GOOD GOVERNANCE – ENHANCING REPRESENTATION

Edited by

László Komáromi – Zoltán Tibor Pállinger

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László KOMÁROMI – Zoltán Tibor PÁLLINGER

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INTRODUCTION

László Komáromi – Zoltán Tibor Pállinger
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The crisis of European democracy has been a subject of on-going political and scientific debates and also a major topic of public discourse in recent decades. The night-watchman liberal state of the 19th century, which only tended to protect the rights and freedoms of individuals, has grown into the chief promoter of social progress and the maintainer of social security. Its activity has become incomparably more complex, it now covers the most fields of public life and affects a huge variety of interests. Notwithstanding, the main features of political representation which evolved after the bourgeois transformation remained mostly untouched and are therefore faced with significant challenges. Decisions and measures that are taken by modern welfare states quite often do not pertain to society as a whole but only affect the interests of particular groups and thus evoke a demand of special groups' representation that can hardly be adapted to the existing institutional framework. The number of state regulations has increased significantly but the laws have lost their genuine force to control due to their loquacity and complexity. Traditional parliamentary statutes are therefore necessarily being replaced by other, indirect influencing factors.[1]

In parallel with these inherent developmental diseases of modern welfare states, traditional forms of political representation encounter other challenges as well. The power of non-elected governmental and economic organizations, banks, advisory bodies, supranational institutions and transnational companies restrict the competence of national parliaments. Although most of these power factors dispose of only a very limited democratic legitimacy (if any), they, in fact, have a major effect on the formation of national economic and social policies. Other influential groupings are able to enforce their interests through

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[1]　Dieter Grimm: Krisensymptome parlamentarischer Repräsentation. In: Peter M. Huber – Wilhelm Mössle – Martin Stock (eds.): *Zur Lage der parlamentarischen Demokratie. Symposium zum 60. Geburtstag von Peter Badura.* Tübingen, J.C.B. Mohr (Paul Siebeck), 1995. 4–8.

extensive lobbying behind the scenes, thus undermining the prerequisites of democratic decision-making, the principles of equality and transparency. Meanwhile the trust of citizens in political parties, parliaments and governments decreases to a considerable extent; the turnout in elections has tended to decline in various countries. Citizens feel more and more alienated from their elected representatives because they do not have the experience of being able to influence political decision-making. Furthermore national governments are no longer able to assure goods expected of the state by their citizens under the prevailing circumstances of the global market economy. In addition to this, huge masses of inhabitants – immigrants, refugees, and, in many parts of the world, ethnic or religious minorities – are legally excluded from political participation. Representative state organizations are "over-responsive" towards electoral groups with a high level of political influencing ability, but the most exposed social classes are unable to pursue their interests through traditional forms of political representation.[2] Common (or moreover global) interests, which can only be achieved in the long run (e.g. environmental protection, sustainable development) are likely to disappear in the short-sighted perspective of a four or five year parliamentary mandate.

These widely known crisis-symptoms of today's democracies incite both local communities, state institutions and international organizations to find new solutions to the shortcomings of modern political representation. The Parliamentary Assembly of the Council of Europe e.g. – besides other recommendations – suggests in a resolution to promote new participatory and deliberative instruments in addition to existing representative mechanisms, to set up independent control institutions in order to assure transparency, responsibility and accountability in the political sphere and to enhance the political education and training of citizens.[3] The way of implementation can be, however, diverse, just like the techniques and procedures that are already in practice amongst various countries.

The Faculty of International Relations of the Andrássy Gyula German Speaking University Budapest and the Faculty of Law and Political Science of Pázmány Péter Catholic University have therefore organized a conference with the title "Good Governance – Reforming Representation" on 20 September 2013

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[2]   Sonia Alonso – John Keane – Wolfgang Merkel: Editors' Introduction: Rethinking the Future of Representative Democracy. In: Sonia Alonso – John Keane – Wolfgang Merkel (eds.): *The Future of Representative Democracy*. Cambridge, Cambridge University Press, 2011. 7–12.

[3]   Council of Europe, Parliamentary Assembly, Resolution 1746 (2010), Democracy in Europe: Crisis and Perspectives, http://assembly.coe.int//nw/xml/XRef/X2H-Xref-ViewPDF. asp?FileID=17882&lang=en (accessed: 23. 02. 2015).

in Budapest[4] in order to gain an overview on how different communities cope with the challenges mentioned above. How do they try to establish additional ways of representation? What kind of tools and mechanisms can improve, correct and enhance the functioning of traditional representative institutions? How can governments be urged to be more responsive? Twelve scholars have presented both theoretical and practical results of their research mostly in connection with concrete solutions from all over the world encompassing participatory budgeting, e-participation, parental proxy-voting, the Ombudsman for Future Generations in Hungary, the peculiarities of the political reform in the Republic of Ireland, the representation of multiple citizens in the EU and foreign nationals in Hungary, etc. The examples did not merely tend to reform existing representative institutions but to reconsider the essence of representation itself and to develop new forms and techniques that help to better translate the general idea – which has existed for centuries in different forms – into practice. This is the reason the title of the book has changed to: "Good Governance – *Enhancing* Representation".

The volume contains eight studies in two sections. In the section "Theoretical Aspects" *László Komáromi* ("Improving Representation by Direct Democracy?") first explains the notion of representation and provides an overview of its evolution from the Middle Ages until modern times focusing on the change from the representation of estates to the representation of the whole nation, and on the development of the imperative to the free mandate of representatives. The paper then takes into account early forms of direct democracy from the Swiss "Landsgemeindeversammlungen" through the "town meetings" of New England Colonies of British America to the French Montagnard Constitution of 1793. It points out that modern direct democratic instruments have been introduced both in Switzerland and in US member states in order to restrict the representative power and subsequently deals with the interwar tendencies of direct democratic development including the Weimar Constitution, the Estonian and the Irish examples. The author is of the opinion that the appearance of modern instruments of direct democracy do not accidentally emerge in a time when universal suffrage and the free mandate of representatives already gained ground throughout Europe. Finally, the paper addresses the question of how representative and direct democracy can be reconciled with each other. The primary question in this respect is how "material representation" can be assured. Mechanisms of direct democracy shall essentially serve this purpose. Based on the Swiss example, the author shows how facultative referendums and popular initiatives correct and amend a representative government without paralysing the work of the parliament and how these instruments help to involve

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concerned groups into political decision-making; they also place on the agenda issues that otherwise would not be the subject of parliamentary or other public discussions. The author comes to the conclusion that direct and representative forms of the exercise of popular sovereignty should not be considered opposites but rather complements of each other.

Zoltán Tibor Pállinger ("Enhancing the Quality of Democracy: Representative and Direct Democracy – Two Faces of the Same Coin?") sets out to explore the possibilities of enhancing the quality of (representative) democracy through the introduction of direct democratic instruments in a way that also helps realise the deliberative potential of (direct) democracy. Starting with the distinction between representative and direct democracy the strengths and weaknesses of these two models will be outlined. In the second step key elements of the quality of democracy will be analysed. In a third step a possible pathway of enhancing both representation and direct popular participation by linking the two elements in a deliberative way will be drafted. In the final section the conclusions will be presented.

Judit Beke-Martos ("»Inestimable to Them and Formidable to Tyrants Only«") analyses the American evolution of the principle "no taxation without representation". In the 18th century, the conflict between the kingdom and the colonies presented itself – from a legal point of view – in a different interpretation of this principle. The Americans rejected the idea of being virtually represented in the British Parliament by such MP's in whose election they had no voice. As opposed to the traditional British representation, which was based on property, the Americans were in favour of actual representation, namely, in their view, not the property but the people themselves must be represented. This difference was expressed in the Declaration of Independence, which can be considered a list of the requirements of representative government. The problem of the relation between taxation and representation remained on the agenda of the Constitutional Convention at Philadelphia as well where both the idea of tax-based representation and the principle of popular representation were formulated. Finally, the Constitution of the United States laid down that both representatives and direct taxes shall be apportioned among the states according to their respective numbers, thus both representation and taxation at the Union level depended on the number of people. The Fourteenth Amendment (1868), however, only preserved the requirement of proportionality regarding representation and the Twenty-Fourth Amendment (1964) prohibited to deny the right to vote of US citizens by reason of failure to pay any tax. This refers to the changed idea that the equal representation of people was now more important than paying their taxes. Notwithstanding, taking into consideration the relatively low turnout in federal congressional elections, one can easily

come to the conclusion that the number of citizens who pay taxes is still higher than the number of those participating in elections.

Franz Reimer and *Balázs Schanda* ("Improving Representation by Parental Proxy Voting?") focus on the principle of universal franchise from the perspective of the (missing) voting rights of minors. Although the exclusion of ca. 20% of human society due to their age has been debated for more than 150 years, practical solutions were hardly introduced until our days. The institution that was given most consideration in this respect is the voting right of children exercised by their parents as custodial caretakers. The central issue of the German discussion is the constitutionality of such a "proxy voting" and the question of whether the Basic Law could be amended in order to introduce parental proxy voting with regards to the eternity clause in art. 79 para. 3 and the unalterable provision on the constitutional principle of democracy (art. 20). The paper analyses here parental proxy voting from the point of view of four principles: the generality, freedom, equality and strict personality of elections. Parental proxy voting improves the generality of elections as it increases the number of enfranchised citizens. It is also in line with the principle of the freedom of elections, because it is not the child but the proxy who must be free in his or her voting. Doubts about the equality of elections can also be resolved: parents being entrusted with exercising the voting right of their children do not necessarily neglect the interests of the minors they stand for, thus they do not simply cast an additional vote to get through their own concerns. Finally, the strict personal nature of elections does not seem to be an essential part of democracy: on the one hand proxy voting is practiced in a number of countries, on the other hand a strict approach would degrade people to isolated individuals who either exercise their franchise in person or do not even have a right to vote. The conclusion is that the Basic Law of the Federal Republic of Germany could be amended with parental proxy voting without violating the eternity clause. Notwithstanding, beyond the constitutional concerns, the basic question is why parental proxy voting shall (or shall not) be introduced. Supportive argumentations either focus on possible positive consequences or on the indefensibility of the exclusion of ca. one fifth of the population from the franchise. One positive effect may be that it may slow down the declining tendency of the population in developed countries as legislation could be made more responsive to the interests of the young generation. This is the key argument of the demographer Paul Demeny who suggests empowering parents to cast a half proxy vote for their children. In addition to this, the paper also refers to the disappearing moral consensus on the value of the family and the future generations. The exclusion of minors from franchise will even boost the process in which these traditional values sink into oblivion, the interests of the youth may cease to be represented. Despite these fundamental concerns, objections often focus on merely technical problems and

if not, the discussion can easily be misled by false questions and presentations as was shown in the course of the "national consultation" held in 2011 on the new Hungarian constitution where 74% of citizens rejected the idea of family voting.

After this series of papers concentrating mostly on theoretical aspects, four studies follow on different concrete solutions, which serve enhancing representation ("Practices of Enhanced Representation"). *Janina Apostolou* ("The Diffusion of Participatory Budgeting in German Municipalities") examines the German practice of a Brazilian political innovation of the late 1980s, the participatory budgeting (PB) and aims at elaborating a framework for future empirical researches. In Brazil, this instrument has evolved in a dialogue between government and citizens during a period of political transition; it served the goal of reducing political and social exclusion and overcoming social injustice and corruption. Therefore, citizens were not only included in the political discourse by giving them the opportunity to formulate their opinion and preferences on local budget in a well-structured process, but they were also enabled to adopt or reject the final decision. Contrary to this, in Germany, PB was introduced in certain municipalities as a top-down political decision, it was aimed at informing citizens about the budget by means of brochures and information events and although they may make proposals on how to use or preserve public resources, their recommendations are not binding on the decision-makers. Administrators are only obliged to give feedback on whether they adopted the citizens' suggestions or not. Thus, PB can't be considered an instrument of direct democracy in Germany. Notwithstanding, the number of such decision-making processes has constantly increased between 2008 and 2013. The paper identifies two main factors behind this development: on the one hand PB gained ground following a common project of the German member state North Rhine-Westphalia and Bertelsmann Foundation ("Kommunaler Bürgerhaushalt"), started in 2000, in order to develop guidelines for the implementation of PB in German municipalities. On the other hand the weak financial situation as well as the high level of indebtedness of certain municipalities were also beneficial to the diffusion of PB: the seriousness of the problem generally increases the chance of political innovations. It could also be observed that geographical closeness was also a supportive cause for introducing PB. In addition to these components, institutional and electoral conditions may further be determinant factors for the diffusion of PB, as well as the presence of political entrepreneurs and demographic circumstances. The success of the innovation is moreover dependent on whether it was raised in a network, which may support the spread of the idea among member municipalities.

Christina Griessler ("The Government's and Citizens' Approach to Political Reform in the Republic of Ireland") demonstrates two political innovations

from Ireland, which were meant for improving representation and increasing the responsiveness of government. The mismanagement of the economic crisis led to a political change in 2011. The new government established a Constitutional Convention in the autumn of 2012, which consisted partly of citizens selected at random from the election register, partly of MP's from the parliaments of the Republic of Ireland and Northern Ireland. The Convention was a consultative body and had to discuss a number of preset issues such as the election system of the Dáil Éireann, the reduction of the presidential term, the question of same-sex marriage, the voting age etc. Finally, the Convention presented its recommendations to the government, which took them into consideration and decided freely which ones to accept. Prior to this, already in the spring of 2011, another initiative ("We the Citizens") was launched by political scientists who organized regional meetings for citizens in order to debate their vision on the future of Ireland and to lay down the topics to be deliberated in the Citizens' Assembly, a gathering of citizens selected by public-opinion researchers in a way that duly represented Irish society. The Citizens' Assembly discussed four issues finally: taxation and expenses, educational reform, the functions of parliamentary deputies and the political reform in general. The members first debated the topics in small groups of eight persons with the assistance of a qualified facilitator and a note-taker. They were also given an objective introduction by experts. After the discussion in groups a plenary session followed, then the groups continued their work and finally they formulated their proposals that were submitted to the vote to other participants. The process has shown that participants tended to change their views as a result of the experts' presentations and the debate. They were also able to understand the context of the issues and to accept tax increase and expenditure cut if economic constraints were explained and the alternatives clearly presented. Moreover, they have shown more interest in and inclination for further debates and participation. Thus, the "We the Citizens" movement has proved that deliberative and participatory procedures may contribute to a growing trust of citizens in politicians even if such a mechanism only has a limited influence on concrete policy decisions.

Sergiu Constantin and *Elisabeth Alber* ("Autonomy and Minority Representation in South Tyrol") outline one of the most successful examples of the protection of linguistic minorities: the case of South Tyrol. After having summarized the historical development of the South Tyrolean autonomy, the paper focuses on the procedures of minority representation and the elements of South Tyrol's consociational democracy. The core of the autonomy settlement was the establishment of the Commission of Six, a joint commission, vested with the power to elaborate the enactment decrees: regulations, which effectuate the provisions of the Second Autonomy Statute of 1972 in detail. The decrees are directly submitted to the Italian government for approval and do not need

any ratification from the Italian parliament. The Commission of Six is formed on the basis of a double parity: on the one hand both the Italian state and the autonomous province of South Tyrol have three representatives, on the other hand the two most significant linguistic minorities, the German and the Italian also have three members (two Germans on the part of the province and one from the state; Italians conversely: one on behalf of the province and two on behalf of the state). The Ladin linguistic minority is represented by the Germans. This arrangement ensures that the state, the province and the linguistic groups feel compelled to find solutions which are acceptable for all parties. In addition to the double parity in the Commission, the South Tyrolean settlement lays great stress on power sharing and proportionality: each linguistic minority has a share both in legislative and executive bodies; the representation of Ladins is guaranteed. The composition of the provincial government corresponds to the proportion of the linguistic minorities in the provincial parliament, moreover, positions in public administration are also sectioned out according to linguistic groups (quota system). Minorities are enabled to put a veto on legislative and administrative acts if they consider the draft harmful to their equality or cultural identity. In this case the issue shall be decided by the Constitutional Court and the Court of Administrative Justice, respectively. Minorities are also protected by a grant of cultural autonomy: every linguistic group has its own administrative structure for organising primary and secondary education and other cultural activities. Thus, separation and compelled cooperation are equally characteristic of this unique autonomy settlement.

The series of papers is closed with a study of *Saskia Fritzsche* ("Legal Challenges of E-Participation as an Instrument of Vibrant Democracy: Insights into the Research Project »Government Information Activities in the Web 2.0 Age« at the German Research Institute for Public Administration"), which focuses on the legal problems that arise from the use of Internet in different mechanisms of e-participation. At first sight, Internet seems to be an effective tool to put the principles of equal chances and plurality into practice in the course of participatory decision-making processes. If we take the German example, however, as does the above mentioned research project, both principles are faced with great challenges: older generations, the poor, women and Eastern German citizens have – in fact – a more moderate access to Internet-based participatory mechanisms than well-situated and young individuals. Highly qualified and better motivated people, who also have more time to devote to e-participation, are over-represented, which tends to the direction of an elitist democracy. Therefore, the distortion of the picture shall be corrected and counterbalanced with transparency, which gives rise to further questions on how to establish the socio-demographic composition of participants. Another problem stems from the fact that the citizens' opinions regarding administrative

plans or services are subjective assessments. If they appear on Internet-based governmental platforms, operators of the platforms are not able to assure their factual foundation. They can only assure that the citizens' reactions were correctly collected and summarized and that their evaluation was carried out in accordance with appropriate criteria. It must also be made clear that such evaluations do not represent the official position of the government and the administration. Even more serious concerns emerge if third parties' Web 2.0 tools are used by public administration, e.g. if Facebook, Google or Twitter plug-ins or other social media contents are embedded in governmental websites. In such cases authorities become responsible for any misuse and damage, which arise from the non-appropriate data protection of third party service providers. The series of problems can be continued with the use of cookies by governmental portals and the practice of big data analytics, which necessitate special guarantees in order to safeguard the right of informational self-determination and privacy. The paper demonstrates that existing constitutional, administrative, copyright, competition and data protection regulations shall be reconsidered in many respects if governmental organisations and citizens want to use techniques of e-participation in a lawful and appropriate manner.

I. THEORETICAL ASPECTS

IMPROVING REPRESENTATION
BY DIRECT DEMOCRACY?

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1. The Notion of Representation

The Latin verb "repraesentare" has several meanings: "make present", "manifest", "set in view", "exhibit", "describe" – to evoke and substitute something or someone being absent at this time. Neither did ancient Greeks nor Romans refer to political representation with this term.[1] In ancient city-states like the polis of Athens or the Early Roman Republic the most important public matters were decided directly by adult male citizens in the people's assemblies, large segments of the population – women, foreigners and slaves – did not have any political rights: no wonder that the abstract idea of political representation could not evolve in these societies.

The concept of representation first emerged in the Roman Church. Tertullian (c. 160 – c. 220) was of the opinion that a single, superior entity can stand for its dispersed, individual members.[2] In this sense ancient ecclesiastical synods could serve as representative bodies of the Christians. This view – together with the organic notion of the Church, which can be traced back to Saint Paul's idea of the Christian community as Christ's mystic body, which consists of himself as head and the Christians as parts of it[3] – played an important role in the evolution of medieval estates. Clericals and lay noblemen, later members of

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[1]   Hanna Fenichel Pitkin: *The Concept of Representation.* Berkeley and Los Angeles, University of California Press, 1972. 241.

[2]   Mónica Brito Vieira – David Runciman: *Representation.* Cambridge, Polity Press, 2008. 9.

[3]   Bónis György: *Hűbériség és rendiség a középkori magyar jogban.* Kolozsvár, Bolyai Tudományegyetem, Erdélyi Tudományos Intézet, 1948. 57–58. Cf. Rom. 12:4–5; Col. 1:16–24; Ef 5, 23.

the burgesses, if they were not present in person in the assembly of the estates, they were represented by elected deputies. These deputies were generally bound to the will of their electors who could instruct them how to vote on issues debated in the assembly. The mandate of the deputy was usually imperative:[4] he was not allowed to diverge from the instructions of those who sent him, nevertheless if he did happen to do so, he could be recalled. Thus, it was ensured that the interests of noblemen who were not present at the general assembly were protected by their deputies.

The transition from the representation of individual estates to the representation of the whole nation can first be observed in England. Thomas Smith (1513–1577), professor in Cambridge and Queen Elisabeth's diplomat and counsellor, provides evidence of this change in his work "De Republica Anglorum" (1565), when he mentions that the members of parliament from the nobles to the commoners carry on their negotiations for the public good of the whole political community:

> "The most high and absolute power of the realm of England consisteth in the Parliament. For as in war, where the King himself in person, the nobility, the rest of the gentility and the yeomanry are, is the force and power of England: so in peace and consultation where the prince is to give life and the last and highest commandment, the barony for the nobility and higher, the knights, esquires, gentlemen and commons for the lower part of the commonwealth, consult and show what is good and necessary for the commonwealth [...]."

He draws a parallel between ancient Roman Century and Tribal Assemblies and the Parliament of England: just like the ancient assemblies, the Parliament also "representeth and hath the power of the whole realm, both the head and the body", and adds even more clearly:

> "For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what preeminence, state, dignity or quality soever he be, from the prince (be he

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[4]   Even Christoph Müller's critical comparison makes it clear that the free mandate of representatives was rather exceptional until the 18th–19th century. Cf. Christoph MÜLLER: *Das imperative und das freie Mandat. Überlegungen zur Lehre von der Repräsentation des Volkes.* Leiden, A. W. Sijthoff, 1966. 50–61.

king or queen) to the lowest person in England. And the consent of the Parliament is taken to be every man's consent".[5]

The same, modern meaning of "representation" occurs in Sir Edward Coke's (1552–1634) Institutes of the Lawes of England (1628–1644). As he expounds: the knights and burgesses in the Parliament "represent all the commons of the whole realm" and "whosoever is not a lord of parliament and of the lords house, is of the house of commons either in person, or by representation".[6]

2. Direct and Representative Forms of Government – A Historical Overview

2.1. Middle Ages and Early Modern Times

As for the development of direct popular self-government, popular participation in the decision of public matters remained exceptional and confined to local issues during the Middle Ages and in early modern times. Since the 13th and 14th century, in Swiss cantons almost every local regulation was discussed and adopted by the assemblies of all adult male inhabitants, by the so-called "Landsgemeindeversammlungen". These popular assemblies were held outdoors, ceremoniously. They embodied the supreme political power of the canton and decided not only on legislative matters but performed administrative and supervisory tasks, elected officials and had juridical competences as well.[7]

Another, perhaps better-known concrete example for direct popular "law-making" is the adoption of the Genevan Ecclesiastical Ordinances. At the beginning of the 16th century, Genevan public affairs were administered by a hierarchy of representative bodies: the Council of Two Hundred, a relatively new institution, which was invested with legislative power and entitled to exercise the prerogative of pardoning; the Council of Sixty, the highest authority of foreign affairs; and the Small Council of twenty-five members, which managed administrative matters. In addition to this, a General Council was also part

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[5]   Geoffrey Rodolph ELTON: *The Tudor Constitution. Documents and Commentary.* 2nd edition. Cambridge, Cambridge University Press, 1982. 240–241. Partly also cited by Georg BRUNNER: Direct vs. Representative Democracy. In: Andreas AUER – Michael BÜTZER (eds.): *Direct Democracy: The Eastern and Central European Experience.* Aldershot, Ashgate, 2001. 215.

[6]   Cited after PITKIN op. cit. 248.

[7]   Louis CARLEN: Die Landsgemeinde. In: Andreas AUER (ed.): *Les origines de la démocratie Suisse / Die Ursprünge der schweizerischen direkten Demokratie.* Bâle et Francfort-sur-le Main: Helbing & Lichtenhahn, 1996. 15–25, esp. 16–22.

of the hierarchy, which involved male citizens and bourgeois who possessed considerable property or pursued an honourable profession and which was entitled to elect other councils and officials.[8] In 1541, after having been passed by the Small Council and the Council of Two Hundred of the city, John Calvin (1509–1564) submitted his "church constitution" to the General Council for ratification,[9] and thus set an example of having fundamental regulations adopted directly by people concerned.

Since the 17th century, some New England colonies practiced "town meetings" where adult male citizens decided public matters directly, without relying on elected deputies. These institutions can be traced back to the informal assemblages of the freemen of the towns of Massachusetts Bay Colony, which first met weekly, later monthly, debated and voted on typical issues which concerned the interests of the municipal society, like the parcelling out of land, construction of a church, engaging of a minister, admission of new settlers. Absence was prohibited under pain of punishment.[10]

2.2. The Age of the Bourgeois Transformation

The first significant propagator of the idea of direct popular decision-making, Jean-Jacques Rousseau (1712–1778) pronounced in "The Social Contract" (1762) that sovereignty – the exercise of the "general will" – cannot be alienated or represented and therefore the laws – the declarations of the "general will" – must be adopted directly by regular assemblies of the people.

> "The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified in person is null and void – is, in fact, not a law."

He also refers to the English representative system and considers it a manifestation of slavery:

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[8]   Robert M. Kingdon: *Adultery and Divorce in Calvin's Geneva.* 2nd edition. Cambridge, MA, Harvard University Press, 1995. 11–13.

[9]   Richard Taylor Stevenson: *John Calvin: The Statesman.* Cincinnati – New York, Jennings and Graham – Eaton and Mains, 1907. 118.; John Kelman Sutherland Reid (ed.): *Calvin: Theological Treatises.* London – Philadelphia, S.C.M. Press – The Westminster Press, 1954. 56–57.

[10]   Joseph F. Zimmerman: *The New England Town Meeting. Democracy in Action.* Westport, CT, Praeger, 1999. 18 et seq.

> "The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them."[11]

Rousseau's radical view remained an opinion of the minority among contemporary political theorists. Moreover, the idea of the imperative mandate of representatives was replaced by the concept of the free mandate and the deputies were relieved of the accountability towards their electors step by step. Twelve years after the Social Contract, in 1774, Edmund Burke (1729–1797) in a snappy answer to Rousseau argued in his Speech to the Electors at Bristol for the freedom of the parliamentary deputy, whose "unbiased opinion", "mature judgement" and "enlightened conscience" shouldn't be sacrificed to his electors:

> "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

According to Burke, it is not impossible to reproduce the will of the nation and to realize the public weal by means of representation, on the contrary:

> "[...] Parliament is a deliberative assembly of one nation, with one interest, that of the whole – where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole."[12]

Not even the French Bourgeois Revolution changed the fundamentally representative character of the government, it only expanded representation to social classes which didn't have a voice in public matters. Although the Declaration of the Rights of Man and of the Citizen of 1789 declared that every

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[11] The Social Contract, book III, chapter XV. In: George Douglas Howard Cole (transl. and intr.): *The Social Contract and Discourses by Jean-Jacques Rousseau*. London and Toronto, J.M. Dent & Sons, 1923. 83.

[12] Speech at the Conclusion of the Poll. In: *The Writings and Speeches of Edmund Burke*. Vol. II. Toronto, Morang, 1901. 95–96. Some years earlier, Sir William Blackstone (1723–1780) already established that parliamentary representatives are equipped with a free mandate: "And every member, though chosen by one particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general (…). And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice, of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do." William Blackstone: *Commentaries on the Laws of England*. Book I. Oxford, Clarendon, 1765. 155. (Chapter 2, section II.) Partly cited also by Brunner op. cit. 215.

citizen is entitled to take part in the formation of laws either personally or by way of representatives,[13] the first constitution of the French Revolution, that of 1791, introduced a pure representative government.[14] The second wave of the revolution already led to the adoption of certain direct popular rights as well: the mandatory constitutional referendum (resolution of September 21, 1792[15]) and some other "bottom-up" instruments like the popular constitutional initiative and the popular veto on laws included in the Constitution of 1793.[16] However, with the exception of the mandatory constitutional referendum, these instruments were never put in practice in revolutionary France – and later, the Napoleons tended to use plebiscites: popular votes ordered by the head of state in order to strengthen their own political position and if necessary to circumvent the parliament.[17]

Contrary to the French "top-down" plebiscitary usage, in Switzerland a fundamentally different practice evolved in the 19th century based mostly on "bottom-up" initiatives. Although the reform of the cantonal constitutions in course of the "Regeneration" in the 1830s and 1840s was inspired by the enlightened ideas of the Helvetic Republic (1798–1803) and the new constitutions were patterned after the French revolutionary constitutions (esp. after that of 1793 and 1795), the influence of former grass-roots democratic experiences of the cantons have certainly played an important role in the transformation.[18] It was the wealthy provincial bourgeoisie and the liberal urban intellectuals, who promoted the process most efficiently, however, the representatives of the lower classes were also ready to take a strong line on claiming for more voice

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[13] Art. 6: "La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. [...]" Horst DIPPEL (ed.): *Constitutions of the World from the late 18th Century to the Middle of the 19th Century.* Vol. XI. Berlin – New York, De Gruyter, 2010. 29.

[14] Art. 2.: "La Nation, de qui seule émanent tous les pouvoirs, ne peut les exercer que par délégation. – La Constitution française est représentative: les représentants sont le Corps législatif et le Roi." Léon DUGUIT – Henry MONNIER – Roger BONNARD: *Les constitutions et les principales lois politiques de la France depuis 1789.* 7th ed. (Ed. Georges BERLIA.) Paris, Librairie générale de droit et de jurisprudence, 1952. 6.

[15] "La Convention nationale déclare, 1° qu'il ne peut y avoir de constitution que celle qui est acceptée par le peuple…" Jean Baptiste Henri DUVERGIER (ed.): *Collection complète des lois, décrets, ordonnances, réglemens, et avis du Conseil-d'État.* Vol. 5. Paris, Guyot et Scribe, 1825. 1.

[16] Cf. art. 58–60, 115. DUGUIT – MONNIER – BONNARD op. cit. 68, 72.

[17] For this development see Christoph FREI: *Direkte Demokratie in Frankreich. Wegmarken einer schwierigen Tradition.* [Vorträge am Liechtenstein-Institut, Kleine Schriften 22.] Vaduz, Verlag der Liechtensteinischen Akademischen Gesellschaft, 1995. 11 et seq.

[18] Cf. Alois RIKLIN – Silvano MÖCKLI: Werden und Wandel der schweizerischen Staatsidee. In: Alois RIKLIN (ed.): *Handbuch Politisches System der Schweiz.* Vol. 1: Grundlagen. Bern, Paul Haupt, 1983. 30–34, 39–42.

in political matters.[19] Thus, the most important direct democratic rights were achieved as a result of revolutionary movements against the representative power. That is how it happened in the Canton of St. Gallen in 1831, on the so-called "Steckli-Donnerstag", when hundreds of peasants armed with bludgeons surrounded the constituent assembly and enforced the adoption of the right of the popular veto on bills passed by the cantonal legislative body. The popular veto was later enacted by other cantons as well and was transformed into facultative referendum: after a law is passed by the parliament, a number of enfranchised voters can demand to submit it to popular vote which makes it possible to hinder the coming into force of the law by the electorate.[20] In course of the democratic movement in the 1860ies and 1870ies the facultative referendum was enacted on the federal level as well (1874). The other cornerstone of Swiss direct democracy, the popular constitutional initiative was similarly first introduced in some of the cantons before 1848; it became part of the federal constitution in 1891. By virtue of this right, a number of enfranchised voters are entitled to propose a constitutional amendment and if the parliament doesn't accept it, the proposal must be submitted to popular vote.[21]

Based on the Swiss model, similar institutions were transplanted to certain US member states at the turn of the 19th and 20th century, because the populist movement saw great possibilities in popular rights for the breaking of the power of monopolies and trusts, which were entwined with the representative power. We must also mention that the example of the town meetings of New England and the constitutional referendums, which were observed in some colonies and later US member states from times of the American Revolution, certainly boosted the willingness of people to participate in political decisions.[22]

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[19]   Alfred Kölz: *Neuere schweizerische Verfassungsgeschichte. Ihre Grundlinien vom Ende der Alten Eidgenossenschaft bis 1848.* Bern, Stämpfli & Cie, 1992. 227–235, esp. 234.

[20]   Silvano Möckli: *Das Gesetzesveto und -referendum. Ein Stolperstein wird zum Grundstein.* In: Auer (ed.) op. cit. 209–217.

[21]   For an overview of the evolution of popular rights in the Swiss cantons see Adrian Vatter: *Kantonale Demokratien im Vergleich. Entstehungsgründe, Interaktionen und Wirkungen politischer Institutionen in den Schweizer Kantonen.* Opladen, Leske & Budrich, 2002. 233 et seq. and Adrian Vatter: Direkte Demokratie in der Schweiz: Entwicklungen, Debatten und Wirkungen. In: Markus Freitag – Uwe Wagschal (eds.): *Direkte Demokratie. Bestandaufnahmen und Wirkungen im internationalen Vergleich.* Berlin, Lit, 2007. 72–75. For a summary of their development on the federal level see Alexander H. Trechsel – Hanspeter Kriesi: Switzerland: The Referendum and Initiative as a Centrepiece of the Political System. In: Michael Gallagher – Pier Vincenzo Uleri (eds.): *The Referendum Experience in Europe.* Basingstoke: Macmillan, 1996. 185–190 and Vatter (2007) op. cit. 75–77.

[22]   For the development of popular rights in the United States see Andreas Auer: *Le référendum et l'initiative populaires aux Etats-Unis.* Bâle et Francfort-sur-le Main – Paris, Helbing & Lichtenhahn – Economica, 1989. 69–92.; Hermann H. Heussner: *Volksgesetzgebung in den USA und in Deutschland. Ein Vergleich der Normen, Funktionen, Probleme und Erfahrungen.*

2.3. After the First World War

In Europe, a first breakthrough and the spreading of direct democratic institutions occurred after the First World War, when several new democracies considered it important to lay a great stress on popular sovereignty and to put the latter into practice. The constitutions of the Weimar Republic, the Republic of Austria, the Baltic States and of the Irish Free State all involved different popular rights, mostly both plebiscitary ("top-down") and direct democratic ("bottom-up") instruments, sometimes also in a combined form. Generally speaking, the aim of these regulations was to promote the formation of a participant political culture, where people not only have manifold cognitive, affective and evaluational attitudes towards the political system they live in, but they also consider themselves a constituent and creative factor of it and believe that they can exert a significant influence on its working.[23] The experiences were diverse. For example in Germany, high participation quorums made it extremely difficult to launch popular initiatives: only organisations with significant membership and financial background had a chance. Also the Nazi Party tried to benefit from the initiative: although the referendum for the adoption of the so-called "Freiheitsgesetz", which was directed against Germany's war reparations didn't reach the threshold, the issue contributed to the increasing popularity of the Nazis. Despite this, after Hitler's takeover direct democratic rights were abolished and only "top-down" plebiscites were practiced by the government.[24] In Estonia, in times of severe economic and stable political crises, attempts of the parliament to modify the constitution failed because its amendments could not reach the threshold required for a valid mandatory constitutional referendum; finally a radical right-wing extra-parliamentary organisation, the League of Veterans could put through its own draft constitution which overthrew the system and

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Köln (i. a.), Carl Heymanns, 1994. 43–47.; Thomas Goebel: *A Government by the People. Direct Democracy in America, 1890–1940.* Chapel Hill – London, The University of North Carolina Press, 2002.

