

# Prospects for Participatory Democracy in the Supranational Constitutionalism of the European Union

*Victor Cuesta*

## 1 Introduction

Constitutionalism, traditionally addressed to national polities, is a widespread expression of democratic governance based on the rule of law, the fundamental rights of the citizens and the sharing of power among legitimate and accountable political actors. In addition to these immovable contents, it is often claimed that the legitimate foundation of a democratic constitution requires the agreement of the sovereign, that is to say, the constituent act of the people of the national community<sup>1</sup>. Therefore, the democratic legitimacy of the national constitution derives from the consent of the citizens, preferably expressed through a constituent referendum. Once the political community has been constituted, a constitutional democracy could enshrine additional devices of direct democracy for the purpose of occasionally expressing the popular will by ballot.

An elementary translation of the contractual principle from national constitutionalism to a supranational polity such as the European Union implies that the foundation of a genuinely democratic European constitution requires the explicit agreement of the European People through a Europe-wide constituent referendum<sup>2</sup>. Such a constituent moment would entail the birth of a supranational sovereign which could be called upon again to express the popular will on important European matters<sup>3</sup>. However, it is doubtful whether the modern principles of constitutional democracy could be simply transferred to the European integration project. As Weiler, Haltern and Mayer argue, “the very principles of democracy may need revision to meet postnational and global conditions, much as they did in tacking on their modern representative form during this century as a result of democracy’s extension to the masses and its application at a national scale” (Weiler/Haltern/Mayer, 1995, p. 33).<sup>4</sup> Constitutional democracy will always be about the fundamental rights of the citizens and the balance of power between the representative institutions, but its formal representation could be significantly altered when moving from one polity to another.

It is particularly questionable whether the whole concept of sovereignty would be able to resist the shift from national constitutionalism to supranational constitutionalism. The

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<sup>1</sup> According to Grimm, a democratic constitution “goes back to an act taken by or at least attributed to the people themselves, in which they attribute political capacity to themselves” (Grimm, 1995).

<sup>2</sup> For instance, Feld and Kirchgässner claim that “the future European Constitution as well as future changes to it, should be decided by the European citizens” (Feld/Kirchgässner, 2003).

<sup>3</sup> Feld and Kirchgässner propose the establishment of “a mandatory (required and binding) referendum on total and partial revisions of the European Constitution. In addition, we propose a constitutional initiative, a statutory and a general initiative as well as a fiscal referendum for financially important projects” (Feld/Kirchgässner, 2003).

<sup>4</sup> M. Poiarés Maduro also argues that “National constitutionalism is simply a contextual representation of constitutionalism whose dated and artificial borders are challenged by European Constitutionalism” (Poiarés Maduro, 2003).

European constitution, enshrined today in the international Treaties and the jurisprudence of the European Court of Justice, must coexist with a set of national constitutions legitimated by their sovereign peoples. This context of constitutional pluralism implies the dispersion of sovereignty among all the citizens of the EU<sup>5</sup>. The emergence of a new supranational sovereign would pose a serious challenge to the principle of constitutional pluralism and, therefore, the integrity of the national sovereignty granted by the constitutions of the Member States and European law<sup>6</sup>. Let us consider, by way of illustration, whether or not the will of the European people would prevail over the divergent will of French and/or Dutch people. The European Union, avoiding a potential conflict of sovereignties, refused to establish Europe-wide direct democracy devices in its last constitutional project: the international Treaty establishing a Constitution for Europe.

This does not mean, however, that European citizens could not be involved at all in European supranational governance. As Reanud Dehousse maintains, what matters in European politics “is not that the eventual decision can be formally attributed to the will of the citizenry, but rather that those who so wish be given a chance to express their views” (Dehousse, 2001, p. 26). Citizens’ involvement in supranational politics is not about popular statements but about reason-giving in the public deliberations guided by the European institutions.

## **2 Direct Involvement of European Citizens in Supranational Politics through Participatory Democracy**

One of the most notable achievements of European integration is the creation of a European citizenship that confers a set of additional freedoms and rights on more than 455 million citizens from the EU’s member-states. The Treaty establishing a Constitution for Europe develops this status, including - in its Title VI: The Democratic Life of the European Union - several opportunities for European citizens to have a say in the decision-making of the European Union. These opportunities for political involvement beyond voting in parliamentary elections - also known as instruments of participatory democracy - allow citizens to be involved in public deliberation and to engage in dialogue with the European institutions, presenting arguments which can be subjected to rational critique. For practical purposes, the multiple demands and proposals from citizens are normally aggregated and promoted by civil society organizations<sup>7</sup>. The participation of civil society is, in fact, a principle of good governance included by the European Commission in the White Paper on European

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<sup>5</sup> The idea of Constitutional Pluralism in a supranational context has been developed by Neil Walker (2003).

