



CITIZENS PARTICIPATING IN CONSTITUTIONAL DECISIONS

Prof. Jens Woelk
Faculty of Law
University of Trento

The idea here is to talk about democracy and participation – they should go together – as well as a relatively new development in democracy: the so-called citizens' assemblies.

In the first part of this seminar, I will explain how these elements are connected. In the second part we will look at some cases from different countries where these new forms of democracy have been tried. Finally, I will draw some conclusions.

Let's start with a key term: democracy.

Here you have a word cloud with many related ideas – *people, politics, democracy, election, government, legislature*, even *patriotic, historic, cooperation* and many others. But what is the essence of democracy?

Audience: People.

Woelk: 'People' is a very good answer. And why do we need democracy? Why do people, as the main actors, need democracy?

Audience: To cooperate.

Woelk: Yes, to cooperate. I'm impressed by this answer, because cooperation is unfortunately not high on the list of priorities today; instead, we often see conflict and controversy. So, 'cooperation'. And for what purpose?

Audience: Decision-making.

Woelk: Exactly. So we have three core ideas here: 'people', 'cooperation' and 'decision-making'. These represent the essence of democracy. There is another concept usually implied in our understanding of democracy. What is it?

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Audience: Equal rights.

Woelk: Yes, each vote counts as one. No votes count 100, or 50 or 0; each vote is equal. Based on this, how are decisions usually made in democratic procedures? What else come to mind?

Audience: A Parliament.

Woelk: Yes, a Parliament. And how are decisions made in Parliament?

Audience: Majority.

Woelk: Exactly, this is another key word, the majority principle is key for decision-making. But why do we accept majority rule, why don't we say – 'Let's do this unanimously. Everybody needs to be aboard. Everybody needs to agree in order to make a decision and afterwards to implement and respect a decision'?

I can answer this. The idea is: even though I'm part of the minority today, and even though the decision goes against my preference, tomorrow I can be part of the majority on another issue. I have a chance, today or tomorrow, to be in the majority. This possibility makes the process acceptable and ensures that rules are respected.

But there are different forms of involvement.

One is suggested by the famous slogan from the Boston Tea Party of 1773 'No taxation without representation', which is still relevant today in Washington DC, as the city doesn't have representation in the Federal Parliament because it's a Federal District, and only States are represented in the Senate. 'No taxation without representation' illustrates the concept of 'representative democracy', where citizens elect representatives to handle complex issues they may not be able to decide themselves.

The second concept is 'direct democracy', in which citizens decide on some issues, including very important ones, without intermediaries, usually through referendums. Think of Brexit or the Scottish independence referendum. Were these results legally binding? No, because they were so-called 'consultative' referendums, where citizens simply expressed their opinion, but the government was not legally obliged to implement their decisions. Politically, however, it was difficult to ignore the outcome.

Now let's bring in another element from the title: Constitutions.

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The slide shows someone amending (i.e. changing) the American Constitution, a process that usually follows special procedures. Why? Because a Constitution contains guarantees (like 'equal rights'), because the Constitution contains values (rule of law, democracy), and structures such as a Parliament and judicial independence and so on. All these principles and rules are written in the Constitution, which is the guiding document of a country. Therefore, because it defines how a community is organised and the principles it cherishes, amendments require special procedures and a special majority.

In Italy, for example, a constitutional amendment requires two different votes in both Chambers, with an interval between the votes of at least three months, and approved by a majority in the second voting. Some countries also include referendums, combining representative and direct democracy. For instance, on 2 June 1946, Italians voted in a referendum to decide whether to remain a monarchy or become a Republic – a form of direct democracy. On the same day, members of the Constituent Assembly were elected to draft the new Constitution.

In other countries, for example in Austria, you only need a parliamentary vote to amend the Constitution, but in case of major revisions require a referendum. In a nutshell, when an important change is needed, it's vital that not only the representatives, but also the citizens have their say. And then there is the case – as you can see here on the right – of Chile last summer. In this country a constitutional convention drafted a proposal, a very innovative one, with novelties for example in the realm of the exploitation of natural resources or the rights of indigenous peoples, but then nearly 62% of the population rejected it. This shows the power of the people: even expert-developed proposals can be rejected by citizens.

Is a third form of involvement possible? There are actually two other forms of democracy: participatory democracy and deliberative democracy, aimed at improving the quality of political decisions. They are not alternatives to representative or direct democracy, but complementary. As you can see on the slide, the vertical axis represents the size and diversity of the population, which means that the bigger the country is, the more different groups exist in the country. In big countries, representative democracy is very often preferred, while in smaller communities like Switzerland, for example, you have a very active form of direct democracy with a lot of referenda, and in many countries you have representative democracy at a national level and direct democracy at a local level. The horizontal axis represents time and complexity: simple issues can be handled directly, but complex issues require more reflection and this is where participatory and deliberative democracy comes into the picture.