[23]   For the notion of "political culture" and its types see Gabriel A. Almond – Sidney Verba: *The Civic Culture. Political Attitudes and Democracy in Five Nations.* 3rd edition. Newbury Park, CA (i. a.), Sage Publications, 1989. 13 et seq.; for the evolution of the concept see Werner Seitz: *Die politische Kultur und ihre Beziehung zum Abstimmungsverhalten. Eine Begriffsgeschichte und Methodenkritik.* Zürich, Realotopia, 1997. Part I.; as for the interpretation of the concept in Hungary: Varga Tamás: A politikai kultúra fogalma és értelmezései a magyar politikatudományban. *Politikatudományi Szemle*, 1997/3. 133–158.

[24]   For the inter-war German experience with direct democracy see Reinhard Schiffers: *Elemente direkter Demokratie im Weimarer Regierungssystem.* Düsseldorf, Droste, 1971.; Otmar Jung: *Direkte Demokratie in der Weimarer Republik. Die Fälle »Aufwertung«, »Fürstenenteignung«, »Panzerkreuzerverbot« und »Youngplan«.* Frankfurt am Main – New York, Campus, 1989.; Otmar Jung: *Plebiszit und Diktatur: die Volksabstimmungen der Nationalsozialisten. Die Fälle »Austritt aus dem Völkerbund« (1933), »Staatsoberhaupt« (1934), »Anschluß Österreichs« (1938).* Tübingen, Mohr, 1995.

paved the way for Konstantin Päts and his authoritarian regime.[25] In Ireland, basically similar institutions were codified in the shadow of the civil war but their putting into force was wisely postponed and so they didn't become weapons in the hands of forces which attempted to demolish the constitutional order.[26]

After the Second World War, and especially in the 1970ies and 1990ies the number of referendums showed a significant increase both in Europe and worldwide.[27] The number was not only raised by temporary issues, like sovereignty questions in EU member states or the establishment of new democracies in Eastern and Eastern-Central Europe. The increasing education of citizens, the amount of information available in social media, the rising standard of living in developed countries, the individualization of society and the emergence of manifold interests all result in a growing attention to public affairs and in a demand for participation in decision-making.[28]

If we look at this short historical overview, it might be striking that modern institutions of direct democracy spread widely after two preceding steps in its evolution: 1) the introduction of universal suffrage and 2) the acceptance of free mandate.[29] Large masses of citizens were already represented in the parliament but at the same time the free mandate dissolved the legal bond between electors and representatives which – due to the imperative mandate – still existed in times of the estate state.

3. Reconciling Representative and Direct Democracy

3.1. Introductory Questions

And this led to the fundamental question: how can it be guaranteed that citizens find their own standpoints and preferences in the activity, ideas and decisions of their elected representatives? How can it be secured that representation

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[25] Cf. Andres Kasekamp: *The Radical Right in Interwar Estonia*. Basingstoke, Macmillan, 1999. 32–48.

[26] Cf. Maurice Manning: Ireland. In: David Butler – Austin Ranney (eds.): *Referendums. A Comparative Study of Practice and Theory*. Washington, D.C., American Enterprise Institute for Public Policy Research, 1978. 193–201.

[27] See the table in David Butler – Austin Ranney (eds.): *Referendums Around the World. The Growing Use of Direct Democracy*. Washington, D.C., The AEI Press, 1994. 5.

[28] Otmar Jung: Siegeszug direktdemokratischer Institutionen als Ergänzung des repräsentativen Systems? Erfahrungen der 90er Jahre. In Hans-Herbert von Arnim (ed.): *Demokratie vor neuen Herausforderungen. Vorträge und Diskussionsbeiträge auf dem 1. Speyerer Demokratie-Forum vom 29. bis 31. Oktober 1997 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer*. Berlin, Duncker & Humblot, 1999). 109–110.

[29] Cf. Brunner op. cit. 215–216.

substantiate not only the expression of a *formal* authorisation but also the realization of a *material* requirement: that the will of the people manifest itself in the acts of power holders and that decisions of representatives be acceptable to those who are governed?[30] The efforts to introduce direct popular rights in the constitution can also be understood as an answer to this question. Beyond other instruments, methods and solutions, the institutions of direct democracy are designed to promote material representation.

As we have seen, the most important traditions of direct democracy – the Swiss one or that of western US member states – were born in revolutionary periods and popular rights were achieved contrary to representative organisations. At this point, a second question presents itself: Is it not a contradiction to enhance representation by means of direct popular participation? Is there no danger in the use of direct democratic instruments becoming weapons whereby representative governments can be paralysed or forced into a mere executive position? Do referendum rights not involve the risk of overthrowing parliamentary institutions? Even the interwar experience can be a warning that such a risk shouldn't be underestimated.

However, if we take into consideration the further development of modern practices of direct democracy, it is also clear that the use of such instruments did not eliminate representative governments anywhere. Even in Switzerland, in the country with the most direct popular votes, only 7% of laws are submitted to the people for direct vote, 93% are adopted in the parliament without popular participation. The fundamentally representative character of modern political systems is not challenged by direct democracy.[31]

3.2. The Preliminary Effect of Referendums

This is no wonder: firstly because popular will can only be expressed if people are asked and to ask people, well-organised social forces are required who are not only able to formulate questions but also to gather the prescribed amount of signatures and to launch the process in which the will of individuals is channelized

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[30] On formal and material representation see Ernst-Wolfgang Böckenförde: Mittelbare/ repräsentative Demokratie als eigentliche Form der Demokratie. Bemerkungen zu Begriff und Verwirklichungsproblemen der Demokratie als Staats-und Regieurngsform. In: Georg Müller – René A. Rhinow – Gerhard Schmid – Luzius Wildhaber (eds.): *Staatsorganisation und Staatsfunktionen im Wandel. Festschrift für Kurt Eichenberger zum 60. Geburtstag.* Basel – Frankfurt am Main, Helbing & Lichtenhahn, 1982. 318 et seq.

[31] Wolf Linder: Licht und Schatten über der direkten Demokratie. (Akademievortrag von Wolf Linder 20. Februar 1998.) *Akademievorträge*, Issue Nr. 1. Bern, Schweizerische Akademie der Geistes- und Sozialwissenschaften, 2000. 6.

in order to get to a decision.[32] Secondly, the possibility itself of exercising a veto on parliamentary resolutions by a subsequent referendum, can have a preliminary effect which makes it unnecessary to resort to direct democratic tools. Also, the Swiss example can be illuminating in this respect: governments intend to avoid the popular veto on their decisions. Therefore they rather choose to draw the interest groups who are concerned and who are deemed to be able to gather the signatures required for referendum into the decision-making process.[33] This practice was established in times of the First World War, when the federation intended to take measures in the field of economic and welfare policies and the National Council tended to consult the most important economic umbrella organisations when making preparations for adopting new regulations. In 1947, when the federal constitution was amended with new powers of the federation to regulate matters of trade, industry and banking transactions, it was also enacted that concerned economic organisations shall be given a hearing and they also can be invited to collaboration in the execution of the implementing provisions.[34] The practice, which has evolved, later went beyond the scope of this regulation.[35] In 1999, the consultation procedure ("Vernehmlassungsverfahren") was included in the federal constitution,[36] and in 2005 a law was adopted on the procedure.[37] The consultation process is mostly triggered and directed by the federal government (exceptionally by a competent parliamentary commission). The goal of the procedure is not only to achieve the appropriateness and applicability of the planned regulation but its acceptance must also be secured.[38] Therefore, the drafts are sent to the cantons, parties and all interested groups and they are

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[32] Böckenförde op. cit. 306., based on Erich Kaufmann's observations on the formation and expression of popular will (Erich Kaufmann: *Zur Problematik des Volkswillens.* Berlin – Leipzig, Walter de Gruyter, 1931.).

[33] Wolf Linder: Direkte Demokratie. In: Ulrich Klöti – Peter Knoepfel – Hanspeter Kriesi – Wolf Linder – Yannis Papadopoulos (eds.): *Handbuch der Schweizer Politik. Manuel de la politque suisse.* 2nd edition. Zürich, Verlag Neue Zürcher Zeitung, 1999. 119–121.; Wolf Linder: *Schweizerische Demokratie. Institutionen – Prozesse – Perspektiven.* 2nd, revised and updated edition. Bern, Haupt, 2005. 246, 249–251, 256–264.

[34] Bundesbeschluss über eine Revision der Wirtschaftsartikel der Bundesverfassung (vom 4. April 1946), art. 82, para. 3. *Bundesblatt*, 98 (11 April 1946), vol. I. 895.

[35] Heinjo Schröder: Das schweizerische Vernehmlassungsverfahren. Beispiel für eine institutionalisierte Beteiligung der Verbände an der Gesetzgebung. In: Franz Burkei – Dirk-Meints Polter (eds.): *Rechtsfragen im Spektrum des Öffentlichen. Mainzer Festschrift für Hubert Armbruster.* Berlin, Duncker & Humblot, 1976. 382–383.

[36] Art. 147: "The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties." www.admin.ch/ch/e/rs/101/a147.html (accessed 12. 01. 2014).

[37] Bundesgesetz über das Vernehmlassungsverfahren, 18 March 2005. www.admin.ch/opc/de/classified-compilation/20032737/index.html#fn1 (accessed 12. 01. 2014).

[38] Adrian Vatter: *Das politische System der Schweiz.* Baden-Baden, Nomos, 2014. 237 et seq.

invited to express their standpoint and to expound their view. Subsequently, the statements are studied and the government elaborates its proposal with regards to them. The parliament also receives the materials and the summary of the internal consultation, thus the parliament can make its decision in full awareness of the opinion of the interest groups.

All this means that the facultative referendum, which was originally meant for a subsequent control of parliamentary decisions, resulted in a preliminary process by which the representative power tries to reach consensus already before the decision. One of the cornerstones of Swiss direct democracy, which was fought out in revolutionary battles, later contributed to the formation of a consensus democracy or a system of concordance.[39] This system can be conducive to holders of the representative power being more sensitive to public opinion between elections even if they have a free mandate.

3.3. The Function of Popular Initiatives

But the other cornerstone of Swiss direct democracy, the popular initiative has its part as well. In Switzerland, 100.000 enfranchised voters are entitled to initiate constitutional amendments and to force out a referendum. They can hand in their initiatives both in form of general suggestions and in form of elaborated drafts. Between 1848 and 2003 244 initiatives were officially brought in on the federal level and more than two thirds of them (157) were put to referendum. But not even one tenth (13) was accepted by the people, nearly 92% was rejected. Thus, the Swiss constitutional system stands the risk of popular initiatives, thoughtless and unserious proposals can hardly get through.[40] Moreover, the parliament is entitled to give a counter-proposal to popular initiatives, which is usually not the diametric opposite of the popular initiative but rather its moderate alternative. This particularly has a greater chance at the polls: 40% (6) of the 15 parliamentary counter-proposals were accepted and 60% (9) were rejected by the voters in the above mentioned period.[41] The main function of popular

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[39]   Trechsel – Kriesi op. cit. 192, 202 (based on Leonhard Neidhart's observations).

[40]   In Hungary, the maturity of voters is in this respect still questioned. József Szájer, former head of the National Consultation Body, leading figure of the wording of the new Basic Law of Hungary said in an interview when he was asked why the new Basic Law wasn't put to referendum, that in complicated matters such as a constitution, it is evident that there is no room for referendums; the constitutional system shouldn't be "grubbed up" by means of referendums and populist campaigns – InfoRádió, Aréna, 18 April 2011. The contrast to the Swiss approach cannot be sharper: in Switzerland every amendment (partial or total revision) of the federal constitution is compulsorily to be submitted to referendum, moreover, the door is opened to bottom-up initiatives as well.

[41]   Linder op. cit. (2005) 254.

initiatives is agenda-setting: by means of this instrument questions, which would otherwise get lost in the labyrinth of parliamentary decision-making can also be put on the agenda. The right of initiative also opens the door to groups who don't have appropriate representation or who cannot get their concern through in the normal representative way of passing political resolutions. Even unsuccessful initiatives can have an effect in the long run: parliamentary forces may espouse the idea if they realize that a significant social interest is concealed behind the failed initiative and therefore they introduce and promote it in the parliamentary decision-making procedure. This way issues, which were previously unthinkable because of the lack of interest of the political forces or due to the weakness of the proponents, have a better chance of getting in the arena of political battles.[42] In this respect, initiatives can also be a tool for enhancing representation.

3.4. Complementary Means, Rather Than Powers Restricting Each Other

It is not to be questioned that the appropriate functioning of direct democratic instruments demands a well developed participant political culture. Not even in Switzerland did the consensus democracy come into existence from one day to the next. But the learning process can be promoted by the proper design of institutions. Representative and direct popular power shouldn't be understood as primarily contradictory factors in the constitutional system. If it comes to a direct popular vote, it does not necessarily mean the withdrawal of the parliament's power but rather a correction of its exercise.

It is certainly not appropriate to apply the rules of the contract of mandate to the legal relationship between parliamentary representatives and electors, but the terminological identity (MPs also have a "mandate") can perhaps refer to some basic, common features, which may clarify. As for the contract of mandate, the agent is obliged to manage the affair(s) of the principal. In course of his service, the agent shall execute the commission in favour of his principal and is generally bound to his instructions.[43] As it is in case of any other contract, the parties are required to cooperate with each other, their scopes of action are

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[42]   Linder op. cit. (1999) 118–119.; Linder (2005) 253–256, 264–270.

[43]   According to the old Civil Code of Hungary (Act IV of 1959), the agent "must perform his authority according to the principal's instructions and his interests" and "is entitled to depart from the principal's instructions if this is inevitably demanded by the principal's interests and there is no way to inform him in advance" – art. 474, para. 2; art. 477, para. 2. The new Civil Code (Act V of 2013, it entered into force on 15 March 2014) includes similar provisions [art. 6:273, para. (1)–(3)].

not completely separated. Also the parliamentary mandate lays the duty on MPs to manage public affairs in favour of the electorate. Even if they cannot be given instructions, as their mandate is free, their activity is not exempt from taking into consideration the preferences of their electors. Moreover they are politically accountable for their decisions to the electorate. Such a relationship does not necessarily exclude that citizens ("principals") occasionally intervene in the action of their representatives ("agents"), either by abrogating their decisions (referendum) or by launching legislation processes (popular initiatives). In this respect it is also to be re-considered whether direct democratic decisions can be labelled as a curtailment of the power of the parliament by the electorate at all.[44] These two kinds of decision-making are rather complementary forms of the realization of popular sovereignty.

Therefore, the procedure of popular legislation should be settled as a kind of collaboration between parliament and the electorate. "Bottom-up" initiatives should not only be filtered by the competent authorities but could also be promoted for example by giving professional assistance to the formulation of the question. The parliament should be entitled to respond to the initiative, either by accepting it or by offering a counter-proposal. Solutions which push representative power in a merely executive role are not advisable. In this respect, the "three-step" popular legislation process of some German member states where the first step is only an agenda-initiative and it only comes to the popular initiative and to the referendum if the parliament didn't accept the proposal,[45] is much more preferable than direct initiatives which are used mostly in US member states where legislative state organs are not drawn into popular legislation, the initiatives avoid the parliament and go immediately to the ballot.[46]

Of course, even if direct democratic rights and processes are suitably regulated, they only can help to get closer to a better representation of manifold interests if they are duly adopted and exercised by the civil society.

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[44] See e.g. Decision 894/B/1990 (X. 15.) of the Constitutional Court: "The enforcement of a conclusive referendum would mean the withdrawal of the Parliament's power." A similar approach can be found in István Kukorelli's dissenting opinion to Decision 50/2001. (XI. 22.) of the Constitutional Court: "[...] the conclusive referendum is a means of the enfranchised voters whereby they can deprive the legislator from the right to decide [...]".

[45] Some German member states – Brandenburg, Saxony, Schleswig-Holstein, Hamburg – practise this kind of "three-step" popular legislation process, where the initiative aims only at the parliamentary debate and adoption of the initiators' draft-proposal ("Volksinitiative" or "Volksantrag") in the first round, and if the parliament fails to adopt the draft without any amendment within a specified time, the initiators are entitled to begin the gathering of signatures ("Volksbegehren"). If the required amount of signatures are collected, the draft will be submitted to referendum ("Volksentscheid"). Cf. Peter Neumann: *Sachunmittelbare Demokratie im Bundes- und Landesverfassungsrecht unter Berücksichtigung der neuen Länder.* Baden-Baden, Nomos, 2009. 183–185.

[46] Heussner op. cit. 14, 35, 286–287.

ENHANCING THE QUALITY OF DEMOCRACY: REPRESENTATIVE AND DIRECT DEMOCRACY – TWO FACES OF THE SAME COIN?

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1. Introduction

If we start with David Easton's definition of politics as the "authoritative allocation of values for a society"[1] then democracy can be seen as a *method* for fulfilling this function. In this understanding the democratic method involves the (peaceful) solution of interest conflicts arising from the allocation of values by applying the majority principle.[2] In this sense – as Karl Popper points out – democracy is an alternative to the violent solutions of conflicts: "I personally call the type of government which can be removed without violence 'democracy' and the other, 'tyranny'."[3]

However, far from being faultless, democracy has been viewed critically throughout history. Both its applicability to modern (large-scale) societies and the competencies of the citizens to rule themselves well have been questioned. Furthermore, Marxist critics pointed to the class bias of political institutions and procedures. And finally the recent discourse of the populist threats to democracy comes back to the ancient fear from the tyranny of the majority. The exhaustion of the Third Wave[4] and the emergence of successful authoritarian regimes have put into question democracy's normative supremacy and have reinforced the discussion about the quality of democracy. These discourses result in a self-

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[1]   David EASTON: *A Systems Analysis of Political Life*. New York, Wiley, 1965. 134.

[2]   Giovanni SARTORI: *Demokratietheorie*. Darmstadt, Wissenschaftliche Buchgesellschaft, 1997. 138.

[3]   Karl POPPER: Prediction and Prophecy and Their Significance for Social Theory. In: Evert Willem BETH (ed.): *Proceedings of the 10th International Congress of Philosophy*. Amsterdam, August 11–18, 1948. Amsterdam, North Holland Publishing Co., vol. 1., 1949. 90.

[4]   Samuel P. HUNTINGTON: *The Third Wave. Democratization in the Late Twentieth Century*. Norman–London, University of Oklahoma Press, 1993. 16.

assertion that helps to recall democracy's strengths and weaknesses in order to identify any potential for improvement in this model of rule.

One of the key elements of democracy that has been particularly debated recently, is the principle of representation. In Dahl's view it was the second transformation of democracy[5], i.e. the emergence of representative democracy that made this model of rule compatible with the rise of large-scale national states. Representation is seen as a means to solve the problems of scope, competencies and – together with other institutions of liberal democracy – the tyranny of the majority. However, this principle also has its drawbacks. In representative democracy, decision-making is trusted upon a few – supposedly – highly qualified persons. The citizen's involvement in politics is generally confined to participating in regularly held elections. But this kind of institutional arrangement bears the risk of alienating large parts of the citizenry from politics.

In recent years direct democracy, i.e. the direct involvement of citizens in the political decision-making process, has also been discussed as a possible remedy for the shortcomings of representative democracy.[6] The main advantage of direct democracy lies in the enhancement of citizens' participation. This model of rule is also said to improve the performance of democracy, the quality of legislation, the level of general knowledge and also stalls the expansion of state activity. Last, but not least, it may also contribute to the collective identity of a political community. However, direct democracy is a double-edged sword: it doesn't seem to be the most coherent means of decision-making, it may also amplify polarisation, foster irrationality, discriminate against minorities and undermine representative decision-making. Participation in direct democracy is uneven and biased against weaker actors.[7]

Finally, deliberative democracy is currently also discussed as a possible remedy for shortcomings of representative democracy: "Increasingly, democratic legitimacy came to be seen in terms of ability or opportunity to participate in effective deliberation on the part of those subject to collective decisions."[8] In deliberative democracy the focus shifts from the result of decision-making to the process. It is assumed that through deliberation actors change their preferences and judgements based on rational exchange of arguments, which in turn leads

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[5]   Robert A. Dahl: *Democracy and its Critics.* New Haven–London, Yale University Press, 1989. 217.

[6]   Wilfried Marxer et al.: Introduction. In: Zoltán Tibor Pállinger et. al. (eds.): *Direct Democracy in Europe. Developments and Prospects.* Wiesbaden, VS-Verlag, 2007. 7–11.

[7]   Cf. Wilfried Marxer: 'Wir sind das Volk': Direkte Demokratie – Verfahren, Verbreitung, Wirkungen. *Beiträge des Liechtenstein-Instituts*, 24., 2004. 35ff.

[8]   John S. Dryzek: *Deliberative Democracy and Beyond. Liberals, Critics, Contestations.* Oxford, Oxford University Press, 2002. 1.

to 'better', more reasonable and acceptable decisions, thereby enhancing the quality of democracy.

Although based on popular participation, direct democracy per se is not deliberative, but it certainly has potential in this regard. Therefore, this paper sets out to explore the possibilities to complement representative democracy with direct democratic instruments in a way (which helps to realise the deliberative potential of direct democracy) that also contributes to improving key features of the quality of democracy. Starting with the distinction between representative and direct democracy, the strengths and weaknesses of these two models will be outlined. In a second step key elements of the quality of democracy will be analysed. In a third step a possible pathway of enhancing both representation and direct popular participation by linking the two elements in a deliberative way will be drafted. Finally, the conclusions will be presented.

2. Representative versus Direct Democracy

It is deceptive to speak about 'democracy'. In reality several models of democracy can be discerned.[9] Although there is no overall consensus about the classification of the models of democracy,[10] the fact that all states have developed representative institutions implies that they rely on the principle of representation as the foundation of political power.[11] Therefore, it will suffice for our purpose to start in a first step with the distinction between representative and direct democracy. A reference to this distinction can already be found in the Federalist Papers: "The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended."[12]

The main difference between the two models lies in the fact that factual political decisions in a republic (representative democracy) in contrast to a (direct) democracy are not taken by the citizens directly, but – indirectly – by elected representatives. Since the American Revolution this model of democracy

9   Cf. Manfred G. SCHMIDT: *Demokratietheorien. Eine Einführung*. 4. überarbeitete und erweiterte Auflage. Wiesbaden, VS-Verlag, 2008. 162–452.

10   Richard SAAGE: *Demokratietheorien. Eine Einführung*. Wiesbaden, VS-Verlag, 2005. 32ff.

11   Theo SCHILLER – Volker MITTENDORF: Neue Entwicklungen der direkten Demokratie. In: Theo SCHILLER – Volker MITTENDORF (eds.): *Direkte Demokratie. Forschung und Perspektiven.* Wiesbaden, Westdeutscher Verlag, 2002. 7–21.

12   James MADISON: Federalist No. 10. In: Alexander HAMILTON – James MADISON – John JAY: *The Federalist Papers*. Edited with an Introduction and Notes by Lawrence GOLDMAN. Oxford World Classics. Oxford University Press, 2008. 52.

has become mainstream. This is why Schumpeter states: "The democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will."[13] Schumpeter's rationale for representative democracy is very blunt: "[T]he typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again. His thinking becomes associative and affective."[14]

In the following the key features of representative and direct democracy will be identified.

2.1. Representative Democracy

The essence of representative democracy can be defined as follows: "In representative democracy decisions are taken on behalf of everyone by a sub-group of the whole but the results are seen as democratic because the people have some influence over those decisions."[15] According to this understanding elections link together voters and representatives. Giving the first group a choice in electing their representatives and imposing accountability on the second group. Logically four different dimensions of representation can be discerned: 1. Somebody being represented (represented), 2. somebody representing (representative), 3. something being represented (interests etc.) and 4. the political context.[16]

The relationship between the two – represented and representative – is open to debate especially in the period between two elections.[17] Regarding this question there are broadly speaking two possible solutions: Either representatives have to follow the voters' instructions during their term or they are trusted to make decisions on behalf of everyone.[18] This – dual – model of representation can already be found in Edmund Burkes 'Speech to the Electors of Bristol': "Parliament is not a Congress of Ambassadors from different and hostile interests; which interests each must maintain, as an Agent and Advocate, against

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[13]   Joseph Schumpeter: *Capitalism, Socialism and Democracy.* New York, Harper, 1942. 260.

[14]   Schumpeter (1942) op. cit. 262.

[15]   Helena Catt: *Democracy in Practice.* London–New York, Routledge, 1999. 77.

[16]   Suzanne Dovi: Political Representation. In: Edward N. Zalta (ed.): *Stanford Encyclopedia of Philosophy.* 2011. http://plato.stanford.edu/entries/political-representation/ (accessed: 19. 11. 2015).

[17]   Ibid.

[18]   Ibid.

other Agents and Advocates; but Parliament is a deliberative Assembly of one Nation, with one Interest, that of the whole; where, not local Purposes, not local Prejudices ought to guide, but the general Good, resulting from the general Reason of the whole. You chuse a Member indeed; but when you have chosen him, he is not Member of Bristol, but he is a Member of Parliament. If the local Constituent should have an Interest, or should form an hasty Opinion, evidently opposite to the real good of the rest of the Community, the Member for that place ought to be as far, as any other, from any endeavour to give it Effect."[19] In this text passage the friction between the two kinds of representation is made clear: Ever since it has become customary to call the first type ('Agent and Advocate') *delegate* and the second ('deliberative Assembly of one Nation') as *trustee*. Although the concept of representation has been further elaborated[20] by Pitkin[21] and Mansbridge,[22] the key problem of the concept remains the question of responsiveness in the relation between the represented and the representative. In other words: how can it be ensured that the representative acts in the – real or perceived – interest of the represented. This situation resembles the principal-agent problem. Although great efforts have been made to overcome this problem, Pitkin comes in a comprehensive article to a somehow sobering conclusion: "Despite repeated efforts to democratize the representative system, the predominant result has been that representation has supplanted democracy instead of serving it. Our governors have become a self-perpetuating elite that rules – or rather administers – passive or privatized masses of people."[23]

Citing Hanna Arendt Pitkin points out that this state of affairs is not inevitable. Democracy can be improved when "the centralized, large-scale, necessarily abstract representative system is based in a lively, participatory, concrete direct democracy at the local level."[24] This line of reasoning brings us to the next model of democracy, direct democracy, which is discussed in the next sub-section.

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[19] Edmund BURKE: Speech to the Electors of Bristol (1774). In: Francis CANVAN (ed.): *Select Works of Edmund Burke.* (A New Imprint of the Paine Edition. Miscellaneous Writings, Vol. 4.) Indianapolis, Liberty Fund, 1999. 3–13.

[20] For an overview on the development the discussion cf. DOVI (2011) op. cit.

[21] Hanna F. PITKIN: *The Concept of Representation.* Berkeley, University of California Press, 1967.

[22] Jane MANSBRIDGE: Rethinking Representation. *American Political Science Review*, 97/4., 2003. 515–528.

[23] Hanna F. PITKIN: Representation and Democracy: Uneasy Alliance. *Scandinavian Political Studies*, 27/4., 2004. 335–342.

[24] Ibid.

2.2. Direct Democracy

Although the modern concept of direct democracy is linked to Rousseau's idea of popular sovereignty,[25] the idea is much older and can be traced back to ancient Greece. In the Greek understanding 'democracy' meant the self-rule of the citizens of a polis. This kind of regime encompassed participation in political decision-making in the popular assembly. Citizens were entitled both to elect officials and also to decide on factual issues. Furthermore, they were also eligible to assume political offices. This notion of democracy as direct democracy prevailed until the modern age and was only rendered atavistic with the emergence of the modern, territorial national state.[26]

As mentioned above, the complexities of the modern world prompted all the existing states to form some kind of parliament and hence the basic power structure can be seen as representative. Nevertheless – as discussed above – representative democracies also exhibit some weaknesses, such as the misuse of elite power regarding the interests of the citizens, as Pitkin describes, which in turn tends to weaken responsiveness and fosters the alienation between elites and masses, thus enhancing passivity and absenteeism on behalf of the citizens.[27]

In contrast direct democracy which can be defined as enabling citizens to raise issues on the political decision-making agenda, without the mediation of some parliamentary actor, or deciding certain factual issues by popular vote[28] seems to offer a suitable means for coping with these problems. Direct democracy – by fostering participation – strengthens popular control on the agenda-setting and the decision-making of the elites, thereby enhancing the system's responsiveness. Therefore, in the past decades awareness of the fact that representative and direct democracy are not mutually exclusive, but rather complementary, was growing:[29] "In the practical context which faces participants in democracy building and democratic institutional design, the alleged choice between these two opposing positions is not only restricting and unhelpful – it is fundamentally false. Direct democracy mechanisms and mechanisms of

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[25]   Jean-Jacques Rousseau: *Du Contrat Social/Vom Gesellschaftsvertrag.* Französisch-Deutsch. Stuttgart, Reclam-Verlag, 2011.

[26]   Zoltán Tibor Pállinger: Direct Democracy in Europe. Current Discussions. *Iustum Aequum Salutare*, IX., 2013/4. 27–40.

[27]   Ibid.

[28]   International Institute for Democracy and Electoral Assistance: *Direct Democracy: The International IDEA Handbook.* Stockholm, International IDEA, 2008. 213. [IDEA (2008b)]

[29]   Ibid.

representative democracy can complement and enrich each other rather than being seen as opposed."[30]

As there is no single model of 'democracy', there is also no single model of 'direct democracy'. Recent typologies list between two and twelve instruments of direct democracy.[31] For our purpose a simple typology is sufficient.[32] This typology is based on the Swiss experience, although minimalist, it is suitable to demonstrate the functioning and the effects of direct democracy. Basically, there are two kinds of direct-democratic instruments: popular initiatives and referendums. *Popular initiatives* allow citizens to propose and/or decide on bills which stem from the people, thereby circumventing the parliament. Popular initiatives can be binding or non-binding in the latter case they are called 'agenda initiatives'. Parliaments may have the right to propose a legislative counter-proposal to the original initiative. *Referendums* are an ex-post means of control on parliamentary decisions. They can be mandatory, which means they are foreseen by law, or facultative. The triggering, the use and the scope of permissible subjects of direct-democratic instruments have to be regulated by law and vary widely in reality.

Direct-democratic instruments can display contradictory effects according to their design: Instruments that are triggered by a political majority and decided by a simple majority of votes tend to have majoritarian effects, whereas instruments triggered by a political minority and decided by qualified majorities (i.e. qualified quorums) tend to display consensual effects. In this context, one has to consider however that the effects of direct democracy also depend on the frequency of use of the given instrument and their attunement with the representative procedures.[33] It is clear that direct democracy has its most profound effects in countries in which these instruments are applied as a routine procedure and form an integral part of the political System.[34]

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[30]   IDEA (2008b) op. cit. 1.

[31]   Cf. IDEA (2008b) op. cit.; Bruno KAUFMANN – Rolf BÜCHI – Nadja BRAUN: *Guidebook to Direct Democracy in Switzerland and beyond*. Marburg, Initative & Referendum Institute, 2010.; Michael GALLAGHER – Pier Vincenzo ULERI (eds.): *The Referendum Experience in Europe*. Basingstoke–London, Macmillan, 1996.; Maija SETÄLÄ – Theo SCHILLER (eds.): *Citizens' Initiatives in Europe*. Houndmills–Basingstoke, Palgrave Macmillan, 2012.; David ALTMAN: *Direct Democracy Worldwide*. Cambridge, Cambridge University Press, 2011.

[32]   Cf. PÁLLINGER (2013) op. cit. 31ff.

[33]   Wilfried MARXER – Zoltán Tibor PÁLLINGER: Stabilizing or destabilizing? Direct-democratic instruments in different political systems. In: Maija SETÄLÄ – Theo SCHILLER (eds.): *Referendums and Representative Democracy. Responsiveness, Accountability and Deliberation*. Abingdon, Routledge, 2009. 34–55.

[34]   Jürgen GEBHARDT: Das Plebiszit in der repräsentativen Demokratie: In: Hans Herbert von ARNIM (ed.): *Direkte Demokratie. Beiträge auf dem 3. Speyerer Demokratieforum vom 27. bis 29. Oktober 1999 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer*. Berlin, Duncker & Humblot, 2000. 13–26.

Before inquiring the compatibility of direct and representative democracy it is necessary to provide – in an intermediate step – an overview on the discussion of the quality of democracy.

3. The Quality of Democracy

Before we can discuss the quality of democracy, democracy itself has to be understood more precisely. It was sufficient for the older, empiric democracy theory during the cold war to establish – dichotomous – measurements which could distinguish between democratic and non-democratic political systems. Since the collapse of Communism democracy has established itself as the normative standard for political systems. Surprisingly (or not) the instruments, which were apt to draw a line between democracies and non-democracies, were not very helpful to ensuing discussions on the quality of democracy. As Michael Coppedge and Jan Teorell clearly point out: "In the wake of the Cold War, democracy has gained the status of a mantra. Yet there is no consensus about how to conceptualize and measure it well enough to support meaningful and accurate comparisons through time and across countries. Sceptics may question whether such comparisons are possible. Nevertheless, there is a clear need for democracy measurement in order to mark progress and setbacks, to explain democracy, to reveal its consequences and to affect its future course."[35] Therefore, in a first step a short overview will be given on certain widely discussed concepts regarding the measurement of democracy, which in turn form the basis to determining the quality of democracy. Based on this presentation we will identify the most important elements that are relevant for the relationship between direct and representative democracy.

