Direct citizen participation in the constitutional reform

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Abstract: This paper aims at analysing the role that direct citizen participation plays in democratic constitutional reforms. In opposition to a non-normative model, typical of those systems which conceive the people as the real sovereign, this paper argues that the direct participation of the citizenry –which can take place at the input (deliberation) or at the output (decision) of the reform process– only makes sense if understood as a legal mechanism aimed at reinforcing the own sovereignty of the legal system itself and thus democracy.

Keywords: direct citizen participation; constitutional reform; popular sovereignty; public participation; initiative for constitutional reform; constitutional referendum.

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I. Introduction.

In the theory of democracy, it is common to find in the idea of popular sovereignty the ultimate basis for asserting the direct participation of individuals in the reform of their Constitution. However, as in other matters, the specific function that this direct participation is called upon to perform within the democratic system depends, to a large extent, on the specific understanding of the own idea of sovereignty. It is precisely because this question is the inevitable starting point when it comes to analyzing the subject before us, that the following pages will begin with the identification of two

contrasting models of the role that individuals' direct participation plays in constitutional reform, constructed on clearly different methodological assumptions.

One is a non-normative model, which makes popular intervention in constitutional reform procedures the most genuine expression of constituent power which is, in short, this omnipotent sovereign people. The other is a strictly normative model, which places popular involvement within the power of constitutional reform and puts it in service of the effectiveness of the Constitution. It is this second positivist model which will be assumed to be valid and on which the rest of the study will be constructed. Highlighting the fact of taking this position is important because, if the legal methodological assumptions held by this study are not shared, it is highly likely that neither will the function attributed to direct citizen participation in constitutional reform.

The aim of this work is not to examine specific legal rules about how this participation seems to be configured in the Spanish legal system or in Comparative Law. On the contrary, the following is a theoretical contribution about the function that this popular participation is called on to perform in a democratic system, depending on when it takes place (input or output) making this study from the abstract that provides the theory of the systems. This systemic analysis will allow us to address the complexity of the matter to subsequently approach it with more specific regulatory suggestions.

II. Two models of direct citizen participation in the constitutional reform.

1. Non-normative model: direct participation of the people as an expression of the constituent power.

In non-positivist legal positions, it is common to find, in a certain understanding of the dogma of popular sovereignty, the justification to assert, apart from what is given in the Constitution, direct participation of the people in the constitutional reform. Sovereignty –conceived here as a quality that can be attributed to a subject or institution– belongs wholly to the people, an eminently political entity whose existence comes before the law and is above it. A sovereign is a subject able to express itself outside of legally established procedures –here, in relation to constitutional reform– as one cannot say that a sovereign is constrained by legal limits without calling into question their own existence. In short, if a subject precedes and is above the law, it is not surprising that they may act

without being bound by a positivity to which they owe neither their (political) existence or activity.

Precisely because the people are sovereign, they embody this archetypal, eternal, all-embracing constituent power. And only where a true *legibus solutus* sovereign exists is it possible to speak of constituent power, as it is nothing more than the translation of that to the sphere of constitutional reform. They both refer to the existence of an entity –the people in this case– not bound by the law but superimposed by it (Ackerman, 1998; Locke, 1986; Sieyès, 1982). In this sense, constituent power, unlimited in nature, has nothing to do with the power of constitutional reform which is a constituted power: created by the legal system and therefore subject to it.

Thus, the people need no legislative enabling to take part in constitutional reform. The opposite would mean converting the constituent power into a constituted power, something which simply implies the denaturalization of the former. Accordingly, if the people take part in the constitutional reform complying with established rules, they act as a constituted power and their participation thus appears *degraded*, given that it is not an authentic expression of popular sovereignty as it is legally limited. Genuine popular participation, which is what interests us for the purposes of this model, is produced *extra ordinem*[1]. Only this is a manifestation of archetypal constituent power.

The important thing, therefore, is not that constitutional reforms are tailored to the legislative provisions set by the Constitution to regulate its own change, but rather to the will of a political subject, the people, who are above that. The dissociation between legality and legitimacy thus becomes evident. The latter is not inserted within the former, it has its own existence outside of the law (Schmitt, 1971). This means that legality can –maybe should– be sacrificed for the sake of legitimacy. The key is that a constitutional reform be legitimate because if it is so, it will also –be said to– be lawful.

