

Participatory constitutionalism: challenges from and to governance

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Abstract

The paper proceeds from the contemporary crisis of legitimacy and decision-making processes, especially but not exclusively in Europe. Demands for more participation and claims for accommodation of pluralism beyond mere parliamentary representation are common to modern democracies. Responses so far have been unsystematic, although many attempts have been made at various levels to provide broader participation and inclusion in decision-making. While it is commonly argued that participatory processes are more suited for lower levels of government and rather administrative issues, comparative practice shows that such processes are taking place to a surprising extent also at constitutional level.

After contextualizing the problem, the paper goes on to describe some of the more significant European experiences of the past years. These include the supranational level (from the convention set up to draft the EU charter of fundamental rights to the new procedure for amending treaties set out in article 48.3 TEU), the national level (cases of Austria, Iceland, Ireland and Italy) and the sub-national one (attention will be paid to the recent experience of some Italian regions such as Sardinia, Friuli Venezia Giulia and South Tyrol). While very different in origin, procedure and outcome, all these cases have in common the search for more inclusive and complementary processes to amend constitutions at various levels in the European context.

The paper concludes by arguing for a more thorough analysis of the phenomenon, which has so far received too little attention, particularly by lawyers. It is contended, in particular, that such processes are especially useful when it comes to “constitutional maintenance”, as they are at odds with revolutionary aims and rather tend to introduce changes without breaking with the overall constitutional structure. Furthermore, it is argued that federal studies can provide useful insights to identify procedural solutions, as federalism is the oldest and more consolidated constitutional instrument for the institutional accommodation of pluralistic claims and their regulation. Finally, it can be concluded that the spreading of participatory practices is encouraged in a multi-level context such as the European legal space, to which mutual influence and cross-fertilization are inherent.

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1. The crisis of decision-making and the challenge of participation

The advent of constitutionalism brought about substantial simplification with regard to the status of individuals by inventing citizenship as a unifying factor. Conversely, as far as decision-making is concerned, constitutionalism has unequivocally meant more complexity due to the adoption of pluralism as the very foundation of the democratic government: unlike in the pre-constitutional era, decisions were no longer taken by one but by many, according to pre-defined rules and controlled by the judiciary. Institutional pluralism was developed both horizontally – division of powers among different bodies and organs – and vertically, i.e. between different levels of government.

Democratic decision-making is the backbone of constitutionalism. Decisions are legitimate only if taken by bodies, and according to procedures, directly or indirectly accountable to the people. Such accountability has normally taken the form of direct or representative democracy, whereby the latter has progressively prevailed alongside the development of ever more sophisticated institutional arrangements.

In more recent times, two factors have begun to cast this simple scheme into question.¹ First, the growing number of people, their better education and the resulting growth of the will to actively participate among a majority of individuals and interest groups has made the traditional forms of representative and direct democracy ever more unsatisfactory to an ever larger number of people. Elected assemblies are perceived as less and less representative and, in fact, they were conceived of at a time when a very small number of persons were allowed to turn to the ballots and in which assemblies served as platforms to reach compromises between a small elite of aristocrats and bourgeois. At the same time, direct democratic tools such as referenda and popular initiatives prove to be rudimental instruments, often in the hands of mobilized minorities, and greatly unfit to regulate increasingly complex issues, ones which often require deep specialized knowledge and that can rarely be reduced to a “yes” or a “no”. Disaffection with politics, the decreasing role of political parties, increasingly recurring protests, and several other symptoms of popular discontent vis-à-vis the political process are, therefore, the outcome of structural and systemic factors rather than of the lower quality of political elites. The latter phenomenon – to the extent it exists – is a consequence rather than the cause of growing heterogeneity, more independent thinking, and a greater democratic consciousness of people.

¹ G. Sartori, *The Theory of Democracy Revised*, CQ Press, part I, 1987.

Second, contemporary constitutionalism has required institutions and procedures to become increasingly complex and sophisticated. While necessary to adapt a relatively simple institutional and procedural machinery – such as that based on the separation of legislative, executive, and judicial power – to growing challenges, such complexity inevitably makes democratic control more difficult, adds layers of government and decisional instances, sometimes mixes up the realms of the various powers, and dilutes accountability.² Such phenomena are not necessarily negative, as sometimes decisions can in fact be more transparent and accountable.³ In any event, such complexity is inherent to the complexity of society (one may think for instance of the technical norms on a number of indeed highly complicated and specialized issues), and even to the very basic democratic need to control and limit power: examples can range from the establishment and the progressive development of the judicial review of legislation to the role of supranational institutions.⁴

Such developments – occurring extremely quickly in the course of the last few decades and which seem to be speeding up more and more as time passes – raise the question as to whether traditional decision-making, based on either direct or representative democracy, is reaching its limits, and thus requires new and more sophisticated tools in order to come to legitimized decisions.

In contemporary societies, decision-making has become an extremely complicated task. This is due to a number of reasons, the most significant being the phenomenon of legal pluralism⁵ and its spread in modern constitutionalism. Decisions are made by a growing number of actors vested with different legitimacies beyond the mere political/electoral one. These actors are arrayed both vertically (levels of government) and horizontally (parliaments,

² Thus the phenomena of “blame shifting”, i.e. the opportunity for decision-makers to avoid accountability for decisions influenced by other governments, as described by R.K. Weaver, *The Politics of Blame Avoidance*, in *Journal of Public Policy*, 1986, 371-398. Another frequent consequence is that of overlapping and interlocking jurisdictions, making it difficult to identify and divide political responsibility clearly, a widespread problem first identified by Fritz Scharpf (see F.W. Scharpf et al (eds.): *Politikverflechtung*. Scriptor Verl., Kronberg/Ts, vol. 1-3, 1976-1979). At the European level see F.W. Scharpf, *Die Politikverflechtungsfälle: Europäische Integration und deutscher Föderalismus im Vergleich*, in *Politische Vierteljahresschrift* vol. 26, no. 4 (1985), p. 323-356.

³ When more actors participate, the chance that transparency increases is greater. Each level is subject to controls, is to some extent interested in keeping its constituency informed, and does not want other levels to take non-transparent decisions against its interests.

⁴ One may think of some of the legislation adopted at various levels, including the supranational one, where texts are drafted by small and closed groups of unknown and not legitimized people, often based on informal and non-transparent consultations, and leading to texts that are either difficult to interpret or extremely technical in nature. One may consider if such pre-legislative activities can be made more transparent and accountable and even whether some legislation is at all necessary. For sure, there is room for improvement in this regard.