When dealing with democracy one can't escape the double nature of democracy as an ideal and an empirical form of rule. Furthermore, democracy is not static: "For a democratic system, the process of 'becoming', of transformation, is its natural state. Democracy is dynamic, despotism is static and always essentially the same."[36] Therefore, one has to become aware of the aspiration level: Democracy can be conceived in a narrow or wide sense, universally or particularly. A further question that has to be decided beforehand is the choice

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[35] Michael Coppedge – Jan Teorell: *V-DEM. Varieties of Democracy. A New Approach to Conceptualizing and Measuring Democracy.* Paper presented by Michael Coppedge and Jan Teorell at the 3rd International Conference on Democracy as Idea and Practice, University of Oslo, Norway, 12–13 January 2012 http://www.uio.no/english/research/interfaculty-research-areas/democracy/news-and-events/events/conferences/2012/papers-2012/Coppedge-etal-Wshop7.pdf (accessed: 12. 12. 2015).

[36] Norberto Bobbio: *The Future of Democracy. A Defence of the Rules of the Game.* Minneapolis: University of Minnesota Press, 1987. 17.

of indicators: should the measurement rely on relatively 'objective' performance indicators, or should it also comprise subjective indicators, which could provide information about the subjective opinions/evaluations of the citizens. Finally, it is also open to discussion which aspect of the political process input, throughput or output/outcome should matter most.

It is clear that the electoral process forms the core of the measurement of democracy. The older concepts of measuring democracy contented themselves – following the principle of parsimoniousness – with minimal definitions, whereas newer ones start with a core of defining features of democracy, which are minimalistically determined in a first step and are then enriched by more demanding features. The same goes for objective and subjective indicators: measurements often start with objective indicators, which are supplemented by subjective indicators – in the most sophisticated measurements (V-Dem) their validity is corroborated by probabilistic techniques. In most measurements several dimensions of democracy are taken into consideration.

Vanhanen attempts to estimate the level of democracy of political systems as the product of two key dimensions of polyarchy: participation (total percentage of people having cast their vote in the last parliamentary election) and degree of competition (the percentage of the votes for the biggest party is subtracted from 100). He constructs a scale ranging from 0-100, whereby 0 means no democracy, and 100 stands for a perfect democracy. 'Democracy' starts at a scale value of 5. This measurement is not really appropriate for measuring the quality of democracy, but it is the only example of a measurement relying only on 'objective data'.[37]

In the following four additional measurements of democracy are be presented. However, technicalities will be avoided, and we will concentrate on the main determinant factors of the quality of democracy. *Lauth* proposes a measurement of democracy based on three equivalent factors, namely freedom, equality and control.[38] The Stockholm based think tank *IDEA* identifies – in a first step – the key democratic principles*, popular control and equality, and complements them with seven secondary factors (mediating values): 1. participation, 2. authorization, 3. representation, 4. accountability, 5. transparency, 6. responsiveness and 7. solidarity. Finally, the institutionalization of the components is assessed.[39] The *Democracy Barometer* starts with the assumption that the quality of democracy results from a balance between the

[37]   Tatu Vanhanen: *Democratization. A Comparative Analysis of 170 Countries*. Routledge, London, 2003.

[38]   Hans-Joachim Lauth: *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. Wiesbaden, VS Verlag, 2004.

[39]   David Beetham et al.: *Assessing the Quality of Democracy. A Practical Guide*. Stockholm, International IDEA, 2008. [IDEA (2008)]

three basic values of democracy: freedom and equality which are bound by control. These three principles can only be guaranteed if the nine functions – 1. individual liberty, 2. rule of law, 3. participation, 4. responsiveness, 5. transparency, 6. vertical accountability, 7. representation, 8. mutual constraints of constitutional powers and 9. governmental powers – are fulfilled.[40] Finally, the most sophisticated measurement of democracy to date, *V-Dem*, grasps democracy through seven 'High-level Principles of Democracy', 1. electoral, 2. liberal, 3. participatory, 4. majoritarian, 5. consensual, 6. deliberative and 7. egalitarian. These components are further disaggregated into individual indicators. Data are collected for all independent countries from 1900 to date.[41]

The main conclusion of modern democracy measurements is that the quality of democracy is the result of a complex interaction of different factors. Regarding the relationship between representative and direct democracy several possible linkages may be identified. Democracy Barometer's 'participation' and 'representation' categories, for example, have a direct link to our topic. They are bound together by 'responsiveness' and 'vertical accountability'. These two factors would sum up to the key principle of 'popular control' of IDEA and Lauth. The relations described here relate to the functionality of democracy. They have to be complemented with the procedural perspective. Here too we can find links to our topic. 'Transparency', 'responsiveness' (IDEA), 'consensual', 'deliberative' and 'egalitarian' (V-Dem) – for example – can be useful in designing the democratic process.

4. Linking Representation and Direct Democracy via Deliberation

In order to realise direct democracy's full potential to enhance the quality of (representative) democracy, the direct-democratic instruments have to be well designed and optimally attuned to the representative system. These rules of procedure and participation are meant to set out which issue areas can be subject to initiative and referendum, determine formal admission criteria, specify who may launch an initiative, regulate relations with representative institutions, and determine how the decision are taken and enacted. They also specify bodies which may be required to carry out checks and balances and deal with complaints and appeals. The function of these rules is to ensure the formal compatibility of the direct-democratic instruments with the political process

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[40]   Marc Bühlmann et al.: *The Democracy Barometer: A New Instrument to Measure the Quality of Democracy and Its Potential for Comparative Research*, 2011 http://www.democracybarometer.org/Papers/eps201146_AOP.pdf (accessed: 12. 12. 2015).

[41]   Coppedge–Teorell (2012) op. cit.

and the legal system.[42] Today these well-established institutional mechanisms are available, and the real question is, how the decision-making process can be linked to the deliberative process:[43] "Contemporary democratic theory and, in particular work on deliberative democracy, is notable for the degree to which it has taken both an 'institutional' and 'institutionalised' turn. The institutional turn implies an increased focus on the ways in which citizens' engagement is shaped by its context, with particular attention to the extent to which different rules and norms enable (or otherwise) participation and deliberation on the part of citizens. The institutionalised turn refers to a focus on a set of innovative institutions that enable citizens to play a more or less formal role in the decision-making process."[44]

Democratic theories in general, but participatory and deliberative theories in particular start with the assumption that people are able to recognise, form and express their preferences and exchange arguments, and thereby enter in a process of political learning – they are therefore enabled to participate meaningfully in public affairs.[45] Participatory theories stress the fact that preferences are formed by socialisation and political participation, hence they are not immutable, but subject to change.[46] Deliberative theories take this line of reasoning further: "[Deliberations] we take it to be a form of reasoned, open-minded discussion. Those who engage in it may have very different views but they must still be willing to listen to and reflect upon opposing arguments and to respond to them seriously."[47] These kinds of discussions are based on mutual respect and a rational discourse. It is important to note that deliberative discourses take place in many different spheres and to a variety of ends.[48] They foster the quality of democracy by opening up the political sphere on different levels of possible popular involvement (multi-level democratic governance) and by helping to

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[42]   Wilfried Marxer – Zoltán Tibor Pállinger: System contexts and system effects of direct democracy – direct democracy in Liechtenstein and Switzerland compared. In: Zoltán Tibor Pállinger et al. (eds.): *Direct Democracy in Europe. Developments and Prospects.* Wiesbaden, VS-Verlag, 2007. 12–29.

[43]   Maija Setälä: Introduction. In: Maija Setälä – Theo Schiller (eds.): *Referendums and Representative Democracy. Responsiveness, Accountability and Deliberation.* Abingdon, Routledge, 2009. 1–14.

[44]   Matthew Ryan – Graham Smith: Defining Mini-Publics. In: Kimmo Grönlund – André Bächtiger – Maija Setälä (eds.): *Deliberative Mini-Publics. Involving Citizens in the Democratic Process.* Colchester, ECPR Press, 2014. 9–39.

[45]   Pállinger (2013) op. cit. 34.

[46]   Ibid.

[47]   Ian O'Flynn – Gaurav Sood: What Would Dahl Say? An Appraisal of the Democratic Credentials of Deliberative Polls and Other Mini-Publics. In: Grönlund–Bächtiger–Setälä op. cit. 41–75.

[48]   Ibid.

aggregate and transform individual preferences into common preferences.[49] Furthermore, based on a shared common rationality the problem of the tyranny of the majority is attenuated.[50]

On a theoretical level it is possible to link together deliberation (public discourse) and responsiveness (understood as rational reaction of the representative to the ongoing public discourse with the represented) through the mechanism of accountability (understood as the need to justify decisions of the representatives). The possible power of the public to sanction their representatives, which can be reinforced through direct-democratic instruments, encourages a continuing dialogue between citizens and representatives.

Clarifying the theoretical interrelationships raises the question whether the potential of combining direct and representative democracy in a deliberative way can also be realized in practice.

It is empirically documented that the regular use of direct-democratic instruments does indeed foster responsiveness.[51] Furthermore, 'weak', rather deliberative instruments – as agenda initiatives and consultative referendums – do display legislative effects, without altering the distribution of power. Therefore, it might be concluded that agenda setting and discourses can also matter. In such cases, the arena of politics can be opened to deliberation.[52]

By narrowing down the political discourse to a simple choice between 'yes' and 'no' and producing clear-cut winners and losers, direct-democratic campaigns and popular votes seem – at first sight – to contradict deliberative principles. But the empirical results regarding these questions are inconclusive. Depending on the political culture and the institutional disposition of the direct-democratic instruments in the representative system, it is also possible to transcend the simple 'friend-foe-logic' by political learning, which in turn can lead to an alignment of interests, especially when the process is iterated.[53]

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[49]   Pállinger (2013) op. cit. 34.

[50]   Ian Budge: Deliberative democracy versus direct democracy – Plus political parties! In: Michael Saward (ed.): *Democratic innovation: Deliberation, representation and association.* London–New York, Routledge, 2000. 195–212.

[51]   Cf. Gabriela Rohner: *Die Wirksamkeit von Volksinitiativen im Bund 1848-2010.* Zürich, Schulthess, 2012.; John G. Matsusaka: Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century. *Journal of Law and Economics*, XLIII, October 2002. 619–650.; Gebhard Kirchgässner – Lars P. Feld – Marcel R. Savioz: *Direkte Demokratie. Modern, erfolgreich, entwicklungs- und exportfähig.* Basel–Genf–München, Helbing & Lichtenhahn, 1999.

[52]   Setälä (2009) op. cit. 1–14.

[53]   Cf. Hanspeter Kriesi: The role of the political elite in Swiss direct-democratic votes. In: Pállinger et al. (2007) op. cit. 82–93.; Simon Hug – Tobias Schulz: Referendums and Ratification of the EU Constitution. In: Pállinger et al. (2007) op. cit.174–188.

Finally, conceiving modern polities as systems of multi-level and multi-arena governance opens up possibilities to avoiding the monopolization of power. Power can be distributed and redistributed to ever changing minorities and majorities.[54] This line of reasoning brings us back to Pitkin's claim that local direct democracy should form the basis of the national democracy.[55] The scope of participation should not be restricted to the political decision-making on national level, but it has to be broadened as well to different policy levels and areas as to different processes of formation of opinion. Regular consultations (without necessary decision-making) should be integrated into the everyday life of democracy. Olle Törnquist identifies three such areas, where deliberative capacities should be strengthened: "First, capacity building to enable people to be active citizens; second, facilitation of popular organisation building; third, government provision of nodes for ordinary citizens' representation beyond elections only, from the provision of institutional channels through which democratic organisations can mediate with the state to fair arrangements for direct participation in planning and budgeting."[56]

5. Conclusions

Democracy is an unfinished and open-ended project. The "promises"[57] of democracy still leave room for efforts in perfecting this system of rule. But one has to bear in mind Popper's warnings against voluntaristic reformers ('social engineering').[58] Modern societies are complex entities. Reforming one section may have repercussions in other areas. Therefore, one has to proceed carefully: The introduction of direct-democratic instruments has to take place in accordance with the function-logic of the representative system and the legal order. The scope of the reforms is dependent on the prevailing concept of democracy and the aspiration level. However, bringing the citizens back in, is not only possible, but can have – as shown above – beneficial effects on the quality of democracy. Representative and direct democracy are not mutually exclusive, but can be mutually supplementing, especially when deliberative claims are also considered. It is perfectly possible to link together deliberation

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[54]   SARTORI (1997) op. cit. 139.

[55]   PITKIN (2004) op. cit. 341.

[56]   Olle TÖRNQUIST: Introduction: The Problem is Representation! Towards an Analytical Framework. In: Olle TÖRNQUIST – Kristian STOKKE – Neil WEBSTER (eds.): *Rethinking Popular Representation*. Houndmills and Basingstoke, Palgrave Macmillan, 2009. 1–23.

[57]   BOBBIO (1987) op. cit.

[58]   Karl R. POPPER: *The Open Society and Its Enemies*. Princeton, Princeton University Press, 2013.

and responsiveness through the mechanism of accountability. Nevertheless, one has to bear in mind that politics is always under the shadow of power. Direct-democratic and deliberative instruments cannot replace decisions concerning the authoritative allocation of resources. However, deliberative procedures may help – under certain conditions – to obstruct the effects of power politics, when designed in an adequate way. Consequently, it may be noted that direct democracy supplemented by deliberative elements may open the possibility to a continued dialogue between citizens and representatives, thus contributing to the (further) development of democracy.

"INESTIMABLE TO THEM AND FORMIDABLE TO TYRANTS ONLY"[1]

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1. Introduction

It is highly typical of lawyers and legal scholars to start any and all scholarship with definitions, making sure all readers have the same understanding about the subject matter detailed therein. I tend to agree with that approach and yet I choose another method for this paper as the clarification of boundaries in this particular subject matter are twofold: first, a fairly general definition of representation would be needed, which by itself could supersede the limits of this paper and which, I am certain, will be addressed by my learned colleagues contributing to this volume. Second, the American approach to representation should be outlined and separated from that of Europe. The latter seems sufficient for my purposes as it is my somewhat ambitious undertaking to contribute the American model as a case study to the writings of my peers on *Good Governance – Enhancing Representation*. Certain outer framework is nevertheless necessary to assist the readers in the understanding of what is to follow here. I agree with the observation of John Phillip Reid who stated that "[a] difference of perspective separates the political, social, economic, and legal historians of eighteenth-century representation," and therefore I must emphasize that I come closest to the approach of the legal historian, who "is interested in the political, social, and economic [aspects] but has another set of

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[1] A partial quote taken from The Declaration of Independence. In: Kermit L. HALL – Paul FINKELMAN – James W. ELY, Jr.: *American Legal History*. 4th Ed. Oxford, Oxford University Press, 2011. 92. The complete section relates to the complaint about the Kind of England refusing "to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them and formidable to tyrants only." This approach to the right of representation is a very noble one that reflects the American mindset fairly accurately, yet it offers no more than a snapshot of the issue of representation from the tumultuous time in 1776.

queries."[2] As the common law and the constitutional documents of the United States precede those schools of political thought and ideologies of the nineteenth century that strongly influenced the development of the European systems of representation, I wish to focus on two distinct questions. The first is the development of the law and legal approach of the American colonies, which led up to the American Revolution – that, no doubt, can be identified as the ultimate reform of representation. The second is, based on the fact that all throughout American history, from the pre-colonial times to our day, taxation played a major role in determining certain elements of representation, it could easily be ascertained that the American notion of government, which – according to the Declaration of Independence – is to be "instituted among Men, deriving their just powers from the consent of the governed"[3] is in reality functioning "from the consent *and with the funding* of the governed."[4]

Therefore, I start with the historic background of politics and law in the American colonies. This is followed by a brief analysis of the Declaration of Independence and of the slow and systematic appearance of the state constitutions, which no doubt limited the array of political rights holders by regulating the previously property-related suffrage. The drafts introduced at the Constitutional Convention in Philadelphia hint at the difficulties of taxation, especially their payment, or rather lack thereof, by the states to the Confederation. This issue, in 1787 resulted in a minimalist solution in the federal Constitution only to be reinterpreted later by the courts and common practice. The struggle for equal suffrage throughout two centuries seems worthless from the perspective of the rather dismal statistical data from recent voting polls showing that barely half of the eligible American population actually practices their voting rights. The necessity of yet another reform to this system of representation becomes questionable in light of this data and considering the fairly slow progress throughout history despite the truth of the observation made in 2011 that "[i]n America today there is a disconnect between an unrepresentative political class and the citizenry it purports to represent."[5]

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[2]   John Phillip REID: *The Concept of Representation in the Age of the American Revolution*. Chicago, University of Chicago Press, 1989. 1.

[3]   The Declaration of Independence. In: HALL−FINKELMAN−ELY op. cit. 92.

[4]   Emphasis and quote added.

[5]   Morris P. FIORINA − Samuel J. ABRAMS: *Disconnect – The Breakdown of Representation in American Politics*. Norman, University of Oklahoma Press, 2011. xix.

2. Historic Background

"When the English established colonies in North America, they brought with them the concepts of local, church, and national government to which they were accustomed. […] The colonists did not simply transfer English politics to the New World, however; they adapted the familiar political forms to the different conditions of North America and to their own political views."[6] This observation is quite true and it also implies the counterargument to the common misconception that American law derives directly and solely from English law. The first settlers brought with them everything they knew from their old lives, but certain aspects they could not, others they would not implement in their new circumstances. The existing solutions to occasionally arising legal arguments provided by the English statutory, customary and common law were regarded as a backdrop, a safety net, rather than the desirable tool. All these, however, were scarcely documented which is why "[t]he colonial period is, for most lawyers and laymen, the dark ages of American law."[7]

Regarding the issue of representation, the American notion formed slowly over the years. The important divide in approach to representation may be traced back to the lack of the feudal system in the colonies. In Great Britain, the people were represented in the House of Commons based on their property, which was the ultimate key to political representation.[8] It was self explanatory that those who had a 'right in land' would pay taxes, and therefore, they could decide on the taxes, as they were practically imposing them upon themselves. These determinations are interesting for my purposes in two regards. First, the American settlers who arrived to the New World in the hopes of obtaining ownership were in no feudal relationship to the sovereign. This is a huge difference between the Americans and the Englishmen, and one that contributed greatly to their protest claiming *no taxation without representation*. The colonial landlords felt inadequately represented in the English Parliament which is why they argued against paying the taxes imposed upon them without their participation. Second, the English system of representation, as it was based on property, allowed the practice of certain property-related rights to women who were the only heirs to their husbands' or families' wealth. This notion of women

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6   Robert Darcy – Susan Welch – Janet Clark: *Women, Elections & Representation*. 2nd Revised Ed. University of Nebraska Press, 1994. 1.

7   Lawrence M. Friedman: *The History of American Law*. 3rd Ed. New York, Touchstone Book, 2007. 3.

8   I wish to acknowledge that the British feudal system was clearly more complex than what can be detailed herein as political and other rights were also strongly influenced by birth. For the questions raised in this paper, however, it is sufficient to focus on the history of property and property-related rights.

having certain rights of representation appeared in America as well on a local level and continued in practice until the drafting of the new state constitutions at the time of the American Revolution.[9]

This slowly developed concept of representation in America started to differ significantly from that of Great Britain. "While there was no consensus about the meaning of political representation in America either before or after the Revolution, many Americans were beginning to insist that only »actual« or »direct« representation was representation at all and so scoffed at England's invocation of virtual representation in response to the American protest of »no taxation without representation«."[10] As Seitz very aptly goes on to explain, it is 'the people' who are the subjects of actual representation as opposed to other subjects, such as property, but since the government shall represent both the people and property, there is a recognizable difference in the subject of political representation in America and Europe.

Great Britain built an empire on the North-American continent as it continued to win over territories. The colonies were partially self-governing in their domestic affairs but were dependent upon the will of the sovereign or the Parliament of the mother country in all other matters with practically no say in those decisions. The English military triumph brought with it the "tightening up [of the] colonial administration and [the] increasing [of] the revenue from the colonies."[11] Americans at this point had already rejected the notion of 'virtual representation,' but it nevertheless took them yet another few years to arrive to the idea of disavowing the British Crown. As the situation escalated, after a number of failed reconciliatory attempts, the thirteen colonies announced their separation from Great Britain in the Declaration of Independence.

3. The Declaration of Independence

Though the Declaration of Independence is neither the Constitution of the United States nor is it a part of the Constitution, it is considered the first constitutional document of what later became the United States of America.[12]

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[9] This notion is introduced and argued for by Darcy–Welch–Clark op. cit. During the earliest settlements, even before the arrival of the Mayflower, there were attempts to lure women to the plantations that went as far as making them eligible for "grants of free land." Yet, as soon as they married, they were stripped of any previous legal rights. For further reading on the early history of American women see Gail Collins: *America's Women*. New York, Perennial, 2004. 1–22.

[10] Quotation marks replaced. Brian Seitz: *The Trace of Political Representation*. Albany, NY, State University of New York Press, 1995. 10.

[11] Hall–Finkelman–Ely op. cit. 81.

[12] Even those who find the primary relevance of the Declaration of Independence elsewhere than

I shall acknowledge the truth of the observation that "constitutionalism" is a "vague and comprehensive catchword embracing the ideals of limited government, the rule of law, and the various structural devices that achieve the substantive content of republican government in America," the origins of which "long predated the Revolution and the creation of the American Republic."[13] The earliest documents of the colonies, such as the Mayflower Compact of 1620 or New York's Charter of Liberties of 1683 all embraced different forms of colonial governments and struggled with the notions later known as the constitutional principles of America, such as the conflicts between the power of government and the individual liberty of the people. In the preface to the First Frame of Government for Pennsylvania, William Penn wrote "I know what is said by the several admirers of monarchy, aristocracy and democracy, which are the rule of one, a few, and many, and are the three common ideas of government, when men discourse on the subject. But I chose to solve the controversy with this small distinction, and it belongs to all three: Any government is free to the people under it (whatever be the frame) where the laws rule, and more than this is tyranny, oligarchy, or confusion."[14]

The ideas of the seventeenth and eighteenth century colonial America are well mirrored in the Declaration of Independence, a document drafted by Thomas Jefferson and signed by the representatives of all thirteen colonies. This is as much a declaration of the separation from Great Britain as it is a registry of all harms inflicted by the King of England upon the colonies. This list provides a deep insight into the mindset of the leading statesmen of this time and especially into their thoughts on government and individual liberties. Read carefully, the text can be untangled and interpreted as a list of requirements for a representative government, though it does not yet entertain the notion of

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in its constitutional character claim that "[a]lthough it is difficult to associate the Declaration with constitutionalism, it seems fair to say that the Declaration's »consent of the governed« was a constitutional manner of speaking." REID op. cit. 139.

[13] HALL–FINKELMAN–ELY op. cit. 12.

[14] William Penn's Preface to the First Frame of Government, 1682. In: HALL – FINKELMAN – ELY op. cit. 32. Penn in this writing goes on to explain the relations between government, men and the law. He argues for good men upon whom the government shall rely, as good men will maintain a good government and create good law as well as execute them well. Regarding a closely related issue, a very similar triangle of three principal actors appears again in the American development with the United States Supreme Court's decision in Marbury v. Madison, 5 U.S. 137 (1803), as Chief Justice John Marshall lays the foundation of the Court's right and obligation to render any and all law repugnant to the Constitution unconstitutional. Following the creation of such judicial review, the justices of the U.S. Supreme Court and judges of any and all American appellate courts join the legislators in regulating, however, because it is the rule of law that is the very basis of the American system, there are three forces competing with each other in the arena of regulation. For further analysis of the American judicial practice and its relation to political theory see Chapter III of MÁNDI, Tibor: *Ideológia és hagyomány*. Budapest, Századvég, 2012. 53–72.

a united state or even a confederation. Due to the spatial constraint, I will only address elements of the text here that relate to my topic at hand.

It is certainly in the text of the Declaration of Independence that the dissolution of a political bond, like the one that existed between the American colonies and Great Britain, is a radical step which should not be taken lightly and without grave cause. However, it also acknowledges that such a separation, the independence of the colonies, is at the same time the alteration of "their former Systems of Government." The Declaration claims it ideal, or rather in the exact words "self evident," that "Governments are instituted among Men, deriving their just Powers from the consent of the governed" in order to secure the unalienable rights that are endowed upon all men. Furthermore, that it is not only the right, but also the duty of "the People" to take action against "destructive Governments." It is within this framework that the list of usurpations includes the one highlighted in the title of this paper, how the sovereign "has refused to pass other Laws for the accommodation of large districts of people, unless those relinquish[ed] the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." Although this text limits the right of representation to that within the legislature, however, it is still true that such a bargain is unacceptable for any and all who believe in a government that derives its powers from the people. Quite a few others of these "Facts," as they call them, listed how the King of England had rendered the activities of the legislature impossible, by dissolving them and refusing to call them together again for a long time, or by calling them together to places that were geographically difficult to reach and were far from the depository of the colonies' public records, and so forth. These limitations, all of which were injuries inflicted in essence on the domestic self-governance of the colonies, prove how much smaller the significance of representation was in Great Britain than in North-America.[15]

The Declaration is fairly straight forward about taxation as it states that the King of England has given "his Assent to […] Acts of pretended Legislation […] [f]or imposing taxes on us without our Consent,"[16] meaning, in essence, the already addressed concept that there should be no taxation without representation and implying at the same time, that the Americans' representation in the English Parliament was "virtual" at best.

Two further observations are worthy of consideration here: first, the Declaration states that the King, by declaring war against the colonies "abdicated Government." An interesting phrase as it clearly uses the term of abdication, which

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[15]   All quotes in this paragraph are from the Declaration of Independence. In: Hall–Finkelman–Ely op. cit. 92. It is worth mentioning that the notion of a government by the consent of the governed was very well a fairly new one, even radical and not at all self-explanatory or self-evident. S. eg. Hall–Finkelman–Ely op. cit. 81–82.

[16]   The Declaration of Independence. In: Hall–Finkelman–Ely op. cit. 93.

is generally associated with the monarch and his throne, yet it is the Government that the King renounced or refused to participate in. This seemingly minor detail could be simple semantics but on closer examination it could indicate a will of differentiation between the sovereign in Great Britain and the system set up in the colonies. Second, in the closing paragraph of the document, the signatories name themselves "the Representatives of the United States of America," who act "in the Name, and by Authority of the good People of these Colonies," which is again a reference to the representative government and to the fact that those who make the decisions do so by the "consent of the governed."[17]

4. From Independence to Union

Differing somewhat from what William Penn wrote in his preface to the First Frame of Government, the "Founders believed with Aristotle that there were basically three forms of government: monarchy, oligarchy and democracy. In establishing a republic they put together elements from these three types to create a »mixed« government."[18] The road to that "more perfect Union"[19] however, was not easy as the notion of one confederation – let alone union – seemed unacceptable to many who had fought for their independence as colonies. As the colonies turned into states with the Declaration of Independence, many saw this as their opportunity to finally set up the sovereign self-governing state they were each individually aiming at. The development therefore, was parallel: the states drafted their own constitutions, set up their own republican form of government and at the same time, they needed to find a common voice on a higher level too. For the newly free and independent states a confederation or any other cooperation that included relinquishing sovereign rights seemed too frightening. Yet, even before their separation from the Crown, they were conscious of the need for a joint effort against the usurpations of Great Britain and they were well aware that no colony alone could successfully fight the mother country. This was why initially the First Continental Congress assembled in 1774: to find a way to join forces against the economic restrictions and other harmful actions of Great Britain. As the crisis escalated, the Second Continental Congress assembled in 1775.[20] The creation of a central authority seemed inevitable as it became apparent that financial and military forces had to be joined if these states wished to step up united.

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[17] Ibid. 92–94.

[18] Quotation marks replaced and added. Robert V. REMINI: *The House*. New York, Smithsonian Books, 2007. 7.

[19] Preamble of the Constitution of the United States

[20] REMINI op. cit. 4.

The Articles of Confederation was the first constitution of the states of the North-American continent. Drafted in committee by John Dickinson of Delaware and adopted by Congress on November 15, 1777, it had quite a few flaws that ultimately led to its demise and replacement by the Constitution, but it had also been a major first step towards a union. The document created a confederacy under the name of "The United States of America," yet it first pointed out that "[e]ach state retains its sovereignty, freedom and independence," before claiming that "said states hereby severally enter into a firm league of friendship with each other."[21] This Confederation was at best a loose federation of highly independent sovereign states with a unicameral Congress where each state's legislature delegated 2-7 members sharing one vote per state. There was no direct representation of the people in this Congress and also no executive on any level.[22] That also meant that the funding for the Confederation that should have derived from the taxes the states paid based on their land was not collected, which essentially rendered this "firm league of friendship" dysfunctional. Article VIII said that "[t]he taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled."[23] This time was not agreed upon and since the Articles' ratification process was only completed in 1781, by the time the Constitutional Convention assembled in Philadelphia in 1787, there still remained some states that had not even determined, let alone paid their taxes to the Confederation. There is truth to the observation that the Articles of Confederation "constituted a major breakthrough in the development of representative government for a collection of sovereign entities,"[24] even if it ultimately failed. It would be fair to say that "America's first national Constitution was a hybrid document."[25]

Many felt that the Confederation was not enough and therefore, the lobby for a Federal Convention to revise the Articles of Confederation and readjust the federal system started even before the 1781 ratification. It took Alexander Hamilton and James Madison – to name two of the most prominent advocates – years to get an approval from Congress for a Convention and even that resolution on February 21, 1787[26] said that "the Convention was to meet […] »for the sole and express purpose of revising the Articles of Confederation«." Quite

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[21] The Articles of Confederation, Article I – III. In: Michael Kammen (ed.): *The Origins of the American Constitution – A Documentary History*. New York, Penguin Books, 1986. 10.

[22] Friedman op. cit. 71.

[23] The Articles of Confederation, Article VIII. In: Kammen op. cit. 13.

[24] Remini op. cit. 5.

[25] Hall–Finkelman–Ely op. cit. 111.

[26] Ralph Ketcham (ed.): *The Anti-Federalist Papers and the Constitutional Convention Debates*. New York, Signet Classics, 2003. xxxvi.

understandably, the opposition was strong. Most states shared the sentiment and asked the same question: "[w]hy fight a war and achieve independence only to be taxed by a powerful Congress instead of by a powerful Parliament?"[27]

The Constitutional Convention did meet in Philadelphia in the summer of 1787 and in practically three months created a Constitution that against all odds became the founding document of the United States of America. With a very limited number of amendments over the course of more than two hundred years, it remains in force and still provides the basis of the strongest democracy in the world. Whether that was indeed a miracle or not is hard to say,[28] but it was certainly not an easy process and it required great sacrifices and compromises from all sides. Both representation and taxation were part of the debates at the Convention and I will introduce the developments and the results through the drafts presented.

The Constitutional Convention was scheduled to begin on May 14, but it did not reach a quorum of seven states until May 25, 1787. During these initial ten days, members of the Virginia delegation met every morning and drafted a list of fifteen resolves.[29] These, introduced to the Convention by Edmund Randolph of Virginia on May 29, provided the basis for the constitutional debates and "were to be the core and foundation of the United States Constitution."[30] The Convention had to answer two basic questions: one, a "theoretic question of what kind of government best suited America – a democracy, a limited monarchy, a republic"[31] – and two, a practical problem of how to create such a government.

There were a total of six drafts, plans or amendments introduced throughout the Convention and the seventh was the final version of the Constitution. The first was the already mentioned Virginia Resolution introduced by the Governor of Virginia, Edmund Randolph on May 29. This was immediately followed by the Plan of Charles Pinckney, a young delegate of South Carolina. Though his plan was never debated in the Convention, it still had an impact on the more mature drafts later on. After nearly three weeks of debates on the Virginia Resolution, William Paterson of New Jersey introduced a new Plan on June 15.[32] Alexander Hamilton presented his proposal in a 6-hour speech on June 18.

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[27] Catherine Drinker Bowen: *Miracle at Philadelphia*. New York–Boston, Back Bay Books, 1986. 10–11.

[28] Bowen chose this as the title of her book, which introduces the story of the Constitutional Convention in detail. Yet, she claims that the term 'miracle' in connection with the events that occurred in the summer of 1787 is not her own, George Washington and James Madison phrased it that way. Bowen op. cit. xi.

[29] This first draft is named differently in the sources, it is known as the Virginia Resolutions, the Virginia Resolves, the Virginia Plan, the Randolph Plan or the Large State Plan.

[30] Bowen op. cit. 18.

[31] Bowen op. cit. 34.

[32] This is also known as the New Jersey Plan, Mr. Paterson's Plan, the New Jersey Amendment

The Convention resumed its debates based on the Amended Virginia Resolution on June 19. At the end of July, the Convention appointed the Committee of the Detail[33] to draft a document based on all the decisions they had already made. During the ten days that this Committee worked, the Convention was adjourned. The First Draft of the Constitution was introduced on August 6 and contained twenty-three resolutions. It was the Committee of Style and Arrangement[34] that in four days, between September 8 and 12, created the seven articles that were ultimately agreed to and signed on September 17, 1787.

All drafts differed somewhat from each other and every one contributed something to the final result. The more radical plans clearly proposed setting up a national government instead of revising the Confederation.

The Second Resolution of the Virginia Plan clearly stated that "the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases."[35] This alternative proposition sums up my underlying questions because in the first scenario, the states obtain representation in exchange for the taxes they pay to the union, while in the second a clear system of direct popular representation is established. This plan proposed a bicameral legislature with members of the first branch "elected by the people of the several states" as opposed to the second branch elected by the members of the first.[36] The Virginia Plan envisioned a very powerful and most important legislature in comparison to the executive and judicial powers. It had the right to initiate law and to legislate in all cases where the states were not able to, and was also given a veto over the states' individual acts – a grave invasion of their individual sovereignty.[37] Ultimately, this plan included the guarantee of the republican government of the United States as well as each individual state.[38]

Charles Pinckney introduced his plan on May 29, 1787, but it was not debated by the Convention. He gave his draft to James Wilson, a member of the Committee of the Detail, whose notes on this plan have survived and were reprinted. This way some details of those provisions that were not adopted into the text of the

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to the Articles of Confederation or the Small State Plan.