In this sense, the involvement of the people becomes a criterion for judging the validity of constitutional reforms, albeit outside of the legal system (hetero-referential). It serves to convert unconstitutional reforms into constitutional reforms, providing validity to those which, despite not having followed established legal procedures, are *healed* by the legitimacy granted by the direct participation of the people (Albert, 2017). This

[1] In this sense, Tierney (2012) explains that only *extra ordinem* referendums are expression of the constituent power of the people, not those that follow the constitutional reform rules. This means that it is not always the case that when the people participate in constitutional reform –via referendum in this case– they are exercising popular sovereignty.

happens, for example, when reforms are considered valid that, despite having not met the applicable procedural requirements, are ratified by referendum (Albert, 2020). It also happens when constitutional assemblies, driven by popular initiative and not subject to any positive limit, are proposed, awakening this dormant sovereign (Colón-Ríos, Hutchinson, 2012; Reed Amar, 1994). In fact, recent constitutional conventions, although with little success –in Iceland and Ireland, for example– are clear evidence of attempts to reactivate the constituent power, flawlessly recreating its initial appearances.

Logically, if popular participation can have healing effects, it can also have invalidating effects: it can make constitutional reforms unconstitutional. It can question the validity of those that, while in compliance with a formally established procedure, were without direct involvement of the people, resulting in them lacking legitimacy. In fact, the doctrine of unconstitutional constitutional reforms explains why there are certain clauses in the Constitution –its basic principles– whether formally declared unamendable or not, that cannot be altered by constitutional reform power but only by the original constituent power[2]. Only the sovereign people –it is said– can *change*, not reform, the Constitution –its identity–. From there comes the theory of constitutional substitution. Thus, when the power of constitutional reform attempts to modify one of these implicitly unamendable sections[3], that reform will be unconstitutional as it affects something reserved to the constituent power (Roznai, 2017). The lack of direct involvement of the people can thus invalidate a valid reform in formal terms.

2. Normative model: direct citizen participation as a mechanism included in the constituent-constituted power.

a) From the direct participation of the people to the direct participation of the citizenry.

The place of the individual in constitutional reform, according to the model described above, may seem to elevate the idea of popular sovereignty as high as it can go. However, it is fundamentally incompatible with the existence of a democratic Constitution. While this is the supreme law of a given legal system, making up the

[2] Unamendable clauses are binding limits on constitutional reform power but not on constituent power which, by definition, is unlimited (Jackson, 2013, p.47).

[3] If such clauses were formally unamendable the question would be different. The constitutional reform would be unconstitutional as it would infringe a legal limit imposed by the Constitution itself.

parameters of validity for the rest (self-reference) and, at the same time, displaying an unlimited capacity of legal creation (positivity)[4], the Constitution is itself sovereign. And the fact is that this sovereignty is necessarily a legal, not subjective, quality because, to put it succinctly, whoever is sovereign is so because a law has prescribed it (Kelsen, 2002, p.170; Ross, 1994, pp.79-81). If that is so, it is not legally possible for there to be a subject –the people in this case– whose existence precedes it, given that legally prescribed powers exist because the Constitution creates and limits them (De Otto, 2010, p.38). Therefore, precisely where there is a Constitution there is no sovereign (Ferrajoli, 1999; Kirchheimer, 1982; Kriele, 1989). Consequently, it is not possible to accept that the people can express themselves outside of the constitutional reform procedures. It cannot be manifested outside the law without violating the legal system. Anything else would mean accepting that sovereignty does not belong to the Constitution but to whoever can do without it to reveal themselves: the sovereign *legibus solutus*.

The legal impossibility of a sovereign existing within the framework of a Constitution becomes even more clear when it is democratic. What both concepts –Constitution and democracy– have in common is precisely the proscription of a power not subject to the rules (Bastida, 1991, p.10). In fact, «there is no democracy without law» (De Otto, 2010, p.56). In order to be able to realize this ideal of self-government –that the people governed can be the people governing– there need to be rules that regulate, in conditions of equality and liberty, who are the people and how they can participate in that task. Thus, it is tremendously difficult to call those referendums or constitutional assemblies that attempt to direct *extra ordinem* constitutional reforms democratic. Without being subject to rules, it is difficult to know whether their realization is subject to laws and, if so, which laws, created by whom and how.