⁵ Inter alia N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2012), R. Michaels, “Global Legal Pluralism”, *Annual Review of Law & Social Science*, 5 (2009), 243-262, B.Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, *Sydney Law Rev.*, 30 (2008), 375-411, and J. Griffith, “What is Legal Pluralism?”, *Journal of Legal Pluralism*, 24 (1986), 1-55 (also available at http://www.jus.uio.no/smr/english/research/areas/diversity/Docs/griffiths_what-is-legal-pluralism-1986.pdf).

governments, agencies, courts, administrations, interest groups). Numerous norm suppliers coexist and shape decision-making and implementation in each subject area, and, at each level, a plethora of actors access institutions in both formal and informal ways to make their claims heard and possibly influence legal norms. Subject matters become more articulated the more society and technology evolve. Thus, jurisdictions tend to overlap as no field can be clearly separated from others, and the legal and administrative regulation of each competence matter is regulated by an entanglement of norms and procedures produced by several authorities at different levels, often in an uncoordinated manner.⁶ At the same time, there seems to be no alternative to the evolution of governance towards greater complexity and pluralism, not only because societies are simply becoming more intricate, but also because democracy requires that many voices be heard and included in decision-making processes, especially in order to increase social acceptance of norms.

No doubt, such a trend can quickly make decision-making immensely cumbersome. While it becomes necessary to adapt a relatively simple institutional and procedural machinery – the one based on the separation of legislative, executive, and judicial powers – to ever newer challenges, such complexity also makes democratic control more difficult, adds layers of government and decisional instances, at times mixes up the realms of the various powers, and dilutes accountability.⁷ Such phenomena are not necessarily negative; occasionally, convoluted decisions can in fact be more transparent and accountable.⁸ Vast complexity requires efficient procedures that allow actors and levels to interact without duplication and to make decisions cooperatively without blocking one other.

Thus, one of the most significant challenges faced by constitutional law and political science is how to combine pluralism with good and effective governance. Put another way: how is it possible to make decisions in a manner that is democratic, transparent, inclusive, and effective, taking into account different claims, different interests, and different legitimacies.

⁶ This might also involve the relationship between public and private spheres, thus going beyond the public law sphere to imply the possibility and even the opportunity to create functional jurisdictions populated by private actors competing with or substituting for the public service providers. See B.S. Frey, “Functional, Overlapping, Competing Jurisdictions: Redrawing the Geographic Borders of Administration”, *European Journal of Law Reform*, V, 3/4 (1997), 543-555.

⁷ Thus the phenomena of “blame shifting”, i.e. the opportunity for decision-makers to avoid accountability for decisions influenced by other governments, as described by R.K. Weaver, “The Politics of Blame Avoidance”, *Journal of Public Policy*, (1986) 371-398. Another frequent consequence is that of overlapping and interlocking jurisdictions, making it difficult to identify and divide political responsibility clearly, a widespread problem first identified by Fritz Scharpf (see F.W. Scharpf et al (eds), *Politikverflechtung* (Kronberg/Ts Scriptor Verl., 1976), 1976-1979). At the European level, see critically F.W. Scharpf, „Die Politikverflechtungsfalle: Europäische Integration und deutscher Föderalismus im Vergleich“, *Politische Vierteljahresschrift*, 26: 4 (1985) 323-356 and J. Zielonka, *Is the EU Doomed?* (Cambridge: Polity Press, 2014).

⁸ When more actors participate, the chance that transparency increases is greater. Each level is subject to controls because it is, to some extent, interested in keeping its constituency informed. Therefore, each level does not want other levels to take non-transparent decisions against its interests.

From the outset, it looks like a titanic endeavor, but, as difficult as this might be in practice, the solution can be found in the adoption of appropriate methods of coordination among actors. Growing complexity is simply part of the natural and inevitable evolution of contemporary societies; consequently, institutions and procedures must become increasingly articulated and sophisticated. Such evolution is inherent to the complexity of society (one may think for instance of the technical norms of a number of indeed highly complicated and specialized issues) and even to the very basic democratic need to control and limit power. Examples range from the establishment and the progressive development of judicial review of legislation⁹ to the role of supranational institutions.¹⁰ In plain words: contemporary constitutionalism requires much more elaborate rules than in the past.

2. Bicycles and dams: Participation and the lack of a constitutional theory

At present, democratic decision-making resembles the very first bicycles of the late 19th century: the small rear wheel is direct democracy, the big one is representative democracy, and on it sits the driver (the executive). Such a bike was a revolutionary innovation at the time it was invented, but for contemporary standards it is far too slow.

In more recent times, frustration with regard to the lack of effective participation through the representative bodies and the structural limits of direct democracy created what can be described as a “dam effect”: like a river blocked by a dam, the water tends to flow in alternative, sometimes unnatural ways.¹¹ Alternative flowing channels need therefore to be built, in order not to waste the water: such a dispersion of water not only dissipates it with all its negative consequences, but it also makes the dam itself useless. Contemporary democracies cannot pretend that the dam does not exist, nor can they claim that it will be destroyed by the flooding water: rather, they are faced with the challenge of developing

⁹ See inter alia H.-P. Schneider, J. Kramer and B. Caravita di Toritto (eds), *Judge Made Federalism? The Role of Courts in Federal Systems* (Baden-Baden: Nomos, 2009); P. Popelier, A. Mazmanyán and W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Cambridge/Antwerp/Portland: Intersentia, 2013); R. Toniatti, M. Magrassi (eds), *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e confronti europei e comparati* (Padova: Cedam, 2011).

¹⁰ One may think of some of the legislation adopted at various levels, including the supranational one, where texts are drafted by small closed groups of unknown and illegitimate people, often based on informal and non-transparent consultations. This practice may lead to texts that are either difficult to interpret or extremely technical in nature. One may wonder if such pre-legislative activities can be made more transparent and accountable, and whether some legislation is even necessary. For sure, there is room for improvement in this regard.

¹¹ Other effects are produced that do not take the form of deliberative or participative procedures, such as, in particular, technocratic-bureaucratic decision-making. Such a tendency towards technocratic governments, for example, has been quite evident in several Southern European countries during times of financial crisis.

effective additional channels for the water and possibly to make the best use of the water encapsulated by the dam.

Starting in the 1980s and accelerating in more recent years, especially at local level, several spontaneous practices have been initiated in order to overcome some of the structural deficits of classical decision-making. The different forms of such experimental practices and instruments have been commonly classified by scholars into two main groups: participatory and deliberative democracy¹², though some include also a third genus, associative democracy.¹³

Rather than engaging in terminological and definitional issues, it seems more useful to consider deliberative and participatory exercises as a common phenomenon, aiming at complementing (rather than substituting) the classical forms of representative and direct democracy. In essence, what matters is the development of complementary forms that are trying to overcome or at least to integrate and dilute the main feature common to both representative and direct democracy: the majority principle. Participatory and deliberative democracy (which can be labelled as alternative or complementary decision-making tools) aim at enlarging the number of involved actors, at anticipating and preventing conflicts, as well as at including relevant stakeholders and collective knowledge as early as possible in the decision-making process. The aim is to avoid, prevent, or at least prepare - to the extent possible - majority decisions and, consequently, to limit opposition to the decision eventually taken, by absorbing such opposition at the earliest possible stage, establishing a more pluralistic and participative decisional process. In fact, this is a natural evolution of the very essence of pluralism and stems directly from constitutionalism. It is as an enlargement of the established decision-making techniques following the exhaustion of structural limits of traditional instruments.