[33]   Its appointed members were Edmund Randolph (Virginia), James Wilson (Pennsylvania), Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), and John Rutledge (South Carolina). Bowen op. cit. 192.

[34]   Its appointed members were William Samuel Johnson (Connecticut), Alexander Hamilton (New York), Gouverneur Morris (Pennsylvania), James Madison (Virginia), and Rufus King (Massachusetts). Bowen op. cit. 234.

[35]   2nd Resolution of the original Virginia Plan. In: Kammen op. cit. 23.

[36]   3rd, 4th and 5th Resolution of the original Virginia Plan. In: Kammen op. cit. 23.

[37]   6th Resolution of the original Virginia Plan. In: Kammen op. cit. 23–24.

[38]   11th Resolution of the original Virginia Plan. In: Kammen op. cit. 25.

Constitution may also be recalled. Pinckney started with a preamble, where he maintained the "Confederation between the free and independent states" that united "together under one general superintending Government."[39] In Article VI, Pinckney provided the "exclusive Power […] of rating and causing public Taxes to be levied" to the confederate legislature, which he envisioned as a bicameral system consisting of the Senate and the House of Delegates termed jointly as these in Congress assembled.[40] This provision created federal taxation while he included his plan for the payment of the Quota of each state in Article XIV. Pinckney's Plan adhered closely to the Articles of Confederation, but it did include a fair amount of basic rights, which did not make it into the Constitution as the delegates voted against a Bill of Rights.[41]

The New Jersey Plan, also known as the Small State Plan, was an attempt to counteract the radicalism of the Virginia Resolutions. It aimed at maintaining the loose federal character of the Confederation as opposed to the national plan, and only wished to add to the existing Articles of Confederation where it clearly lacked any regulation otherwise necessary. As such, in the Second Resolution it authorized Congress "to pass acts for raising a revenue, by levying a duty or duties," which was the replacement of a federal tax that used to be laid and levied by Great Britain.[42] No further resolution related to either representation or taxation as it referred all those back to the existing Articles of Confederation.

Alexander Hamilton delivered a 6-hour long speech on June 18, 1787, explaining his vision for a fairly centralized America. His notions were not well received as they seemed too radical for all. He termed the Legislature 'Supreme' as opposed to the Virginia Plan's 'National' and saw in it a popularly elected Assembly and a lifelong appointed Senate.[43]

Following serious debates, an Amended Virginia Plan came before the Convention. It was quite similar to the original, especially with regards to the legislature. In its Seventh Resolution, it specifically addressed the issue of suffrage and that it ought to differ from that of the Articles of Confederation in that it was to be based on "some equitable ratio of representation."[44] In addition, it claimed that the suffrage in the second branch of the legislature should be the same as that in the first.[45] It did, however, omit any reference to the quota paid by the states to the Confederation.

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[39] Preamble of the Pinckney Plan. In: KAMMEN op. cit. 26.

[40] Article VI of the Pinckney Plan. In: KAMMEN op. cit. 28.

[41] BOWEN op. cit. 243–253.

[42] 2nd Resolution of The New Jersey Amendments to the Articles of Confederation. In: KAMMEN op. cit. 31.

[43] The Plan Presented by Alexander Hamilton. In: KAMMEN op. cit. 37.

[44] 7th Resolution of the Amended Virginia Resolutions. In: KAMMEN op. cit. 34–35.

[45] 8th Resolution of the Amended Virginia Resolutions. In: KAMMEN op. cit. 35.

The First Draft of the Constitution consisted of twenty-three articles and was the work of the Committee of the Detail. It was introduced on August 6, 1787 and it already included the *Great Compromise* of July 16. According to that decision, the representation in the first house was based on the population, while the representation in the second house was equal for all states. It is widely believed that this compromise saved the Convention from a complete failure.[46] Regarding federal revenue, including taxes, this draft gave the authority of originating "[a]ll bills for raising or appropriating money" to the House of Representatives. The Senate could not alter or amend these. It also claimed that "[n]o money shall be drawn from the Public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives."[47] This regulation clearly gave the say in this regard to the people, since they were proportionately represented in the House of Representatives. The framework was not complete without Article VII Section 1 that provided the "power to lay and collect taxes, duties, imposts and excises" to the Legislature of the United States.[48] This meant that whenever the Union aimed to collect revenue in any of these forms, it had to do so by a legislative act, and such bills had to be originated in the House of Representatives and agreed to without debate by the Senate. In addition to these regulations, this draft also included that the "proportion of direct taxation" should be based on the population that was to be regularly counted at a census.[49] Except for the ban on taxing state exports,[50] all other rules of this First Draft related to slavery and were re-debated throughout the Convention.

The original text of the United States Constitution stated that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."[51] This provision made both representation and federal taxation dependent on the number of people, echoing the First Draft's numerous provisions. Yet, this text has been replaced by Section 2 of the Fourteenth Amendment claiming that "Representatives shall be apportioned among the several states according to their respective numbers."[52] Any further regulation referring to representation and taxation can be located in the list of congressional legislative powers, where it states that "Congress shall have Power to lay and collect Taxes, Duties, Imposts

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[46]   Bowen op. cit. 185–187.

[47]   Article IV. Section 5. of the First Draft of the Constitution. In: Ketcham op. cit. 124.

[48]   Article VII. Section 1. of the First Draft of the Constitution. In: Ketcham op. cit. 127.

[49]   Article VII. Section 3. of the First Draft of the Constitution. In: Ketcham op. cit. 128.

[50]   Article VII. Section 4. of the First Draft of the Constitution. In: Ketcham op. cit. 128.

[51]   Article I. Section 2. Clause 3 of the Constitution of the United States. In: Kammen op. cit. 39.

[52]   XIV. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxiv (accessed: 14. 08. 2013).

and Excises."[53] As a reassurance, though, it also guarantees "every State in this Union a Republican Form of Government."[54]

5. Suffrage

As I have mentioned earlier, the drafting of the state constitutions in their rules on eligibility seemed to limit the right to vote. "It was not until the period of the American Revolution that newly drafted state constitutions explicitly and completely barred women from participation in political life. In the colonial period, custom and practice were somewhat inconsistent and loose; the state constitutions, in contrast, specified political rights at the national and local level as well as at the state level."[55]

It may be interesting to note, that throughout the Philadelphia Convention, nearly every draft implied some kind of a property requirement when determining suffrage, but it was ultimately omitted from the final text. The Constitution gave the right to vote for the directly elected Representatives to everyone who was eligible to vote in their respective state legislatures' "most numerous Branch."[56]

On the federal level, suffrage has widened gradually. The restrictions set forth in the Constitution were alleviated step-by-step. The already mentioned Article I Section 2 was amended by Section 2 of the Fourteenth Amendment in 1868.[57] It maintained however, that in order to be eligible to vote, one had to be a male of at least twenty-one years of age.[58] The prior requirement was eliminated in 1920 as the Nineteenth Amendment gave women the right to vote,[59] while the age limit was lowered to eighteen in 1971 by the Twenty-sixth Amendment.[60] Two further amendments affected suffrage: the Fifteenth Amendment of 1870 that gave the right to vote to everyone independent of "race, color, or previous

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[53] Article I. Section 8 of the Constitution of the United States. In: KAMMEN op. cit. 42. Article I. Section 9 deals with the capitation tax and all other costs of importing people to the United States, as well as the ban on taxing state exports.

[54] Article IV. Section 4 of the Constitution of the United States. In: KAMMEN op. cit. 49.

[55] DARCY / WELCH / CLARK op. cit. 2.

[56] Article I. Section 2. Clause 1 of the Constitution of the United States. In: KAMMEN op. cit. 39.

[57] All dates signal the enactment of the Amendment and not their initial proposal.

[58] XIV. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxiv (accessed: 14. 08. 2013).

[59] XIX. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxix (accessed: 14. 08. 2013).

[60] XXVI. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxxvi (accessed: 14. 08. 2013).

condition of servitude."[61] And Section 1 of the Twenty-fourth Amendment claimed the ultimate liberation as it said that "[t]he right of citizens of the United States to vote […] shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax."[62] This Amendment implies that it is more important that everyone be eligible to vote and thereby render the legislature as equally represented as possible, than all to pay their dues. Yet, America could not function if people did not pay their taxes and taxation and representation have always gone hand-in-hand.

6. Still Remaining *Taxation without Representation*

Though the outrage over imposed taxation without sufficient representation was the catalyst of the American separation and independence, there is still one place where it lingers on. The capital city of the United States, Washington D.C. did not exist at the time the Constitution was written. It only mentions a "District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States" over which Congress shall exercise exclusive legislation.[63] Washington D.C. became the capital in 1800 and while it mainly hosts federal buildings, there are indeed a few inhabitants of this District who, as citizens of the United States have to pay federal taxes, but are not represented in Congress.[64] The Twenty-third Amendment, in 1961, improved this situation to the extent that it allowed D.C. electors to participate in the presidential and vice-presidential elections as if it were a state.[65] Since it is not a state, however, it does not have representatives or senators but only a delegate in Congress, which is why their state motto – as is visible on every car's number plate – still is "Taxation without Representation."

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[61]   XV. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxv (accessed: 14. 08. 2013).

[62]   XXIV. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxxiv (accessed: 14. 08. 2013).

[63]   Article I. Section 8. Clause 17 of the Constitution of the United States. In: KAMMEN op. cit. 43.

[64]   There is a delegate in the House of Representatives, who has no vote on the floor but may vote in committee and on certain procedural matters as well as be present in every debate. There is absolutely no representation in the Senate for Washington D.C.

[65]   XXIII. Amendment to the Constitution of the United States, www.law.cornell.edu/constitution/amendmentxxiii (accessed: 14. 08. 2013).

7. The Grim Reality of Today

Despite the struggle over more than two centuries ago and all the battles for equal suffrage, only about half of the American population, who are eligible to vote actually exercise their right today. In presidential election years the nationwide numbers are around the 60% mark, while in midterm elections it is closer to the 50%. The data is nearly identical in 2004 and 2008, where more than 60% of the eligible population voted, and an additional approximately 5% were registered to vote and did not, while another 10-15% were not even registered. The numbers in the midterms of 2006 and 2010 are even worse as less than 50% voted while about 15% were registered and did not vote, and again about 15% were not even registered. The probability of registering and voting grows with age, as in 2008 only 50% of the youngest voters (age 18-29) voted as opposed to approximately 70% of those 70 or older.[66] The statistical data is equally grim at the state-by-state breakdown of the original thirteen states, as in 2010 (a midterm election) in only three of the thirteen have more than 50% of the eligible population voted (Massachusetts – 52%, Delaware – 51%, South Carolina – 50%). The numbers look better for the 2008 presidential election where in every one of the original states more than 50% of the eligible population voted, though only one exceeded the 70% margin (New Hampshire – 71%).[67]

The initial demand of equal representation in exchange for taxation changed significantly with the Twenty-fourth Amendment, which rendered these two issues officially independent from each other with the primacy of representation and equal suffrage. Yet, the American people do not seem to be interested at all as only about half of those eligible exercise this right. Indeed, more people pay their taxes than those who vote. This situation confirms the above mentioned disconnection or rather divide between the political class and the citizens and clearly begs the question whether there is indeed a need for a reform in this system at all.[68]

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[66] United States Census Bureau, Voting and Registration, smpbff1.dsd.census.gov/TheDataWeb_HotReport/servlet/HotReportEngineServlet?reportid=78b627d51b32ccd64ecad1ee1705e3e1&emailname=essb@boc&filename=0328_nata.hrml# (accessed: 14. 08. 2013).

[67] United States Census Bureau, Voting and Registration, Percent of Citizens 18 years and older voting by state, smpbff1.dsd.census.gov/TheDataWeb_HotReport/servlet/HotReportEngineServlet?reportid=497526014ddef3dceb6606177fac9b4d&emailname=essb@boc&filename=statec.hrml (accessed: 14. 08. 2013).

[68] Fiorina – Abrams op. cit. xix.

8. Closing Remarks

"That representation is today a significant and widely used concept need hardly be argued. In modern times almost everyone wants to be governed by representatives (although not necessarily by a conventional representative government); every political group or cause wants representation; every government claims to represent. At the same time we are troubled by the difference between sham and real representative institutions, and by the many competing ways in which representation can be institutionalized."[69] This quote from 1967 still applies today as representation is still significant and is still as widely used as it is hard to define.

The United States of America is known as the world's largest and oldest democracy. It is true that a system, an idea fairly radical in its own time, that the "people ruled, not the King or the King in Parliament,"[70] has proven itself and maintained itself throughout all these years. It would be unfair to say that it was easy, as members of the highly acclaimed Constitutional Convention included some, like Elbridge Gerry of Massachusetts, who said referring to the rebellion in his home state that the "evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots."[71] Sure, democracy had a different meaning then, "[d]emocracy signified anarchy; *demos* was not the people but the mob,"[72] and therefore, not the most desirable form of government. And still, it is the United States of America that all developing countries look to for advice on democracy and a republican form of government. Perhaps it is true and worth taking into consideration that "[i]f America is a phantasm, that is because it has always been the dreamscape of European desire."[73]

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[69]   Hanna Fenichel Pitkin: *The Concept of Representation*. Berkeley and Los Angeles, CA, University of California Press, 1967. 2.

[70]   Friedman op. cit. 73.

[71]   Ketcham op. cit. 13.

[72]   Bowen op. cit. 45.

[73]   Frederick M. Dolan – Thomas L. Dumm (eds.): *Rhetorical Republic – Governing Representation in American Politics*. Amherst, MA, The University of Massachusetts Press, 1993. 2.

IMPROVING REPRESENTATION
BY PARENTAL PROXY VOTING?

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An essential part of democratic governance is representation. An essential tool for assuring representation is democratic elections. They establish the first and foremost link between the represented and the representatives. The represented may be the respective people or the population *in toto* including persons who have not participated in the elections, or have even been excluded from voting. It is obvious that the "universal suffrage" has never been truly universal, and it is widely accepted that certain people in prison, or living abroad for a considerable time, or mentally ill people, might be banned from voting.[1] Equally, it has been rather uncontroversial that minors, or at least children, have no suffrage. Given the fact, however, that about 20 % of the population in Western societies are thus excluded from voting,[2] it comes as no surprise that for more than hundred and fifty years a suffrage for children exercised by their parents has been debated. In France, the discussion started as early as 1850.[3] In the US, it seems to have been considered since 1909.[4] In Germany, the debate goes back to the 1920ies,[5]

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[1] For an account of the jurisprudence of the European Court of Human Rights, cf. Christoph GRABENWARTER: *Europäische Menschenrechtskonvention*. 4th ed., München, C.H. Beck, 2009. § 23 IV.

[2] 26% in an average US congressional district: Jane RUTHERFORD: One Child, One Vote: Proxies for Parents. *Minnesota Law Review*, 1998. 1465.

[3] Werner SCHUBERT: Familienwahlrecht in Frankreich. *Familie, Partnerschaft, Recht*, 2005. 55. et seq.

[4] Cf. More Babies, More Votes. Father Phelan to Suggest "Familiy Suffrage" Law in Missouri. *New York Times*, 30 August 1909, query.nytimes.com/mem/archive-free/pdf?res=F40F14FB345512738DDDA90B94D0405B898CF1D3 (accessed: 13. 09. 2013).

[5] Friedrich ZAHN: Generalbericht an die Zweite Delegiertenversammlung der Internationalen Vereinigung für sozialen Fortschritt. *Die Zukunft der Arbeit*, H. 2/4, 1927. 174., quoted from Max WINGEN: Familienwahlrecht – Grundrecht für Kinder. *Die Neue Ordnung*, 1999. 118. et seqq.

and personalities as diverse as Carl Goerdeler and Ernst Jünger seem to have been interested in the idea.[6] The German discussion about "family suffrage" ("Familienwahlrecht") has become lively in the 1990ies;[7] in 2004 and 2008, the Federal Parliament dealt with respective motions.[8] By now, the jurisprudential debate has reached the second stage: the phase of sedating by way of commenting on it;[9] and the first monographies on the topic have been published.[10]

Although one of the main deficits of the German discussion is its lack of concreteness,[11] two main models can be distinguished: a right to vote for children to be exercised by themselves (as minors), and a right to vote to be exercised by their parents (custodial caretakers) as proxies or trustees of their children. In both cases, the ideal of "one man, one vote" seems to be promoted, whereas in the case of an additional vote for parents who would not be conceived as representatives of their children, the maxim of "one man, one vote" would be violated.

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[6]   Cf. Hans Hattenhauer: Über das Minderjährigenwahlrecht. *Juristenzeitung*, 1996/9. 12.

[7]   Cf. Matthias Pechstein: Wahlrecht für Kinder? *Familie und Recht*, 1991. 142. et seqq.; Konrad Löw: Verfassungsgebot Kinderwahlrecht? *Familie und Recht*, 1993. 25. et seqq.; Albert Post: Erfahrungen mit dem Familienwahlrecht als Bestandteil des Allgemeinen Wahlrechts. *Zeitschrift für Rechtspolitik*, 1996. 377. et seqq.; Werner Schröder: Familienwahlrecht und Grundgesetz. *Juristenzeitung*, 2003. 917. et seqq.; Rainer Wernsmann: Das demokratische Prinzip und der demographische Wandel. Brauchen wir ein Familienwahlrecht? *Der Staat*, 2005. 43. et seqq.; Heiko Holste: Wahlrecht von Geburt an: Demokratie auf Abwegen? *Die Öffentliche Verwaltung*, 2005. 110 et seqq.; Dirk Niebel (Pro) – Brigitte Zypries (Contra): Wahlrecht für Kinder? *Zeitschrift für Rechtspolitik*, 2008. 271; Michael Rolfsen: *Eine Stimme für die Zukunft? Über erneute Bestrebungen nach einem altersunabhängigen Wahlrecht. Die Öffentliche Verwaltung*, 2009. 348. et seqq.; by now all commentators of Art. 38 of the Basic Law touch upon the topic, cf. Fn. 9.

[8]   BT-Drs. 15/1544 (11 September 2003); 16/9868 (27 June 2008); the topic has also been dealt with in BT-Drs. 17/7331 (Hauptgutachten 2011 des Wissenschaftlichen Beirats der Bundesregierung Globale Umweltveränderungen, Welt im Wandel – Gesellschaftsvertrag für eine Große Transformation), 228. et seq.

[9]   Hans Hugo Klein, in: Theodor Maunz – Günter Dürig (eds.): *Grundgesetz-Kommentar.* München, C.H. Beck, 68. Ergänzungslieferung 2013, Art. 38, marginal no. 138; Bernd Grzeszick, in: Klaus Stern – Florian Becker (eds.): *Grundrechte-Kommentar.* Köln, Heymanns, 2009. Art. 38, marginal no. 42 et seqq.; Hermann Butzer, in: Volker Epping – Christian Hillgruber (eds.): *Beck'scher Online-Kommentar zum Grundgesetz.* München, C.H. Beck, 2009. Art. 38, marginal no. 82, to name but a few.

[10] Hanna Quintern: *Das Familienwahlrecht. Ein Beitrag zur verfassungsrechtlichen Diskussion* (Dissertation, University of Cologne, 2009). Berlin, Lit, 2010.; Isabel Rupprecht: *Das Wahlrecht für Kinder – Verfassungsrechtliche Zulässigkeit und praktische Durchführbarkeit* (Dissertation, University of Regensburg, 2011). Baden-Baden, Nomos, 2012.; Sebastian Müller-Franken: *Familienwahlrecht und Verfassung. Veränderungen des Wahlrechts zugunsten von Familien als Reaktion auf den "demographischen Wandel" auf dem Prüfstand des Verfassungsrechts.* Tübingen, Mohr Siebeck, 2013.

[11] As an attempt to discuss a concrete modell, cf. Franz Reimer: Nachhaltigkeit durch Wahlrecht? *Zeitschrift für Parlamentsfragen*, 2004. 322. et seqq.

The German debate, however, focuses on one point only: the constitutionality of a vicarious parental suffrage, i.e. the question, whether or not a right to vote of parents (custodial caretakers) would be either in conformity with the Basic Law (1.) or at least could be introduced by way of an amendment of the Basic Law (2.). In other words, many fundamental questions as to the desirability of such an additional parental suffrage have not been raised (3.). The Hungarian debate is more vigorous, even after the national consultation which rejected the idea of family suffrage (4.).

1. Parental Proxy Voting *de constitutione lata*

While the general provision of Art. 20 of the German Basic Law states that the "(1) Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies", Art. 38 as the *lex specialis* concerning the right to vote reads:

> "(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
>
> (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
>
> (3) Details shall be regulated by a federal law."[12]

Paragraph (2) seems to make it clear that the Basic Law tolerates, or even affirms the exclusion from the right to vote of persons under 18 years of age. It had, however, been asserted that the provision is constitutionally dubious due to a potential violation of the principle of democracy,[13] this is hardly convincing[14] since the norm enshrines a decision of the founding fathers and therefore

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[12]   Translation by Christian Tomuschat and David P. Currie: www.gesetze-im-internet.de/
englisch_gg/englisch_gg.html#p0182 (accessed: 14. 09. 2013).

[13]   Konrad Löw: Verfassungsgebot Kinderwahlrecht? Ein Beitrag zur Verfassungsdiskussion.
Familie und Recht, 1993. 27.: "verfassungsrechtlich nicht unbedenklich", pointing to the
possibility of "unconstitutional constitutional law" under Art. 79 paragraph (3) of the Basic
Law.

[14]   Klein op. cit. Art. 38, marginal no. 95: „abwegig" (absurd).

expresses their concept of a representative democracy. Accordingly, the federal law provision excluding persons under 18 from voting (sec. 12 para. 1 No. 1 Federal Electoral Act) is regarded as constitutional. The same is true as far as the Länder lever is concerned (eg. sec. 2 para. 1 No. 2 of the Hessian Electoral Act). There is, on the constitutional level, no (expressed or implicit) differentiation between a right to vote and its exercise. In other words, irrespective of its design, a parental proxy voting based on an amended Federal Electoral Act would not be in conformity with Art. 38 para. 2 of the Basic Law.

2. Parental Proxy Voting *de constitutione ferenda*

In Germany, therefore, the exciting and controversial question is whether parental proxy voting could be introduced by way of amendment of the Basic Law. This depends on the interpretation of the famous (or rather, infamous) "Eternity Clause", i.e. Art. 79 para. 3 stating:

> "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

The problem then boils down to the question whether parental proxy voting might affect the principle of democracy laid down in Art. 20. It is to be noted that the maxims of "general, direct, free, equal and secret elections" mentioned in Art. 38 para. 1 (cf. supra, 1.) do not necessarily form part of the "principle" of democracy as guaranteed in Art. 79 para. 3 since only the "principles laid down in Articles 1 and 20" are unchangeable, their emanations in the other provisions of the Basic Law on the other hand are not. For instance, the maxim of direct elections (as mentioned in Art. 38) can hardly be regarded as essential to the notion of democracy itself. It is therefore not incorporated in the principles laid down in Art. 20 and can consequently be subject to amendments of the Basic Law. On the other hand, democracy requires a choice for the respective individuals; democracy without free decisions is a *contradictio in adiecto*. It has thus been discussed if parental proxy voting touches upon one of the essential preconditions of democracy. The maxims enshrined in Art. 38 of the Basic Law can serve as heuristic elements, in particular the generality of elections (1.), the freedom of elections (2.), the equality of elections (3). At times, the allegedly strict personality ("Höchstpersönlichkeit") of voting is added (4.).

2.1. Generality of Elections

Parental proxy voting increases, rather than decreases the generality of elections since it increases the number of people having the right to vote. The idea of extending the right to vote has been one of the driving forces behind the different concepts of "vote familial", "family suffrage", or "Familienwahlrecht". The only question arising in this context is whether or not the improvement of generality of elections could justify a potential decline in, for instance, the equality of elections.

2.2. Freedom of Elections

At times, the freedom of elections is thought to be violated by parental proxy voting. The minor represented by his or her custodial caretaker has allegedly no freedom of choice both as to the question whether or not to vote at all and to the question which person and/or party to elect in case of participation. This is, however, erroneous since the proxy is the relevant person. His or her decision must be free, i.e. taken without external pressure or deception. In other words, even though freedom of elections (or ballots) is such an integral part of democracy that an encroachment would affect one of the principles laid down in Art. 20, there is no reason to believe that representation in voting could infringe this freedom.

2.3. Equality of Elections

Parents being given additional votes (to be exercised on behalf of their children) seem to be "more equal" than other voters. Even though the model discussed here does not give parents additional own votes (which would be an obvious violation of the notion of equality of elections), most German commentators end up in saying that de facto parents would be privileged. The premise is that since the act of voting is secret and the caretaker's electoral decision can therefore not be checked, it is up to him or her how to vote. In other words, he/she has an additional vote to pursue his/her interests, thereby diluting the right to vote of ordinary voters.[15]

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[15] GRZESZICK op. cit. margial no. 45: "Die Konstruktion eines Treuhand- oder Vertretermodells […] läuft im Ergebnis auf ein Pluralstimmrecht der Eltern hinaus. Denn wie die Eltern sich bei der Abgabe der Kinderstimme inhaltlich entscheiden, bleibt ihnen unbenommen. Dieses dadurch einzufangen, daß den Eltern eine inhaltliche Bindung an das Wohl des Kindes auferlegt wird, gelingt nicht. Denn aus dem Grundsatz der Geheimheit der Wahl folgt, daß

This critique presupposes that caretakers are unable to distinguish their respective responsibilities and therefore tend to take one decision only (rather than a personal decision for their own vote on the one hand and a representative one for the minors entrusted to them on the other hand). In our opinion, it is not only the law (e.g. family law) that is based on the premise that parents are in general capable to differentiate between their interests and the interests of their children; after all, there is empirical evidence to the fact of sociotropic voting (i.e. of electoral behavior taking into account the interests of others).[16] It is also a counterintuitive proposition that parents above all pursue their own interests at the expense of those of their children.

In other words, the idea that the custodial caretaker usurps the vote of his or her children to implement his or her objectives without considering their respective benefit and wishes is, to put it mildly, not constitutionally cogent. The Basic Law does not enshrine a concept of human beings of the *homo homini lupus* type, and in the case of parent-child-relations, in spite of the state's duty to watch over the families, Art. 6 para. 2 entrusts the prerogative to the parents ("The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty."). It should be added that the legislator of an Electoral Act is not impotent; but rather can procedurally support adequate decision-making of proxy voters. The custodial caretaker will have to use a separate ballot paper for each one of the votes exercised by him or her in all cases; the information given on the voter's notifications could then easily include a reminder that proxy voting includes particular consideration as to the interests of the represented.

2.4. Strict Personality of Elections?

Sometimes, the maxim of strict personality of elections is seen as an essential feature of democracy.[17] Given the numerous examples of proxy voting in many countries, this is entirely unconvincing. Of course, the voter must not sell his or her right to vote; it is not at his or her disposal and in this sense strictly personal.

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der Inhalt der Stimmabgabe nicht kontrolliert werden darf, womit die rechtliche Durchsetzung einer inhaltlichen Bindung ausgeschlossen ist. […] Die Vertretung des Kindes bei der Wahl durch seine Eltern ist daher grundsätzlich offen für eine Handhabung, die im Ergebnis einem Pluralstimmrecht der Eltern entspricht."

[16]   Cf. Bernd HARTMANN: Eigeninteresse und Gemeinwohl bei Wahlen und Abstimmungen. *Archiv des öffentlichen Rechts*, 2009. 1., 26. et seq.

[17]   E.g. Hans H. KLEIN: Generationskonflikt am Beispiel des Kinderwahlrechts. In: Rainer PITSCHAS / Arnd UHLE (eds.): *Wege gelebter Verfassung in Recht und Politik. Festschrift für Rupert Scholz zum 70. Geburtstag.* Berlin, Duncker & Humblot, 2007. 277 et seqq.

But in the case of a child's right to vote, the disposition is created by the law, and only by virtue of this disposition can the right be thought of in the first place. Instead, the assertion of a strictly personal right seems to go back to a notion of autonomy and self-determination which appears to be slightly privatistic; it makes the individual a monad. In any case, the underlying bifurcation (either capability to exercise a right by oneself – or denial of the right in the first place) seems to be simplistic and inadequate.

In sum, the model of parental proxy voting can hardly be regarded as hostile or external to the notion of democracy as laid down in Art. 20 of the German Basic Law. It is therefore up to Bundestag and Bundesrat to amend the constitution and allow the legislator to introduce a "family suffrage".

3. Parental Proxy Voting – The Basic Question(s)

After the constitutional argument is swept away, the basic question should be raised expressly: Do we want parental proxy voting? The German debate offers consequentialist and deontological reasons.[18] Consequentialist approaches would stress the objectives of changing election outcomes, enhancing sustainability of politics, improving demographic data by electoral incentives, compensating for decreasing election turnouts, or the like. None of the above is convincing in the end.[19] The deontological approach would point to the injustice which allegedly lies in the fact of excluding one-fifth of the population from voting. One may wonder why this injustice has been felt so little and so late (if at all). At any rate and as a matter of principle, it is the exclusion, rather than the attempts to include the excluded part of the population that is in need of justification. In other word, the onus is on the defenders of the *status quo*. If, however, good governance entails inclusion, the problem shifts to the question of adequate means to end the exclusion. It seems to be paradoxical that one means should be excluded from the process of creating democratic representation: representation of children by their custodial caretakers.

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[18] Cf. Achim Goerres – Guido Tiemann: Kinder an die Macht? Die politischen Konsequenzen des stellvertretenden Elternwahlrechts. *Politische Vierteljahresschrift*, 2009. 50., 55. et seq.

[19] As to the political outcome, Goerres – Tiemann op. cit. predict on the basis of empirical data that there would be no significant shift in the distribution of political power in German Bundestag.

4. The Issue of Family Voting in Hungary

4.1. Constitutional Debate, 2011

The question of family voting was raised in the constitutional debate in Hungary early 2011 without a decent preparation.[20] The question was made subject of the National Consultation program on the new constitution as all citizens of voting age received a questionnaire on certain sensitive, value-related issues of the constitution-making. A decisive majority of citizens rejected the idea within the National Consultation.[21] It has to be noted, that the question addressed to the citizens was not formulated in a correct way as it suggested that parents could get additional votes, whereas the additional vote would have been one of the child not a plus one for the parent. As the idea was a surprise for most voters, the rejection cannot be regarded as valid. Frankly speaking a decisive reason beyond the rejection could have been a fear that the political weight of the Roma population would be strengthened by the change. An option even suggested that parents – irrespective of the number of children they have – would get one additional vote: a hardly understandable compromise that happened to be inconsequent from both perspectives. As the fertility among Roma is over the national average the percentage of Roma under 18 may be twice as high than the percentage of Roma with the population as a whole (especially as the life expectancy of the Roma population is ten years less than that of the non-Roma population). As some parts of the Roma population are almost excluded from society there is a general fear that their vote can become the subject of bargain. In fact an estimated 300,000 Roma minors (15% of all minors) could not determine more than one or two mandates. The rapid constitution-making process did not enable a factual discussion on the topic.

Mainstream legal scholarship was hardly open for serious consideration.[22] Younger scholars, however, have shown some interest[23] and the topic has become a subject of discussion in seminars and a part of civil society. In the drafting procedure of the constitution a number of politicians seemed to have

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[20]   The National Association of Large Families has advocated for the issue for two decades with limited success. Individual members of Parliament (the liberal Imre Mécs in 1996 and the conservative Máriusz Révész since 2007) have endorsed the idea but were not able to get it on the agenda.

[21]   74% of respondents rejected the idea: www.kormany.hu/hu/miniszterelnokseg/hirek/nagy-nemzeti-vallalkozas-volt-a-konzultacio (accessed: 27. 11. 2013).

[22]   Balázs SCHANDA: Családi választójog – alkotmányjogi képtelenség vagy a fenntartható demokrácia biztosítéka? *Magyar Jog*, 2010/10. 608–611.

[23]   Johanna FRÖHLICH: Alapkérdések a családi választójog vitájában. *Pázmány Law Working Papers*, 2011/20. plwp.jak.ppke.hu/images/files/2011/2011-20.pdf (accessed: 27. 11. 2013).

endorsed the idea. As the general public was not convinced, the radical reform of representation was postponed. Since 2011 the issue is not on the agenda of public discussions but the discussion of the topic may be reopened at a certain point.

4.2. Challenge of Demography: Demeny-Voting

Parental proxy voting is getting special attention with the demographic crises western societies face – and not by chance in Japan as well, who is also facing a demographic decline. A strong advocate of the case is the Hungarian-American demographer, Paul Demeny (literature often refers to parental proxy voting as to Demeny-voting).[24] Demeny suggested that each parent should be given the right to exercise an extra half vote for each child under their guardianship to give minors a political voice.

The demographic decline is only one aspect that urges radical reconsideration of the exclusion of minors from the right to vote. Another aspect – that does not get much attention – may be the collapse of the moral consensus and a consensus on generally accepted values of western societies. Having children is not a generally respected value any more, just one of the options besides sports or pets or other. It is not evident any more that in case limited resources have to be distributed children should enjoy a preferential treatment. Traditionally not more than 10% of women were childless; nowadays this percentage is over 20%, in some countries 30%. Whereas in Hungary 8.5% of the generation 1963 did not have children, with the generation 1975 this percentage is 18, with the generation 1980 it is 29%, and for the generation 1985 the predicted percentage of childless women by the end of their fertile years is 38%.[25] Traditionally childlessness was regarded as a sad, often even a tragic personal fate, nowadays there is a growing phenomenon of voluntary childlessness. When we allow the grown up to decide on behalf of the whole society we assume that voters truly share the values of non-voting compatriots. With a growing number of singles and "dink" (dual income no kids) couples this cannot be taken as granted any more. Grandparents also consider the interests of their grandchildren – if they have any. Shifting values, a disappearing moral consensus on the value of family and future generations also determine how the construction of representation is equitable. If we reject parental proxy voting we accept that the representatives of minors will be elected by all the grown ups. The political landscape will

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[24]　www.popcouncil.org/staff/PaulDemeny.asp (accessed: 27. 11. 2013).