The function of popular sovereignty is not to underpin the existence of a *legibus solutus* sovereign but rather the exact opposite: prevent anyone from becoming a sovereign (Carré de Malberg, 1922, p.168, p.176; Ferrajoli, 2011, p.36). This is the only way of reconciling a democratic Constitution with the idea of popular sovereignty: understanding that it does not empower the people to express themselves outside the Constitution, but is rather a mechanism that ensures that those subject to the law participate directly or indirectly in its creation, something which gives the system

[4] The ideas of self-reference –which refers to the ability of a system to create norms through norms (legal closure)– and positivity –which refers to the ability of that system to include new content (cognitive openness)– are taken from the system's theory from Luhmann (1990).

legitimacy. In short, it is popular sovereignty that is put at the service of the Constitution: by involving the targets of laws in their creation and by allowing the content to be changeable if the established procedures are followed, it reinforces the self-reference and positivity respectively and thus sovereignty (Bastida, 1998, p.389).

As a matter of fact, the maximum power that exists in a legal system –that of constitutional reform– is a legalized power, created by the own legal system and subject to it. Precisely because of that, it is not possible to assert, with regard to a distorted understanding of popular sovereignty, the existence of a constituent power within a democratic Constitution, able to emerge at any time to express its will outside of the procedures designed by that same Constitution for its own change. Constituent power is extinguished by the adoption of the fundamental law. It is tamed by being legalized, becoming therefore a *constituted-constituent* power, regulated by the legal system and obliged to operate according with its rules. Where a Constitution is the supreme law there is no sovereign people and so the idea of constituent power, the maximum expression of the former, disappears. Only where the Constitution is the supreme norm it possible to speak of constituted-constituent power and, consequently, of constitutional reform, whatever its object and its scope. Anything else would be revolution.

Putting the debate in these terms, if popular sovereignty is incorporated into constituted-constituent power, the direct participation of individuals in constitutional reform can only be an exercise of that. It is, necessarily, a *legalized* participation. It does not constitute a external criterion of validity of the legal system (hetero-referential) –as in the previous model– but rather internal (self-referential). This direct participation *per se* does not serve to judge the validity of the reform in question. It would only do so if the system included that as a part of the procedure, in other words, if that direct participation is a rule, a legal requirement. The constitutional reform would therefore be legitime by being valid, but not the other way around. The former is no longer available outside the latter, only within it.

In this sense, when individuals take part in constitutional reform in compliance with applicable rules, then there is no longer any political, prelegal, unlimited subject (the people) acting. Instead, what is involved is the set of individuals on which the legal system has conferred power to take part in public matters, in this case directly: the citizenry. Therefore, while before we spoke of the direct participation of *the people*, typical of a legal context in which the Constitution is not the supreme law, as it is subject

to the designs of a prior and superior political subject (the people), now we must speak of direct *citizen* participation, typical of legal systems in which the Constitution, as the sovereign law, legally regulates its own change and therefore sets out which subjects –now fully legalized– must be involved and how.

However, the issue before us now is not only resolved by stating that those who must be able to participate are the legal subjects that make up the citizenry. It is essential to know exactly what makes up a citizen and how he or she is configured in legal terms. Some designs more closely approach this idea of self-government inherent in popular sovereignty, which is nothing more that the governed may be, as far as possible, also those who govern. When these two poles are closer and therefore there is less distance between the individual and the citizen, the legal system as a whole is more democratic. The opposite is true: when fewer of the governed –subjects– govern –active citizens–, the system is less self-referential and, as a consequence, less democratic.

Therefore, if the aim is that those subject to the law can participate in its creation, when it comes to defining who are truly the governed –who are the potential governors– the democratic system must step back from the social conditions surrounding the individual, such as religion, language, nationality, etc., and stress their condition as equally subject to the rules of a particular legal system. That being so, the person who should be able to participate in constitutional reform in a democratic system is not a national of the State or one who shares certain cultural traits, but rather the resident, who is truly subject to the legal system that the Constitution presides over (Aláez Corral, 2006; Bastida 1998; Presno Linera, 2003). Nonetheless, this does not prevent requiring a minimum time to ensure the relative stable incorporation of the individual in the legal community in each case as part of the process to become a resident and, therefore, a citizen.

However, the question of who must participate in constitutional reform is not only resolved by maximizing the concept of the citizen, as we have seen, but also by knowing who can effectively act as such, which leads to the question, not so much of the ownership of fundamental rights, but rather the exercise of them. That is not to say that the democratic system cannot restrict the exercise of right of political participation based on certain individual circumstances. Instead, those restrictions must be properly justified, a justification that occurs, in short, by demonstrating that those subjects are not, due to various circumstances, capable of political self-determination. This consideration must be

borne in mind when, for example, setting the minimum age for participation –in light of the sociological circumstances of the time and of the various ages that are set out for various legal situations (getting married, the age of legal responsibility, work, testifying in court, etc.)– or when removing that possibility from individuals with certain disabilities, as that is not always synonymous with the inability to politically decide for oneself (Presno Linera, 2003).

b) Direct citizen participation as a mechanism in service to the democratic Constitution.