While legal, political, and sociological literature has begun to pay increasing attention to such new forms of decision-making, it has not yet developed a consistent theoretical framework to classify and explain this phenomenon. The persistent lack of a sound theory makes the

¹² In a nutshell, *participatory* democracy is linked especially to several experiments seen in South America, is more practice oriented, and often originates from protest movements. A typical example of such an approach is participatory budgeting. *Deliberative* democracy, by contrast, has its roots in Europe and North America, and takes forms such as citizens' assemblies and other bodies complementing rather than substituting for elected assemblies or referenda. See the seminal work by J. Steiner, *The Foundations of Deliberative Democracy*. Empirical research and normative implications, Cambridge Univ. Press, 2012.

¹³ Whereby power is decentralized and partly transferred to voluntary civic associations such as citizens' initiatives, NGOs, interest groups, etc. See the seminal work by P. Hirst, *Associative Democracy*, Cambridge Univ. Press 1995 and more recently P. Hirst, V. Bader, *Associative Democracy: The Real Third Way*, London-Portland (Frank Cass), 2005.

analysis of such practices descriptive rather than normative, at least from the point of view of a possible classification and thus for comparative investigation. This is the reason why several definitions put forward in the literature – but quite often also by the legislators themselves – consider that participatory instruments include or perhaps even coincide with tools that are typical of direct democracy, such as referenda, popular initiatives, and consultations. It would be pointless to suggest here one more definition of participatory and/or deliberative democracy based on a futile attempt to include all possible comparative experiences different from more traditional representative democracy. We propose instead, to identify one criterion that characterizes all decision-making processes of this kind. Such criterion is the abandonment of the majority principle, or at least the inclusion of participatory practices prior to a majority decision. Relevant for this research are all decision-making processes that depart from or at least complement and anticipate the majority rule and adopt different rationales to come-up with a decision. This decision can, in the end, still be made by the majority (in an elected assembly or in a referendum), but is at least initiated, prepared, and discussed by involving a variety of actors and taking different perspectives into account.

A lot more could be said on this. A thorough and comprehensive analysis would include, inter alia, the role of political parties, the theory of democracy, the not necessarily democratic nature of citizens' initiatives and NGOs, as well as studies on the efficiency and performance of governments and administrations, partially in order to better clarify that more participation does not necessarily mean, per se, better and more efficient democracy. To the contrary, it can make the system more cumbersome and in the end even less democratic. The theoretical point to be made here, however, is more humble. It just considers the phenomena described above and the existence of a variety of instruments that have been pragmatically, rather than systematically, developed in comparative practice and tries to consider how this can add to a contemporary understanding of constitutional pluralism. In other words, the aim is not to develop a theoretical framework for alternative/complementary and non majority-based decision-making procedures, but simply to provide a small contribution to the development of such a theory by looking at a few paradigmatic examples in the constitutional sphere.

3. Some cases of (somewhat) participatory constitutional processes

It is often contended that participatory practices are possible only at a local level. There is of course some truth in such contention, the more obvious being that size matters: the smaller the community involved, the easier is participatory decision-making. At a closer look, however,

such statement needs to be at least partly relativized. First, the same holds true for whatever organization and deliberative processes: also representative and direct democracy are easier to be set up on a smaller scale. Second, the degree of success of participatory practices is not much higher on a smaller than on a bigger scale.

In fact, participatory procedures are being experimented with at a constitutional level too, and while their outcomes have not been immediately successful, they are changing some of the long-held views regarding to the constitution drafting or amending processes. Some recent European examples seem to support this conclusion and will be briefly examined in the following pages. The national cases have been selected and examined following a “scale of intensity” of participation, from rather political bodies with just some small expert participation (Germany, Austria) to international assistance (Ukraine) to more proper participatory forms, from a maximum of non-party-political involvement (Iceland) to mixed bodies (Ireland), ending with a failed attempt to split expert and political levels (Italy). As the constitutional level is however not only national, but also supranational and sub-national, also the supranational case of the EU and some recent sub-national experiments (based on the Italian case) are analysed to round up the analysis.

3.1. The EU and the convention method

The issue of the constitutionalization of the EU is causing a never-ending debate among lawyers. Supporters of a more formalistic view, according to which the EU is still an international organization regulated by “normal” international treaties, tend to deny the existence of a European constitution due to the lack of the formal and substantial elements of a constitution. Supporters of a substantive view, on the other hand, maintain that the EU already has a constitution in functional terms.¹⁴ In any event, it is undisputed that the EU has a constitutional law even without a formal constitution, and that the relationship between domestic and European law needs to be understood in constitutional terms.

For the purposes of this chapter, it suffices to point out that the EU constitution-building process is quite relevant for a number of reasons. First, constitution-building at the level of the

¹⁴ The two approaches are reflected by, on the one hand, the German judicial saga from the “Maastricht” (BVerfGE 89, 155 (1993)) to the “Lisbon” (BVerfGE 123, 267 (2009)) rulings, when the court repeatedly pointed out that without a State there cannot be a constitution, and without a people there cannot be a State. On the other hand, the Court of Justice of the European Union not only affirmed the principle of supremacy of EU law, but since 1986 defined the (then) European Community as “a community based on the rule of law, inasmuch as neither its member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the *basic constitutional charter, the Treaty*” (ECJ, 23-4-1986, case 294/83, *Parti ecologiste “Les Verts”*, ECR, 1339 at 23, emphasis added).

EU is clearly separated from any sort of State and nation-building. Second, this process is being realized through a series of (legally and logically) connected acts and facts of constitutional relevance,¹⁵ that spread out over an extremely long time, making it impossible to separate the one from the other, to such an extent that it gives rise to endless debates between those who support the idea that a European constitution has already been established and those who support the opposite view. Third, this process is being realized through a progressive stratification of constitutionally relevant acts (particularly through the case-law of the courts), which tend to functionally substitute formal moments of constitutional “big-bang”. Fourth, even though the treaty amending process is still deeply anchored in international (thus inter-governmental) law, significant participatory elements have recently been added to that process.¹⁶

In such a context, the Cologne European summit of 1999 decided for the first time to set up a special and unprecedented procedure in order to draft a very significant constitutional document for the EU: the Charter of Fundamental Rights of the European Union. Instead of following the traditional procedure of an intergovernmental conference, it was decided to establish an ad hoc European “Convention”, composed of 15 representatives of the Heads of State and Government, 30 representatives of the national parliaments, 16 representatives of the European Parliament, and 1 representative of the Commission, plus a number of observers representing the Court of Justice, the Council of Europe, and other bodies. This example was followed and further developed by the 2001 Laeken summit, when a second Convention (“Convention for the Future of Europe”) was established in order to prepare a draft “Constitution for Europe”. This body was composed of 102 members drawn from the national parliaments of member states and candidate countries, the European Parliament, the European Commission, and representatives of heads of state and government. Not only did the Convention deliberate in public, but it also adopted a participatory working method, including by establishing an open forum for debate, where proposals were posted and each European citizen could provide comments and suggestions.¹⁷

¹⁵ In addition to the founding treaties, in the last two decades there has been a overflow of constitutional documents, adopted at ever closer intervals: from the Single European Act (1986) to the treaties of Maastricht (1992), Amsterdam (1997) and Nice (2000), the Charter of Fundamental Rights of the EU (2000), the Treaty establishing a Constitution for Europe (2004), and the Lisbon treaty (2009). These constitutional developments have been followed by significant constitutional amendments in almost all Member States.