[25]　According to the research conducted by the Hungarian Central Statistical Office: Népesedési helyzetkép – a népesedési világnap alkalmából. *Statisztikai Tükör*, 2013/54., www.ksh.hu/docs/hun/xftp/stattukor/nephelyzetkep.pdf (accessed: 27. 11. 2013).

continue to be determined by the general public – a general public that may not share the values and interests that families with children have.

4.3. From a Shocking Idea to Technical Details

As it has not been introduced in any country (only NGOs use it in their internal democracy), parental proxy voting may seem to be a shocking idea challenging established principles and customs of election system. But it has to be noted that today evident realities like the equal suffrage or the right to vote for women was shocking for many as well not that long ago.[26] Attempts to narrow the gap between citizen and voters go already beyond the legal age, partly to get young people more involved into politics. After countries like Brasil and Cuba voting age was lowered to 16 in Austria as well. Depriving minors already active on the labour market and paying taxes from the right to vote is highly controversial for several reasons. Certainly small children would not be capable to exercise political rights on their own. They need a representative to be represented.

Those who do not want to engage into the discussion usually regard the parental proxy vote to be an additional vote for a parent. This would clearly not be compatible with equal suffrage. Excluding minors, however, is against the general character of the suffrage. Consequently there are two major issues that need further clarification: how far do parental rights reach and if voting as a proxy is acceptable. Generally we have no difficulties recognizing parental rights with regard to highly determinative issues like education, health, religion or property. The weight of political representation does not exceed other generally accepted areas of parental representation. Parental rights needed reconsideration to embrace political representation. As for the question of voting by a proxy we can state that proxy voting is already an existing institution in some countries for certain groups of voters.

A powerful argument against parental proxy voting seems to be a concept of democracy focusing on deliberation. Children are certainly not capable or only partly capable of participating in the discussion of public issues. In fact most adult citizens do not take part in the discourse either but still have the right to vote. Voting, however, is a day when discussions seize: this is an act of decision making and not of discussion. In decision making the mere voting power prevails over arguments and smart ideas.

Objections to parental proxy voting are often of technical nature: what happens with the votes of children in state care, with children under changing

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[26]   The first election law of Hungary, Act V/1848 regards it as evident that women and criminals cannot get the right to vote (§ 2). The right to vote was opened for women in Hungary after World War I, 50 years after Wyoming, the first country ever opened the right to vote for women.

custody, divorced or single parents etc. The nature of electoral law shows that law can provide a technical answer to all technical questions if there is a will to settle the issue. The voting system foreseen for citizens not residing in the country or for residing citizens who happen to be abroad on the day of the election shows that once fundamental decisions are made technical details can be settled, even if some of these settlements seem to be somewhat complicated.

4.4. A Matter of Principle – Consequences

The term "people" in the constitution is not limited to the grown up [Art. B) (2)]. Representatives are there to represent general public not just the grown up population.[27] Voters passing away between two elections need no representation any more but new citizens are to be represented by the given representatives as well. The "people" is an abstraction of the constitution. Exclusions have to be justified and need to be challenged constantly.

The proxy vote of parents on behalf of their children would undoubtedly change the balance of powers. Parents raising children would have a stronger voice in politics – parents acquire the right to represent their children instead of the general public deciding on their behalf. The perversion of the present system of representation can also bee seen in the strange priviledge enjoyed in Hungary by (EU) citizens over 65 as they are entitled to use the public transport free of charge since the 1998 election campaign. With parental proxy vote minors would be likely to enjoy this right as well.

Expanding the right to vote to minors would undoubtedly bring radical changes. The present crisis of democracies, however, calls for action: we cannot afford not to reconsider even fundamental issues of our political system. Beyond all practical consequences however, parental proxy voting would be the last major step towards a truly universal suffrage.

5. Conclusion

The notion of parental proxy voting remains controversial, not to say shocking, in Hungary and in Germany. While the discussion is illuminating as far as basic concepts of democracy (such as people, representation, deliberation, and universality of suffrage) are concerned, it would benefit from better

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[27] Strangely the new Hungarian election law for parliamentary elections has changed the rule on the circumscription of constituencies. These in the future have to have an equal number of voters and not of citizens. The new law on local elections, however, continues to link election systems to the number of inhabitants, not to the number of voters.

differentiating between the categories outlined above. Questions as to the desirability of a family suffrage on the one hand and technical matters on the other hand should be distinguished more clearly.

II. PRACTICES OF ENHANCED REPRESENTATION

THE DIFFUSION OF PARTICIPATORY BUDGETING IN GERMAN MUNICIPALITIES

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1. Introduction

In Germany, a large part of society complains about a lack of transparency and participation in the policy-making process. This manifests itself in low turnouts in elections, especially at the municipal level. To engage citizens in the policy-making process, some municipalities have adopted Participatory Budgeting (PB). Since the introduction of the first PB process in 1997, the number has increased to around 100 in 2013. The aim of this paper is to create a theoretical framework of factors that might influence the adoption pattern of PB in German municipalities. PB is a one-year decision-making process in which citizens negotiate among themselves and with government officials in organized meetings over the allocation of public revenues and expenditures.[1] PB can thus be a tool that redistributes decision-making power from elected officials to citizens. How many competencies are transferred to the citizens depends on the rules of the PB, which vary from country to country. While in some countries, PB is an instrument of direct democracy on the representative side, in other countries it is merely a tool for informing citizens about a municipality's finances.

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[1] Brian Wampler: *A Guide to Participatory Budgeting*. October 2000. Available at www.partizipation.at/fileadmin/media_data/Downloads/themen/A_guide_to_PB.pdf (accessed: 06. 10. 2013). 2.; Brian Wampler: A Guide to Participatory Budgeting. In: Anwar Shah (ed): *Participatory Budgeting*. Washington, D.C., The International Bank for Reconstruction and Development / The World Bank, 2007. 21.

Sintomer et al. have defined five criteria on the basis of a worldwide comparative study to narrow down the term "PB".[2] The first criterion that has to be met in order to speak about PB is that the financial and/or budgetary dimension must be at the center of the discussion. The second criterion is that an elected body with some power over administration has to be involved, which means it is not enough for just a neighborhood level to be involved that does not have any administrative power. The third criterion is that the discussion about the municipalities' finances has to be a repeated process; a one-time referendum on financial issues is not considered to be PB. The process must furthermore include some form of public deliberation within the framework of specific forums. It is not sufficient for already existing administrative meetings to be opened up to the public. The last criterion is that participants have to receive feedback on the output of the PB.

The idea of Participatory Budgeting was born in Porto Alegre, Brazil. The key factor in its development was what PB scientists call a "window of opportunity".[3] This took place during Brazil's transition from military dictatorship to democracy. During the course of this transition, some authority and financial autonomy were transferred from the national level to the state and municipality level. The Brazilian Workers' Party (PT) was able to use these developments to its advantage when voted into office in Porto Alegre in 1989. The PT actively promoted transparency in government affairs and more citizen participation in the policy-making process.[4]

However, PB did not evolve from a top-down process. During Brazil's military dictatorship, a politically aware civil society grew. Having experienced years of suppression and growing social injustice, citizens demanded more participation rights and more transparency in public finances.[5] PB evolved from a mutual dialogue between policy-makers and citizens. Public programs and projects were discussed in public meetings. In these meetings, priorities were defined and citizens appointed delegates who were to supervise whether these

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[2]   Yves Sintomer – Carsten Herzberg – Anja Röcke: Participatory Budgeting in Europe: Potentials and Challenges. *International Journal of Urban and Regional Research*, 32(1), 2008. 164 et seq.

[3]   Brian Wampler: A difusão do Orçamento Participativo brasileiro: "boas práticas" devem ser promovidas? *Opinião Pública*, 14(1), 2008. 65–95. English version: The Diffusion of Brazil's Participatory Budgeting: Should "Best Practices" be Promoted? Available at www.internationalbudget.org/themes/PB/AdoptingParticipatoryDemocracy.pdf (accessed: 03. 07. 2014). 3.

[4]   Wampler (2000) op. cit. 3.; Yves Sintomer – Carsten Herzberg – Anja Röcke: *Der Bürgerhaushalt in Europa – eine realistische Utopie*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2010. 31 et seq.

[5]   Wampler (2007) op. cit. 22.; Sintomer–Herzberg–Röcke (2008) op. cit. 166 et seq.

priorities were implemented in the further course of the budgetary process. This process led to what was later called Participatory Budgeting.

One of the main goals of PB in Porto Alegre was to reach a higher level of social justice. To make sure that this goal was accomplished, a distribution key was established that ensured that districts with higher poverty, higher populations and less infrastructure receive a higher proportion of resources than do better-off neighborhoods.[6]

The rules for PB tend to be designed by the elected government with input from citizens. Participants must approve the rules and any subsequent changes to the rules.[7] To legally ensure the participation of citizens in the budgetary process, it was laid down in the constitution of Porto Alegre in 1990 that citizens have to be involved in the budgetary process. However, the details of the process are not regulated. This is considered to be an advantage even by citizens, because it allows PB to be a dynamic process whose framework can be changed according to needs.[8]

Studies show that PB in Porto Alegre helped to improve social justice. Poorer regions were equipped with access to clean drinking water, were connected to sewage systems, and were provided with hospitals and crèches, for example.[9]

Since PB was very successful in Porto Alegre, more and more cities in Brazil adopted the process. More than 200 PB processes were counted in 2010.[10] While in Brazil the concept of PB spread quickly, in Germany just a small percentage of municipalities have so far adopted it. To explain the adoption pattern of PB in Germany, literature about the diffusion of policy innovations is consulted.

In the first part of this paper, the relevant studies are presented. Furthermore, the empirical results of two studies that focus on the diffusion patterns of PB among Brazilian cities are presented. In the second part, the diffusion of PB in Germany is described. On the basis of the presented literature possible determinants of the diffusion of PB in Germany are discussed. A theoretical framework is built, which can be used for further empirical research.

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[6]   Sintomer–Herzberg–Röcke (2008) op. cit. 33 et seq.; Wampler (2007) op. cit. 7.

[7]   Wampler (2000) op. cit. 7–8.

[8]   Carsten Herzberg: *Der Bürgerhaushalt von Porto Alegre. Wie partizipative Demokratie zu politisch-administrativen Veränderungen führen kann.* Münster, Lit Verlag, 2001. 43.

[9]   InWEnt gGmbH – Servicestelle Kommunen der Einen Welt: Vom Süden lernen: Bürgerhaushalte weltweit – eine Einladung zur globalen Kooperation. Bonn, *Dialog Global – Schriftenreihe der Servicestelle*, Heft 25, 2010. 23.

[10] InWEnt gGmbH – Servicestelle Kommunen der Einen Welt op. cit. 9.

2. Diffusion of Innovation

There is a broad literature on the diffusion of political innovations. Most of it focuses on adoption patterns among states in the USA. In this section the relevant empirical studies are presented with the aim of finding determinants of policy diffusion that can also be applied to the adoption of PB in Germany.

A widely accepted definition of policy innovation, which is also applied in this paper, comes from Walker.[11] He defines an innovation as a program or policy which is new to the states adopting it, no matter how old the program may be or how many other states may have adopted it. Diffusion has been described as "the uncoordinated but interconnected adoption of similar programs by Governments"[12] or "Policy diffusion can be described by a logistic growth curve, or an S-shaped curve. Policy adoption is slow at first, then very rapid, then slow again as the saturation point is reached."[13]

In the diffusion debate, there are two main streams trying to explain the diffusion of policy innovations. Following Dye,[14] one approach focuses on internal state determinants of policy innovations. According to that approach social, economic, political and other characteristics of a state determine a state's innovativeness. Following Walker,[15] the other approach concentrates on the diffusion of innovations across states. According to "regional diffusion", the probability of a state adopting a particular policy is higher if neighboring states have already adopted the policy. While the early literature analyzed the two groups of determinants separately, the later literature uses models to test these two explanations jointly.

In his study on regional diffusion, Walker focuses on finding answers to the questions of why some states act as pioneers by adopting new programs more rapidly than others, and how these innovations spread among the American states.[16] To answer these questions, he develops an innovation score based on the analysis of eighty-eight different programs that shows the relative speed of adoption.[17] He chose programs that were enacted by at least twenty state legislatures prior to 1965 and for which there was reliable information on the

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[11]   Jack L. WALKER: The Diffusion of Innovations among the American States. *American Political Science Review*, 63(3), 1969. 881.

[12]   WAMPLER (2008) op. cit. 6.

[13]   Frank R. BAUMGARTNER – Bryan D. JONES: *Agendas and Instability in American Politics*. Chicago, University of Chicago Press, 1993. 17.

[14]   Thomas R. DYE: *Politics, Economics, and the Public: Policy Outcomes in the American States*. Chicago, Rand McNally, 1966.

[15]   WALKER op. cit.

[16]   Ibid. 881.

[17]   For a full list of programs, see Ibid. 889.

dates of adoption. The larger the innovation score of a state, the faster the state has been, on average, in responding to new ideas or policies.[18]

Walker also defines factors that determine a state's willingness to adopt new policies.[19] He sees one important determinant as a state's relative wealth or the degree to which resources are available. He argues that if "free floating" resources are available, either in the form of money or highly skilled staff, politicians can more easily experiment with new policies. Furthermore he suggests that larger cities are more likely to adopt innovations at an early stage, as they potentially have a higher level of resources. To verify his hypothesis, he analyzes the connection between the wealth and size of a state and the innovation score using a correlation analysis. The correlation analysis shows evidence that the larger, wealthier states adopt new programs more rapidly than their smaller, less well-developed neighbors.[20] Given the results of this correlational analysis, Walker suggests that these states can be seen as regional pace-setters, each of which has a group of followers, usually within their own region of the country, that tend to adopt programs only after the pioneers have led the way. He conducts a factor analysis to test whether clusters of states with a similar order of adoption for the policies in the innovation score exist and then assesses whether states in the same cluster are in the same region of the country. The factor analysis shows that regional groupings exist.[21]

Walker's study has had a significant effect on further studies of the diffusion of policies by pointing out the regional dimension of adoption patterns.

Berry and Berry[22] study the pattern of state lottery adoption in the USA, reflecting both internal and regional influences. Their dataset consists of the forty-eight continental US states in the period between 1964 and 1986. 1964 was chosen as the first year of observation because a lottery was adopted for the very first time in that year.

They use a method called "state-year event history analysis." Within event history analysis (EHA), the hazard rate for an event occurring (in this case a state adopting a lottery) at a particular time is calculated. When the event under analysis is one that an individual cannot repeat, the size of the risk set will decrease over time as individuals in the dataset experience the event. The dataset for analysis is a pooled cross-sectional time series.[23]

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18   Ibid. 883.

19   Ibid. 884 et seq.

20   Ibid. 886.

21   Ibid. 893 et seq.

22   Frances S. BERRY – William D. BERRY: State Lottery Adoptions as Policy Innovations: An Event History Analysis. *American Political Science Review*, 84(2), 1990. 395–415.

23   Ibid. 398.; Craig VOLDEN: States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program. *American Journal of Political Science*, 50(2), 2006. 295.

Berry and Berry base their explanatory variables on Mohr's approach[24] that suggests that the probability of innovation is inversely related to the strength of the obstacles to innovation, and directly related to the motivation to innovate and the availability of resources for overcoming obstacles.[25] On those grounds, they argue that states should be more likely to adopt a policy innovation when neighboring states have already implemented that policy. Berry and Berry consider the information of how that particular policy works in a neighbor state as a resource to overcoming the obstacle of uncertainty about the way a policy innovation works.

Furthermore Berry and Berry argue that if the particular policy is generally popular with voters, like a lottery, the existence of previously adopting nearby states should intensify internal political pressures to adopt, as voters see a popular policy in place in nearby states and want it in their state as well.[26] Consequently, as a higher number of nearby states adopt a popular policy, the motivation of a state's politicians to adopt increases. According to this argumentation, Berry and Berry hypothesize that the likelihood of lottery adoption is positively related to the number of nearby states that have already adopted a lottery.

To control for the influence of internal factors, the authors include the short-term fiscal health of a state as an independent variable. They expect that a state in bad financial health is more likely to adopt an innovation like a lottery to increase state revenues.[27] Furthermore they include a variable to test the influence of election cycles on the probability of adopting a state lottery. Since they assume that a lottery is popular with voters, states should be more likely to adopt it in an election year.[28] The authors also control for obstacles to adoption. They see fundamentalist religious groups as a potential obstacle. Thus they hypothesize that the greater the proportion of a state's population that adheres to fundamentalist religions, the lower the probability that the state will adopt a lottery.[29] Another obstacle could be a population with insufficient financial resources to support a lottery adequately. Therefore the assumption is that the lower the level of personal income in a state, the lower the probability that the state will adopt a lottery.

Despite the fact that lottery adoptions are quite rare, with only 3 percent of the observations in the authors' sample scored as adoptions, nearly all hypotheses receive support. The estimated coefficients of the regional variables have a

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24   Lawrence B. Mohr: Determinants of Innovation in Organizations. *American Political Science Review*, 63(1), 1969. 111–126.

25   Berry–Berry op. cit. 404.

26   Ibid. 403.

27   Ibid. 401.

28   Ibid. 402.

29   Ibid. 403.

positive sign and are statistically significant. That gives reason to believe that states do indeed tend to emulate neighboring states. As expected, the estimation results show that a decline in a state's fiscal health increases the probability of adopting a state lottery. The income hypothesis also receives support.[30]

In his study, Mintrom focuses on the influence of political entrepreneurs on the adoption of policy innovations.[31] Interestingly, he not only considers the spread of policy innovations that were already approved by the legislature but also includes innovations that have only been considered. He analyzes the influence of political entrepreneurs on the example of school choice programs in the forty-eight continental US states from 1987 through 1992. He assumes that policy entrepreneurs constitute an identifiable class of political actors. He describes them as decision-makers that see themselves as innovators. They actively promote changes of policy by networking in policy circles, shaping the terms of policy debates, and building coalitions.[32] He also uses EHA to analyze which factors influence the probability of adopting a school choice program. As an estimation method, he uses a standard logit regression analysis. The data were collected in a questionnaire. First, he asked the chief state school officer in each state to nominate the best person in his or her organization to answer his questionnaire. Survey respondents were asked to name the most important school choice policy entrepreneurs in their states and to record the year in which they first advocated school choice. Other possible determinants of adoption are also controlled for. He includes an independent variable that measures the relative change in student test scores,[33] and assumes that the greater the decline in the average test scores within a state relative to the change at the national level over a given period, the greater the probability that members of the education policy elite would perceive a problem with their system of schooling and turn to reforms like school choice. Moreover, Mintrom argues that the greater the percentage of private schools in a state, the higher the probability that school choice ideas would be considered.[34]

He also includes variables capturing the political situation in a state. He assumes that consideration and approval of school choice is more likely in years that are not election years. That is, according to Mintrom, because the legislative agenda is typically narrower in an election year, as politicians spend more time on campaign issues, and school choice can create significant political battles. Therefore risk-averse politicians are more likely to avoid controversial

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[30] Ibid. 405 et seq.

[31] Michel MINTROM: Policy Entrepreneurs and the Diffusion of Innovation. *American Journal of Political Science*, 41(3), 1997. 738–770.

[32] Ibid. 739.

[33] Ibid. 751.

[34] Ibid. 751.

legislation in an election year. He also creates two independent variables that take into account regional influences.[35] The estimation results show that the existence of political entrepreneurs has a strong positive effect on the probability of the adoption of school choice. The most important differences between the explanatory factors for school choice consideration and approval seem to be that legislators will be more supportive of school choice if there is evidence of problems with the current system. School choice consideration on the other hand is more influenced by neighboring states adopting it and the electoral cycle.[36]

Sapat analyzes which factors influence the adoption of environmental policy innovations by state administrative agencies in the US in the area of hazardous waste regulation.[37] She defines four main factors that influence adoption: the severity of the problem, the importance of institutional factors, the role played by interest groups, and contextual factors. She uses a random-effects probit model to empirically measure the influences of these factors on state innovations between 1986 and 1995. State environmental policy innovations are defined as state-sponsored, non-federally mandated programs or policies to protect the environment.[38]

As dependent variable she includes a dichotomous dummy variable that equals one if the state adopted an innovation in a particular year, and zero otherwise. As an independent variable she includes the total number of hazardous waste sites by state. She assumes that the more hazardous waste sites there are in a state, the more likely the state is to adopt a hazardous waste regulation.[39] To detect the influence of institutional factors, she includes a variable that captures state commitment to environmental protection. That is measured as the percentage of state expenditures spent on environmental and natural resource programs, lagged by one year. Sapat hypothesizes that states with a high prior commitment to environmental protection will be more likely to adopt a policy innovation.[40]

She also takes into account the ability and motivation of the policy-makers and administrative staff in a state. She assumes that the higher the number of full-time staff employed in state environmental agencies, the higher the chance they will adopt a hazardous waste regulation. The measure used for this variable is the number of full-time equivalent staff in state hazardous waste cleanup programs in 1993.

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[35]   Ibid. 753.

[36]   Ibid. 755 et seq.

[37]   Alka Sapat: Devolution and Innovation: The Adoption of State Environmental Policy Innovations by Administrative Agencies. *Public Administrative Review*, 64(2), 2004. 141–151.

[38]   Ibid. 142.

[39]   Ibid. 144.

[40]   Ibid. 144.

To capture the effect of interest groups, Sapat includes a variable measuring the strength of environmental groups in each state.[41] The assumption is that the stronger they are, the more likely the state will be to adopt a hazardous waste regulation program. Moreover, she assumes that political ideology has an influence on the probability of adoption.[42] Referring to previous research that has found liberalism to be positively related to pro-environmental regulation at the state level, she expects that states with liberal electorates will be more likely to adopt environmental policy innovations.

The estimation results show that the coefficients taken jointly are significant and the model appears to be a good fit. As expected, the severity of the problem measured by the number of hazardous waste sites in a state has a strong positive effect on the probability of policy adoption. The hypothesis that greater commitment to environmental issues by the government increases the likelihood of adopting a hazardous waste regulation can also be confirmed. However, an unexpected result is that the coefficient of the variable for interest groups is not statistically significant. As an explanation, the author proposes that agency officials might not be directly influenced by interest group pressures, in contrast to elected officials, who are pressurized by political realities and increasingly expensive election campaigns.[43]

In his diffusion study, Volden[44] focuses on the influence of the success of a policy innovation. He uses the example of policy changes in Children's Health Insurance Programs (CHIP) in US states between 1998 and 2001 to test statistically the significance of success.

Volden argues that states are more willing to adopt policies that have been proven successful in other states.[45] He presumes this because decisions by legislators will rely heavily on evidence of success since their chances of being re-elected will increase upon the implementation of a successful program. Volden uses EHA as an estimation model, but instead of focusing on state-years as observations, he examines dyads or pairs of states.[46] Each of the fifty states may adopt policies in each year that imitate the policies in place in any of the other forty-nine states. The dependent variable for this analysis captures whether or not State A in the dyad emulates State B.[47]

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[41]   Ibid. 145.

[42]   Ibid. 145.

[43]   Ibid. 146 et seq.

[44]   VOLDEN op. cit.

[45]   Ibid. 298.

[46]   Ibid. 296.

[47]   Ibid. 296.

As Volden is especially interested in the effect of the success of a program on adoption, he has to define "success." Therefore, by conducting a survey, he finds out that the most important common feature of success is the reduction in the uninsured rate among the target population of poor children. To test the hypothesis that successful programs are more likely to be adopted, Volden creates an independent dummy variable equaling one for each dyad including a state that was especially effective in lowering its uninsured rate among poor children as the potentially emulated state, and zero otherwise. Volden expects a positive coefficient for this variable, as he assumes that states with successful policies are more likely to be emulated.[48]

He also controls for other influences. To capture regional influences, he includes neighbor variables. In line with Walker,[49] and as state officials that were questioned by Volden often mentioned, looking at the policies of the larger, wealthier states like California, Florida, and New York, he examines the role of potential leader state by including variables that control for size and wealth of states. If larger, wealthier states are really more likely to be emulated, the coefficient for these variables should have positive signs.

The results show that the success of a program has an important impact on the diffusion process. In dyads in which State B was successful the odds are nearly 20 percent greater of State A abandoning its policy in favor of that in State B, when compared to dyads in which State B was unsuccessful. Also similarities in political ideology seem to matter in explaining policy diffusion. The odds of the adoption of a policy moving State A toward State B are 50 percent greater when both states are under unified Republican control than when under other political configurations.[50]

The presented literature has revealed certain factors that seem to influence diffusion patterns of policy innovations. All studies show that geographically neighboring states tend to adopt similar policies. Furthermore, geographically distant states with similar demographics, political ideologies, and budgetary situations would adopt similar policies over time. In the next section, two studies that focus on the diffusion of Participatory Budgeting in Brazil are presented.

3. Participatory Budgeting in Brazil

As mentioned earlier, the development of the first Participatory Budget can be explained by a "window of opportunity." The Workers' Party quickly branded

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[48]   Ibid. 289 et seq.

[49]   Walker op. cit.

[50]   Volden op. cit. 303 et seq.

PB as the main tool in their innovative policy-making practice. Between 1989 and 2004 all cities governed by the Workers' Party with more than 100,000 residents had adopted PB.[51] However, by 2001 two thirds of new Participatory Budgets were adopted by parties other than the PT.[52] What are the motives for non-PT governments adopting a policy that is strongly associated with the PT?

Wampler conducted a study analyzing potential motives. He designs two models for two different time periods estimating the probability that a municipality would adopt PB using logistic regression analysis. His dataset only includes municipalities with more than 100,000 residents (2000 Brazilian Census).[53]

As dependent variables, he uses dummy variables for the 1997–2000 and 2001–2004 mayoral terms that take a value of one if the municipality has PB, and zero otherwise. All municipalities that had PB during the previous administrative periods are excluded. For each period, Wampler performs two tests. The first includes all municipalities. The second excludes all municipalities governed by the PT to better explain why non-PT governments adopt PB.[54]

As explanatory variable he includes one variable that captures whether or not the elected mayor from the 1996 and 2000 elections is from the PT. Wampler expects that the existence of a PT mayor increases the probability of adoption, as PB became an important symbol of PT politics.[55]

As another electoral variable he includes the percentage of seats held by the political left in the municipality's legislature. If this variable is positively signed and statistically significant, it will show that PB continued to be adopted mainly in municipalities where the political left had a solid base of support when compared with other municipalities.[56]

He also controls for the effect of being in a political network.[57] He captures this effect by creating a dummy variable that takes the value of one if the given municipality is in the "Innovations in Government" project sponsored by the Getulio Vargas Foundation and the Ford Foundation, and zero otherwise. Wampler expects a positive coefficient for this variable, as governments that participate in policy networks gather information about what will help them govern more effectively, as well as what may support them in future elections.[58]

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[51]   WAMPLER (2008) op. cit. 4.

[52]   Ibid. 5.

[53]   Ibid. 12.

[54]   Ibid. 16.

[55]   Ibid. 16.

[56]   Ibid. 17.

[57]   Ibid. 17.

[58]   Ibid. 10.

He assumes that a city's wealth also influences the adoption of PB.[59] He argues that, based on democratization theories, increasing wealth raises citizens' demands to decide about political outcomes. To capture the effect of wealth, he includes the Human Development Index (HDI) as an explanatory variable. This index is generated by the United Nations to measure the mean standard of living in a given location. HDI includes per capita income, adult literacy, and longevity. In Brazil these data are produced on the municipal level, and higher scores are associated with higher standards of living. Wampler therefore expects a positive sign for this coefficient.

Furthermore, he includes some regional determinants. He argues that the pattern of adoption is likely to be different in the South and the rest of the country. PB was initiated in the southern city of Porto Alegre, where it became closely associated with the PT. Wampler therefore assumes that non-PT governments in the South are less likely to adopt PB and that the reverse would also be true.[60]

The estimation results are ambivalent. While the coefficient for the PT variable is statistically significant and has a positive sign for the second time period, for the first time period it is not significant. Wampler explains the unexpected result in the first period with 1996 being a very bad electoral year for the PT.[61] Furthermore the results show that municipalities with higher percentages of legislative seats held by leftists are more likely to adopt PB in the first period. This gives credence to the claim that parties other than the PT are willing to adopt to respond to citizens' demands for PB's core organizing tenets, like transparency, social justice, and participation.[62] The coefficient of the regional variable is also statistically significant suggesting that the adoption of PB by parties other than the PT is more likely in other regions of Brazil compared to the southern part (p. 20).

For the first period, the results show that those municipalities that are part of a policy network are more likely to adopt PB. However, for the second time period this hypothesis cannot be confirmed. On the other hand, the coefficient of the variable HDI is positive and statistically significant in the second time period, while it is not for the first time period.[63] Interestingly, in the 2000–2003 period a decrease in the seats won by leftists in the city council has a positive effect on the adoption of PB in the model that only considers non-PT governed cities. Wampler's explanation (p. 23) is that policy-makers from other parties

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[59]   Ibid. 17.

[60]   Ibid. 18.

[61]   Ibid. 20 et seq.

[62]   Ibid. 19.

[63]   Ibid. 20 et seq.

are more willing to adopt PB when the left party is weak, so that their own party can be associated with the introduction of PB.

In summary, the adoption of PB by non-PT governments in the earlier years of adoption is best explained by the governments' inclusion in a political network. In the later years, the adoption is best explained by a decreasing number of leftist in the legislature.

Another empirical study focusing on the diffusion of PB in Brazil was published by Spada in 2010. He analyzes the impact of political competition on the spread of PB. Analyzing the diffusion pattern of PB in Brazil between 1989 and 2008, he discovers that the diffusion of PB does not follow the typical S-shaped curve like many technocratic policy innovations.[64] He argues that this is due to the fact that many cities only adopt PB for one or two election cycles and then abandon it. Spada believes PB to be a program that is rather popular among voters and that mayors implement it to increase their chances of being re-elected.[65] His dataset consists of panel data including cities with more than 50,000 residents in the period from 1996 until 2008. For estimation he employs a Linear Probability Model with fixed effects and time effects. The dependent variable is a dummy variable taking the value of one if the city has implemented PB, and zero otherwise.[66]

As explanatory variables he includes the victory of the PT in the mayoral elections. In line with Wampler he hypothesizes that the victory of the PT should increase the likelihood of adoption of PB, as the PT branded PB as one of their core policy tools. That makes it more costly for other parties to implement PB.[67] Of special interest for Spada's analysis is the impact of political competition on the adoption of PB. To capture the effect, he implements a variable taking into account the seat share of the biggest opposition party. As PB is a costly program, he only expects it to be adopted by mayors who are under political pressure. Therefore, he expects political competition to increase the probability of adoption.[68]

Following the diffusion literature, he also includes several economic and regional control variables like GDP per capita, ratio between expenditures and revenues, and peer proximity.[69]

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[64] Paolo SPADA: *Political Competition and the Diffusion of Policy Innovations in Local Government: the Case of Participatory Budgeting in Brazil.* New Haven, Yale University, 2010. 4.

[65] Ibid. 11–12.

[66] Ibid. 15.

[67] Ibid. 17.

[68] Ibid. 18.

[69] Ibid. 19.

As expected, the estimation results show that victory by the PT increases the likelihood of adopting PB (p. 22). The coefficient for the political competition variable also has the expected positive sign and is statistically significant. Furthermore, the results show that in large cities not controlled by the PT, the PT party's seat share in the opposition is negatively correlated with the adoption of PB. Wampler observed the same effect. This result shows that parties other than the PT are more willing to implement PB when the share of PT members in the legislature is low. Spada and Wampler[70] assume that this is because the rivaling parties are then under the impression that they can brand PB as their own policy and it will not be a policy associated with the PT.[71]

Interestingly, the coefficients of the economic variables are not statistically significant when political variables are controlled for. According to Spada, this result emphasizes the fact that political factors are the key driver for the adoption of PB in Brazilian municipalities.[72]

In summary, it can be said that Spada's study provides strong support for the hypothesis that political competition has a significant effect on the adoption of Participatory Budgeting in Brazil.

4. Participatory Budgeting in Germany

As the studies above have shown, there are electoral, internal and regional determinants for the adoption of policy innovations. As the studies focusing on Participatory Budgeting in Brazil show, political competition can also be a key factor in adoption. In this section, the adoption pattern of PB in Germany is described. Furthermore, factors are described that might have contributed to the adoption in Germany.

Participatory Budgeting in Germany shows very different characteristics from that in Brazil. Table 1 summarizes these differences. Firstly, the circumstances that led to adoption differ. While PB in Brazil evolved from a mutual dialogue between local government and citizens during a transition period, in Germany the first PB process was implemented as a political experiment during the course of an effort to reform the local administrative apparatus in the nineties.[73] PB was implemented as a top-down approach. German citizens have no part in deciding about the rules and framework of PB, unlike citizens in Porto Alegre.

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[70]   Spada op. cit. and Wampler (2008) op. cit.

[71]   Spada op. cit. 24.

[72]   Ibid. 24.

[73]   Sintomer–Herzberg–Röcke (2010) op. cit. 113.; Lars Holtkamp: Bürgerhaushalt. In: Norbert Kersting (ed.). *Politische Beteiligung*. Wiesbaden, VS Verlag für Sozialwissenschaften, 2008. 224.

Furthermore, different goals are pursued by adoption. While social injustice and corruption were drivers for the development of PB in Brazil, informing citizens about the municipalities' finances is one of the main goals in Germany. This applies especially to municipalities that are in a budget crisis. PB seems to be an instrument that policy-makers use to prepare citizens for budget cuts. A special form of PB in Germany has even evolved, in which citizens are asked to make austerity proposals in order to establish a balanced budget.[74]

The level of citizen involvement also shows different depths in Brazil and Germany. While citizens in Brazil have actual decision-making rights, in Germany citizens can only make proposals. The decision-makers are not bound to follow those proposals in any way. In Germany, a PB process consisting of three stages has developed. In the first stage, citizens gain information about the budget via brochures, meetings and/or the internet. During the second stage, public meetings take place, in which citizens can discuss the finances and make proposals on how to use and/or save public resources. In some cities the whole PB process takes place on the internet. During the third stage, policy-makers and administrators give feedback on whether proposals are implemented or not.[75]

Since no transfer of decision-making power to the citizens is taking place, PB cannot be considered an instrument of direct democracy in Germany, unlike in Brazil.

|	Development	Goal	How	Transfer of decision-making power
Brazil	Regime change, mutual dialogue between government and citizens	Reduce political and social exclusion	Inclusion of citizens in political discourse	yes
Germany	Political decision	Informing citizens about the budget	Preparing budget as readable document, information events, citizens can make proposals	no

Table 1: Comparison of PB in Germany and Brazil

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74   SINTOMER–HERZBERG–RÖCKE (2010) op. cit. 112.; HOLTKAMP op. cit. 222. et seq.