In a system where the target subjects of laws must participate in their creation, citizens have to be able to be involved in the modification of their Constitution. What happens is that modern democratic systems are extraordinarily complex and the best way to manage that complexity is articulating this participation indirectly, via the institution of representation. However, it is not that participation that interests us here, but rather direct participation. The issue now lies in determining what function this could have in a democratic system.

In order to do that, we must begin with the role played by constitutional reform in the legal system. Through this, the Constitution can convert social expectations into legal rules at the highest level. Thus, constitutional reform plays a key role in the legal system as it ensures the system's survival and, therefore, its effectiveness (Luhmann, 1995). By making it possible for different social expectations or demands to be able to gain legal validity, the system makes it less likely for them to end up being so strongly desired that they are imposed outside the law, which if it did happen, would call into question the sovereignty of the Constitution. In other words, constitutional reform expresses the unlimited possibility of legal creation –positivity– and, by doing so, ensures its legal closure –self-reference– (Aláez Corral, 2000).

If constitutional reform is the mechanism par excellence through which the legal system is opened up to and keeps contact with the social environment that surrounds it, direct citizen participation contributes to that goal. It is a *channel of communication* between the legal system and the social environment, through which the former can be more alert to the demands of the latter and to understand them better or more easily. It is a loudspeaker or a «sixth sense». That is why direct participation does not exclude or oppose indirect (representative) participation but is complementary. The aim is to

maximize the means of communication between the legal system and social environment to minimize the tensions that may arise between the two, which over the long term could result in a drain of normativity[5].

Where the sovereignty of the Constitution is at stake, and the most exalted form of this is constitutional reform, communication between the system and environment must be more intense. In contrast to other processes of sub-constitutional legal creation, in constitutional reform what is much more in play is the self-reference of the system –as it deals with attempting to change the rules that give all others validity– as well as the positivity of the system –by modifying the limits of what is legally permissible–. Therefore, the communication between the system and environment must be stronger and flow better when the issue is modifying the limits of what is legally valid, the frontiers of the law. The more that the legal system and the underlying social environment seem to be reconciled with each other, the less likely there are to be subsequent tensions that result in threats to the sovereignty of the system.

While from the perspective of the legal system, direct citizen participation is a channel of communication between it and the social environment, from the citizens' point of view it is an expression of the exercise of the fundamental right to participate in public affairs. It is what allows them to participate in the construction of the constitutional framework which is, in short, what underlies the idea of popular sovereignty (self-reference). Here one can clearly appreciate how, in a democratic system, the means are essentially an end in themselves.

However, one cannot deduce from the above that a Constitution that does not include direct citizen participation in its reform is not democratic. It is the Constitution itself, from its own sovereignty, that must articulate how and to what extent the citizens are involved in the process of legal creation. It would no longer be democratic if there

[5] It is precisely because direct citizen participation acts as a mean of communication between the legal system and the social environment that it is functional regardless of the social demands that it allows to be communicated. In other words, no one is judging whether it gives rise to more democratic constitutional reforms from the point of view of its content. It does not seem appropriate, in legal terms, to call for the use of certain mechanisms if they lead to certain material results and dispense with them otherwise. The democratic system makes it possible for social demands to reach the legal system, to be argued and maybe approved, and converted into law. It is a process. To the extent that direct citizen participation contributes to the openness and effectiveness of this process, it is functional, not depending on the goodness –at least in legal terms– of the specific legal results it produces. Nonetheless, there are studies which have analyzed the relationship between a country's level of democratization and participatory constitutional reform procedures, such as Saati (2015) or the more political than legal effects of participative processes, such as Ginsburg et al. (2008).

were no participation, either direct or indirect. The only thing which happens if a Constitution does not provide for direct citizen participation in its reform is simply that one channel of communication is lost that would have allowed direct and closer contact with the environment. The system, if it permits the expression, would be a little more «blind» or «deaf» to the social medium and its corresponding demands, its «senses» would be weakened. It would be less democratic.

III. Direct citizen participation in the different phases of the constitutional reform.

Although direct citizen participation in constitutional reform is a channel of communication between the democratic system and the social environment, this communication does not always have the same objective. It is a complex legal mechanism that contains within it various instruments that allow this interaction at various points in the process and, therefore, it does so in various ways and with various purposes. It will depend whether this direct participation is at the beginning –the *input*– or at the end of the process –the *output*–. We will examine this in more detail below.