¹⁶ B. de Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. Beaumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002, 137-160.

¹⁷ Statistics on the work of the convention and on the number of active engagements by citizens are available at: <http://european-convention.europa.eu/EN/bienvenue/bienvenue2352.html?lang=EN>. After the closure of the Convention’s page the platform was transformed into a new interactive site where citizens,

Both conventions produced tangible results: the first adopted the Charter of Fundamental Rights of the EU, which is now integral part of the EU treaties,¹⁸ and the second drafted the so-called Constitutional Treaty, which was not adopted after being rejected by referenda in France and the Netherlands in 2005. Nonetheless, its substantive provisions were included in the Treaty of Lisbon and in the resulting Treaty on the Functioning of the European Union (TFEU).

More importantly, after amendments introduced by the Lisbon treaty, art. 48 TEU now provides that the establishment of a Convention be the ordinary way to amend the EU treaties. While nothing is said as to the working methods of the Convention, the participatory practice established by the work of the second Convention would seem difficult to disregard. Thus, while still not very formalized, participatory procedures are gaining a foothold also at the constitutional level of a sizeable organization like the European Union. This is further confirmed by a number of provisions inserted in the treaties, such as art. 10.3 TUE (right to participate), art. 15 TFEU (participation and transparency), and others, although their concrete impact has so far been very limited.¹⁹

3.2. The national level and its nuances

As mentioned, national experiences related to participatory bodies for the purpose of constitutional amendment, show substantial differences in terms of aim, composition, timing and working method of the respective body. They can however be classified on a scale that ranges from merely technical, expert advise to political bodies (Austria, Germany) to international support (Ukraine) to more properly participatory bodies, which vary from a completely non-party-political organ (Iceland) to mixed institutions (Ireland) to an attempt to divorce the political and the expert component (Italy).

3.2.1. Expert advise to political bodies: Germany and Austria

associations, and organizations can follow and participate in the debate on the future of Europe: http://ec.europa.eu/archives/institutional_reform/

¹⁸ Article 6 Treaty Establishing the European Union (TEU).

¹⁹ More on the reasons A. Lollini, F. Palermo, *Comparative Law and the "Proceduralization" of Constitution-Building Processes*, in J. Raue, P. Sutter (eds.), *Facets and Practices of State-Building*, Martinus Nijhoff, Leiden/Boston 2009, pp. 301-326

At the beginning of the millennium, in both Austria and Germany special bodies have been set up with a view to amending some parts of the respective federal constitution.²⁰

In Germany it was just a selected group of representatives of the federal Parliament (*Bundestag*) and of the federal Council (*Bundesrat*), which was joined and supported by experts on constitutional and financial issues. The purpose was to come up with a technically valid and politically acceptable reform proposal on the division of powers between the Federation and the *Länder* as well as on the financial relations in the German federal system. The drafts were subsequently adopted as the so called “federalism reform I” (2006, on the division of powers) and “federalism reform II” (2009, on financial relations). The participatory element was thus extremely limited and essentially based on technical expertise.

Austria went a little step further as it established a formal body, called convention, which worked between June 2003 and January 2005 and was tasked with formulating constitutional amendments, as well as with the “unification” of federal constitutional law.²¹ The core of the convention was the so called “founding committee”, a very institutional/political body composed by the federal chancellor and vice-chancellor, the speakers of the upper and the lower chamber, the heads of the political groups in Parliament, the regional governors and representatives of the mayors. The committee subsequently appointed 18 experts (mainly in law) and representatives of the civil society, who were nevertheless proposed by the political parties proportional to the respective strength in Parliament.²² The convention adopted a wide-ranging report that was submitted to the Parliament. As the convention reflected party-political cleavages, its proposals faced the very same political obstacles in Parliament and very little of its report was adopted at the end of its mandate. However, the proposals produced were taken up by a committee of experts established by different federal governments in 2007 and in 2008 and important issues such as the establishment of the administrative courts in the *Länder* were eventually taken up and transposed in constitutional amendments that were adopted.

3.2.2. *International support: the case of Ukraine*

The issue of international conditionality may raise several questions as to its relation with participation. In fact, it is certainly not a form of popular participation, rather the contrary, as

²⁰ G. Avolio, C. Zwillig, *Percorsi alternativi di revisione costituzionale in Germania ed Austria. Il rischio dell'empasse tra bilancio e progetto*, in *Diritto Pubblico Comparato ed Europeo*, 2006-I, 3-19.

²¹ Explain

²² See Beschluss des Gründungskomitees vom 2. Mai 2003, in www.konvent.gv.at

some conditions are imposed on a political or even technocratic level. However, the forms of international involvement in constitution-drafting or amending processes are relevant to this study, as they nevertheless represent a segment of pluralism beyond the political process.

Among the various possible examples of international conditionality, suffice here to mention a recent and relatively soft form of international support in constitution-reforming processes in Europe, the 2015 constitutional commission in Ukraine. Established by presidential decree in March 2015 and headed by the speaker of Parliament, the commission was composed of 55 national members, most of whom from the dominant political parties and some from the “civil society”, especially academia. In addition, the commission was supplemented by some international “observers”, mostly from the Council of Europe but also from the OSCE, who had the right to participate in the plenary and in the working group meetings, although with no right to vote.

In addition, it was agreed that the text of the wide-ranging draft constitutional amendments be submitted to the Venice Commission, the Council of Europe’s advisory body on constitutional issues, for an opinion. Such opinion was given in June, although on a very short notice.²³

3.2.3. Ireland and the conventional method

In Ireland a constitutional convention more similar to “established” conventional / participatory assemblies was set up in 2012 and worked from 1 December 2012 until 31 March 2014. It was composed by 100 members: one chairman, 29 MPs, 4 representatives of the Northern Irish political parties and 66 randomly selected citizens. The selection was done by a polling company and ensured to be respectful of gender, age and geographical distribution, and the citizens remained largely anonymous, as only their names were made public.

