alternative but complementary and intended to give a greater role to civil society, either individually or through groups, creating the will of the state. It does not seek the participation of all citizens but of those that are interested in the process of decision-making primarily through organizations representing social interests.

Next, the legislative hearings are analyzed.

2. The hearing of citizens in the legislative process

The establishment of a process of hearing of social organizations in the legislative process, either directly or through social organizations has been incorporated in some autonomous standing orders. Indeed, the rules of Andalusia, Asturias and more recently the Standing order of the Catalan Parliament, establish a phase of legislative procedure, processing on commission, where the hearings of the citizens take place. However, it is to be noted that such participatory forms originating in the standing orders have been welcomed as a manifestation of the right of political participation in some of the Statutes of Autonomy reformed since 2006, incorporating the catalogue of rights that include the right to political participation. The Catalan Statute of 2006 was the first statutory provision which recognized that citizens have the right to participate, directly or through representatives, in the process of preparing acts of Parliament, through the procedures established by the Regulation (Article 29.4). Subsequently, it was also recognized in Andalucía Statutes (art. 30.b), Baleares (art. 15.2.b) and Aragon (art. 15.2). Therefore, the standing order from these Parliaments must establish this procedure to be part in the legislative process. But, so far, only Catalonia and Andalusia regulations contemplate this procedure, which had been established prior to the statutory provision. Regardless of this regulation, the recognition of the right in the statute to elevate the category of right was previously a decision from the Parliament.

Now, we will analyze the most relevant aspects of the regulation regarding legislative hearings in autonomous Parliament.

a). Legal grounds for the request

A legislative hearing can be requested by parliamentary groups and parliament members in Andalusia and Asturias and only groups in the case of the Catalan Parliament. In Catalonia and Andalusia the request must be approved by majority decision. Instead, in Asturias the regulation is that the decision of the majority of the commission is not necessary when one fifth of the members of the commission or two parties make the request. Such regulation, which allows a qualified minority to request a binding hearing, is more respectful of pluralism and minority rights than decisions taken by the majority. Also, if only the majority has the right to decide on the hearings, it would make it possible to call only those that are most similar or, in any case, elude the most antagonistic. However, ensuring no distortion of parliamentary work requires a qualified minority that can apply and enforce a hearing. A correct criterion is to enforce a portion of the commission members (such as a fifth or a quarter) and two parties. In comparative law, such provision is found in the Regulations of the German Bundestag, which gives binding force to the request to a hearing for a quarter of the members of the commission (art. 51).

On the other hand, the social organizations can request to be heard in any way at Parliament. It would be more appropriate to have a more specific procedure, especially in communities where participation in the legislative process is recognized as a right in their statutes.

b. Subjects

The legislative hearings respond to the need to supplement the general interest that Parliament represents for those groups of citizens interested in or affected by the law being developed.

The existing regulations refer to "social agents and organizations" (Article 113 Andalusia Regulation), "corporations, associations, bodies or groups representing affected

interests" (art. 67. F) Regulation of Asturias) and interested organizations and social groups (art. 106.1 Catalan Regulation).

Therefore, they are generally representatives of collective entities, primarily social organizations or entities, exceptionally some persons can appear as individual. The most suitable for the parliamentary and legislative process, and the most appropriate form of organization of interests in society, is that such participation is conducted through social organizations or groups, to which the Constitution recognizes the right to defend collective interests (art. 7, 51.2, 105c) EC). As to which organizations can be called, there should be no restrictions of access to organizations recognized by law (as is done in the 105th article of the Constitution). It should be the decision of the parliamentary groups to call the interested organizations of their choice. However, to better organize the selection of organizations it is recommendable to create a register - as with the German Bundestag - and register these entities willing to be heard in the Parliament in order to limit the number of organizations. Moreover, this register makes it possible to find out the existing partnerships in the various parliamentary groups, their representation and legal status, among other main facts, as well as their willingness to appear in Parliament. Other than that, there should be no further limitation to the free choice of the parliamentary groups. The fact that they can be requested by a minority in Parliament, as has been stated in the previous section, is a guarantee to ensure the plurality of entities to be called to appear. Notwithstanding this, the appropriateness that certain organizations must be heard in Parliament should be questioned. Hearings of organizations like unions (Article 7 EC), consumer organizations and users (art. (51.2 EC), professionals(36) and in the field of education associations of parents and students (27.5 EC) should be mandatory to legislation. This would not only act on constitutional principles of participation and political pluralism but also bring to Parliament some players who exert considerable influence in government and are actively involved in public debate. However, unlike what was said above, in cases of an obligatory hearing, it must be strictly defined which organizations should necessarily appear.