1. Direct citizen participation in the *input*: participation-deliberation.

One of the points at which direct citizen participation may operate is in the *input* of the system, the deliberative phases which, in constitutional reform, can be split into two: the initial and the central phases. What allows direct citizen participation at this point is not that all individuals can decide about the reform in question, but rather that they can all be involved in how it is done. Thus the compound term *participation-deliberation* for this point, the sole end of which is to actively involve the citizens in the communicative process that makes up constitutional reform, distancing itself from the ideas of direct democracy and aligning more with the ideas of participative or deliberative democracy (Fishkin, 2009; Gutmann, 2004; Habermas, 1998; Nino, 1997). As such, direct citizen participation in the *input* fundamentally affects system's positivity, how open it is to the social demands of its environment.

a) The initial phase.

Through citizens' right to propose constitutional reforms, they can activate the constitutional reform power, formulating alternatives to current constitutional text for

consideration (De Vega, 1984; Presno Linera, 2012). If the role of democratic constitutional reform is making the constitutional text permeable to the social expectations of the environment, that demands the legal articulation of a procedure in which the greatest number of them can have access to the system and the possibility of being discussed. The *input* should be as broad as possible so all political options can be equally and freely expressed –a requirement of pluralism– as this will help expand the positivity of the legal order.

Traditionally, the level of positivity in a system has been assessed from the perspective of the material content of potential reforms, linking it paradigmatically with the unamendable or eternity clauses. The absence of these clauses increases positivity as it means that, without exception, any social expectation can become law. There are no material limits. Nonetheless, the level of positivity of the legal system, the broadness of its *input*, is not only linked to the content of the expectations that are to be added to the legal system, but also to the issuing bodies. In other words, it is not just about *what* can be reformed –an objective criteria dealt with by unamendable clauses– but also *who* can propose reforms –a subjective criteria dealt with by the reform initiative–.

Citizen initiative of constitutional reform is a mechanism which allows certain social expectations –coming from citizens– to access to the legal system. Here one may clearly appreciate how it functions as a channel of communication between system and environment. Its role is eminently conductive and transmissive –*participation-deliberation*– never decisive (Pizzorusso, 1973, p.1473), a character which should serve to placate the demagogic mistrust that occasionally argues against this participative instrument (Presno Linera, 2014). The communicative usefulness of this mechanism may be questioned by the idea that citizens' expectations of constitutional reform can already be expressed via their representatives. However, one must bear in mind that citizen initiatives convey aspirations that do not find a home in Parliament. It is about incorporating *other* expectations into the legal system, different from those that already exist, expectations that reside in the social environment and thus would simply not get to be debated if this channel for expressing them did not exist (Cuesta, 2008; Larios Paterna, 2002). Participative democracy thus acts as a complement to representative democracy, as stated previously.

When citizen initiative of constitutional reform is prohibited, as in the Spanish Constitution (art. 166 SC), the *input* to the system is narrowed as one safeguard is

blocked through which certain social expectations might have gained access. The legal system folds in the face of these, not according to *what they say* but rather because of *who says it* –the citizens– which reduces its positivity. Thus, it is more likely that there will be attempts to impose these blocked expectations outside the law, invoking a dangerous and spurious constituent power, the emergence of which would call into question constitutional sovereignty. In the highest expression of the latter, which is the exercise of the power of constitutional reform, one cannot suppress channels of communication but rather the opposite.

In fact, citizen initiative of constitutional reform, far from being a *rara avis*, is a relatively common mechanism in Comparative Law. Switzerland, for example, uses this option both for total and partial reform if there are 100,000 signatures (arts.138-139 Bundesverfassung), as does Liechtenstein (arts.64 and 112 Verfassung des Fürstentums Liechtenstein) and Austria, which requires the support of 200,000 citizens with the right to vote, or half of those with the right to vote in each one of the three States (art.41.2 in relation to art.44 Bundesverfassungsgesetz). Other systems such as Latvia require the support of a tenth of the electorate (art.78 Satversme); Lithuania, requires 300,000 voters (art.147 Lietuvos Respublikos Konstitucija); Romania, requires 500,000 (art.150 Constituția României); Georgia, 200,000 (art.102 Constitution of Georgia); Slovenia, 30,000 (art.168 Ustava Republike Slovenije); and Serbia and Macedonia, which both require the support of 150,000 electors (art.203. Constitution of Serbia and art.130 Constitution of the Republic of Macedonia).

b) The central phase.