The convention has a specific mandate. Eight thematic issues were identified in the motion establishing the body and convention had thus to provide proposals for each of such questions. These regarded the following issues: 1) reducing the presidential term of office to five years; 2) reducing the voting age to 17; 3) partly reviewing the electoral system; 4) conferring the right to vote in presidential elections to citizens residing abroad; 5) the constitutional guarantee of the same-sex marriage; 6) removing from the constitution the

²³ Venice Commission preliminary opinion on proposed decentralization in Ukraine, CDL-PN(2015)006.

clause of “woman in the house”; 7) increase political participation of women; 8) remove the offence of blasphemy from the constitution.

The topics had been largely discussed in politics, academia and society for a long time and were considered to be ripe for deliberation, but before adopting decisions on controversial issues, the decision was made to submit them to public deliberation in a specialized body such as the convention.²⁴ The working method reflected this idea, as each of the ten sessions held over weekends was introduced by the presentation of an expert paper (circulated before), then the debate took place between advocates and opponents of the proposal contained in the paper, and the day after the discussion was reconsidered and eventually the issue was put to a vote.²⁵

Considering the wide support in politics and society for the issues, one could have expected a speed adoption of the proposals of the convention. However, this was not the case, the government’s response was delayed and when it came only two out of 18 recommendations of the convention were put to a referendum (notably the constitutional recognition of same-sex marriages, which was approved by a large majority in May 2015), while others have been endorsed in principle and will put to a referendum on a later stage.

3.2.4. Iceland and the temptation to do without politics

Following the economic crisis of 2008 and its dramatic effects, Icelandic society called for a political and moral renewal, one which should include a new constitutional document.²⁶ In 2009 the first grassroots movements of intellectuals and civic organizations were started, calling for a national “brainstorming session” christened the National Assembly. This gathering identified core values and a number of issues particularly interesting for Iceland, such as education, economy, environment etc. The government led by Ms. Sigurdadottir, in power since 2009, adopted the assembly’s idea of a broad and participatory constitutional reform. In June 2010 the Act on the Constitutional Assembly was adopted. It provided not only for the election of a Constitutional Council composed of 25 members but also for a crowd-sourcing gathering on constitutional matters, a one-day civic/participatory event to be

²⁴ S. Suteu, *Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland*, in 38 *B.C. Int’l & Comp. L. Rev.* (2015), <http://lawdigitalcommons.bc.edu/iclr/vol38/iss2/4>

²⁵ See www.constitution.is

²⁶ For a detailed illustration of the whole process and additional literature see B.T. Bergsson, P. Blokker, *The Constitutional Experiment in Iceland*, forthcoming in K. Pocza (ed.), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?*, Nomos Verlag, Baden Baden 2014 and also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320748.

held before the elections for the Council and to be prepared by a constitutional committee composed of seven experts.²⁷ The constitutional gathering, from which members of political parties were excluded, took place on 6 November 2010: a total of 950 randomly selected Icelanders participated in 128 different roundtables.²⁸ The outcome was the identification of eight main themes for the Icelandic constitution, which became one of the bases of deliberation of the Constitutional Council, which was elected on 27 November from among 522 self-selected candidates by a proportional, single transferrable vote system. Members of parliament were excluded from candidature. The turnout was very disappointing: only 27% of the electorate went to the polls, which is less than half of the normal turnout in a political election. Furthermore, there were major problems with the voting and following some claims of irregularities the Supreme Court suggested annulling the elections. The Act on the Constitutional Assembly was eventually repealed and the Constitutional Council was installed by means of parliamentary appointment.²⁹

The Council started its work in April 2011. It based its work on the conclusions of the national gathering as well as on the report of the constitutional committee and adopted a very transparent working method, including an active website where draft proposals were posted and citizens could provide comments and suggestions. The draft constitution was adopted by consensus by the Constitutional Council, was then sent to the Icelandic Parliament in July 2011. It was then submitted to an evaluation by a group of international experts³⁰ and by the European Commission for Democracy through Law (Venice Commission), an expert body of the Council of Europe dealing with constitutional issues.³¹ Both groups expressed some criticism of the draft.

As the text was then stalled in parliament, it was decided to hold a non-binding (consultative) referendum on 20 October 2012. The referendum asked six questions, one on the reform as such³² and five on specific proposed contents.³³ The turnout was of 49% and all questions

²⁷ See the TED video presentation by Gudrun Petrusdottir, chairperson of the constitutional committee, at <http://www.youtube.com/watch?v=AiO9oNbpN14&feature=relmfu>.

²⁸ <http://agora.is>

²⁹ A.T. Árnason, *A review of the Icelandic constitution – popular sovereignty or political confusion*, Tijdschrift voor Constitutioneel Recht 2001, vol. 2 no. 3, 342-351.

³⁰ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2013\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)010-e)

³¹ Opinion no. 702/2013, CDL-AD(2013)010, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e)

³² Do you want the Constitutional Council's proposal to be adopted as the basis of a new draft constitution?

³³ 1. In the new constitution, do you want natural resources that are not privately owned to be declared national property? 2. Do you want to insert in the constitution provisions on an established (national) Church of Iceland? 3. Do you want a provision authorizing the election of particular individuals to the Althing? 4. Do you wish a provision giving equal weight to votes cast in all parts of the country? 5. Do you wish a provision stating that a certain proportion of the electorate is able to demand that issues be put to a referendum?

were answered with a clear majority in the affirmative. The political parties were split on how to follow up on the nonbinding referendum; debates were held in parliament but no final vote took place on the text adopted by the Constitutional Council. Instead, a different bill was presented that postponed the discussion until after the 2013 elections, providing further that a reform should take place before April 2017 and be adopted by at least a two-third majority in parliament and subsequently confirmed by a majority of voters in a referendum with at least 40% turnout. This amendment was passed by the Althingi in July 2013, right after the general elections.

The strong popular pressure for a participatory constitutional reform thus decreased with the passing of time and the parliament gradually took over again, even though the process is formally continuing. Despite the vanishing enthusiasm³⁴ – resulting also from the speedy recovery after the economic crisis – the process does represent a unique experience of participatory constitutional reform. Whatever happens in terms of constitutional change in Iceland, from now on forms of participation will have to be included and the experience will remain as a milestone in the still rather spontaneous process of developing instruments and procedures for participatory democracy, including at the constitutional level. The interest that the Icelandic experience attracted far beyond the little populated island shows that this process might have a significant comparative impact also in the future.

The small population of Iceland might raise the objection that what has been an experiment to extend participatory democracy to the national constitutional level was in fact nothing else than a confirmation of the fact that such instruments are better suited for the local level, since Iceland's population corresponds to that of a medium-small town in most larger countries. Notwithstanding, also the geographical size and the distance should be taken into account, as these are – especially in extreme geographic conditions like in Iceland – potential obstacles to effective participation. In any event, the experimentation with participatory procedures at the national constitutional level needs to be extended to bigger countries in order to prove the approach's value.