<sup>6</sup> M. Maduro states that the European Union cannot assume a supreme constitutional authority, a popular *pouvoir constituant*, because “it would entail replacing the national polities by the European polity and it could destroy the present plural relationship between the European and national constitutions” (Maduro, 2004, p.38).

<sup>7</sup> “Civil society organizations include: the so-called market players; organizations representing social and economic players, which are not social partners in the strict sense of the term; NGOs which bring people together in a common cause, such as environmental organizations, human rights organizations, consumer associations, charitable organizations, educational and training organizations, etc.; CBOs (community-based organizations), e.g. youth organizations, family associations and all organizations through which citizens participate in local and municipal life; religious communities.” Consultation and Participation of Civil Society in the White Paper on European Governance. De Schutter claims that “people belong to groups that build up expert and grassroots knowledge of the social issues in question. These bodies also participate in public information and communication processes, so helping to create a general perception of the common good” (De Schutter, 2002, p. 202).

Governance and it is intended to serve as an alternative strategy in the search for democratic legitimacy for the European Union. In this sense, Dehousse claims that “European decision-makers will be compelled to pay attention to a wide range of citizens’ opinions in order to obtain legitimacy” (Dehousse, 2002, 202).<sup>8</sup>

It is particularly significant that the Constitutional Treaty was drafted in a deliberative forum, the Convention on the Future of Europe, which had several formal contacts with civil society<sup>9</sup>. Even if the political impact of these contacts was restrained, it should be noted that “the draft Constitution indeed contained quite a number of essential demands of the NGO sectors”. In fact, “one of the welcome gains was the inclusion of art.47 on civil dialogue” (Berger, 2004, 6).

Let us now consider the achievements embraced by article I-47 of the Constitutional Treaty. The first and second paragraphs are supposed to give a normative strength to the principle of participatory democracy in European governance<sup>10</sup>:

- Article I-47. The principle of participatory democracy: 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
- This article is addressed to all European institutions that must not only consider the diverse opinions of both individuals and associations on their initiatives but also maintain a permanent dialogue with the representatives of civil society. Nevertheless, the wording of article 47 does not specify what are the “appropriate means” that would guarantee communication between the political actors. The article is particularly “ambiguous on the question of whether the Commission and other institutions, once they have engaged in the dialogue, are then obliged to treat all associational views as equally legitimate” (Bignami, 2003, p. 29). It is undeniably true that the principle of participatory democracy needs further normative arrangements in order to be truly operative. However, even in its current wording, when taken together with other constitutional principles such as openness, transparency, accountability and political equality, it would acquire (if the Constitutional Treaty is ratified) relevance even before the European Court of Justice.

The third paragraph of article 47 is particularly addressed to the European Commission. It gives a proper legal status to external consultation with interested parties:

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<sup>8</sup> Dehousse continues: “An extensive dialogue with the various segments of civil society would obviate some of the shortcomings of representative democracy at European level, by enabling those who so wish to have a say in the decision-making process. In so doing, one might enhance the legitimacy of decisions taken by European bodies, for there is empirical evidence to suggest that decisions taken by public bodies (even non-representative ones, such as courts) are more readily accepted when they appear to be taken according to fair procedures. A greater openness of the decision-making process also improves public awareness of the issues discussed at the European level, thereby contributing to the emergence of a truly pan-European public sphere” (Dehousse, 2002, 202).

<sup>9</sup> “By June 2002 there were signs that the NGOs were winning their battle and that a more structured dialogue would take place (...). At the latest by July 2002, the NGOs, the platforms and the Civil Society Contact Group had established firm connections with a strong segment of Convention Members” (Berger, 2004, 5).

<sup>10</sup> “What appears to be required is a decision of a constitutional nature, namely a formal recognition of participatory rights to be enshrined in the Treaty itself” (Dehousse, 2001, 23).

