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Principles, rights and participatory institutions in the reformed statutes

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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 2007¹ 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. Various 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.



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^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.

References

- Aguado Renedo, C., 2011, “El referéndum autonómico”, in F.J. Matia Portilla, (dir), *Pluralidad de ciudadanías, nuevos derechos y participación democrática*, CEPC, Madrid, 389-419
- Castellà Andreu, J.M, 2001, *Los derechos constitucionales de participación política en la Administración Pública*, Cedecs, Barcelona
- Castellà Andreu, J.M., 2011, “Las consultas populares en la Sentencia 31/2010, sobre el Estatuto de Autonomía de Cataluña”, in Álvarez Conde, E. – Rosado, C, (eds.), *Estudios sobre la Sentencia 31/2010, de 28 de junio, del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña*, IDP, Madrid, 197-234
- Expósito, E. – Castellà, J.M., 2009, “Los derechos políticos y ante la Administración en el Estatuto de Autonomía de Cataluña”, in Castellà, J.M. - Y Expósito, E. (eds.), *Derechos y principios rectores en los Estatutos de Autonomía*, Atelier, Barcelona, 61-94
- Gavara De Cara, J.C., 2007, *La homogeneidad de los regímenes electorales autonómicos*, CEPC, Madrid
- Larios Paterna, M.J., 2003, *La participación ciudadana en la elaboración de la ley*, Congreso de los Diputados, Madrid
- Larios Paterna, M.J., 2008, “La participació dels ciutadans en el procediment legislatiu”, *Revista Catalana de Dret Públic*, Issue 37, 183-222
- Lasagabaster Herrarte, I., 2008, *Consulta o referéndum. La necesidad de una nueva reflexión jurídica sobre la idea de democracia*, LETE, Bilbao.
- López Basaguren, A., 2009, “Sobre referéndum y Comunidades Autónomas. La ley vasca de la ‘consulta’ ante el Tribunal Constitucional”, *Revista d’Estudis Autonòmics i Federals*, Issue 9, 202-240
- Oliver Araujo, J., 2011, *Los sistemas electorales autonómicos*, IEA, Barcelona
- Pérez Alberdi, M. R., 2008, “Los derechos de participación en los Estatutos de Autonomía reformados recientemente: especial consideración al Estatuto de Autonomía para Andalucía”, *Revista de Derecho Político*, Issue 78, 181-2005