3.2.5. Italy: the widest consultation, the smallest result?

The call for constitutional reforms has been a pressing one in Italy for about three decades. The main deficits of the constitution are widely identified in the academic and in the political discourse as revolving around two aspects. The first is the decision-making process at the

³⁴ For example, the very active and interesting web portal agora.is is no longer maintained or updated.

national level, which arises also due to the crisis of political parties. This has made it extremely difficult to form stable political majorities and thus to pursue a clear governing agenda, not least due to a very cumbersome legislative process, with two quite sizeable chambers vested with essentially the same powers including the vote of confidence for the government. The second area in need of profound reforms is that of the vertical relationship between the State, the Regions, and the municipalities, a sector in which a number of overlaps, conflicts, and inefficiencies have arisen.³⁵ Although such relations have been deeply reformed through a number of significant constitutional amendments adopted between 1999 and 2001,³⁶ the problems have not been solved and the intergovernmental conflict has even increased.

It was 1983 when the first ad hoc parliamentary committee was set up and tasked to work out a constitutional reform bill. This committee was followed by several other parliamentary and governmental committees, especially during the 1990s: each of them produced valuable proposals but none was turned into a constitutional amendment.³⁷ Thirty years after to first efforts, in 2013, a new process for constitutional reform was started. In the beginning, the idea was to set up a constitutional convention, a mixed body composed of a certain number of members of parliament and an equal number of experts. The idea was soon abandoned due to sharp criticism of the differing legitimacy of the members of such a body, half elected and half appointed. Therefore, a special procedure was started, according to which a special committee composed of 42 members of both chambers of parliament would be appointed to work out a proposal to then be approved by qualified majority in parliament and subsequently submitted to confirmative referendum irrespective of the majority in parliament.³⁸ In parallel, an expert panel consisting of an equal number of academics (42) was set up as a consultative body to the President of the Republic, tasked with the preparation of some drafts that were to then be submitted to Parliament for its sovereign deliberation.

³⁵ See F. Palermo, *Italy: A Federal Country without Federalism?*, in: M. Burgess, G. A. Tarr (eds.), *Constitutional Dynamics in Federal Systems. Sub-national perspectives*, Montreal & Kingston, 2012, 237-254.

³⁶ Const. laws no. 1/1999, 2/2001 and 3/2001. Furthermore, a new reform was adopted by parliament in late 2005 but did not enter into force, as it was rejected by popular vote in a confirmative referendum in June 2006.

³⁷ Ironically, the reforms that were in fact adopted by Parliament in 1999 and 2001 as well as in 2005 were produced by the Parliament itself and were not the product of special parliamentary, governmental, or expert committees.

³⁸ This would have implied an ad-hoc derogation to the constitution-amending procedure laid down in art. 138 of the constitution, which provides that if a constitutional law is adopted by two-thirds or more in each Chamber in the second reading then no referendum need take place.

Parallel to this process, the government organized the widest public consultation³⁹ ever to take place in Europe. It set up an internet platform where a number of questions related to the constitutional reform were asked to those who desired to participate.⁴⁰ The questions were grouped in three main areas: system of government, direct democracy, and territorial setup of the country.

The outcome was quite significant: in three months⁴¹ and despite very little (if any) attention by the media, more than 203,000 people completed the online questionnaire.⁴² They confirmed that the main priorities for reform are the bicameral system and the territorial setting of the country, but while the overwhelming majority was in favour of providing only one chamber of Parliament with the vote of confidence to the government and budgetary power, most citizens opposed the idea of reducing the powers of the regions by centralizing competences, despite the fact that this was suggested by the expert group and advocated by most political parties. The final report was prepared and made public by the government.⁴³

In terms of practical follow-up to this initiative, quite little happened. The government changed in February 2014 (from Mr. Letta to Mr. Renzi) and the different political climate led to a discontinuation of the envisaged reform process: the constitutional law derogating the ordinary constitution amending procedure (by establishing a special parliamentary committee and providing for a compulsory final referendum) was abandoned and a new process was started, following a purely institutional way. The new government presented a draft reform text in late March 2014 and parliament examined it according to the traditional procedure. No further consultation was started on this text.

However, it is worth noting that the online platform that was originally established in order to carry out the consultation on the constitutional reform was not discontinued and became the official site for public consultations on several other legislative proposals by the government on a number of key issues, such as the reform of the public administration, fiscal policy, and others. While the particular (and first) consultation on constitutional reforms was eventually stalled, public consultation did establish itself as a method of government.

³⁹ While not binding and not necessarily representative of public opinion, a public consultation is far more than just an online poll, as it is a structured process based on a consolidated methodology. This very consultation was supported by a scientific committee and by the National Institute for Statistics (ISTAT).

⁴⁰ The platform was called “partecipa” (www.partecipa.gov.it) and it required registration in order to avoid the possibility of one single person participating more than once.

⁴¹ The consultation was open between 8 July and 8 October 2013, i.e. it included the month of August, which is normally the holiday month in Italy.

⁴² Disaggregated data are even more interesting. Out of the 203,000 who filled out the whole questionnaire, more than two-thirds were male, their education was higher than average, and most of them (60%) were (active or retired) civil servants.

⁴³ Full text in http://www.riformecostituzionali.partecipa.gov.it/assets/PARTECIPA_Rapporto_Finale.pdf.

3.3. The subnational level. Selected cases from Italian regions

Since the start of the new millennium, an impressive amount of participatory experiences have spread out at all levels (including the subnational one) and in several areas (including the constitutional amending process). Some of these processes became paramount and widely studied examples, in some occasions even prototypes (such as in British Columbia, in Vorarlberg, in Catalonia, and others), although a detailed comparative analysis of such cases still does not exist and would no doubt help identify common traits and rationales of the several differences.⁴⁴

Italy is an interesting case in point in this regard. While the second wave of autonomy statutes, following the constitutional reform in 2001 which granted considerable new powers to the regions, was completed by the 15 normal regions between 2004 and 2012, none of the five special regions⁴⁵ amended its statute.⁴⁶ Four of them, however, somehow started participatory processes in order to elaborate new autonomy statutes.⁴⁷ The approaches have been quite different from one another and while none was completed successfully in terms of adopting a new statute, all attempts have been marked by a participatory approach.

The first special region to experiment with a participatory method for elaborating a new autonomy regime, and the one that came closer to a success, was Friuli Venezia Giulia, which established a constitutional convention in 2004. The regional law⁴⁸ set up a “regional convention”, tasked with the elaboration of a new special autonomy statute. The idea to create a specialized body based on the assumption that the elected regional parliament was not in a position to effectively debate on the issue nor to guarantee wide participation in the reform process. The convention was composed by an equal number of elected representatives (of the political parties represented in the regional assembly and of the municipalities) and of members from the “civil society”, such as, inter alia, representatives of the universities of the

⁴⁴ For a theoretical framing see A. Gamper, *Forms of Democratic Participation in Multi-Level Systems*, in C. Fraenkel-Haerberle et al. (eds.), *Citizens Participation in Multi-Level Democracies*, Brill, Leiden-Boston, 2015, 67-84.