Although the initial phase of constitutional reform is the true *input* to the system, it does not end there. *Input* encompasses all the deliberative –not decisional– phases in which there are debates on the possibility of legalizing certain social expectations. This can also happen in the central phase of the process, once the proposal or project of reform has reached the Parliament. These considerations are important because, when thinking of direct participation, it is quite frequent to attempt to reduce it to the beginning and the end of the procedures, removing it or relegating it to a second tier during them. This ignores the fact that the *input* to the system is not only the particular point when expectations gain access to it but also the subsequent deliberative phases.

Since social expectations, at this point, continue to be expressed and discussed, it is still desirable for the legal system to maintain direct communication with the social environment. Here, participation continues to be part of the duality *participation-deliberation*. The object of this is for the citizens to be able to take part in the discussion about projects or proposals for constitutional reform, simply giving them the chance to be heard. They can take part in the parliamentary discussion as one more «deliberative subject», together with the representatives, which would broaden the *input* to the system and thus increase its positivity.

Citizens taking part in Parliament can express their own thoughts about the constitutional reform in question and can uniquely offer first-hand information from the social environment that they know because of how close they are to it. This information helps to enrich and enliven debate and to better connect it to the immediate reality that the constitutional reform will affect following approval. It is evident that citizen's insights may not be accepted. However, the legal system can only ensure that they can be formulated, facilitating the social permeability of representative institutions.

While direct citizen intervention at this point in the process, as in the initial phase, is in order to help expand the *input*, increasing the positivity of the system, this will only happen as long as citizens gain access to Parliament and participate. With that, the debate on the constitutional reform will be open to receive different expectations which, in this case, come from exactly the social environment that the potential reform will affect. In short, the system directs channels of communication such that certain information that could be very valuable in the reform being managed, may be effectively received by the system, but nothing more. Participation finishes, in this sense, in this possibility of transmission –from the perspective of the subject– and reception –from the perspective of the system–.

That being the case, the next question is how the legal system should articulate this direct citizen participation during the central phase of the constitutional reform. Without intending to be exhaustive –this is not the place to formulate very specific legal proposals–, if there were a citizens' initiative of constitutional reform, it would be consistent that those who promote it could participate in its parliamentary processing, defending it and responding to the various objections and criticisms that may arise. The communication system-environment will be better if an expectation that comes from the social medium and gains access to Parliament could continue to have the support and

defense of those who originally formulated it. In addition, this participation could be done by public hearings. In that way, not only would experts have access to the parliamentary debate but also people and representatives from the social groups that would be affected by the constitutional reform (pensioners, young people, women, students etc.), who make up that part of the society that could contribute most to the debate.

2. Direct citizen participation in the *output*: participation–co-decision.

As noted above, direct citizen participation can occur at various points of the constitutional reform process and play, correspondingly, different roles. In addition to happening in the *input*, it can be part of the *output*, which is essentially the decision-making phase. The nature of this point in the process affects the role of direct citizen involvement, making it very different to the role played in the prior deliberative phases.

a) The systemic role of constitutional referendum.

Unlike in the initial and central phases of the process, in the decision phase there is no pluralism, but only minorities that manage to form a majority. The complexity caused by pluralism with the entrance into the system of many and varied social expectations, at some point has to be reduced so that the reform process can be concluded (*output*). Not because it is exhausted but rather because at some point the decision has to be taken to *provisionally* close the communication process until it is reopened again (Habermas, 1998, p.601). This need for closure, for a decision, banishes the participative-deliberative element as a democratic basis of citizen intervention at the final point of the process. It does not have the goal of inserting social expectations in the communicative circuit of the system –deliberation– but rather reaching a definitive decision, through a referendum, about converting a particular social expectation into law, that is, about the approval of a proposal or project of constitutional reform [6].

[6] Precisely because a referendum is a binary instrument (yes/no), there are more than a few democratic criticisms that have been traditionally expressed about it. Essentially, they concentrate on the «deliberative deficit» caused by this mechanism and the threat that it may pose to minorities, given that it is a majority that imposes it (Leduc, 2015; Qvortrup, 2002; Sartori, 1988; Tierney, 2012). These dangers literature warns of exist, but if a referendum is a decisive mechanism that necessarily operates in the *output* phase, the truth is that this tool cannot be other than binary. These warnings, in my opinion, more than demonizing referendums, serve to indicate that they should maybe not be the only instrument given to the citizens in the decision-making process, but should instead be accompanied by other, more deliberative instruments such as those indicated previously. In short, they are about the citizens participating and this does not only have to be related to the decision but to them taking an active part in the whole process.