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These are relatively new phenomena. The idea with participatory democracy is to include stakeholders, i.e. everyone who has an interest in the decision. In the USA there's a famous institution called 'Town hall meetings', whereby the whole local community meets once or twice a year in a range of venues (e.g. schools, libraries, municipal buildings, etc.) to discuss local legislation or issues.

In the case of deliberative democracy, by contrast, only a smaller group of people are selected in order to make an informed and shared decision. Unlike the town hall meeting, where everybody can go, and citizens choose whether or not they want to go, the idea here is to have a smaller group of people that are representative of the population, like some kind of 'model' community. These people discuss the issue at hand among themselves in a deep and profound manner. In order to have a small group, citizens are selected by a lottery, based, for example, on the voting election registers so that one citizen is picked out of every ten people or something like that. They are then asked whether they want to participate. It is important to ensure that the group is made up of enough women, enough young people and enough old people, i.e. a mix which is representative of the whole population. The outcome of the deliberative process is a moderated deliberation, which means that there's a moderator. The discussion goes very profoundly into the substance of things, the selected citizens weigh the options in a calm atmosphere, with no screaming, thinking about the consequences of each decision, and they do this in a relatively calm way, and eventually they come up with specific recommendations for action. Very often this is a report or a list of recommendations that are then sent to an institution – an Assembly or Parliament or a government, which can or cannot do something with them. It's a political recommendation which is not legally binding.

Let's look at some cases.

1. Iceland's Crowdsourcing Constitutional Reform (2009). This was the first time that these forms of democracy were applied in a country, however small, and in relation to the Constitution. After the 2008 economic and financial crisis, there was a big problem in Iceland, and the people said 'We need a new Constitution, a new basis for our community'. In 2009 a law was adopted which permitted crowdsourcing gatherings on constitutional matters (i.e. participatory democracy) – everybody could opt for participating in these meetings, if they wanted to. A total of 950 people were selected by lottery. The outcome of the meetings was that 8 main topics were identified as the most important issues people wanted to be regulated and represented in the Constitution. These became the basis for deliberation in a smaller group of 25 people, who were elected out of 500 self-elected candidates. However, there was a problem here because there was a low turnout: only 30% of the Icelanders actually voted to elect this Constitutional Council. Then the elections were annulled by

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the Supreme Court because of irregularities and in the end it was the Parliament who appointed the Constitutional Council. The Council came up with a draft Constitution which was adopted by consensus by these 25 people and then sent to Parliament. After that, a consultative referendum was held, with the participation of 49% of citizens. There was a clear majority in favour of all points (one was about the need of a new Constitution, and five about other issues like the national Church, the national collective property, which is important because of the natural resources of the country, etc.). However, there was a lot of conflict and controversies in Parliament and, in the end, the adoption of the new Constitution was postponed. However, it was an interesting and very innovative approach to writing and adopting a new Constitution. A lot of comments and books have been written on this.

2. Ireland (2012-2013). A Constitutional Convention was established which was to discuss a number of changes of the Irish Constitution, and then make recommendations. The resolution committed the government to provide responses to each of the recommendations. This is very important because it was not only about consultation: the government had to react and comment on these outcomes. Over 18 months 10 issues were discussed and several of the recommendations made by the Convention were used to make amendments to the Irish Constitution. Here you have information about the composition of the assembly: there were 29 MPs, 4 Northern Irish representatives and 66 randomly selected citizens. Interestingly, apart from the Constitutional amendments which were directly related to this Convention, in its final report the Convention also recommended that citizens' assemblies should be established, in other words that this method should be continued and used to discuss very controversial issues. I have put two on the slides: legalisation of same-sex marriage and removal of constitutional ban on abortion, both very difficult to discuss in Parliament, because Ireland is a Catholic country and MPs have their positions and need to show them. What has been noticed in this type of discussions is that, from their extreme positions, participants gradually moved towards the centre, because they listen to the other side in a calm atmosphere. In other words, there is what we call a 'depolarization effect', which means that from initial polarised positions, consensus is created through constructive reasoning in the assemblies. In Ireland, referendums were held in the following years in compliance with the recommendations of these assemblies and the results were the legalisation of same-sex marriage and the removal of the Constitutional ban on abortion, which were taboos in the Irish politics of that time. Again, what is interesting here is that in these fora you can even deal with controversial issues, because you create a protective environment where people can talk about them without the need to defend their positions necessarily.