⁴⁵ On the functioning of the system see recently F. Palermo, *Autonomy and Asymmetry in the Italian Legal System: The Case of the Autonomous Province of Bolzano/Bozen*, in G. Pola (ed.), *Principles and Practices of Fiscal Autonomy*, Palgrave, forthcoming 2015, 227-241.

⁴⁶ The procedure is different: the normal regions adopt their own regional constitutions by qualified majority and the national government can challenge them to the constitutional court if it considers it violates the national constitution (as it happened in a handful of cases), while the autonomy statutes of the special regions are adopted by constitutional law of the national parliament. This way, the special statutes result from a bilateral, negotiated procedure, are more entrenched but also more difficult to amend.

⁴⁷ The only one that was not active was Sicily.

⁴⁸ Regional law no. 12/2004.

region, of the social sector, of the trade unions and of the linguistic minorities settled in the region (Friulian, Slovenian and German speakers). The convention did work for some six months in a participatory way, including by granting access to all interested citizens, and presented a new draft autonomy statute composed of 80 articles, each of them supplemented by a few alternative formulations reflecting the various options discussed in the convention. The text was submitted to the regional assembly, which quickly adopted a draft new autonomy which largely confirmed the proposals put forward by the convention. The text, however, was not supported in the national parliament and could therefore never be passed.

A similar path was followed in the small alpine region of Aosta Valley, which created an analogous convention in 2006.⁴⁹ The body reflected the same rationale in its composition and also produced a text after one year of participatory work.⁵⁰ The text was submitted to the regional assembly in 2008, which however never properly debated it, due to political change meanwhile occurred both at regional and at national level, and subsequent assemblies never resumed the convention's work.

Sardinia took a different and more radical approach. In 2012 a set of 10 referendums (5 consultative, 5 abrogative) were put to a popular vote.⁵¹ One of the consultative referendums asked the voters whether or not they wanted the regional assembly to call for a constitutional assembly, directly elected by the citizens, tasked to drafting a new autonomy statute. While the turnout was relatively low (35,5%), the quorum of 33% was met and the votes were thus valid. In the particular case of the referendum on the election of a constitutional assembly, the overwhelming majority of those who participated in the vote (94,2%) supported the proposal. Three years after, however, the referendum has not been implemented, due to changes in the regional political arena, where a new political majority was formed, and the constitutional assembly has not been yet elected.

The latest attempt to amend the special autonomy statute was started in the most complex region, the one in which the presence of national minorities makes every balance much more complex and difficult. In April 2015 a provincial law was passed⁵² establishing a convention for the reform of the autonomy statute. The approach chosen was almost identical to the one

⁴⁹ Regional law no. 35/2006. All texts and documents are available at www.consiglio.vda.it/convenzione_autonomia/documentazione_i.asp

⁵⁰ The only relevant difference with Friuli Venezia Giulia was that the convention in the Aosta Valley established a forum, an additional body of all interested citizens, to monitor and support the work of the convention.

⁵¹ Decree of the President of the Region no. n. 18/2012.

⁵² Provincial law no. 3/2015. This poses an additional problem since the autonomy statute is regional (i.e. it includes both autonomous provinces of Trento and Bolzano/Bozen).

implemented in the Aosta Valley, including a preparatory phase during which the whole population will be consulted through open meetings and a forum of 100 people, representing all segments of society, will be established to accompany the work of the convention.

4. Concluding remarks

4.1. Poor performance?

While very different in composition and approach, all the mentioned experiences show that legislators are increasingly aware of the claim for participation emerging in pluralistic societies and that classic representative democracy mirrored in elected assemblies is no longer perceived as properly representing the complexity of society. A possible additional explanation has to do with the spreading weakness of politics (and consequently of representative assemblies) in a growing number of countries, which forces political elites to seek broader participation in order to make decisions more widely accepted by the citizens. Such an explanation might be supported by the fact that most of such participatory experiments take place in countries where disaffection vis-à-vis politics is growing, while it is much more limited in countries in which such feeling is less common. Be it as it may, it is a fact that the number of participatory processes, including in constitution-amending, is growing.

While increasingly popular, however, such processes have so far produced little results in terms of number of reforms adopted. One may therefore argue that the overall performance of participatory instruments is relatively poor, at least at a first glance. Undeniably, either the influence of non-political members of such bodies is quite limited (such as in the case of Germany, Austria, Ukraine), or the texts adopted by such bodies are rarely and only partly transposed in legal norms (see the mentioned cases of Iceland, Ireland, Austria and Italy, both at national and sub-national level, as well as the peculiar case of the EU). At a closer look, however, some elements have to be taken into account. First, it is not so much the participatory bodies themselves (that normally do produce proposals) but rather the political process that is not particularly receptive. This has possibly to do with the fact that participatory institutions normally work over a time span which usually crosses political elections. Therefore, their ability to achieve positive results might be impaired by political changes and by the creation of new political majorities in the assemblies. Secondly, the balance between political representatives and other members is difficult to achieve and should be tailored to each specific situation. Too much political representation replicates the

dynamics of elected assemblies that participatory bodies are aimed at overcoming, but too little of such representation might disconnect such bodies from the political reality of the assemblies that are ultimately called to eventually adopt the texts. Furthermore, as the experience of the Italian special regions shows, the more numerous the actors and levels that take part in the decision-making, and the more complex the procedures, the more difficult the obstacles to be overcome by texts prepared by participatory bodies. This does not mean, however, that federal/multilevel systems are less suited than unitary countries to experiment with and further develop participatory practices. Rather the opposite seems to be true, as the next section tries to demonstrate.

In the end, the issue of the performance of such bodies is rather nuanced and cannot be tackled in a simplistic way. At the same time, as participatory processes are still in an embryonic stage, also their performance and, more generally, the effectiveness of their link with the political-representative decision-making still requires substantial fine-tuning.

4.2. Federalism as a matrix?

While very different in terms of structure, composition, role, functions, context (most of the mentioned countries are not federal) and level of government, all experiences analysed in this paper present interesting participatory features at the level of the constitutional process. Furthermore, should the conclusion be reached that in federal systems participatory democracy is less likely to be implemented at central and/or at constitutional levels, this would mean that in federal countries participatory claims are less pressing and, therefore, that federalism is as such already compensating for some pluralist claims. Above all, the point here is to try to address the aforementioned deficit, i.e. the lack of a sound constitutional theory on participatory and deliberative forms of democracy, complementary to representative and direct forms based solely on the majority principle. Thus the question is whether and to what extent federalism can help in this regard. It is contended here that it can.