The communication channel in this case serves to discover what the citizens think about a specific constitutional reform and, consequently, whether they accept it or not. This is now about intensifying the connection between the will of the citizens and the will of the State, aligning them as much as possible. The closer they are together or the less distance there is between the two extremes, the more referential the democratic system as a whole and, consequently, the more effective. Thus, while direct citizen intervention in the *input* corresponds to the term *participation-deliberation* and fundamentally affects the system's positivity (openness), now, in the final phase of the procedure, it corresponds to the term *participation–co-decision*[7], more strongly affecting the system's self-reference (closure).

Nonetheless, although a referendum may be a tool of voting and not of voice and, as such, an expression of *participation–co-decision*, the participative-deliberative element is not completely absent. Calling a referendum on a constitutional reform transcends the binary act of voting. It generates discussion about the question put to the vote, placing it squarely in the center of public debate and triggering healthy public deliberation. Although this mechanism is purely decisive –reducing complexity– it does generate complexity –at least *ex ante*– because it encourages the exchange of opinions and the expression of social expectations in the public debate, fostering the political pluralism (Levy, 2013; Tierney, 2015). In this deliberative function of referendums, information campaigns are fundamental. These should have the highest possible levels of transparency, neutrality and heterogeneity in order to be able to achieve not only this informative-deliberative goal but also a subsequent vote that is properly democratic.

Building on this, the next question is whether a referendum should be required for all constitutional reforms. If it is in the exercise of the power of constitutional reform where citizen participation makes most sense and has the most democratic function, as it is the maximum expression of the sovereignty of the legal system, it seems logical to accept that the ratification or constitutional reforms by referendum should always be a requirement in democratic terms (Aláez Corral, 2018; Pérez Sola, 1994). This is what happens in some European legal systems, such as Ireland (art.46 Constitution of Ireland), Denmark (Part X, section 88 Danmarks Riges Grundlov), Switzerland (art.140 Bundesverfassung), Andorra (art.106 Principado de Andorra Constitution) and Romania

[7] The term *participation–co-decision* is used rather than *participation-decision* because reforms that are put to a referendum have been approved previously by the respective Parliaments. There are, therefore, two state bodies –Parliament and the electorate– who are involved in the approval.

(art.147 Constituția României). Similarly, it is a requirement in all of the State Constitutions in the USA except Delaware (art.128 Commonwealth of Australia Constitution Act) (Donovan, 2014, p.128), Japan (art.96 Japanese Constitution) and some Latin American States such as Uruguay (art.331 Constitución de la República Oriental del Uruguay).

However, this unconditional requirement for citizen ratification is sometimes argued as being occasionally unnecessary and expensive for some constitutional reforms which are not so important (De Esteban, 1984) and superfluous for modifications that do not change the essence of the Constitution (materially constitutional rules). This is once again a problem of the starting point. If what justifies direct citizen participation in constitutional reform is that it strongly affects the system's self-reference and positivity, given that it modifies the limits of what is legally valid, then the system's sovereignty is questioned in every case, independently of the object of the reform (formal concept of Constitution). Provisions are always being modified that demonstrate the position of supremacy in the heart of the legal system. As such, there are no reforms which do not deserve a referendum because there are no «less constitutional» reforms than others, that is to say, that do not address the sovereignty of the system overall[8].

b) Intensity of direct citizen participation and the democratic principle.

Although all constitutional reforms jeopardize the sovereignty of the Constitution (self-reference and positivity), it is no less true that they do not all do so to the same extent. It is more tested in those reforms that directly affect the democratic principle –as it appears legally configured in each specific constitutional text, not in abstract terms[9]–. This expresses the same qualities that encapsulate sovereignty: self-government –which

[8] In contrast, if one starts from a material conception of Constitution, it is almost inevitable that one must accept that referendums are not always necessary, save for those that will ratify reforms involving *constitutionally material* rules. Since those are not found only in the Constitution, a referendum is necessary to approve those other reforms concerning aspects that, although formally outside the Constitution, are materially constitutional. This is the understanding that led Beckman, 2018, to consider a referendum not to be a necessary requirement for the democratic legitimacy of constitutional reforms. This point of view cannot be shared if one starts from the position that what defines a Constitution is its supreme position in the hierarchy of norms, not its specific content.