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3. Trentino-Alto Adige/Südtirol. You might have heard about the reform of the Autonomy Statute. Our region is an autonomous region, with an Autonomy Statute which has the same rank as the Constitution. So we are still in the area of constitutional decisions because the Autonomy Statute is a kind of basic law of our region. How old is this law? Any idea?

Audience: Second World War

Woelk: Yes, Second World War, the first Autonomy Statute was passed in 1948, like the Italian Constitution. But there is a second Autonomy Statute, as the first one was radically changed in 1972. So this year – 2022 – was the 50th anniversary of the second Autonomy Statute. You may remember that some years ago, in 2016, the idea was launched to amend the Italian Constitution. The then Prime Minister, Matteo Renzi, had a very ambitious proposal of changing the Italian Constitution and one of the consequences would have been the need to adapt the Autonomy Statute to the new Constitution by introducing some changes. This was seen as an occasion, in parallel to the process of changing the Constitution, to also discuss how to change the Autonomy Statute, which was already four and a half decades old. Unfortunately, our region is quite complex, because we have two components within the region – the Autonomous Province of Bolzano and the Autonomous Province of Trento, both with their own autonomy. Furthermore, the Autonomy Statute has a part that only applies to Bolzano and a part that only applies to Trento. So, basically, two parallel but distinct processes were established. The first process was in Bolzano, where two thirds of the population are German speakers and the rest are Italian speakers and some Ladin speakers. Here, in Bolzano, they started bottom-up; they organised something like 15 Open Spaces, i.e. meetings of citizens who wanted to participate in the decision-making process (a participatory element). The citizens then discussed which issues and topics were to be regulated in the basic law – what should be changed, what should remain, etc. In a second phase there was a convention of 33 members selected by the Provincial Council – the local Parliament – and a forum of 100 citizens randomly selected. These two fora discussed in parallel the issues that had been proposed by the citizens' meetings. As you can imagine, this was not easy in Bolzano due to both the different language groups and interference from politics. It was a very long process and, in the end, unfortunately, a consensus was not reached, but three or four different final reports were drafted, one by the majority and others by different minorities. Among the aspects where there was very strong disagreement was the organisation of schools, because – as you may know – in Bolzano there are Italian-speaking and German-speaking schools. A large minority wanted to have an integrated bilingual school, but this was seen as problematic by the majority.

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In Trento, they did a totally different thing. They appointed 25 representatives from the trade unions, from the university, from politics (with 9 representatives from the Provincial Parliament), and then also people from associations etc., that is stakeholders and NGOs. Together, they worked out some proposals and, in a second phase, they went out consulting citizens about these proposals, organising citizens' assemblies. In the last phase, they worked out recommendations for a new basic law. Here, by contrast with Bolzano, there was one final report as consensus was reached. Some say that it was not difficult to do so because the results were not innovative. Anyway, it's a bit like the story of the Constitution in Iceland – we do not have a new Statute because in the end the referendum for the amendment of the Constitution proposed by Matteo Renzi failed, which took out the pressure on the idea that the Autonomy Statute should be reformed. So, unfortunately, we have proposals but we do not have a change.

4. Bosnia-Herzegovina. This country is as complex as our region, maybe even more complex. It has a Constitution that has been imposed by the international community at the end of the war. The country's Constitution is part of a wider agreement, the so-called Dayton Peace Agreement. Strangely enough, the Constitution is relatively easy to amend – you just need a two-third majority in Parliament, no referendum, no double voting, etc. Despite that, there was only one attempt to amend the Constitution. In 2006, basically ten years after the end of the war, there was a proposal for a major change of the Constitution in order to start the period immediately following the reconstruction. The attempt to change the Constitution failed, the constitutional reform-package was not amended and since then practically nothing else has happened. There were some negotiations between local politicians and the European Union, but constitutional reform became a taboo. The idea was then launched to try something different, so this year in February a citizens' assembly was sponsored by the EU delegation. The Embassy of the EU in Sarajevo randomly selected 57 citizens, who sat together for two weekends to discuss a lot of important issues on constitutional reform and electoral reform, i.e. very complicated technical issues in a country where you have three different groups, two entities, ten cantons, and a very complex institutional structure. What was quite surprising was that they came up with very innovative and constructive recommendations, for example in the field of equal rights, abolition of discrimination, the indirect election of the Presidency (Bosnia has three Presidents and they are directly elected but only in some parts of the country). On this latter issue, the idea was to transform the Presidency into a symbolic one, only. Then there was the question of the second Chamber. The citizens very radically proposed to abolish the Second Chamber. The Second Chamber is important in Bosnia, not in the daily life, but they have veto power, which means they can veto legislation when this is against the interests of one ethnic group. The citizens