Federalism is an institutional principle, i.e. it is a mode of organizing state structures in a way that preserves the plurality of levels of government and their decisional autonomy.⁵³ As such, it does not per se include citizens in decision-making any more than other systems, even though in a federal system a citizen is involved more often, if nothing else then at least through various levels of election. Moreover, the wider sub-national and local autonomy, the

⁵³ It is not for this contribution to engage in exploring the relationship between federalism and democracy. This is done by A. Benz and J. Sonnicksen and partly by S. Kropp in this volume. See also the work by A. Stepan, *Federalism and Democracy: Beyond the US Model*, in *Journal of Democracy*, 10 (1999), 19-34.

more these levels of government can experiment with forms of participatory democracy. But as such, participation is certainly a different phenomenon than federalism.

Federalism is, however, the most powerful and so far the most experimented with tool for institutional pluralism. It does exactly what is at the core of this study: by multiplying it, it attenuates and complements the majority principle; deciding by majority - but at different levels - fragments and dilutes the majority principle and thus produces a counter-majoritarian effect. For this reason it can be argued that federalism is the oldest instrument for dividing and de-concentrating power, even though other have followed, such as judicial review of legislation. Federalism is the most developed form of institutional pluralism. In their common innate connection with pluralism lies the link between federalism and participatory democracy: the latter is a contemporary manifestation of the claim for pluralism, of which federalism is perhaps the oldest. In other words, federalism can be identified as the institutional side of pluralism, similarly to what participatory democracy is on the societal or even on the individual side. Both are expression of pluralism: institutional and societal respectively.

Federalism and its by-products (such as regionalism, devolution, and the like) developed at a time when the claims for pluralism were limited to the institutional sphere. It was not the individual nor organized “civil society” who claimed a share in power and the right to effectively participate in decision-making, but existing institutions. Conversely, participatory forms of democracy are demanded in a time when institutional pluralism is no longer sufficient, the interests in society cannot be all channelled through institutions and the claim is therefore extended to a direct form of participation, no longer mediated by institutions – such as subnational units, for instance.

If such analogy is correct, it can be concluded that federalism – with its institutions, procedures, structured relations, and mechanisms for the prevention and resolution of conflicts – can provide inspiration for the development of a theory and (more importantly) procedural solutions for the growing demands for participatory democracy. As the older brother of complementary decision-making processes,⁵⁴ the history and the machinery of federalism could be looked at in order to identify how instruments and procedures for participation could be designed and to foresee how the development of such participatory instruments might look. Consequently, as it has always been the case for federalism, there will

⁵⁴ The German scholar Peter Häberle once famously described regionalism as the younger brother of federalism (P. Häberle, *Europäische Rechtskultur*, Suhrkamp 1997, 233). Federalism might have more little brothers than just regionalism.

be times when participatory instruments will be used more or less often, depending in part also on the priorities of the country concerned, on the time available, on the reasonability of participatory claims, and on the policy fields in which participation is called for.

Furthermore, in federalism inter-governmental relations are institutionalized and regulated by procedures and it is safe to predict that participatory instruments will also become more procedural: the instruments for participation will tend to be procedural, regulated in a way that looks similar to administrative procedures, where discretion is more limited as compared to legislation. Federalism makes it impossible for one level of government to arbitrarily decide to use a power, as division of powers is clearly laid down in the constitution and legislation. Similarly, the decision to participate, the limits of participation, the degree of influence, and so on, will increasingly be determined by rules on the participatory procedure.

Very importantly, federalism was allowed to develop and establish itself through judicial litigation and it is well known that judicial review originally was born in order to guarantee the hierarchy of norms. Similarly, it is safe to expect a growing role of judges in determining the specific content of participatory processes. Primarily it will be the administrative judges (at least in the continental systems where they exist), but the more the legislation on participation develops, the more the role of ordinary or even constitutional judges in guaranteeing the right to participate can be expected to increase.

4.3. Issues rather than levels?

As Dahrendorf put it, there is no other future for democracy than pluralism as the constitutional means to institutionalize social conflicts.⁵⁵ Unlike non-democratic and partisan constitutions,⁵⁶ democratic constitutions are not meant to meld social divisions into an artificial unity, but to establish the formal and substantive prerequisites for political competition.⁵⁷ Participation is and will increasingly be a key element of pluralist constitutionalism. While federalism has been a key factor for developing institutional and ideological pluralism, participatory and deliberative instruments will be critical to develop

⁵⁵ R. Dahrendorf, *The Modern Social Conflict: An Essay on the Politics of Liberty*, Weidenfeld and Nicholson, 1988, 107.

⁵⁶ See M. Dani, *The 'Partisan Constitution' and the corrosion of European constitutional culture*, LSE paper series LEQS paper 68/2013, Nov. 2013, available at <http://www.lse.ac.uk/europeaninstitute/leqs/leqspaper68.pdf>.

⁵⁷ M. Loughlin, *Sword&Scales. An Examination of the Relationship between Law and Politics*, Oxford, Hart, 2000, 189.

additional and supplementary forms of decision-making, thus increasing the degree of pluralism and the overall legitimacy of contemporary constitutions.

Participation and other forms of deliberation are in fact key elements of pluralism, as the latter clearly requires broad inclusion of the various segments of society far beyond mere electoral or direct democratic rights. At the same time, federalism can represent a possible (perhaps the most developed) matrix for institutional participation, showing how participatory and deliberative elements can be included in and complement traditional decision-making processes.

Besides the theoretical aspects that participatory/deliberative democracy is raising and the possible link with comparative federalism, this chapter has focused on some initial, embryonic experiments in introducing participatory procedures into constitutional drafting or amending processes. The mentioned examples are very different in terms of scope, modes, and range of participatory procedures, and perhaps even with regard to the aims and the very understanding of participatory and deliberative processes. The practical outcomes have been extremely limited, as participation has for the most part been marginal, the institutional actors have kept overall control and in the end the processes did not produce significant constitutional changes. For these and other reasons, the aforementioned experiences are far from constituting the basis for a possible theory of participation and deliberation in constitutional processes. However, they show that participation is not necessarily confined to local issues nor to small-scale projects, but is fit to cover also the very foundations of societies.

It is not so much the size, but rather the issue at stake that determines the success or failure of new forms of deliberation, complementary to the traditional representative or direct democratic ones. To be effective, participation needs to be carried out with some passion, to be moving and even exciting for people, motivating them to engage. Therefore, participation is more likely to happen on issues going to the heart of the interests of people. These issues are normally either very local, or very foundational, such as constitutional questions. There is, by contrast, less likelihood of mobilizing people on either very technical or extremely dry issues, such as those typically decided by the majority of legislation that is normally adopted at national or subnational level.

A lot more (and more systematic) research is needed in this field, including by lawyers, before a sound, structural theory can challenge consolidated, but now clearly insufficient, dogmatic categories. Only more thorough research and the further development of the practice of

participation, including judicial adjudication of some emerging challenges, will reveal whether the initial, tentative hypotheses sketched out in this paper are meaningful or not.