- Article I-47.3: The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Consultation is not a new process introduced by the Constitutional Treaty. In fact, the European Commission “has a long tradition of consulting interested parties when formulating its policies. It incorporates external consultation into the development of almost all its policy areas”, (Commission of the European Communities, 2002, p. 3). The consultation procedure has been recently re-ordered and rationalized by the Commission in its Communication: “Consultation document: Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission”. The Communication sets up a coherent framework that includes “what to consult on, how to apply the principle of early consultation, the criteria for identifying the relevant stakeholders, practical guidance on how to carry out the actual procedure, how to present the results of the consultation to the political decision-makers and, last but not the least, how to provide feedback to the stakeholders who were consulted” (Working Group “Consultation and Participation of Civil Society, 2001, p. 4). In addition, the European Commission has created a directory of non profit-making civil society organizations CONECCS (Consultation, European Commission and Civil Society). This database allows civil society organizations to locate the Commission's structured consultative bodies.

The initiative for both civil dialogue and external consultation seems to be in the hands of the European institutions. In contrast, the **European Citizens’ Initiative** encourages the spread of participation from the bottom:

- Article I-47.4: Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.

The fourth paragraph of the article, included during the very last session of the Convention, constitutes a real participatory innovation. The implementation of this supranational agenda-initiative, merely sketched out in the Constitutional Treaty, is addressed to the European legislature. As article 47.4 of the European Constitutional Treaty states that European citizens will invite the Commission, it seems safe to assume that the ECI will be an indirect device. In other words, the European participatory device will be an initiative of an initiative. The Europe-wide citizens’ initiative will be just a very first step in the law-making process which is always launched by the Commission. Here we have a specific discrepancy between the future European initiative and the national indirect initiatives, which are always sent to the legislature. This discrepancy is a logical consequence of the particular structure of the Union and its institutional balance, which assigns legislative initiative exclusively to the Commission (article I-25.2: “Union legislative acts can be adopted only on the basis of a Commission proposal”). We should pay special attention to this difference, because in countries such as Spain or Italy the correct submission of the initiative

to Parliament initiates per se (automatically) the law-making process, and consequently, only the representatives are authorized to decide whether the initiative is or is not politically opportune. This automatic initiation of the legislative process is the main difference between the indirect popular initiative and the right of petition. However, the ECI will need a first examination by the Commission before the definitive submission to the legislative process. I hope that this preliminary control measure by the Commission will be merely to check that the initiative is constitutional and that it satisfies the formal conditions. In my opinion, once the initiative has satisfied these requirements, the popular request should be automatically passed on by the Commission to the lawmaking process. I would argue that the initiative does not need a prior political judgment from the Commission because this kind of control will be made later by the European Council and the European Parliament.

Another conclusion to be drawn from article 47.4 is that the Europe-wide citizens' initiative will operate as a statutory initiative. The popular proposals directed to the Commission must suggest the adoption of some European legal act. We must suppose, according to article I-32, that the European citizenry will be able to design both kinds of legal acts: legislative acts (European laws, European framework laws) and non-legislative acts (European regulations, European decisions, recommendations and opinions). It is obvious from the wording of the article that the ECI will serve to develop the constitutional charter through new statutes, but it also seems clear that the initiative will not be able to promote constitutional amendments (like the Swiss *initiative populaire constitutionnelle*), review laws in force (like the Italian *referendum abrogativo*) or demand the popular approval of enacted laws (like the Swiss *referendum facultatif*). In fact, these kinds of institutions are always oriented in comparative law to popular consultation, and, as we have seen above, referendum initiatives are excluded in the ECI model. It must be said, however, that the enactment of a new European legal act proposed by a hypothetical ECI could implicitly result in the derogation of a European statute in force.

Another important point to note is that article I-47.4 does not present a list of issues excluded from the popular request. This is also the situation with the Italian indirect initiative which was not materially restricted by its founding charter; this precedent is particularly important, because the initiative was not limited later when it was given its statutory form. On the other hand, we have the Spanish indirect statutory initiative which was substantially limited in its scope by the Spanish Constitution and later on by legislation; as a consequence, this initiative cannot be used today to promote the adoption of fundamental laws, taxation issues, or international affairs, nor to the prerogative of pardon. Fortunately, the European Convention has not followed the restrictive Spanish option. Nevertheless, it seems obvious that our ECI will be automatically dismissed if it conflicts with any constitutional provision, and especially if the ECI promotes policies beyond the boundaries of the European competences or does not rigorously respect the charter of fundamental rights. In addition, it must be said that all national indirect initiatives are in one way or another excluded from several legislative procedures reserved for the exclusive initiative of representatives (for instance laws on the national budget). In fact, a second reading of the European constitutional draft shows the difficulties that a popular initiative will have in promoting initiatives that deal with such specific matters as common foreign and security policy, which is excluded from the ordinary legislative process and absolutely dominated by the European Council.