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proposed to abolish this Chamber and move the veto rights to the First Chamber in the Parliament, as this would be more functional and the legislative process would function more smoothly. What I want to show is that there were even radical proposals which politicians would not dare to pursue. Do we have a new Constitution in Bosnia? No, we don't. This is not surprising; the Citizens' assembly was of course an experiment promoted by the EU delegation, which did not care too much about how this assembly and its recommendations would feed into the decision-making process. The latter is very important to make deliberative democracy function – there needs to be a link between what is discussed in the citizens' assemblies or in these special bodies and how this feeds into the decision-making process. Unfortunately, in parallel to these citizens' debates, the EU delegation negotiated with politicians – as it has always been done in the last 25 years – in order to come up with a quick solution for the elections this October.

5.The European Union. The European Union is not a State, but we also have participatory and deliberative democracy at the EU level. At this level there were two Conventions, in 2000 and 2004 respectively. What is a Convention? It's a bit like a Constituent Assembly, which means it is made up not only by representatives of the Member States, but also by representatives of the national Parliaments and of the European Parliament sitting together in order to work out something. What? The first experiment was the Charter of Fundamental Rights, i.e. a bill of rights guaranteed at EU level. It was a successful experiment. A second Convention was called in 2004 which was supposed to work out a Constitutional Treaty, in other words a Constitution for the European Union. Is there an EU Constitution? No, the EU is still currently governed by the so-called Treaty of Lisbon from 2009. So you could ask me 'What is this all for if nobody has ever succeeded in doing something?' Actually, there was not the courage to say 'Let's give the EU a Constitution', but several elements were taken from this draft-Constitutional Treaty and introduced in the Treaty of Lisbon. So, this method produced something important, even though we don't have a new Constitution. And if you look at Article 48 of the Treaty of the European Union, you will discover that the Convention has become the standard method to be applied to change the Treaties, before the decisions of the Parliament, the Commission and the Council.

Another example is the Conference on the Future of Europe. Have you ever heard of it? From April 2021 to May 2022 a Conference on the Future of Europe was convened by the three institutions (the Council, the Parliament and the Commission), which was to discuss ideas and shape the common future of the European Union. There was a series of citizens' debates on different topics. An Internet platform was set up and everybody in the EU could write an email which would then be published, and the

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inputs would then be grouped. The conclusions were then presented in May, on Europe Day, to the three Presidents. Altogether 49 proposals on nine different topics were presented. And then... We are still waiting for a reaction. Here you see the big weakness of deliberative democracy, the lack of a link to the decision-making process. Anyway, if you're interested in European issues, google 'Conference on the Future of Europe' and have a look at the topics that were debated.

In conclusion, the idea is that simple things can be decided by direct democracy or by representative democracy, while more complicated things need to be treated differently, by relying on a different process. To sum up on deliberative democracy, it should be clear that it's not a substitute for representative or direct democracy. It's rather a complementary instrument which can be added to the previous two. Representation in Parliament still makes sense and also direct decisions by citizens in referendums still make sense, but they should be integrated with deliberative democracy in order to prepare decisions better and provide greater legitimacy. This sounds very complicated. What does it mean? It means – as we said at the beginning – I know that tomorrow I might be part of the majority. Even if I'm part of the minority in society, I can feel that in this process my interests are also on the table. Deliberative democracy is not about majority or minority; it's about having a quality discussion on a topic. The point is to provide differentiated views and arguments before a decision is adopted. Deliberative democracy is about exchange, about a balance of arguments, about equal consideration and equal representation, reflecting societal diversity, and about informed discussions. In the end, the objective usually is to reach a consensus and to tell politicians what we think. Probably politicians will listen more and better if there's one strong recommendation coming out from this deliberative process rather than if there's a recommendation from the majority, then one from the minority, etc. as in the case of Bolzano.

In conclusion, the question is: 'Are these new ways for democracy?' Direct democracy is the oldest way to decide (represented by the old bike) – think of democracy in Athens, people gathering in the agora and deciding, including by means of a sort of referendum among the people gathered there. Of course, this is risky, especially when it comes to sensitive topics, maybe because you don't reach the turnout, or the majority is too small. The next evolution is therefore representative democracy, with a group of people representing the whole country. With regard to constitutional amendments in particular, we can say that this is a reliable and fast way, and it's usually also balanced, so this is like our everyday bike. And what I'd like to introduce today is a new method which can also be used in fields such as constitutional decisions, when we need a third wheel for a specific purpose, e.g. when we need to transport very

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heavy goods. In this case it's probably better to use a special bike, a transport bike, a model which is an integration of the other two methods.

Thank you for your attention.

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