75   Carsten HERZBERG: *Von der Bürger- zur Solidarkommune. Lokale Demokratie in Zeiten der Globalisierung.* Diss.: Universität Potsdam, 2008. 134 et seq.; Innenministerium NRW – Bertelsmann Stiftung: *Kommunaler Bürgerhaushalt: Ein Leitfaden für die Praxis.* Bielefeld, Gieselmann Druck, 2004.

Diagram 1 shows the number of PB processes in German municipalities between 2008 and 2013. This period was chosen for practical reasons. In 2007, the website www.buergerhaushalte.org was launched by the German Federal Agency for Political Education (Bundeszentrale für politische Bildung) and the Service Agency Communities in One World (Kommunen der Einen Welt). This website supplies information on the topic of PB. Furthermore, reports about the number of PB processes in Germany have been published there every year since 2008.[76]

Diagram 1 shows that there has been a steady increase in the total number of PB processes between 2008 and 2013. In 2013, 252 municipalities were registered on the PB website. The diagram also shows the number of PB processes in "pre-phase." Those are municipalities that have considered adopting PB but have not yet implemented it. Even though the total number of PB processes increased, it can also be seen that the number in place has not increased significantly. These are PB processes in municipalities that have been carried out more than three times. That suggests that many municipalities adopt PB at one point and then abandon it after one or two years. The diagram also shows that the number of stopped PB processes has increased from 6 in 2008 to 28 in 2013. These developments show that despite the increasing total number of PB processes, PB cannot be described as a well-established process in Germany.
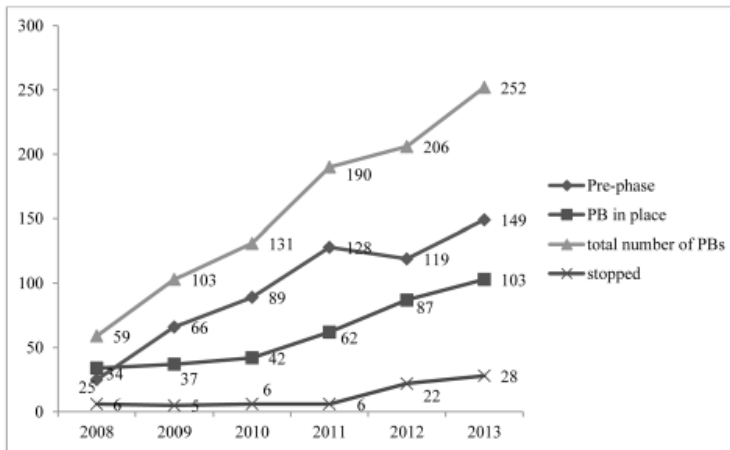
Diagram 1: Development of PB in Germany between 2008 and 2013
Source: own diagram, data: www.buergerhaushalt.org/de/statusberichte

On the basis of the literature review, which factors best describe the specific adoption pattern of PB among German municipalities? Due to a lack of

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[76]   The reports are downloadable: www.buergerhaushalt.org/de/statusberichte (accessed: 03. 07. 2014).

sufficient data at this point in time, only a theoretical framework for answering this question can be developed.

Factors that were found to have an influence on adoption patterns in the presented literature are geographical proximity, similarity in fiscal, economic and demographic characteristics, institutional and electoral factors, potential obstacles to adoption, the presence of political entrepreneurs, the severity of the problem that is supposed to be solved by the particular policy innovation, the success of the innovation, and being part of a network or ideology.

Considering these factors, it makes sense to assume that the likelihood of PB adoption in Germany varies from state to state. Due to the fact that the German federal states have different constitutions, electoral and institutional factors differ from municipality to municipality depending on which state they belong to. This results for example in different balances of power between the mayor and the city council. Empirical studies suggest that legislators are mainly not in favor of PB, as they are afraid of losing political power.[77] Therefore, a hypothesis would be that municipalities in which relatively more power is granted to the mayor by the constitution are more likely to adopt PB.

Since the relevant literature reveals that states are more likely to adopt a policy innovation that a neighbor state has already implemented, it is reasonable to assume that municipalities in the same state have similar adoption patterns. An empirical study to verify this hypothesis cannot be conducted at this time, but some descriptive studies can be used to gain an initial idea about the adoption of PB by state. This is shown in Diagram 2. The diagram shows that one third of all PB processes counted between 2008 and 2013 were adopted by cities in North Rhine–Westfalia (NRW).
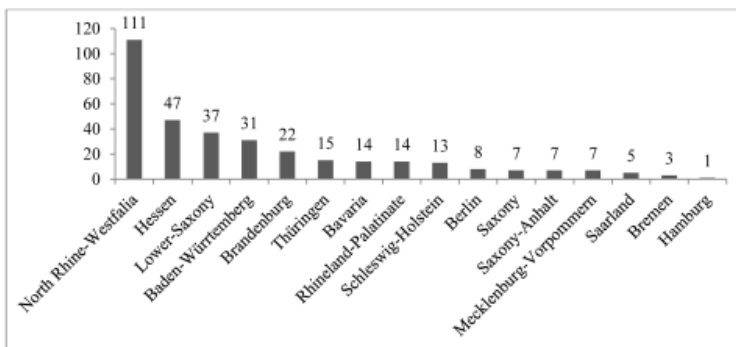

Diagram 2: Number of PB processes by state between 2008 and 2013
Source: own diagram, data: www.buergerhaushalt.org/de/statusberichte

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[77]   Holtkamp op. cit. 232.

It can be argued that this is not surprising, as NRW is the largest German state by number of inhabitants (17.8 million, 2012 census). However, it is not one third of the German population that lives there. Moreover, with 396 municipalities NRW is not the state with the highest number of municipalities. If the number of municipalities in a state had an influence on the number of PB processes in that state, the most PB processes would be found in Rhineland-Palatinate with 2,307 municipalities or Bavaria with 2,248 municipalities.[78] Therefore, it is likely that there are factors other than size that might explain the agglomeration of one third of all PB processes in NRW. In the diffusion literature, being part of a political network was found to be a factor that influences the adoption of PB. That might help explain the high number of PB processes in NRW, since there the Bertelsmann Foundation and the state of NRW launched the "Kommunaler Bürgerhaushalt" project that supported municipalities in NRW with adopting PB. Between 2000 and 2004 five municipalities introduced PB. The goal of the initiative was to develop guidelines for the implementation of PB in German municipalities.[79] One hypothesis to be tested is whether this network has had a significant impact on the agglomeration of PB in NRW. Another explanation for the agglomeration of PB in NRW could be the fiscal situation of many municipalities there. As already mentioned, many municipalities in Germany which have adopted PB are in a budgetary crisis. Diagram 3 shows the accumulated debt of all municipalities per capita by state (without the city states). It is easy to recognize that municipalities in NRW are highly indebted. In fact, 138 cities and municipalities operate on an emergency budget.[80] Referring to the diffusion literature, the more severe a problem, the higher the chance of adopting a policy innovation. On the basis of this, it can be hypothesized that in Germany the worse the budgetary position of a municipality, the more likely it is to adopt PB.

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[78]   Data available online: http://www.gemeindeverzeichnis.de/dtland/dtland.htm

[79]   Innenministerium NRW – Bertelsmann Stiftung op. cit.

[80]   Roland Kirbach: Kurz vor Schluss. *Zeit Online*, 26 November 2011. Available at www.zeit. de/2011/48/Kommunalfinanzen (accessed: 06.10.2013). Emergency budget according to § 81 GO NW. This means that municipalities are only allowed to make expenditures that they are obliged to make.
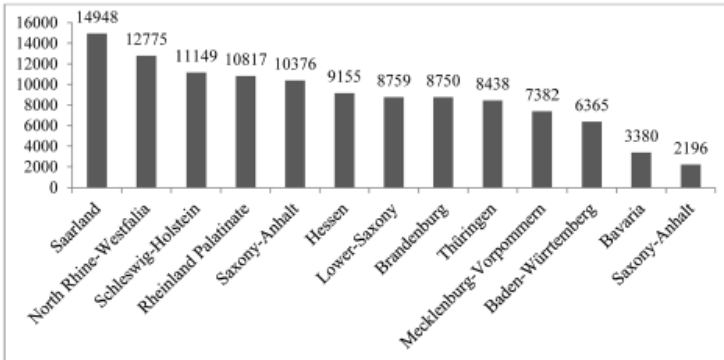
Diagram 3: Debt level per capita of all municipalities by state in 2011
Source: own diagram, data: StatistischesBundesamt
online: www.destatis.de/DE/Startseite.html

Another variable to be tested is the existence of political entrepreneurs. It is quite difficult to operationalize this variable, since a survey would have to be conducted to identify these entrepreneurs. However, on theoretical grounds it can be argued that political entrepreneurs play a role in the adoption of PB, since they were especially promoted by directly elected mayors.[81] It would also be interesting to statistically analyze the impact of success on PB diffusion in Germany, as three of the four cities that are considered by experts as best practice examples are located in NRW. Literature on PB in Germany suggests that adoption does not depend on the ideology of the governing party. However, this relationship was never empirically tested.

In the conclusion, the theoretical results of this paper are summarized and an outlook on future studies will be given.

5. Conclusion

The aim of this paper was to build a theoretical framework of possible explanations for the adoption pattern of Participatory Budgeting in Germany based on the relevant literature on the diffusion of policy innovations. Studying this literature, two main streams trying to explain the diffusion of policy innovations have emerged: a state's internal characteristics and regional determinants. That means that geographically neighboring states show similar adoption patterns for a particular policy innovation, but also that geographically distant states with similar demographics, political ideologies, and budgetary situations are likely to adopt similar policies over time. The diffusion of PB has

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[81]   HOLTKAMP op. cit. 224.

so far only been studied empirically in Brazil. While the development of the first Participatory Budget was supported by a "window of opportunity," later on political competition in particular leads to the adoption of PB.

In the last section, characterictsics of PB in Germany are presented. On theoretical and descriptive grounds it is analyzed to what extent the factors found in the literature might be useful in explaining adoption patterns in Germany. The fact that one third of all German Participatory Budgets have been adopted by municipalities in the state of NRW suggests there are regional factors at work. Furthemore, it seems as though the fiscal situation of a municipality has a strong influence on adoption. PB in Germany is often introduced with the aim of informing citizens about the financial situation of a municipality. There are many cases in which citizens are even asked to make austerity proposals. Thus, a strong hypothesis for empirical testing would be that the worse the budgetary situation of a municipality, the more likely it is to adopt PB. This is in contrast to Brazil, where political competition has been identified as a key driver for the introduction of PB in the later adoption periods, while economic factors do not seem to matter. In a further study, an empirical model like those presented can be designed for German Participatory Budgeting to test the factors presented in the last section for statistical significance.

THE GOVERNMENT'S AND CITIZENS' APPROACH

to Political Reform in the Republic of Ireland

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1. Introduction

In general, democracy all over Europe is considered to be in crisis, as the trust of the people in the democratic institutions, particularly in their governments, is diminishing. Furthermore, the link between the sovereign (i.e. the people) and their elected representatives in parliament or government seems to have vanished. This description would especially apply to Ireland, where people feel let down by their governments, holding the previous government responsible for the economic disaster and the current government for continuing the policies of austerity introduced by the previous government. On one side, since the policy-makers realised that the support of the people is needed to be able to implement austerity measures effectively, an effort was made to give them a say in the political decision-making process. On the other side, since the people realised that the policy-makers have to be monitored and held accountable for their decisions, citizens are more willing to become actively engaged in the decision-making process. For the Irish government it is essential to address the anger of the population and re-establish trust in the political institutions of the state.

The idea of deliberative democracy is regarded as a tool for addressing political disaffection, since legitimate collective decisions are arrived at through public reasoning and discussions among equal citizens.[1] With this concept in mind the government decided to set up a Constitutional Convention, where two thirds of its members are citizens selected at random from the election register and one third are from the parliamentary assemblies in the Republic of Ireland and Northern Ireland, to consider changes to the Irish constitution. Although the establishment of the Constitutional Convention was written into the Programme

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[1] Ian O'FLYNN: *Deliberative Democracy and Divided Societies*. New York, Palgrave Macmillan, 2006. 1.

for Government,[2] it took the government until December 2012 to formally establish it. Meanwhile, under the guidance of a group of experts, the "We the Citizens" initiative began implementing a participatory democracy project by organising a number of regional meetings at various locations throughout the country and a Citizens' Assembly in Dublin in 2011. The people participated in this project voluntarily, as it was for many a possibility to become involved in discussions about political, societal and economic reform in Ireland.

The government's attempt to discuss and legitimise political reform by establishing a Constitutional Convention can be described as a top-down approach due to its composition and the limited remit of topics to be discussed. The "We the Citizens" project was initiated by a group of political scientists, politically interested people, and people who have strong feelings about the importance of politics; it is therefore clearly a bottom-up project. This paper will analyse political reform projects initiated by the current government, the Fine Gael–Labour coalition government, and by the independent citizens' initiative "We the Citizens", which comprehensively tested a citizens' assembly model of democratic engagement in 2011.

The paper argues that deliberation as a tool for enhancing participatory democracy is limited in its actual impact on policy decisions but has a positive outcome on people's understanding of the political decision-making process and how decisions are arrived at. Deliberation in this respect can help to change people's attitudes towards politics, and hence increase their support for democracy.

The next chapter will give a brief overview of the economic and political developments in Ireland from the start of the economic crisis in 2007 until the 2011 elections, when a new government was elected to deal with the disastrous economic situation. This will be followed by a description of the work of the Constitutional Convention and the "We the Citizens" project on participatory democracy.

2. Background: Economic Crisis and Political Change

The early general elections in February 2011 became necessary after the collapse of the government coalition between Fianna Fáil, the Green Party and the Progressive Democrats, and individual party members, as well as government ministers, withdrew their support from their party leadership. The political crisis was the result of the economic difficulties and the mismanagement of the

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[2]   MerrionStreet.ie, Irish Government News Service: *Programme for Government*, 2011. 17. Available at www.merrionstreet.ie/wp-content/uploads/2010/05/Programme_for_Government_2011.pdf (accessed: 30. 10. 2013).

economic situation by the Fianna Fáil-dominated government. Subsequently, the economic difficulties led to the loss of financial sovereignty in November 2010, when the government was compelled to accept an IMF-EU bailout deal to stabilise the Irish banking system.

The economic difficulties first became worrying when in September 2008 the government announced that they would guarantee all deposits in the six Irish banks, in fact nationalising them. The result of this "blanket guarantee" was that the debts of the insolvent banks became sovereign state debts. The move became necessary because the mounting bad debt of the Irish banks led to the instability of the entire Irish banking system – the result of a number of massive property investments by the banks, which failed to return profits after the property bubble burst in 2007/08. The international financial crisis emerging in 2007 in the United States impacted heavily on the open Irish economy, which from around 2000 onwards was mainly based on property and financial businesses.[3] The Celtic Tiger collapsed and instead of a soft landing, as promised by the Irish government, economic growth came to a sudden halt in 2008. From 2008 onwards unemployment, migration and social expenditure on welfare increased, as did the cost of borrowing from the international bond markets, and as a consequence public debts mounted to an unbearable level. This situation combined with a deep recession starting in 2008, and the attempt to recapitalise the banks in 2009, 2010 and 2011 by injecting money – tax payers' money – into the fragile banking system to avoid its collapse meant that the general government debt more than quadruplicated within four years from 25 per cent of GDP in 2007 to 117.4 per cent of GDP in 2012.[4] Forecasts estimate that this figure will peak at the end of 2013 with a debt rate of 123.3 per cent of GDP.[5] Up to the end of 2012 the recapitalisation of the banking system has cost the Irish tax-payer approximate €64 billion.[6]

Emergency budgets to deal with the debt crisis were introduced in October 2008 and there was also a supplementary budget in April 2009, increasing taxes

[3]   Patrick Honohan: Resolving Ireland's Banking Crisis. *The Economic and Social Review*, 40(2), 2009. 209.; Morgan Kelly: On the Likely Extent of Falls in Irish House Prices. In: Alan Barrett – Ide Kearney – Martin O'Brien (eds): *Quarterly Economic Commentary*, Summer 2007. 54.

[4]   The Economic and Social Research Institute: *The Irish Economy*, 2013. Available at www. esri.ie/irish_economy/ (accessed: 24.07.2013); National Treasury Management Agency: *Debt Projections, Projected General Government Debt / GDP Ratio 2012–2016*. 2013. Available at www.ntma.ie/business-areas/funding-and-debt-management/debt-profile/debt-projections/ (accessed: 24. 07. 2013).

[5]   National Treasury Management op. cit.

[6]   Jim Power: Column: Ireland's debt deal will be crucial. *The Daily Business Post*, 24 January 2013. Available at www.businesspost.ie/#!story/Home/News/COLUMN%3A+Ireland%27s+debt+deal+will+be+crucial/id/19410615-5218-5100-da2b-44ad13479304 (accessed: 24. 07. 2013).

and cutting public expenditure. When the crisis hit, the government frantically tried to cut costs on public expenditure. As the biggest slice went towards civil and public servants' pay, a moratorium on public recruitment, cuts in salaries, tax increases and the introduction of new levies became necessary. Although the Irish government took every possible measure to regain the trust of the international bond markets, it was forced to accept a €85 billion bailout deal offered by the IMF and the EU in November 2010. Since then the Irish budgetary situation has been reviewed by the IMF-EU-ECB Troika every three months. However, Ireland has left the IMF-EU bailout deal in December 2013.

Even before the Irish government accepted the bailout, the political reputation of Fianna Fáil, the main government party, was at an all-time low. In October 2010 support for the party was at only 18 per cent[7] and in January 2011 – after the bailout deal – at 16 per cent,[8] compared to 42 per cent in the 2007 elections. In autumn 2010, 33 per cent of the Irish population believed that the EU was better able to deal with the economic and financial crisis than was the Irish government, which received only 13 per cent support.[9] Hence it was obvious that the elections on 25 February 2011 would bring about a change of government.[10] As was expected, on the day of the election support for Fianna Fail lay at only 17.4 per cent and the Green Party, its junior partner in government, only managed 1.8 per cent, losing all their seats in the lower house of the parliament. Fine Gael and the Labour Party received 36.1 per cent and 19.4 per cent respectively.[11] The two parties announced their new cabinet on 9 March 2011, having a total of 113 (Fine Gael – 76, Labour – 37) out of 166 seats in the Dáil Éireann, the lower house of the Irish parliament.[12]

Political and constitutional reform was a recurring topic during the election campaign. While Fianna Fáil's reform proposal was limited to some aspects of the political system and political processes, Fine Gael and Labour proposed a larger

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[7]   Red C: *Voting Intention Tracking Poll*, October 2010. Available at redcresearch.ie/wp-content/uploads/PDF/SBPElectionPollReport24thOct2010.pdf (accessed: 26. 07. 2013).

[8]   Red C: *Voting Intention Tracking Poll*, January 2011. Available at redcresearch.ie/wp-content/uploads/PDF/SBPElectionPollReport30thJan2011.pdf (accessed: 26. 07. 2013).

[9]   Eurobarometer 74: *Public opinion in the European Union, National Report Ireland*, 2010. 8. Available at ec.europa.eu/public_opinion/archives/eb/eb74/eb74_ie_ie_nat.pdf (accessed: 26. 07. 2013).

[10]   Michael Courtney – Michael Gallagher: The parliamentary election in Ireland, February 2011. *Electoral Studies*, 31, 2012. 232.

[11]   Michael Gallagher: Ireland's Earthquake Election: Analysis of the Results. In: Michael Gallagher – Michael Marsh (eds): *How Ireland Voted 2011. The Full Story of Ireland's Earthquake Election*. Basingstoke, Palgrave Macmillan, 2011. 145.

[12]   Houses of the Oireachtas: *31st Dáil General Elections, February, 2011: Election Results and Transfer of Votes*. 2011. 69. Available at www.oireachtas.ie/documents/publications/2011_Electoral_Handbookrev.pdf (accessed: 29. 07. 2013).

constitutional reform. Fine Gael issued the policy document "A New Politics", which laid out an envisaged political reform. Among other things, Fine Gael intended to hold a referendum on the abolition of Seanad Éireann (the Senate), the second chamber of the Irish parliament (Oireachtas);[13] to reduce the number of TDs (deputies);[14] to strengthen the committees of the Dáil Éireann (the House of Representatives); to introduce voting in presidential elections for Irish people living abroad; to publish an Open Government Bill aimed at significantly strengthening the Freedom of Information Act, and promised to establish a Citizens' Assembly to consider additional changes to the Irish constitution.[15] The aim of the political reform was clearly stated in the document: "Fine Gael's New Politics (…) will restore people's trust in the political process by delivering real, tangible change. The Irish people are rightly outraged at the way in which their country has been misgoverned."[16] Labour, in line with Fine Gael, stood for the abolition of the Seanad Éireann and promised the establishment of a Constitutional Convention to draft an entirely new constitution.[17] Fianna Fáil also favoured discussing possible electoral and constitutional reform in the form of a Citizens' Assembly.[18]

Participation in the political decision-making process by the people was the guiding principle of all the parties during the election campaign. For any political system in crisis it is essential to re-establish the people's trust in the state's institutions and especially in the elected government, as their policies need to be based on some level of legitimacy. What the Irish people have learned from the crisis is that the electorate is indirectly responsible for policies implemented by the government they have elected, that the electorate has to be more critical and aware of political goings-on, and that they have to scrutinise their representatives and hold them responsible for their wrongdoings.

3. Constitutional Convention

Since the political elite had lost the trust of the people due to the mismanagement of the economy by the previous government, the Fine Gael–Labour coalition

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[13]   The Irish parliament (Oireachtas) consists of the President and two Houses: Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate).

[14]   TD stands for Teachta Dála, a member of the Dáil Éireann.

[15]   Yvonne GALLIGAN: *Irish General Elections 2011, 25 February 2011.* Electoral Reform Society, 2011. 10. Available at www.electoral-reform.org.uk/publications/ (accessed: 02. 11. 2013); Fine Gael: *New Politics.* 2010. 3. Available at cdn.thejournal.ie/media/2013/08/fine-gael-new-politics-march-2010.pdf (accessed: 29. 07. 2013).

[16]   Fine Gael op. cit. 2.

[17]   GALLIGAN op. cit. 10.

[18]   GALLIGAN op. cit. 9.

government felt that involvement by the people in the discussion of political reform was necessary. The objective was to re-establish and strengthen the relationship between the policy-makers and the citizens, as this would result in a higher level of acceptance of the necessary reforms by the population. As was announced in the Fine Gael policy document "A New Politics",[19] the coalition government fulfilled their election promise and set up a Constitutional Convention consisting of 100 persons in total, where two thirds are citizens selected at random from the election register (66 persons), one third are politicians from both chambers of the Irish parliament (Oireachtas) and the Northern Irish Assembly (33 persons), and one chairperson. In July 2012 the Constitutional Convention was formally established by both houses of the Irish parliament and was commissioned to make recommendations on amendments to the Irish constitution. Tom Arnold, the appointed chairperson of the Convention, describes the Constitutional Convention as "a new venture in participative democracy in Ireland".[20] The first meeting of the Convention took place on 1 December 2012.[21] Over one year, the Convention had the mandate to consider the following topics: "Review of the Dáil electoral system; Reducing the Presidential term to five years and aligning it with the local and European elections; Giving citizens the right to vote at Irish embassies in Presidential elections; Provision for same-sex marriage; Amending the clause on the role of women in the home and encouraging greater participation of women in public life; Increasing the participation of women in politics, Removing blasphemy from our [the Irish] Constitution; Reducing the voting age to 17".[22] The Convention's work was scheduled to be finalised within one year in December 2013. The government pledged to respond publicly to all recommendations made in the Convention's report within four months of its publication. Additionally, an expert group consisting of academics, political scientists and constitutional lawyers will support the Convention in its task and provide assistance, information and guidance throughout the period.[23]

The Convention was asked to report within two months of its first meeting on two issues: the reduction of the presidential term from seven to five years and the lowering of the voting age to 17. The first decisions were taken in

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[19]   Galligan op. cit. 10.

[20]   Tom Arnold: *Message from the Chairman, The Convention of the Constitution*, 2013. Available at www.constitution.ie (accessed: 25. 08. 2013).

[21]   RTÉ News: *Constitutional Convention meets for first time, Kenny commits to referendums on each decision.* 1 December 2012. Available at www.rte.ie/news/2012/1201/356267-constitutional-convention/ (accessed: 22. 07. 2013).

[22]   MerrionStreet.ie: *Irish Government News Service, Constitutional Convention – Government Proposals.* 28 February 2012. Available at www.merrionstreet.ie/index.php/2012/02/constitutional-convention-government-proposals-28-february-2012/ (accessed: 22. 07. 2013).

[23]   MerrionStreet.ie (2012) op. cit.

January 2013, when a majority of the members voted against a reduction of the presidential term to five years (57 per cent against, 43 per cent in favour) but in favour of reducing the voting age to 17 (52 per cent in favour, 47 per cent against, 1 per cent no opinion). Moreover, a majority declared that the voting age should be further reduced to 16.[24] Furthermore, it recommended that the age for presidential candidates should be reduced to 21 years of age (50 per cent in favour, 47 per cent against, 3 per cent no opinion) but not for other elections (51 per cent against, 42 per cent in favour, 7 per cent no opinion).[25] Since then, the Convention has decided in favour of amending the constitution to allow for same-sex marriages,[26] voted in favour of changing the Dáil electoral system to a new MMPR-STV system,[27] and recommended introducing larger Dáil constituencies and allowing for the appointment of external ministers.[28] In February 2013 the Convention voted on the amendment of Article 41.2, in particular Article 41.2.2, which states that "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."[29] It was recommended that the article of the constitution be amended to make it gender neutral and to include other careers within and beyond the home. Furthermore, the Convention voted in favour of amending Article 40 of the constitution which states "All citizens shall, as human persons, be held equal before the law"[30] to include "an explicit provision on gender equality".[31] Although, 97 per cent of the participants at the

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[24] Constitutional Convention (2013d): *Convention on the Constitution formally submits recommendation to Government to reduce voting age to 16.* 3 March 2013. Available at www.constitution.ie/AttachmentDownload.ashx?mid=edd8f2cf-2896-e211-a5a0-005056a32ee4 (accessed: 06.08.2013). Constitutional Convention (2013f): *Constitutional Convention Votes in Favour of Lowering Voting Age but Opposes Reducing Presidential Term, Press Release – Convention Plenary Meeting.* 27 January 2013. Available at www.constitution.ie/AttachmentDownload.ashx?mid=1314946b-b468-e211-a5a0-005056a32ee4 (accessed: 23. 07. 2013).

[25] Constitutional Convention (2013f) op. cit.

[26] Constitutional Convention (2013a): *Same-Sex Marriage Report submitted to overnment by Convention on the Constitution.* 2 July 2013. Available at www.constitution.ie/AttachmentDownload.ashx?mid=42285e46-fae2-e211-a5a0-005056a32ee4 (accessed: 06. 08. 2013).

[27] Mixed-Member Proportional Representation – Single Transferable Vote.

[28] Constitutional Convention (2013b): *Press Release*, 9 June 2013. Available at www.constitution.ie/AttachmentDownload.ashx?mid=19668332-0ed1-e211-a5a0-005056a32ee4 (accessed: 19. 08. 2013).

[29] Bunreacht na hÉireann: *The Irish Constitution.* Dublin, The Stationery Office, 2012. 162. Available at www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2012/Bunreacht_na_h%C3%89ireann-March2012.pdf (accessed: 06. 08. 2013).

[30] Bunreacht na hÉireann (2012) op. cit. 150.

[31] Constitutional Convention (2013e): *Vote on Amending the Clause on the Role of Women in the Home.* 17 February 2013. Available at www.constitution.ie/AttachmentDownload.

Convention were in favour of governmental support to encourage more women to participate in politics and public life, the motion to include "a duty on the State to take positive action to enhance women's participation in politics and public life" was narrowly defeated.[32]

What seems to be problematic is that the Convention's remit to deliberate on constitutional reform was limited to a pre-set list of topics prepared by the government, which excluded discussion of the abolition of the Seanad and of the children's rights referendum, both of which were election promises by Fine Gael. The children's rights referendum, which took place on 10 November 2012, was successful and required the 31st amendment of the Irish constitution. In June 2013 the government published its proposal for the abolition of the Seanad and additional changes to the constitution to remove references to the Seanad.[33] In July 2013 a vote on this bill was taken in the Seanad, where a majority of the senators, in accordance with the government's wishes, voted 33 to 25 in favour of the bill and for a referendum on the abolition of the Seanad in autumn 2013.[34] According to a Red C Opinion Poll from June 2013, a majority of 52 per cent of respondents are in favour of the abolition, 34 per cent are against, and 14 per cent have not decided yet.[35] However, the government and all the other parties in favour of the abolition of the Seanad were surprised by the actual results of the referendum, which took place on 4 October 2013, when a narrow majority of 51.7 per cent rejected the government's proposal, thereby expressing a wish to retain the two-chamber parliament.[36]

Prior to the installation of the Convention, the government worked with the Constituency Commission on another aspect of political reform, which is again one of Fine Gael's election promises: the reduction of the number of representatives to the Dáil. Already in July 2011 was the Constituency Commission instructed by the government to review constituency boundaries. The final recommendations, published in June 2012, were to reduce the number of TDs from 166 to 158 and to reduce the number of constituencies from 43 to 40. In some instances these changes were to affect the size of the constituency,

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ashx?mid=cee1b183-0b79-e211-a5a0-005056a32ee4 (accessed: 25. 08. 2013).

[32]   Constitutional Convention (2013e) op. cit.

[33]   Eoin BURKE-KENNEDY: Government publishes Seanad abolition referendum details. *The Irish Times*, 14 June 2013. Available at www.irishtimes.com/news/politics/government-publishes-seanad-abolition-referendum-details-1.1417902 (accessed: 01. 08. 2013).

[34]   RTÉ News: *Seanad passes bill for abolition referendum*. 23 July 2013. Available at www.rte.ie/news/2013/0723/464148-seanad/ (accessed: 23. 07. 2013).

[35]   Red C: *Political Opinion Poll*, June 2013. 4, 13. Available at redcresearch.ie/wp-content/uploads/2013/06/Paddy-Power-13th-Jun-Political-Poll-2013.pdf (accessed: 01. 08. 2013).

[36]   Irish Times: *Referendum 2013. An in-depth look at the Seanad and Court of Appeal Referendums*. 8 October 2013. Available at www.irishtimes.com/news/politics/referendum-2013 (accessed: 03. 11. 2013).

although the maximum number of seats per constituency is fixed at five and the minimum at three.[37] Nevertheless, the Constitutional Convention was asked to deliberate on the issue of the electoral system for Dáil elections, thereby considering repercussions on the size of the constituencies and the number of TDs in the Dáil. Even though the Convention voted in favour of a change to the electoral system for Dáil elections (54 in favour, 45 against, 1 abstention) and for larger constituencies, where the minimum should be a five-seat constituency (86 in favour, 13 against, 1 abstention), it rejected a change to the number of Dáil members (59 against, 37 in favour, 4 abstentions).[38] Even though the recommendation to retain the number of Dáil members at 166 is not in the remit of the Convention, it will be interesting to see what the government's reaction will be on this issue, as it has to reject the recommendation of either the Constituency Commission or the Constitutional Convention.

Meanwhile, the government has accepted three of the four recommendations from January 2013, which were to retain the presidential term at seven years, reduce the age for candidacy in presidential election to 21, and reduce the voting age to 16. However, the government rejected the recommendation that ordinary citizens should have a role in the nomination process for a presidential candidate, which under the current provision needs the support of at least 20 Oireachtas members or four local authorities.[39] Besides the referendum on the abolition of the Seanad, the government has to organise additional referenda on the reduction of the voting age to 16 and the lowering of the age of candidates for presidential elections.

The implementation of a Constitutional Convention can be seen as a new approach to increasing political participation by citizens, but a point which can be criticised is that the agenda was limited and pre-set by the government, who simultaneously tried to fulfill their electoral promises and published legislation on the abolition of the Seanad, appointed the Constituency Commission to review constituency boundaries with the aim of reducing the number of deputies in the Dáil, and went ahead with the children's rights referendum without engaging citizens in these discussions. Furthermore, it seems that the government is not inclined to accept all the recommendations unopposed or might even reject them completely. Depending on the government's response, the recommendations –

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[37]   Constituency Commission: *Constituency Commission Report – Dáil and European Constituencies.* Dublin, The Stationery Office, 2012. 5. Available at www.constituency-commission.ie/docs/report2012.pdf (accessed: 06. 08. 2013).

[38]   Constitutional Convention (2013b) op. cit.; Constitutional Convention (2013c): *Voting results – Dáil Electoral System.* 9 June 2013. Available at www.constitution.ie/AttachmentDownload. ashx?mid=a1e7a1cc-0bd1-e211-a5a0-005056a32ee4 (accessed: 24. 08. 2013).

[39]   Harry McGee: Reduction of voting age from 18 to 16 to be put to referendum. *Irish Times*, 10 July 2013. Available at www.irishtimes.com/news/politics/reduction-of-voting-age-from-18-to-16-to-be-put-to-referendum-1.1458229 (accessed: 22. 07. 2013).

if they require a constitutional change – have to be put to referendum. In the end the population, who has not been engaged in the deliberation process, has the right – by means of direct democracy – to decide about any changes to the constitution. Not only did the Constitutional Convention receive a pre-set agenda of topics to be considered for political reform, but it has no guarantee that the government will accept their recommendations. In the end, it is the citizens who decide if they wish to approve any constitutional change in a referendum.