It is also significant that the article does not establish any formal requirements regarding the citizen's request. We know that the ECI must be submitted as an appropriate proposal, but there is no further detail. In comparative law, national indirect statutory initiatives must normally satisfy formal requirements on the composition of the legislative draft. Usually, initiatives must consist "of a bill drafted in articles" (Italian initiative) or "must be put forward in the form of a draft law" (Austrian initiative). In contrast, the Hungarian indirect initiative does not need any formal bill from the petitioners and the Swiss direct constitutional initiative can also be formulated in general terms. It is relatively easy to draft a general initiative, but it should not be forgotten that such a general proposal would require further intervention by representatives who would draft the final version. Despite the possible difficulties in the design of a legal draft, I venture to suggest that a bill drafted in formal articles would be a more accurate and definitive support for the citizen's demands.

In comparative law, the number of required signatures is based either on an absolute number of national citizens or on a proportion of the voting population. The European Convention has chosen a fixed number of signatures, one million, which could in principle be increased by the future European law on ECI. This possibility seems to me rather unlikely: if we analyze previous constitutional experience, once a constitution has established a minimum number of required signatures, legislative developments have never increased it. From the table below we can see how the European Convention has chosen a fairly low number of signatures representing just 0.2% of the citizens of the future enlarged EU (25 members—around 480 million inhabitants). Only the number of signatures required in Italy represents a lower percentage than the European one.

Let us now look at the geographic distribution of the signatures. The European Convention has specified that support for the ECI must come from several member states. The future territorial distribution could be established following the Massachusetts model, where no more than 25% of the signatures may come from any one county; in other words, the proportion of signatures coming from a member state could be limited (for instance, no more than 25% of one million signatures coming from one state means in practice that the ECI would have to be supported in at least five states). Another way to determine the territorial distribution is by setting an absolute minimum number of involved countries. If the ECI follows this option, an additional important point to be determined will be the number of signatures required in each country for it to be included in the list of the "significant number of Member States". This territorial requirement could be perceived as a logical consequence of the transnational dimension of the EU. I argue that the territorial distribution will contribute to the creation of a Europe-wide democratic consciousness and it will encourage our emerging European civil networks. However, this requirement could also be seen as a potential added obstacle to the success of the initiative; it will be very difficult for any initiative committee to organize the collection of signatures from several different and possibly widely separated member states.

Since the Constitutional Treaty has been rejected by the French and Dutch voters, it is time to consider the prospects for the implementation of the initiative in the absence of a constitutional basis.

### 3 Prospects for European Participatory Democracy in the event of Failure of the Constitutional Treaty

National ratification and, therefore, the enactment of the Treaty establishing a Constitution for Europe remains today highly uncertain. Its likely failure would mean that participatory democracy will have no constitutional status. Nevertheless, it does not mean that the principle of participatory democracy and the consultation procedures cannot be solidly implemented by the European institutions. In fact, the White Paper on European Governance constitutes a reasonable ground for dialogue between civil society and the European Commission. The Council Decision of January 2004 establishing a Community Action Programme to Promote Active European Citizenship (2007-2013) is also an attractive project from the institutions to support the political involvement of the European citizens. Additional efforts must be made by the European institutions to engage in dialogue not only with interested parties, but with the whole citizenry. New research must be also developed in order to avoid the arbitrariness and to ensure equal consideration for reasonable demands, including those coming from individual citizens.

Implementation of the European Citizen's Initiative without any recognition in European primary law (which regulates the decision-making process of the EU) is more complicated. Even so, I venture to suggest that the European Commission, which will preserve the monopoly on the legislative initiative, could itself adopt a suitable code of practice welcoming the legislative initiatives formally supported by a certain number of European citizens. The translation of the citizens' initiative into a formal legislative proposal would depend on the political will of the Commission. The content of article 47.4 and the work done by the Research Centre for Direct Democracy at the University of Marburg and the Initiative & Referendum Institute (Criteria for implementation) could serve as a reference for the Commission. Another arguable alternative (defended by Democracy International) is the adoption of a future Regulation on the basis of article 308 of the Treaty establishing the European Community<sup>11</sup>.

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<sup>11</sup> It reads: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

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