Standing orders in autonomic parliaments establish hearings without making them obligatory for some organizations, except the Catalan rule, which provides that the organizations, that defend the interest of municipalities, must be heard in bills that directly affect them (art. 106.3).

c. Time and place to provide the hearings

Hearings should be provided in a time prior to the amendments, so that the social sectors can be involved in the regulation; at the same time the hearings can serve to inform the committee that is preparing the law. It is also suitable to be held after a first debate where all the principles and general options of the bill have been discussed. This is the rule in Andalusian and Catalan regulation, according to which, after full debate and hearings, the deputies or the parliamentary groups can present amendments to the articles, which may collect the contributions made by social organizations in the hearing (art. 114 RPA and 106 RPC).

As shown the experience in other parliaments, the stage of legislative procedure more appropriate for holding the hearing is in a commission.

d. The hearings in the legislative process and his contributions

After analyzing its regulation, we should note the positive elements that legislative hearings can provide.

In general, this way of participation can contribute to the integration of interests in Parliament. In a parliamentary democracy this integration is usually achieved through the action of the parliamentary groups and political parties. By means of the hearings, the groups of citizens directly affected by a regulation can promote the defence of their rights and interests. In general, the first contribution of hearings in the legislative process is to strengthen the principles of participation and pluralism in the legislative process; it also contributes to realize the constitutional principle, also in some Statutes of Autonomy, which sets the mandate to empower citizen participation in political, economic, cultural and social issues.

In addition to this general contribution, there are other positive aspects given to the legislative process, and which differ substantially from those developed in government consultation. These positive aspects are the following: better information about the Chambers, intensifying the principle of transparency and publicity of legislative activity and enhancing the legitimacy of laws and their effectiveness.

Obtaining information is not configured as a parliamentary function in itself but as an instrumental technique for the exercise of all parliamentary functions. Such an instrument is so essential that the Constitutional Court has considered that the right of the deputies to obtain information is integrated in the status of the parliamentary member as a part of the right of political participation (art. 23.2 of the Spanish Constitution, cfr STC 57/2011). The limits of this right are exclusively the inevitable restrictions to safeguard other constitutional rights.

In relation to the legislative function, to obtain information on the matter to be regulated is absolutely fundamental. To exercise the legislative function in the complex societies of today, where the law is characterized by specialization and precision, it is absolutely necessary to have appropriate information. Parliament should have access not only to information that may be provided by the executive and the administration but should also obtain it through other ways. This is essential for the discussion, amendment, improvement and adoption of laws. Direct consultation on Parliament, through public hearings with social organizations representing their interests, is directly linked to the provision of information necessary for the exercise of the legislative function. This information is valuable not only because it is expert information but also because it is information that comes from the interest groups and, therefore, is also an important way for parliaments to know the state of opinion in the social sectors directly affected. On the other hand, obtaining information through hearings can somehow contribute to reduce the distance of human and technical resources between parliament and government in order to exercise their functions.

Secondly, the hearings can help to improve the principle of transparency and parliamentary publicity, which are fundamental principles of Parliament's legitimacy and the necessary connection between parliament and citizens.

The parliamentary public sessions provide to the people information about the various positions in Parliament. In the legislative procedure the different positions and transactions will be known because they are seen in the different stages through different mechanisms. A system of public legislative hearings helps to increase the transparency of the legislative process as it contributes to improve information on conflicting interests. The publicity of hearings allows some control over the possible influence of the participation. Also, from the communication point of view between Parliament and society,

the hearing can contribute to better understanding by the citizens of the functions of social organizations in public decision making and, in general, the whole process of the decision. Also, the sectors involved will be able to have knowledge not only of the activity and position of the political parties but also on the organizations themselves.

Thirdly, the legislative hearings contribute to increase the legitimacy of the law. The legitimacy of parliamentary decisions also depends on the connection and communication between Parliament and society. Formally, strictly following the theory of representation, the law does not require adding democratic legitimacy because this comes from the representative status of Parliament. If the affected sectors, through representative organizations, are heard in public, probably they will perceive the decision as more justified or legitimized. Thus, while pluralism implies that various positions are present in the chamber - because they are defended by the various parliamentary groups - the intervention of social organizations will provide another form of legitimacy.

Finally, it should be mentioned the increase of efficiency in the application of laws. This can be derived from a participatory process, since it can lead to greater acceptance and understanding of the law in the affected sector of society and therefore increase efficiency in their application. In the pluralist State, the implementation of laws depends greatly on how they are affected by the overlapping of the sectors concerned in society. The fact that citizens are involved in the process of making the laws, through the representative organizations of interest, increases the acceptation of the law of all sectors concerned. For example, laws aimed at consumers show how certain necessary protective measures are difficult to apply when no strong organization can be mobilized in that interest. Actually, the laws that have been developed without the participation of affected sectors and organizations now have great difficulty being accepted. Bringing the participation of those affected to Parliament will increase the chances of consensus and, therefore, laws will be implemented effectively.

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