The Citizens' Assembly organised by the "We the Citizens" initiative in June 2011 had a rather different focus on and approach to the entire process of deliberation. The main objectives of the initiative were to prove that the concept of participatory democracy can be implemented in Ireland and to measure whether deliberation has any impact on the participants' attitudes and opinions. The organisers wanted to find out if people in a deliberation process start to better understand the ways of the political decision-making process, hence leading to an appreciation of the current political system and democracy. The principle question of the experiment was "Does deliberation work in Ireland?"

4. We the Citizens

Political reform was perceived as one way to cope with the political, economic and democratic crisis in Ireland. The "We the Citizens" initiative was set up by four Irish political scientists who felt that an adequate reaction to the government's political reform plans was necessary. The academic team – Elaine Byrne of Trinity College Dublin, David Farrell of University College Dublin, Eoin O'Malley of Dublin City University and Jane Suiter of University College Cork – successfully applied to the Atlantic Philanthropies in 2010 for funding for a participatory democracy project.[40]

From spring 2011 onwards, the "We the Citizens" initiative started to bring together citizens from all over the country to discuss issues of political reform in open regional citizens' events. One of the objectives of the project was to give citizens the opportunity to deliberate on issues of political reform and to make informed decisions. However, the organisers of the initiative clarified that the Citizens' Assembly was never meant to replace any institution of Irish representative democracy, but aimed to enhance the existing democratic system.[41] The main aim of the participatory democracy project was to assess if and how deliberation works in Ireland. In fact the focus of the project was

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[40]   We the Citizens: *Participatory democracy in action – a pilot.* December 2011. 10. Available at www.wethecitizens.ie/pdfs/We-the-Citizens-2011-FINAL.pdf (accessed: 29. 07. 2013).

[41]   Fiach MAC CONGHAIL: Column: We need a new politics – and here's how it might work. *TheJournal.ie*, 16 December 2011. Available at www.thejournal.ie/readme/column-we-need-

not so much the nature of reform, but rather the question of how the reforms might be implemented and how deliberative approaches in relation to the urgent questions faced by Irish politicians and citizens work in the Irish context.[42] The participatory democracy project kicked off with regional meetings in Kilkenny, Cork, Galway, Blanchardstown, Tallaght, Letterkenny and Athlone in the months of May and June 2011.[43] The objective was to discuss the citizens' visions of a future Ireland and thereby identify the most important topics, which were compiled and used to set the agenda for the Citizens' Assembly in June 2011.[44] The participants of the Citizens' Assembly were selected at random from a group of citizens by an independent polling institute, thereby ensuring a representative cross section of the Irish population.[45] The selected participants were invited to take part in the meetings of the Citizens' Assembly, though it should be taken into account that people more interested in politics were more likely to accept the invitation.[46] The total number of participants in the Citizens' Assembly was set at 100. In addition to the selection of the participants a poll was commissioned to ask the population about a number of issues which emerged as dominant topics of discussion from the regional meetings.[47] In the end, four areas were identified for deliberation: taxation and spending, educational reform, the roles of TDs, and political reform in general.[48] Participants deliberated the topics in groups of eight, and a trained facilitator and note-taker was assigned to each of the groups. Prior to the deliberation of the four identified main topics, experts gave a brief presentation summarising the most important facts about the subject under consideration. The groups of eight deliberated each of the four topics, and this was followed by a round of plenary discussions to hear the opinions of the other participants. Then the smaller groups continued with another round of deliberations and finally made recommendations, which were put on a ballot paper for the other assembly participants to vote on.[49]

According to Farrell, deliberation on political issues impacted on participants in the Citizens' Assembly on two different levels: it triggered a behavioural shift among the people participating in the deliberation, and it produced an

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a-new-politics-%E2%80%93-and-here%E2%80%99s-how-it-might-work-304591-Dec2011/ (accessed: 29. 07. 2013).

[42] David FARRELL et al.: Deliberative Democracy in Action Irish-style: The 2011 We the Citizens Pilot Assembly. *Irish Political Studies*, 28(1) 2013. 102.

[43] Fiach MAC CONGHAIL op. cit.

[44] FARRELL et al. op. cit. 102.

[45] FARRELL et al. op. cit. 103.

[46] FARRELL et al. op. cit. 107.

[47] We the Citizens op. cit. 30.

[48] FARRELL et al. op. cit. 103.

[49] We the Citizens op. cit. 34–35.

institutional shift with respect to understanding how political institutions work.[50] Due to participation in the deliberative process, people's opinions shifted in relation to efficacy and interest in the topic. Consequently, people were able to place themselves in the political system and become more interested in political topics. As a result of deliberation, people might change their opinions after listening to the opinions of others.[51] Farrell argues that the Citizens' Assembly works for Ireland, as people are willing to discuss issues, take other opinions into account and even make hard decisions, once there is an understanding of the background and the alternative options. Ireland's disastrous economic situation, which resulted in the current austerity policy, means that the government does not have the option of choosing between cutting public spending and increasing taxes, but has to opt for both measures at the same time. When this problem was put forward for deliberation, participants were better able to understand the choices the government took and were more inclined to take harsh decisions themselves.[52]

To be able to measure the impact of deliberation on the participants, a control group was polled on the same issues as those discussed by participants in the Citizens' Assembly. The data confirms that participants "showed a greater interest in politics [and] expressed more willingness to discuss and become more involved in politics".[53] The participants felt more positive about the ability of ordinary citizens to influence politics. It was established that a shift of opinion on economic issues emerged among the participants. This also applied to opinions regarding the role of Dáil deputies, with the result that participants want TDs to concentrate more on legislative and public work on the national level and not so much on the local level.[54] After deliberation on economic issues, people became more willing to accept a tax increase and additional charges, but objected to the sale of state assets.[55] The conclusion of the initiative's reports is that "deliberation works" and that the shifts in opinion "in terms of feelings of trust and interest in politics" are conclusive and statistically significant. "When given access to objective information, the opportunity to hear from expert witnesses and the time to debate and deliberate on these issues, citizens do make informed decisions."[56]

In December 2011 the experiences gained from the Citizens' Assembly were presented to the government in the form of a final report. In February 2012

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[50]   Farrell et al. op. cit. 101.

[51]   Farrell et al. op. cit. 105.

[52]   Farrell et al. op. cit. p. 108.

[53]   We the Citizens op. cit. 43.

[54]   We the Citizens op. cit. 43.

[55]   We the Citizens op. cit. 46.

[56]   We the Citizens op. cit. 50.

the government announced the establishment of the Constitutional Convention as previously promised and as stated in the Programme for Government. This development was welcomed by the "We the Citizens" initiative, as it seemed to have pushed the government into going ahead with the Convention. Although there is no direct link between the government's Constitutional Convention and the Citizens' Assembly, there is the assumption that its positive outcome had some impact on the government's decision to go ahead with the deliberation experiment. Nevertheless, it is doubtful whether the recommendations of the Citizens' Assembly's deliberation exercise will have any impact on government policy. It is therefore not clear whether the government is willing to assess the conclusions derived from the deliberation experiment by the Citizens' Assembly, despite having officially welcomed the initiative and its report.

5. Conclusion: Does Deliberation Work to Establish Trust?

Any change to the Irish constitution requires a referendum, which enables the Irish population to have the last say on the issue. After Ireland gained its independence, the constitution enacted in 1937 by *Taoiseach* (Prime Minister) Eamon de Valera was a tool for establishing an Ireland politically and culturally distinguishable from Great Britain. De Valera, who came from the Irish republican tradition and was one of the surviving 1916 rebels, kept alive the idea of sovereignty by the people as declared by the Irish rebels in the Proclamation of the Irish Republic in 1916. The Irish republic, in contrast to the British monarchy, was meant to be a political system where people are ruled by their elected representative and not by a dynastic monarch. For Irish citizens, the current political and economic climate is proof that Ireland has deviated from this idea of the democratic republic. The economic crisis, which triggered the political upheaval at the elections in 2011, made it necessary for the new government and the citizens to look for ways to return to the roots of Irish democracy. At the moment it cannot clearly be established whether the deliberation experiments by the governments and the "We the Citizens" initiative will have any impact on political reform efforts or on possible government policies to strengthen aspects of participatory democracy in everyday politics.

The government's Constitutional Convention works within very limited terms of reference and is dependent on the government's decision to act upon their recommendations, which might require the announcement of a referendum, giving the people the final say on the issue. The focus of the Convention was deliberation on aspects of political reform and to issue recommendations in this regard for the government. In contrast, the "We the Citizens" Assembly focused on the question of whether this tool of participatory democracy could work in

Ireland. From the start of the project it was made clear that the Assembly is not designed to replace any other democratic state institutions and that the project is limited in time and has a specific objective. The organisers showed that deliberation can produce a shift in the behaviour of the people in relation to how political decisions are taken, thereby increasing understanding of how politics works. Based on Michael Saward's argument that deliberative democracy is more than counting heads in elections – it is about getting people involved in discussion – the Citizen's Assembly and the Constitutional Convention were established with the idea of citizens' involvement in political discussion. "This discussion should deepen participant knowledge of issues and awareness of the interests of others, and help to instil the confidence to play an active part in public affairs."[57] It can be established that this seems to have happened in the case of the "We the Citizens" initiative as indicated by David Farrell.

Deliberative forms of democratic participation can increase understanding of political decision-making processes, as the people participating in the deliberation are faced with similar situations as their elected representatives and governments. Subsequently, this leads to a better understanding of how the political system works, the background to why the decisions were taken and why politicians opted for certain alternatives, thereby re-establishing the link between elected representatives and citizens. Hence, it is the government's assumption that deliberative participation can aid in dealing with the anger of the population in relation to the current political situation in Ireland. Although deliberation has a positive effect on participants and can enhance participatory democracy, it is limited in its actual impact on policy decisions. In this respect deliberation can only help to change people's attitudes towards politics and politicians when they are actively involved in the process. Consequently, despite the fact that trust in politicians and the political system can only be re-established within a small group of people, deliberation has the potential to increase people's support for democracy.

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[57]   Michel SAWARD: *Democracy.* Cambridge, Polity Press, 2003. 121.

AUTONOMY AND MINORITY REPRESENTATION IN SOUTH TYROL

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1. Introduction

In the Italian constitutional tradition, the concept of nation is "understood as *demos* and not as *ethnos*", therefore "legally speaking, in Italy there are no ethnic but only linguistic minorities."[2] The rights of officially recognized linguistic minorities are not attached to the persons belonging to the respective groups, but to a certain territory where they can be exercised. In other words, when it comes to minority protection, at the national level Italy applies the territorial not the personal principle. In practice, this means that members of the same linguistic minority may be treated differently depending on whether or not they live in a certain territorial-administrative unit. The autonomy arrangements at sub-national level and the high degree of asymmetry are the main features of the Italian system of minority protection.

In academic literature and public discourse, it is generally asserted that South Tyrol[3] is one of the most successful examples of minority protection through territorial self-government. The province enjoys a far-reaching autonomy within Italy's asymmetric regionalism, and its institutional set-up is based on

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[1] During the common elaboration of the present article, parts 3.1, 3.2. (a) and (b) were written by Sergiu Constantin, parts 2, 3.2 (c) and (d) by Elisabeth Alber, and parts 1 and 4 by both.

[2] Francesco Palermo: Asymmetric, "Quasi-Federal" Regionalism and the Protection of Minorities: The Case of Italy. In: Alan Tarr – Robert Williams – Joseph Marko (eds.): *Federalism, Sub-National Constitutions, and Minority Rights*. Westport, Connecticut London, Praeger Publishers, 2004. 107–31, at 114.

[3] In Italian and German, the autonomous province of South Tyrol is called *Provincia Autonoma di Bolzano – Alto Adige / Autonome Provinz Bozen – Südtirol*. Bolzano/Bozen is the capital city of the autonomous province. South Tyrol together with the autonomous province of Trento (official name *Provincia Autonoma di Trento*) forms the autonomous region Trentino–South Tyrol (official name *Regione Autonoma Trentino-Alto Adige/Südtirol*).

the principle of power-sharing among three linguistic groups, i.e. German, Italian and Ladin.[4] South Tyrol in many ways epitomizes the development of the minority protection system in international law.[5] It became part of Italy after World War I, and the Italian fascist regime (1922–43) imposed a series of harsh assimilation policies on the German- and Ladin-speaking inhabitants of the territory. The majority-minority conflict in South Tyrol reached a new dimension after the First Autonomy Statute entered into force in 1948. In the 1960s, the grievances of the majority German-speaking population of the province escalated into violence. The implementation of the Second Autonomy Statute (ASt) of 1972 through a set of special normative and institutional measures led to the conflict settlement in 1992.

South Tyrol is an alpine area borderland with slightly more than half a million inhabitants.[6] According to the 2011 census, 69.41% of South Tyroleans are German-speakers, 26.06% are Italian-speakers and 4.53% are Ladin-speakers. While persons belonging to the German linguistic group inhabit mainly the rural areas, the Italian-speaking population constitutes the majority in the capital city, Bolzano/Bozen, and the Southern part of the province. In fact, all major cities have a consistent number of Italian-speakers. The Ladin linguistic group is territorially concentrated in the Eastern part of the province, in the "Ladin Valleys" (i.e. Badia and Gröden).[7]

This article aims to provide an overview of the specific procedures and mechanisms that guarantee minority representation in South Tyrol. It starts with a short presentation of the conflict's history, focusing mostly on the developments that led to the establishment of the present self-governance arrangement. The main part of the article deals with the issue of representation in the context of the autonomy statute's implementation process and explores the key pillars of South Tyrol's consociational democracy. Firstly, we analyze the peculiar features of the "Commission of Six", which is in charge of the negotiation and

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[4]   Ladin is a Rhaeto-Romance language spoken in the Central and Eastern Alpine region. In Italy, it is spoken in the valleys of the Dolomite mountain range situated in the provinces of South Tyrol, Trento and Belluno.

[5]   Roberta MEDDA-WINDISCHER: Protection of Minorities under International Law and the Case of South Tyrol. In: Jens WOELK – Francesco PALERMO – Joseph MARKO (eds.): *Tolerance through Law. Self Governance and Group Rights in South Tyrol.* Leiden – Boston, Martinus Nijhoff Publishers, 2008. 17–49.

[6]   Overall, South Tyrol's surface area amounts to 7,400 km². Almost 5,000 km² are more than 1,500 meters above sea-level and only 292 km² are less than 500 meters above sea-level. Categorized by land use, most of the surface area is forest (2,920 km²) or used for agriculture (2,670 km²). Agriculture and tourism are two of the major components of South Tyrol's flourishing economy. For detailed information see "South Tyrol in figures – 2012", Provincial Statistics Institute ASTAT, available at www.provincia.bz.it/astat/de/service/845.asp (accessed: 24. 10. 2013).

[7]   For detailed information, see "South Tyrol in figures – 2012" op. cit.

drafting of the "enactment decrees" that bring into force all executive measures dealing with matters under South Tyrol's competence. Secondly, we highlight the special position of these enactment decrees within the Italian legal system and explain why, in this special mechanism of joint commissions, the principle of parity prevails over the principle of democratic legitimacy. Thirdly, we focus on the four main elements of South Tyrol's consociationalism: participation of all linguistic groups in the joint exercise of power, right of veto to defend each group's vital interests, proportionality (i.e. quota system) based on declarations of belonging (or affiliation) to linguistic groups and cultural autonomy for each group. The concluding remarks summarize the main aspects of minority representation in South Tyrol and highlight the strengths and weaknesses of the special mechanisms and procedures established by the autonomy system.

2. Historical Background

The alpine area that today covers the Italian provinces of South Tyrol and Trentino was ruled by the House of Habsburg from the 14th century until the end of World War I. After the Peace Treaty of St. Germain (1919), these territories became part of Italy without any guarantees regarding the rights of German- and Ladin-speaking inhabitants.[8] The population of Trentino was almost entirely Italian-speaking, but in South Tyrol the mother tongue of a large majority of the people was either German or Ladin. From 1922, when the fascist regime came to power, Italy started to adopt a series of repressive measures against the German-speaking South Tyroleans with the aim of "Italianizing" them. Firstly, the fascists tried to eliminate the German language and culture from the public space. German-language schools, cultural associations and newspapers were closed down. German-speaking civil servants were fired from the public administration, which functioned only in Italian. The use of Italianized personal names and place names was imposed. Secondly, the Italian government encouraged industrialization through the migration of Italian workers from other parts of the country to South Tyrol. Thirdly, in 1939 Hitler and Mussolini agreed upon the "Option" as the final solution to the South Tyrolean "problem". The German-speakers had to choose between moving to the German Reich and staying in South Tyrol. The former option meant preserving their linguistic and cultural identity, but giving up their home. By choosing the latter, they were expected to renounce their mother tongue and culture and thus accept a rapid "Italianization". A large percentage of German-speaking South Tyroleans

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8   Rolf STEININGER: *South Tyrol: A Minority Conflict of the Twentieth Century*. New Brunswick, London, Transaction Publishers, 2003. 5.

decided to leave, although in the end only a small part of them left, due to the outbreak of the war.[9]

In 1945, the South Tyrolean People's Party *(Südtiroler Volkspartei – SVP)* was established as the legitimate representative of all German- and Ladin-speakers in South Tyrol. One of the first initiatives of the party was the collection of 158,000 signatures for self-determination. Nevertheless, the Paris Peace Treaty (1947) confirmed the absorption of South Tyrol into Italy. However, in September 1946 Austrian foreign minister Karl Gruber and Italian prime minister Alcide De Gasperi signed an agreement that guaranteed the German-speaking population of South Tyrol "complete equality of rights with the Italian-speaking inhabitants" and the "exercise of autonomous legislative and executive regional power". The Gruber–De Gasperi Agreement became Annex IV to the Paris Peace Treaty, which therefore provided for an international anchoring of the rights of the German-speaking population of South Tyrol. Two more aspects are worth noting in relation to the Gruber–De Gasperi Agreement: firstly, it acknowledged the protective function that Austria plays as the kin-state of the German-speaking South Tyrolese and, secondly, it did not cover the Ladin minority. However, since its foundation, the SVP has also claimed to represent the Ladins' interests.

The Italian Constitution of 1948 established a territorial-administrative system of twenty regions with an inbuilt asymmetric feature. Five regions were "special" because they had their own autonomy statutes as laws of constitutional rank, significant legislative and administrative competences, as well as financial autonomy.[10] Moreover, they enjoyed a special relationship with the central government based on the bilateral principle. The remaining fifteen regions were "ordinary", as they had limited legislative competences and similar governance structure.[11] Trentino–South Tyrol was established as one of the five special regions, and the Italian government considered its international obligation fulfilled after the First Autonomy Statute entered into force in 1948. However, the German-speaking South Tyroleans challenged this autonomy arrangement because most legislative competences belonged to the region and not to the two provinces (i.e. South Tyrol and Trento). At the regional level, Italians were in the majority (71.5%). As a consequence, the German-speaking South Tyroleans were easily outvoted in the decision-making process. This situation led to an increasing dissatisfaction in South Tyrol and, at the end of the 1950s, the

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[9]   For details, see Emma Lantschner: History of the South Tyrol conflict and its settlement. In: Woelk – Palermo – Marko op. cit. 3–15, at 9.

[10] The five special regions were Sicily and Sardinia (i.e. the two main islands), Trentino–South Tyrol, Aosta Valley and Friuli–Venezia Giulia (i.e. three small Northern regions with large minority populations).

[11] Palermo (2004) op. cit. 109.

tension erupted in a series of bomb attacks against electricity powers plants, state symbols and security forces. In 1960, Austria in its function as kin-state urged the United Nations to take a position on the South Tyrolese question. In two resolutions, the UN General Assembly recommended the parties involved find a solution through further negotiations.[12]

It took several decades of strenuous negotiations brought forward by political elites of different levels within special commissions to achieve a conflict settlement in South Tyrol. In 1961, the Italian Minister of the Interior established the "Commission of 19" with a mandate to investigate the "South Tyrolean question" and to propose to Rome a set of measures for the conflict settlement. The commission was composed of eleven Italian-speakers, seven German-speakers and one Ladin. It is worth noting that the Italian members were representing not only the national government but also the governments and parliaments of the region of Trentino–South Tyrol and the province of South Tyrol respectively. The regional and provincial authorities appointed all German-speakers in the commission and South Tyrol appointed the only Ladin member. The Commission of 19 submitted its report in 1964 and after five years of negotiations the Italian government proposed to the SVP a set of 137 measures (known as the "Package") aiming to reform the First Autonomy Statute. The core element of the Package was the significant transfer of legislative and administrative powers from the regional to the provincial level. In November 1969, the SVP approved the Package by a narrow majority after a heated internal debate.[13] A few weeks later, both the Italian and Austrian parliaments endorsed this set of measures. However, neither the regional nor the provincial parliament had a say with regard to the Package. Similarly, there was no direct consultation via referendum of the population of the region of Trentino–South Tyrol or the province of South Tyrol.

The Second Autonomy Statute of 1972 maintained the region of Trentino–South Tyrol as a "roof" structure but transferred most of its legislative and administrative competences to the two provinces. Hence, this constitutional law gave Trento and South Tyrol a special position within the Italian asymmetric regional system. They are the only *special autonomous provinces*. The

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[12]   UN General Assembly Resolution 1497 (XV) of 31 October 1960, "The Status of the German-Speaking Element in the Province of Bolzano, Implementation of the Paris Agreement of 5 September 1946"; and UN General Assembly Resolution 1661 (XVI) of 28 November 1961, "The Status of the German-Speaking Element in the Province of Bolzano (Bozen)".

[13]   Only 52.8% of the SVP delegates voted for the Package in November 1969. The party was split between two conflicting positions. On the one hand, the hardline opinion was to reject the Package and thus reaffirm the external self-determination goal. On the other hand, the pragmatics viewed the compromise of establishing an extensive autonomy at the provincial level (where the German-speaking population was in the majority) as the only realistic solution. See LANTSCHNER op. cit. 12.

implementation of the most important provisions of the Second Autonomy Statute in South Tyrol took twenty years. In 1992, Austria in its function as kin-state officially acknowledged at the UN General Assembly that the conflict had been settled. The representation and influence of linguistic groups in the special mechanisms and procedures established for the implementation and functioning of the autonomy arrangement is one of its key factors for success.

3. Procedures and Mechanisms of Minority Representation

3.1. Implementation of the Autonomy Statute

According to Article 107 (2) ASt, the executive measures dealing with matters under South Tyrol's competences and the implementation of the autonomy basic law shall be issued by enactment decree following the consultation of a joint commission made up of six members, of whom three represent the state and three the autonomous province. The chief feature of this Commission of Six is the double parity between the actors involved.[14] Firstly, the commission has an equal number of members representing the state and the autonomous province and, secondly, the Italian and German linguistic groups have an equal number of representatives as well. However, as Figure 1 below illustrates, in the Commission of Six one of the members representing the state must belong to the German linguistic group, and one of South Tyrol's representatives must belong to the Italian linguistic group. This is logical, as German-speakers are a minority in Italy and Italians are a minority in South Tyrol.
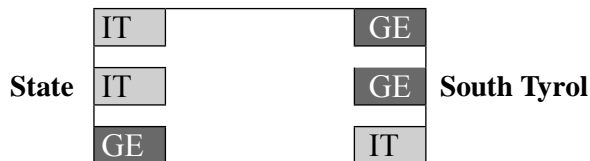
Figure 1: Composition of the Commission of Six

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[14]   The Commission of Six is part of a larger Commission of Twelve that deals with the implementation of the autonomy statute at the level of the entire region of Trentino–South Tyrol. However, today this Commission of Twelve plays a limited role because most competences belong to the two provinces (Trento and South Tyrol) and not to the region. According to Art. 107 (1) ASt, in the Commission of Twelve both the state and the region have six representatives. The members representing the region are appointed as follows: two by the regional parliament, two by the provincial parliament of South Tyrol and two by the provincial parliament of Trento). Finally, three of the members of the Commission of Twelve must belong to the German linguistic group.

It is worth noting that none of the joint commission's members belongs to the Ladin linguistic group. The lack of representation of the small Ladin minority may be criticized, but when this mechanism was established, the main concern was to ensure a symmetrical balance between the state and the province, on the one hand, and between the two largest linguistic groups in South Tyrol, on the other. Moreover, the SVP declares itself to be a "collective party of German and Ladin South Tyroleans of all social classes",[15] therefore the joint commission's members representing the German linguistic group and the province also defend the interests of the Ladins, in principle.

It is undoubtedly true that the clever structure and composition of the joint commission encourages confidence building and collaboration between all the actors involved. The big differences between them in terms of size of territory and population are irrelevant. They all have the same weight in the Commission of Six and, in the case of divergent opinions, the only way out of a deadlock is through cooperation and compromise. In this joint commission the state, the province and the linguistic groups are "forced" to find the middle ground and the six experts negotiate a solution that is acceptable to all. They draft the texts of the enactment decrees and submit them to the Italian government for approval. Once they are approved, the enactment decrees enter into force without being debated in the Italian parliament. Hence, the national legislative body is "bypassed" in this legislative process and a subsequent law of the Italian parliament cannot amend or abolish an enactment decree that implements the autonomy constitutional law. Only a subsequent enactment decree adopted through the same procedure (i.e. drafting by the Commission of Six and then approval by the Italian government) can amend or abolish an existing enactment decree. In fact, these legislative decrees enjoy a special status within the Italian legal system. Their position in the hierarchy of norms is below the constitutional provisions but above the ordinary laws. This special rank of the enactment decrees is linked to the necessity of upholding the principle of parity with regard to state-province and majority-minority relations in the process of implementation of the autonomy statute. South Tyrol elects only a handful of deputies and senators in a national parliament of almost 1000 members. A mechanism designed to guarantee minority representation and influence in the decision-making process with respect to the implementation of the autonomy constitutional framework would be meaningless if the Italian parliament could amend or abolish the hard-negotiated enactment decrees drafted by the Commission of Six. Thus, the principle of democratic legitimacy is limited by the principle of parity.[16] A

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[15] *Das neue Programm der Südtiroler Volkspartei*, Merano/Meran, 8 May 1993. 4. The document is available online at www.svp.eu/smartedit/documents/download/grundsatzprogramm.pdf (accessed: 24. 10. 2013).

[16] Francesco PALERMO: Implementation and Amendment of the Autonomy Statute. In: WOELK –

small group of appointed experts drafts the norms that implement the autonomy statute, which in turn prevail over the laws adopted by the democratically elected Italian parliament.

Finally, the transformation of the Commission of Six is particularly noteworthy in at least two essential aspects. Firstly, it was designed as a consultative body but became the main decision-making institution with respect to the implementation of the ASt. Secondly, it was established as a temporary body but functions even today, more than forty years after the ASt entered into force.[17] In fact, the work of the Commission of Six guarantees the further development of South Tyrol's autonomy. Without this joint commission, the autonomy system would be "frozen", as the existing enactment decrees can only be amended or abolished by another enactment decree.

Ultimately, the role of the joint commissions is also to guarantee that no essential rules or special mechanisms of the system are changed unilaterally. South Tyrol's institutional design is based on both separation of groups and their "forced" cooperation. This brings us to the question of how South Tyrol fits into the framework of consociational theory.

3.2. South Tyrol's Consociational Democracy

Consociationalism is at the heart of academic and political debate in many divided societies. According to this influential theory, first formulated by Arend Lijphart more than forty years ago, in such context four basic elements are required for engineering a democratic and stable political system: (1) a grand coalition government between parties representing the different groups, (2) cultural autonomy, (3) the proportionality principle as regards the voting system and civil service, and (4) the right of veto.[18] South Tyrol is an illustrative example in this regard because the conflict settlement required the establishment of a sound system of institutional and legal guarantees for linguistic groups, in accordance with these principles of consociational democracy.

The group rights regime established in the autonomous province is based on the mechanism of declaration of belonging (or affiliation) to a linguistic group and a quota system. The underlying principle is to allow all segments of society to contribute to the development of a system that while separated in its essence, forces all groups to cooperate in practice. The consociationalism in South Tyrol translates into four main elements: the participation of all linguistic

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PALERMO – MARKO op. cit. 143–59, at 148.

[17]   According to Art. 108 ASt, most of the enactment decrees containing the executive measures of the autonomy statute should have been issued within two years after its entry into force.

[18]   Arend LIJPHART: Consociational democracy. *World Politics*, 21(2), 1969. 207–25.

groups in the joint exercise of power, the right of veto to defend each group's vital interests, the quota system based on linguistic declarations, and cultural autonomy for each group.

3.2.1. Power Sharing

The South Tyrol autonomy arrangement combines legally guaranteed separation of groups with institutionalized forms of cooperation between their political elites. It may reasonably be argued that German-, Italian- and Ladin-speakers live together but apart. The logic of division along linguistic lines goes beyond civil society and pervades the whole political–administrative system. Consider, for example, the organization of political parties in South Tyrol. All German-speaking parties are province based but have a different stance as regards the self-governance arrangement: while the SVP, the main party, is pro-autonomy and aims to enhance it, the other three smaller parties are anti-autonomy and call for self-determination or independence.[19] Italian-speaking parties reflect to various extents the patterns and logic of national-level politics. Moreover, the Italian political spectrum shows a relatively high degree of fragmentation. The Green Party (*Grüne Fraktion – Gruppo verde – Grupa vërda*) is traditionally the only party in South Tyrol that is "interethnic", in the sense that its underlying philosophy brings together people from all language groups. However, in recent years a new political actor that may be considered interethnic has emerged. *Movimento Cinque Stelle Alto Adige – Südtirol* is the provincial branch of the national party *Movimento Cinque Stelle* and ran in the October 2013 provincial elections with a candidate list composed of 14 Italian-speakers, five German-speakers and one Ladin. A German-speaking candidate of *Movimento Cinque Stelle Alto Adige – Südtirol* was elected to the provincial parliament.

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[19] Günther PALLAVER: Südtirols Parteien und Parteiensystem: Ethnisch, fragmentiert und zentrifugal. In: Günther PALLAVER (ed.): *Politika 09, Jahrbuch für Politik, Südtiroler Gesellschaft für Politikwissenschaft.* Bolzano/Bozen, Edition Raetia, 2009. 245–70.

Political parties and linguistic cleavage			
German-language	**Italian-language**	**Ladin-language**	**"Interethnic"**
Südtiroler Volkspartei	*Partito Democratico*	*Ladins Dolomites*	*Grüne Fraktion – Gruppo verde – Grupa vërda*
Die Freiheitlichen	*Popolo della Libertà*		
Südtiroler Freiheit	*Lega Nord*		
BürgerUnion	*L'Alto Adige nel cuore* *Forza Alto Adige* *Unitalia* *Scelta Civica* *La Destra*		*Movimento Cinque Stelle Alto Adige – Südtirol*

Table 1: The main regional and national parties in South Tyrol

All this goes to show that in South Tyrol different political arenas coexist while being separated along linguistic lines. Hence, one of the main features of the political sphere is the segmental competition. For instance, in the provincial elections German-speaking parties compete among themselves but not with Italian-speaking parties.[20]

The parliament of South Tyrol consists of thirty-five members elected for a mandate of five years through direct and universal suffrage based on an open list proportional representation voting system.[21] Voters can indicate up to four preferences for candidates selected from the party list for which they vote. The number of votes that a party list receives determines the number of candidates elected in the provincial parliament from the respective party list. The fact that voters can indicate their order of preference within the list also makes it possible to elect candidates placed at the lower end of the party lists. The representation of the Ladin linguistic group in the provincial parliament is guaranteed. If none of the Ladin candidates receives enough votes to be elected to the provincial parliament through the regular procedure, one seat is assigned to the Ladin candidate who received the highest number of votes. This Ladin candidate takes the place of his/her colleague from the party list who, according to the individual ranking of the votes, should have been the last of the elected candidates from the respective party list. The Italian Constitutional Court has upheld this system, arguing that, in certain circumstances, the goal to protect linguistic minorities

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[20]   On the other hand, notable is the recent trend among some Italian-language parties to include a number of German-speakers as well on their list of candidates, with the aim of collecting votes from the German linguistic group. For instance, national parties such as *Partito Democratico* and *Scelta Civica* did this in the 2013 provincial elections.

[21]   Art. 47 (3) ASt and Provincial Law no. 5 of 8 May 2013 on the election of provincial parliament in 2013 and the composition of provincial government.

may require specific guarantees that go beyond the principles of proportional representation and equality.[22] According to Article 48c ASt, the members of the provincial parliament elect its president and two vice-presidents, who must belong to different linguistic groups. The parliament has a rotating presidency: for the first two and a half years of the mandate, the president is a member belonging to the German linguistic group and for the subsequent period, he/she is an Italian-speaker. A member belonging to the Ladin linguistic group may be elected president of the provincial parliament, subject to the approval for the respective period of the German or Italian linguistic groups.

It should not be omitted that, according to Article 25 ASt, Italian citizens can only vote in South Tyrol's provincial elections after four years of permanent residence in the province. The rationale for this is to impede any attempt to influence the election results by engineering demographic changes through the migration of Italians from other parts of the country. The Italian Constitutional Court has confirmed the legitimacy of electoral regulations based on the specific requirements laid down in Article 25 ASt.[23] It is worth noting that the present provincial electoral law requires a gender quota in the lists of candidates. Indeed, in the October 2013 provincial elections, at least one third of the candidates from each party list must be women. This is the first time such regulation has applied. Another novelty is the possibility of voting by correspondence, under several conditions.[24]

The composition of South Tyrol's government must reflect the numerical strength of the linguistic groups as represented in the provincial parliament (Article 50 ASt). However, the small Ladin linguistic group may be represented in the provincial government even by derogation from this proportional system. The government is composed of a maximum of nine members and the two genders must be represented proportionally to their proportion in parliament.[25] The German-speaking president of the government[26] (and of the autonomous province of South Tyrol) has two vice-presidents, one belonging to the German linguistic group and the other to the Italian group. The internal regulations of local public bodies shall contain provisions to ensure the proportional

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[22] Constitutional Court's Judgment no. 261 of 19 June 1995. For details (in Italian), see www.giurcost.org/decisioni/1995/0261s-95.htm (accessed: 24.10.2013).

[23] Constitutional Court's Judgment no. 240 of 17 December 1975. For details (in Italian), see www.giurcost.org/decisioni/1975/0240s-75.html (accessed: 24.10.2013).

[24] Arts. 5 and 8 of Provincial Law no. 5 of 8 May 2013 on the election of provincial parliament in 2013 and the composition of provincial government.