[9] This means that the democratic principle is not susceptible to interpretation outside of the specific constitutional text it exists in. That would break the self-reference of the legal system as we would be backing out of positive terrain. The content cannot be pre-understood, but rather must be deduced from the specific constitutional rules in which it is expressed –different in each legal system– and which subsequently have unique content (De Otto, 2010, p.141).

corresponds to a self-referential idea– and the possibility of changing the content of the law as long as the established procedure is followed –positivity– (Bastida, 1998, p.389).

With the question put in these terms, one can say that all constitutional reforms affect the democratic principle in some way as it is one of the main structural principles of the legal system. Nonetheless, this «affectation», to be truly such, must affect the *core elements* of that principle, not others which are ancillary, taking into account its specific constitutional configuration (Aláez, 2000). Consequently, if a constitutional reform affects the core elements of the democratic principle, the sovereignty of the system will be more affected and thus the stronger the direct citizen participation will need to be at the decision-making point. And the opposite, as long as the reform does not affect those core elements, participation can be reduced. The variables are directly proportional.

How, then, should we calibrate this distinct *intensity* that the participation should take on? It could be done via quorum of participation and the level of majorities needed to finally approve the constitutional reform. In those reforms that do not affect the essential elements of the democratic principle, direct citizen participation in decision-making could be weaker given that constitutional sovereignty is jeopardized to a lesser extent. In this case, it would be sufficient for the majority of voters not to oppose the reform, in other words, for the result to be based on a simple majority of votes cast without a quorum. The referendum would then operate as a «referendum oppositivo» (Guarino, 1948, p.130) in the Italian style, which gives minorities the chance to mobilize and contradict the decision of the parliamentary chambers and overcome a passive or indifferent majority. The *participation–co-decision* function of citizen ratification works more, here, in a negative sense. Through it, citizens could confirm that the will of Parliament is not in opposition to their will, as the former will not change as long as the latter does not contradict it. Citizens, in this case, decide in negative terms. The referendum thus becomes a «counter-democratic» instrument (Rosanvallon, 2006), with the citizens being a counterweight to the institutions[10].

[10] Nonetheless, this negative control function that referendums can perform can also be achieved if convening them is left in the hands of citizen initiative, as proposed, for example, by Saenz Royo (2016). This would allow minority groups to compel the direct decision of the citizens on a specific question, with the mechanism thus serving as a purely counter-democratic resort. In other words, the referendum may play this control function in different ways. In this study, by opting for it being obligatory regardless of the object of the constitutional reform, the control element is articulated via the establishment of a referendum by simple majority without quorum (oppositional).

In those cases where the constitutional reform in question directly affects the essential elements of the democratic principle –as they are constitutionally configured– direct citizen participation through referendum should be stronger. And that means requiring, not simply that the citizens not oppose the reform, but rather that they themselves co-decide. In this case, the referendum would have a positive function, rather than the negative or control task described above[11]. The important thing here is not that the citizens do not say «no», but rather that they expressly say «yes»: they «positively decide» (Rescigno, 1994, p.193). For that reason, there should be a minimum quorum of at least 50% of voters[12]. This would ensure that the result would be socially representative by involving at least half of the electorate, preventing abstention from playing a decisive role in finally passing the reform. With this quorum, and as this time the citizens should expressly say «yes», rather than simply not saying «no», there could be a requirement for an absolute majority of validly cast votes to finally approve the reform.

This proposal about a quorum and required majorities attempts to reconcile the need for the referendum to allow the citizens to strictly co-decide while, in the interests of achieving that successfully, it does not impose extremely strict requirements –a quorum over 50% and qualified majorities–. Overly strict requirements would make it into an instrument almost exclusively in the service of constitutional rigidity (Contiades and Fotiadou, 2017; Lutz, 1994) and frustrate the function that constitutional reform is called on to perform in a democratic system. This being so, it includes the essential «rigidities» for the referendum to be an instrument of strict co-decision rather than a mere instrument of control, disregarding those extra elements of rigidity that add nothing to the task that it is called on perform.

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[11] This dual function performed by constitutional reform referendums is outlined, using other terminology, in Aláez Corral (2018, pp.652-653), in whose understanding in the Spanish case is that referendums under art. 167 SC should be configured as a «mechanism of contradictory popular control», while those under art. 168 SC should operate as «confirmatory referendums».

[12] Quorums required by European Constitutions for ratification in referendums include 40% of the electoral roll in Denmark (Part X, section 88), 50% in Slovenia (art.170) and Latvia (art.79). Others require much higher levels of participation, such as Lithuania which has set the need for ¾ of the electoral roll (75%) to vote in favor to modify art. 1 of their Constitution (republican form of government).

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