[25] Art. 2 (3) of Provincial Law no. 5 of 8 May 2013 on the election of provincial parliament in 2013 and the composition of provincial government.

[26] The president of the government is *de facto* not *de jure* a member of the German-speaking group. This is a consequence of the fact that the president is elected by the provincial parliament that always has a German-speaking majority.

representation of linguistic groups in the composition of their organs and to guarantee the representation of the Ladins. Moreover, if in the municipal council there are at least two members from a linguistic group, that group has the right to be represented in the municipal government (Articles 61 and 62 ASt).

The SVP has dominated the political life of the province since its foundation. This catch-all party based on Catholic social principles won all provincial elections held after World War II and gained an absolute majority of seats in the provincial legislative body.[27] However, in recent years the SVP has lost more and more votes to the three smaller (and anti-autonomy) German-speaking parties. In 2008, it received less than 50% of the votes, which had never happened before, but managed to obtain 18 seats. The SVP won the October 2013 elections but, for the first time, lost the absolute majority in the provincial parliament (see Table 2 below).

German-language party	Legislature			
	1998–2003	2003–2008	2008–2013	2013–2018
Südtiroler Volkspartei	21 seats	21 seats	18 seats	17 seats
Die Freiheitlichen	1 seat	2 seats	5 seats	6 seats
Südtiroler Freiheit	–	–	2 seats	3 seats
BürgerUnion	2 seats	2 seats	1 seat	1 seat

Table 2: The results of German-language parties in the last four provincial elections
Source: www.consiglio-bz.org/it/elezioni/risultati-elezioni-provinciali.asp

Before 2013, the SVP always governed in coalition with an Italian party, because that is one of the specific requirements laid down in the autonomy statute. The Italian linguistic group usually had two members in the provincial government.[28] The results of the last elections brought some significant changes. Firstly, the SVP now needs the support of one or more parties representing the Italian linguistic group to form a government. In other words, Italian parties will join the ruling coalition not only with respect to the principle of proportional representation, but also for the purpose of procuring a political majority. It is obvious that this will affect the balance of power and the relations between the coalition partners. Secondly, the representation of the Italian linguistic group in the provincial parliament fell due to absenteeism and party fragmentation from eight to five members (see Table 3 below). According to the autonomy

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[27]   Günther PALLAVER: The Südtiroler Volkspartei: from Irredentism to Autonomy. In: Lieven DE WINTER – Margarita GOMEZ-REINO – Peter LYNCH (eds.) *Autonomist Parties in Europe: Identity, Politics and the Revival of the Territorial Cleavage*. Barcelona, Aleu, 2006. 161–88.

[28]   Between 2008 and 2013, South Tyrol's government was composed of eight members: five German-speakers (from the SVP), two Italian-speakers (from the left-wing *Partito Democratico*) and one Ladin (from the SVP).

statute and the principle of proportionality, the new government has only one Italian-speaking member. It may be asserted, however, that such government composition is questionable in the light of the democratic representation principle. It may be argued that the Italian and Ladin linguistic groups cannot have the same number of members in the provincial government because the former is more than six times larger than the latter. If the SVP wanted to show openness towards Italian-speakers, it could have accepted the inclusion of a second member from this group in the coalition government, notwithstanding the proportionality rule. However, the party rejected such an arrangement, arguing that it may be challenged as unconstitutional because it goes beyond the letter of the autonomy statute. Finally, the new government has to be gender balanced. Roughly one third of the members of the provincial parliament elected in 2013 are women, therefore according to the principle of proportionality, two out of the present eight-member government are females.[29]

Party	Votes %	Seats	Linguistic group of elected candidates
Südtiroler Volkspartei	45.7	17	16 German-speaking, 1 Ladin-speaking
Die Freiheitlichen	17.9	6	6 German-speaking
Alliance between *Verdi – Grüne – Verc* and *Sinistra Ecologia Libertà*	8.7	3	2 German-speaking, 1 Italian-speaking
Südtiroler Freiheit	7.2	3	3 German-speaking
Partito Democratico	6.7	2	2 Italian-speaking
Alliance between *Forza Alto Adige*, *Lega Nord* and *Team Autonomie*	2.5	1	1 Italian-speaking
Movimento Cinque Stelle	2.5	1	1 German-speaking
Alliance between *BürgerUnion*, *Ladins Dolomites* and *Wir Südtiroler*	2.1	1	1 German-speaking
L'Alto Adige nel cuore	2.1	1	1 Italian-speaking
Members of provincial parliament		35	29 German-speaking, 5 Italian-speaking and 1 Ladin-speaking

Table 3: Results of 2013 provincial elections
Source: www.consiglio-bz.org/it/elezioni/risultati-elezioni-provinciali.asp

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[29] The present provincial government is composed of six German-, one Italian-, and one Ladin-speaker. Both female members are German-speakers.

3.2.2. Right of Veto

An additional guarantee for linguistic groups is the right of veto foreseen by Article 56 ASt. It is not absolute, having instead a preventive nature that serves as a sort of "alarm-bell procedure" which can ultimately end before the Italian Constitutional Court. Whenever a draft law is considered prejudicial to the equality of rights between citizens of the different linguistic groups or to the cultural characteristics of the groups themselves, a majority of the members of a linguistic group in the provincial parliament may request a vote by linguistic groups. If the request for separate voting is not accepted, or if the draft law is approved despite a contrary vote of two thirds of the members of the linguistic group that had put forward the request, the majority of that group may challenge the law before the Constitutional Court within thirty days of its publication.[30] However, the law would remain in force until the Court decided otherwise. "In this way, democratic decision-making [is] upheld, in contrast, for example, to situations elsewhere where the negative vote by a majority of one linguistic group would have the same effect as an automatic veto."[31] With respect to administrative acts, the autonomy statute lays down similar rules. The members of the regional or provincial parliaments may contest any administrative act that is considered prejudicial to a linguistic group before the regional Court of Administrative Justice. Also, municipal councilors have the right to contest acts adopted by local administration at the same court, whenever they are considered prejudicial by a majority of the councilors belonging to the linguistic group that considers its rights to have been violated (Article 92 ASt).

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[30] A hypothetical example may better explain the mechanism. Let us imagine that the composition of the provincial parliament is the following: 25 members belong to the German linguistic group, nine to the Italian linguistic group and one is a Ladin-speaker. Seven Italian-speaking members consider that a draft law is prejudicial to the Italian group and request a separate vote by linguistic groups. The results of the voting are the following: within the German linguistic group, 20 members of parliament vote for the draft law and five against it; within the Italian linguistic group, seven votes are against and two are in favor; finally, the Ladin representative votes for the draft law. Summing up the votes, the result is that the draft law is approved (23 votes in favor, 12 against) despite the opposition of more than two thirds of the Italian-speaking members of the parliament. In this case, the majority of Italian-speaking members of the parliament may challenge the law before the Constitutional Court.

[31] Antony ALCOCK: *The South Tyrol Autonomy. A Short Introduction*. University of Ulster, Northern Ireland, County Londonderry, Bozen/Bolzano, 2001. 14. For details see www.provinz.bz.it/en/downloads/South-Tyrol-Autonomy.pdf (accessed: 24.10.2013).

3.2.3. Quota System

The proportionality principle is enforced through a quota system based on a declaration of belonging (or affiliation) to a linguistic group.[32] Following a 2005 reform, there are two types of declarations: one that is used to determine the numerical strength of the linguistic groups, and another that is used for the exercise of certain rights (e.g. access to public jobs and housing, right to stand as candidate in elections). The former is anonymous and it is submitted every ten years during the census to the provincial statistical office of the province by Italian citizens who are residents of South Tyrol. The latter contains identification data (i.e. given name and surname), but is kept in a sealed envelope at the Bolzano/Bozen Court until the individual concerned requests it to exercise certain rights. In addition to Italian citizens, residents of the province who are citizens of EU member states can also make this declaration. Unlike the anonymous declaration, the one containing identification data is not attached to the census. Finally, it is possible to withdraw it or change it, but only under certain conditions. This is to avoid abuse of the system.[33]

According to Article 89 (3) ASt, employment in public service is "reserved for citizens belonging to each of the three linguistic groups in proportion to the numerical strength of those groups ascertained from the declarations of membership given at the time of the official census of the population".[34] In practical terms, this means that candidates only compete for the posts reserved for their respective group, not for the totality of the posts. Those who do not

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[32]   If, for whatever reason, a person does not want to declare his/her *belonging* to a linguistic group, the person has the option to merely choose his/her *affiliation* (*aggregazione* or *Angliederung*) to a linguistic group. However, from the statistical point of view, those who make declarations of affiliation also count as members of the respective linguistic group. For instance, a bilingual person coming from a mixed family may feel that he/she "belongs" equally to the German and Italian linguistic groups. In the end, he/she chooses to declare affiliation (not belonging) to the German-speaking group. The provincial statistical office will count that person as a member of the German-speaking group.

[33]   Until 2005, it was compulsory to submit both types of declaration every ten years during the census. After the reform, only the anonymous declaration remained attached to the census. A declaration with identification data submitted to the Bolzano/Bozen Court during the 2001 census remains valid until the person who made it decides to withdraw or change it. To avoid abuse of the system (i.e. individuals switching from one language group to another for reasons of expediency), the declaration may only be changed five years after it was made. Moreover, if it is changed, the new declaration only enters into effect after a delay of two years. Anybody may withdraw his/her declaration at any time. The Bolzano/Bozen Court returns the sealed envelope to the individual in question and records the date of its withdrawal. The person concerned may submit a new declaration but only three years after the date of withdrawal. This new declaration shall take effect two years after it is submitted to the Court.

[34]   Enactment decree no. 752 of 26 July 1976 sets forth the details of the quota system in South Tyrol. Art. 46 of the decree stipulated that proportionality in public service should be reached in a maximum of 30 years from the entry into force of the autonomy statute.

make the declaration are excluded from applying for public posts, offices, public housing and various other social contributions.[35] The quota system has to be applied to all state and semi-state bodies operating in the province, as well as to the provincial and municipal administrations. At the municipal level, the quota is based on the strength of the linguistic groups in the same municipality. This means, for instance, that the municipal administration of the predominantly Italian-speaking capital city, Bolzano/Bozen, has a majority of Italian civil servants, while in the other municipalities the majority is German-speaking.

The quota system was introduced as a way to gradually reverse the Italian dominance in the state public administration,[36] i.e. as a mechanism of reparation for the forced Italianization of public service during the fascist oppression. With regard to provincial and local administration, the quota system was already foreseen in the First Autonomy Statute and in respective regional laws. It was applied according to the ethnic composition of the respective assemblies. The representation of language groups in their respective proportions in local and provincial administration was basically already achieved in the 1980s (also facilitated by the creation of public posts due to the transfer of competences), whereas this was not that quickly achieved with regard to posts within the public state administration.[37] Overall, the representation of language groups in their respective proportions in the civil service has now been achieved.[38] The system came under criticism for its rigidity, but from the late 1990s onwards it could be argued that it has been handled more flexibly, if for no other reason than necessity. In practice, this means that in the event that it is not possible to find a qualified candidate belonging to linguistic group A for which a position is open, a qualified candidate from language group B is hired. Such a position granted off-quota should be returned to linguistic group A during a subsequent selection procedure that will be open to candidates from linguistic group B. In some specific cases (e.g. executive positions and highly specialized occupational

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[35]   Emma LANTSCHNER – Giovanni POGGESCHI: Quota System, Census and Declaration of Affiliation to a Linguistic Group. In: WOELK – PALERMO – MARKO op. cit. 219–33.

[36]   According to the 1971 census, in South Tyrol there were 62.9% German-speakers, 33.3% Italian-speakers and 3.7% Ladin-speakers. However, in 1975 the state administration employed 13.9% German-speakers and 86.1% Italian-speakers. For details, see Karl GUDAUNER: Zu Unrecht verteufelt – Eine Zwischenbilanz zum Proporz als Garantieinstrument, In: Günther PALLAVER (ed.): *Politika 13, Jahrbuch für Politik, Südtiroler Gesellschaft für Politikwissenschaft.* Bolzano/Bozen, Edition Raetia, 2013. 181–220.

[37]   If one compares data with regard to civil servants in state administration bodies of 1975 to data with regard to public employees in state administration bodies of the years 2002 and 2010, the results show that the ethnic quota system – together with the requirement of bilingualism – was overall also successfully applied in state bodies. As to 2012, public state posts are fewer in number as competences were transferred to the provincial levels throughout the years. See GUDAUNER op. cit. 191.

[38]   GUDAUNER op. cit. 199–209.

profiles), the meritocratic principle may prevail. Although various segments of South Tyrolean society question the necessity of maintaining the quota system, it seems that it is still generally considered a valid mechanism of the autonomy arrangement.[39]

3.2.4. Cultural Autonomy

The autonomy of groups enshrined in Article 2 of the Second ASt regarding all culture-related issues, as well as the provisions for the protection and promotion of their cultural characteristics (including the proportional allocation of financial resources) are typical expressions of group protection. The cultural autonomy translates into a system of separated schools based on monolingual instruction and separated cultural departments within provincial administration.[40] While each linguistic group has its own administrative and organizational structures for educational and cultural activities, it may reasonably be argued that in these fields cooperation between all segments of South Tyrol's society is increasing.

According to Article 8 ASt, South Tyrol enjoys exclusive legislative power over nursery schools, school welfare, school buildings and vocational training. Furthermore, the province is entitled to issue laws on primary and secondary education (and teacher training) in conformity with the principles established by state legislation. Article 19 ASt stipulates that German and Italian linguistic groups have the right to monolingual instruction in their mother tongues by teachers who are native speakers of the respective teaching language. The group rights are, however, balanced by the individual right of the parents to choose whether to enroll their child in a German- or Italian-speaking school.[41]

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[39]   In the 2011 census, South Tyrol's statistical office recorded 505,067 residents and 458,641 linguistic declarations. The difference (46,426) comprises residents with foreign citizenship, and South Tyroleans who, for whatever reason, did not submit their declaration. Of note is that out of the total number of declarations, 4,934 were invalid and 435 were handed in blank. The large number of valid declarations seems to support the idea that the quota system is still a welcomed means.

[40]   The plurilingual Ladin school system is an exception because it is organized according to the principle of "teaching language parity". Half the subjects are taught in German, half in Italian. Ladin is taught as a separate subject and is used as a back-up language while teaching. In detail, part 2 of Elisabeth ALBER: South Tyrol's Education System: Plurilingual Answers for Monolinguistic Spheres? In: Francesco PALERMO – Elisabeth ALBER (eds.): *L'Europe en formation – A New Era of Federalism*, no. 363, Spring 2012, Journal of Studies on European Integration and Federalism (Paris: Centre International de Formation Européenne), 399–415.

[41]   The school authority has the right to refuse enrolment if the pupil's linguistic ability is considered to be insufficient to attend classes in the language of the school, and the parents can challenge the school's decision before the administrative court. In the early 1970s, in several cases pupils were denied enrolment (especially in the German-language schools), but in more

The teaching of the second language (i.e. German in Italian-language schools and Italian in German-language schools) is compulsory. Article 19 ASt also provides for special measures in the school curriculum, as well as the structure and administration of the provincial school system, which are in derogation of the principles established by state law but functional to the needs of South Tyrol. This results in three separate school departments (i.e., Italian, German and Ladin) that function under the control of the respective ministry in the provincial government. Each of the three departments is responsible for the administration of its respective school system, for the management and partly the design of the curricula, and for the salaries of the teachers. Unlike primary and secondary education, which is based on the principle of separation of linguistic groups, tertiary education follows the path of linguistic integration.[42] The Free University of Bolzano/Bozen was founded in 1997 as a trilingual (Italian, German and English) institution.

4. Conclusions

All this goes to show that South Tyrol's autonomy arrangement provides individuals and groups with a set of specific institutions and mechanisms that aim to ensure an effective equality, representation and influence on the decision-making process. "Parity or equality of both the institutionally recognized groups and of the individuals is balanced by the proportional principle (representation according to numbers in population), and the personal principle (protection as group members) is balanced by the territorial principle (special status of the Region and the Provinces)."[43]

After the internationalized conflict de-escalation, a special procedure for the implementation of the Second Autonomy Statute was established. The composition of the joint Commission of Six ensures a double equal standing between the state and the province and between the German and Italian linguistic groups, and its work is based on the principle of bilateral negotiations. This continuous dialogue in the main decision-making body reinforces cooperation and mutual trust. The enactment decrees drafted by the Commission of Six implement the autonomy constitutional principles by-passing the Italian

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recent times this safeguard provision has been handled in a much more flexible way by the school authorities.

[42]   Elisabeth ALBER – Francesco PALERMO: Creating, Studying and Experimenting with Bilingual Law in South Tyrol: Lost in Interpretation? In: Xabier ARZOZ (ed.): *Bilingual Higher Education in the Legal Context*. Leiden – Boston, Martinus Nijhoff Publishers, 2012. 287–309.

[43]   Jens WOELK: Individual and Group Rights in South Tyrol: Article 2 as *Grundnorm* of the Autonomy Statute. In: WOELK – PALERMO – MARKO op. cit. 203–17, at 212.

parliament. On the one hand, it may be argued that the lack of transparency and democratic control in the decision-making process is a weakness of the system. On the other hand, the fact that no level of government and no linguistic group can prevail over any other has a confidence-building effect. The parties negotiate on an equal footing irrespective of the majority-minority position, and the principle of parity prevails over the principle of democratic legitimacy.

The fundament of South Tyrol's governance rests on power-sharing among linguistic groups and a balance between contrasting principles. The legal and institutional design of the autonomous province reflects a "mix" of separation and "forced" collaboration of the language groups. The quota system based on the declaration of belonging/affiliation to a linguistic group came under criticism for its segregationist character and rigidity. However, this mechanism guarantees proportional access to resources for each group, thus no one can claim discrimination. Moreover, it is also an element of power-sharing because the provincial and local governments must reflect the numerical strength of the groups in provincial parliament and local council respectively. The 2013 provincial elections marked a turning point in South Tyrol's political landscape and reinforced the debate over the necessity for a Third Autonomy Statute. Any major changes will surely also be seminal with regard to the development of the relationships between linguistic groups within the autonomous province, influenced also by increasing (im)migration and the necessity to elaborate policies for the so-called "new minorities".

The "institutionalized" forms of cooperation, representation and an increased "interethnic" interaction aim to balance the legally guaranteed separation between the groups. In South Tyrol, the large spectrum of special provisions regarding the relationship between the linguistic groups establishes a consociational system based on the joint exercise of power, proportionality, cultural autonomy, and mechanisms to defend each group's interests. One idea all seem to agree upon is the debate that revolves around the expansion of the autonomy towards the empowerment of an alpine cross-border macroregion within the context of the European Union.

LEGAL CHALLENGES OF E-PARTICIPATION AS AN INSTRUMENT OF VIBRANT DEMOCRACY:

INSIGHTS INTO THE RESEARCH PROJECT "GOVERNMENT INFORMATION ACTIVITIES IN THE WEB 2.0 AGE" AT THE GERMAN RESEARCH INSTITUTE FOR PUBLIC ADMINISTRATION*

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1. Introduction

"Political Participation is an expedition in an only partially known and less foreseeable terrain and therefore needs to be continuously replanned." With this statement, sociologist and participation researcher Herbert Kubicek aptly characterises the challenges of political participation and its dynamic development, driven by the interactive possibilities of Web 2.0. The metaphor of an expedition into unexplored territory makes one thing clear: the discovery of virtual space as a "new digital world" for public deliberation and participatory democracy is no less challenging, time-consuming and cost-intensive than voyages of discovery were in the past centuries. Its success depends essentially on the interdisciplinary composition of the expedition team. In addition to experienced expedition leaders from inside the government and an expedition crew of IT professionals, online community managers and net activists as local guides, there should be also legal advisers on board. Their task is to survey and map the virtual space from a legal perspective and to analyse whether there is a need for new legal solutions or a modified legal framework. This task includes not only ascertaining the applicable data protection and media regulations for e-participation activities, but also staking out roadmaps for vitalising democracy through e-participation in a legally compliant manner.

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*   Unless otherwise indicated, this paper represents the project work and research status at the time of the Budapest Conference in September 2013.

The research project "Government Information Activities in the Web 2.0 Age", led by Prof. Dr. Mario Martini at the German Research Institute for Public Administration Speyer, has taken up this mission. The research programme covers both constitutional and sub-constitutional legal issues raised by open, participatory and collaborative government and administrative behaviour in Germany. The project is associated with the interdisciplinary research group "The State in the Web 2.0 Age – Challenges of a Collaborative Governance in the 21st Century".[1] This paper will outline some of the research foci of the project, namely, the quality characteristics of e-participation from a constitutional perspective (see Chapter 3.1.), adverse affects on constitutional and fundamental rights arising from information activities of public administration on the internet (see Chapter 3.2.), and the dilemma facing the public administration when using Web 2.0 tools from private service providers or big data analysis (see Chapter 3.3.). But first, the paper will take a brief look at the political and real importance of e-participation as an integral element of open government in Germany (see Chapter 2.), thereby shedding some light on the framework and background of the research project.

2. E-Participation as a Cornerstone of the German Open Government Approach

Along with transparency and collaboration, Citizen's participation is one of the three central pillars of the concept of open government and open public administration, which is the basis of the current move of German public administration towards open government. Both the current Government's coalition agreement "Shaping Germany's Future"[2] as well as the previous German Government Programme "Network-Based and Transparent Administration"[3] underline the social necessity of increasing public participation. Similar expressions could already be found in the former National E-Government Strategy of the IT Planning Council[4] and the Dresden Agreement on the

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[1]   Information on the research group can be found at www.foev-speyer.de/collaborative-governance/ (accessed: 20. 07. 2014).

[2]   See chapter 5.2 of the coalition treaty between CDU/CSU and SPD of 27 November 2013. A non-official English translation is available at www.kas.de/wf/doc/kas_36853-544-2-30.pdf?140212155227 (accessed: 20. 07. 2014).

[3]   The English version is available at www.verwaltung-innovativ.de/SharedDocs/Publikationen/Pressemitteilungen/government_programme_network_based_and_transparent_administration.pdf (accessed: 20. 07. 2014).

[4]   See Chapter 4.4 of the agenda, available at www.it-planungsrat.de/SharedDocs/Downloads/DE/Strategie/National_E-Government_Strategy.pdf (accessed: 20. 07. 2014).

Fifth National IT Summit 2010.[5] From a historical perspective, the call for greater public participation in administrative decision-making processes in Germany has its roots in the participation debates of the 1970s regarding urban and regional planning and of the 1990s regarding the output legitimation of administrative actions. As opposed to the earlier debates, citizen participation today is commonly denoted with an "E", which represents the use of electronic information and communication technology. Internet development in the form of Web 2.0 has prepared the information infrastructure to provide broad administrative transparency and enable interaction from any location at any time. This created the basis for various new forms of participation. It is not only a drive for economic, but also for social innovation, which gives new impulses to the civil society.[6] Therefore, researchers attributed huge potential to the internet for the realisation of modern collaborative government, including providing additional participation possibilities.

In particular, the fact that the German government publicly consulted its strategy paper on open government and administration,[7] demonstrates that they are striving, not only on paper but also in reality, to enable citizens to contribute more to public decisions. The strategy paper was developed further in conjunction with the consulting process. Essential points regarding coordinating participatory initiatives and the design of the German open data portal can be traced back to the comments from the consulted citizens. Moreover, the strategy paper is not only an example of successful and transparent e-participation. From the legal point of view, the paper is interesting also because of its considerations on how open government fits into the current legal framework. The final version of the strategy paper concludes that it is necessary to prove whether the existing law can be interpreted and applied in the context of open government. This question also is the focal point of the present project.

3. Research Foci of the Project

The research questions of the project are focused on analysing the relevant constitutional, administrative, media, copyright, competition and data protection laws comprising the legal framework for open government and administration in Germany. The project examines whether the existing law appropriately

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[5]   Available at www.it-gipfel.de/IT-Gipfel/Navigation/archiv,did=455774.html (accessed: 20. 07. 2014).

[6]   Cf. Wolfgang Hoffmann-Riem: Neue Kollektivität im World Wide Web als Herausforderung für das Recht. *JuristenZeitung*, 2012. 1081–1136.

[7]   The consulting process is documented online at www.zebralog.de/opengovkonsultation (accessed: 20. 07. 2014).

covers and shapes the new forms of governmental and administrative action and behaviour driven by web 2.0 applications. In the very centre of the project stands the evolving top-down and bottom-up participation and collaboration structure between administration and citizens, rather than the related research fields of freedom of information and open data.[8] The project seeks to generate and contribute knowledge on how to design e-participation initiatives in an attractive and usable way that also complies with the applicable legal requirements.

The constitutional limit on greater civic participation in the public decision-preparing and decision-making process is not examined in an abstract manner but is instead discussed on the example of consultant and dialogue procedures that tends to delegate the decision to the consulted citizens (instead of only seeking a better articulation of interests). In such cases, the process is not only consultative but contains a legally binding vote that threatens to remove the politicians' or officials' responsibility for ultimate decision, as is assigned to them by the electorate. Citizens' participation which is not limited to the run-up to the decision but makes the decision itself the object of the consultation deprives the decision of its parliamentary-mediated legitimation and is, therefore, inadmissible under German constitutional law.

3.1. Quality Characteristics of E-Participation from a Constitutional Perspective

The experience with e-participation accumulated in Germany over the last years has led to numerous guidelines for successfully conducting e-participation initiatives. As central success factors and quality characteristics, the guidelines usually call for the prevention of obstacles to participation, for offering broad information on the subject matter and clearly defined participation goals, for transparency of the participation results for citizens and consultees, and for responsivity.[9] From the perspective of the research project, we are interested in whether these quality criteria are derived from or could be traced back to

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[8] Open data was the object of study in the "Open Government Data Deutschland" report commissioned by the Federal Ministry of the Interior, available at www.bmi.bund. de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/ModerneVerwaltung/opengovernment.pdf?__blob=publicationFile (accessed: 20. 07. 2014).

[9] Cf. e.g. Katharina Grosse – Alexander Hoose – Nancy Jäger – Matthias Verbeck – Christian P. Geiger – Jörn von Lucke: *Der Erfolg von enquetebeteiligung.de, Version 1.0*, fold.liqd. net/files/2011/10/Der-Erfolg-von-enquetebeteiligung-V1.pdf (accessed: 20.07.2014), 54.; see also John Morison: Governance and Democracy: From E-Consultation to E-Participation. In: Spyridon Flogaitis – Ulrich Karpen – Alfonso Masucci (eds.): E-*Government and E-Democracy*. London, Esperia, 2006. 221–245. (237. et seq.).

constitutional principles. For sake of brevity, the following explanations in this regard are restricted to the aspects of prevention of obstacles to participation and verification of transparent participation.

The central issue inherent in these aspects is the democratic principle. Its requirements for democratic legitimation of public decisions have implications for the construction of e-participation procedures. This is particularly true when the new internet-based participation procedures are seen as an answer to the crisis of trust in democracy[10] and to the resulting decrease in traditional participation.[11] In this case, the constant expansion of e-participation is intended to stabilise the general level of democratic legitimation of public decisions.[12] Given this function, the construction of e-participation procedures needs to be oriented towards the requirements and optimization principles for democratic decision-preparing and -making. In particular, it has to consider the democratic values of equal participation in public discourse, pluralistic formation of public opinion,[13] and rational administrative decisions.[14]

At first glance, equal opportunities and plurality seems to be amply assured by the outstanding participatory capability of the internet itself. Theoretically, citizens can participate and access public information at any time and any place when using the internet.[15] Moreover, they are no longer only recipients of government and administrative information, but can themselves become active information providers. The internet, therefore, provides the optimal

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[10]   Cf. Susan J. PHARR – Robert D. PUTNAM: *Disaffected Democracies: What's Troubling the Trilateral Countries?* Princeton, NJ, Princeton University Press, 2000.; Colin CROUCH: *Post-Democracy.* Cambridge, UK, Polity Press, 2004.; Russell J. DALTON: *Democratic Challenges, Democratic Choices – The Erosion of Political Support in Advanced Industrial Democracies.* Oxford, UK, Oxford University Press, 2004.

[11]   Cf. Chris SKELCHER – Jacob TORFING: Improving Democratic Governance through Institutional Design – Civic Participation and Democratic Ownership in Europe. *Regulation and Governance*, 4(1), 2010. 71–91. (84.); Roland ROTH: Durch Beteiligung zur Bürgerdemokratie. In: Kurt BECK – Jan ZIEKOW (eds.): *Mehr Bürgerbeteiligung wagen. Wege zur Vitalisierung der Demokratie.* Wiesbaden, VS Verlag für Sozialwissenschaften, 2011. 45–55.

[12]   For the constitutional basis of a required general level of democratic legitimisation see Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), BVerfGE 83, 60 (72); 93, 37 (66. et seq.); 107, 59 (87. et seq.).

[13]   For the relevance of a varied multitude of opinions and the constitutional importance of freedom of expression with regard to the free and democratic order see the Federal Constitutional Court's *Lüth* decision, BVerfGE 7, 198 (208).

[14]   For the requirement of rationality in political decisions and the democratic theory of a corresponding output-orientated interpretation of legitimation see Niels PETERSEN: Demokratie und Grundgesetz – Veränderungen des Demokratieprinzips in Art. 20 Abs. 2 GG angesichts der Herausforderungen moderner Staatlichkeit. *Jahrbuch des öffentlichen Rechts der Gegenwart*, 58, 2010. 137–171.

[15]   Patrick DONGES – Otfried JARREN: Politische Öffentlichkeit durch Netzkommunikation? In: Klaus Kamps (ed.): *Elektronische Demokratie? Perspektiven politischer Partizipation.* Opladen, Westdeutscher Verlag, 1999. 85–108. (86).

prerequisites for the formation of public opinion in a pluralistic democratic way. However, it was soon pointed out[16] and has since been proven[17] that the problem of social selectivity already known from offline participation procedures is not completely solved by the government's participatory use of the internet. On the contrary, in parts social selectivity tends to be intensified in the case of e-participation.[18] Society's use of the internet is traversed by several digital divides. These are of both a technical and socio-demographic nature. High-speed broadband internet access that offers the download speed required for data-intensive applications is not available everywhere in Germany (so-called broadband gap).[19] The internet use of the elderly, the poor, women and East-German citizens (the latter because of the availability of broadband access) lags behind the internet use of younger, well-educated and wealthy people.[20] If e-participation is not to land into the hands of an evolving elitist democracy, it has to be designed in keeping with the core principles of easy access and simple use of websites, apps and tools.[21] Government and administration should provide the financial resources within the budget for participation needed to improve the participation of citizens affected by the digital divide.[22]

This alone, however, will not allow us to draw general representative conclusions from e-participation in the future. The dominance of certain societal groups – namely well-educated, highly motivated and prosperous people with

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[16] Pippa Norris: *Digital Divide – Civic Engagement, Information Poverty, and the Internet Worldwide.* Cambridge, UK, Cambridge University Press, 2001; Alexander Siedschlag – Arne Rogg – Carolin Welzel: *Digitale Demokratie: Willensbildung und Partizipation per Internet.* Opladen, Leske + Budrich, 2002. 98. et seq.

[17] Cf. Initiative D21: D21-Digital-Index, 2013, www.initiatived21.de/wp-content/uploads/2013/05/digialindex_03.pdf (accessed: 20. 07. 2014), 22. et seq.

[18] Cf. Ulrich Sarcinelli: E-Partizipation in der Web 2.0-Demokratier – Wege und Hindernisse demokratischer Teilhabe. in: Wolf J. Schünemann – Stefan Weiler (eds.): *E-Government und Netzpolitik im europäischen Vergleich.* Baden-Baden, Nomos, 2012. 435–448. (445.).

[19] At the end of 2013, only 16 percent of the households in Germany's rural regions had a data transmission rate above 50 MBit/s; half of the households in this area not even achieve a broadband internet access of up to 16 Mbit/s. Moreover, there is an obvious discrepancy with respect to the demand for a broadband of at least 100 MBit/s over the next 5 – 10, cf. TNS Infratest: *Zukunftspfade Digitales Deutschland 2020.* October 2013. 10, 26. et seq.

[20] Cf. German Institute for Trust and Safety on the Internet (DIVSI): *Milieu-Studie zu Vertrauen und Sicherheit im Internet*, 2012, https://www.divsi.de/wp-content/uploads/2013/07/DIVSI-Milieu-Studie_Gesamtfassung.pdf (accessed: 20.07.2014). 16. et seq.; Initiative D21 op. cit. 18.

[21] Mario Martini: Vom heimischen Sofa in die digitale Agora: E-Partizipation als Instrument einer lebendigen Demokratie? In: Hermann Hill – Utz Schliesky (eds.): *Neubestimmung der Privatheit. E-Volution des Rechts- und Verwaltungssystems IV.* Baden-Baden, Nomos, 2014. 161–205. (189.).

[22] See the corresponding advice of the parliamentary Enquete Commission "The Internet and the Digital Society" in its seventh interim report "Demokratie und Staat", Bundestag printed paper 17/12290, 116.

time to spare – will probably remain the Achilles heel of e-participation. The potential distortion resulting from that dominance has to be countered with transparency. In order to reasonably and appropriately evaluate and assess the relevance of non-representative participatory results for the general public interest, government and administration need a social-demographic breakdown of those results. Thereby they can take into account the selective composition of participant groups or possible participatory asymmetry. This in turn enables the decision-maker to factor in the interests of those who do not participate in the hope that they will be represented by the elected politicians and legitimated officials.[23] Moreover, the transparency of the participants' composition is required for verifying the entitlement to participate in case of participant-restricted procedures[24] and for preventing any manipulation.

However, the documentation and disclosure of the socio-demographic characteristics of the participants in times of big data analyses give rise to concerns about the identifiability of the participants. Therefore, aspects of data protection should be borne in mind. Additionally, attempts should be made not to establish new participatory obstacles when requesting socio-demographic data from the participants.

3.2. Possible Adverse Effects on Constitutional and Fundamental Rights Arising from Public Information Activities on the Internet

The discovery and use of the internet as an instrument of public information policy and public information initiatives not only give rise to praise but also lead to a number of reservations and criticisms. One issue of concern from the point of view of fundamental rights is the influence that state-run rating platforms or online accessible registers of trade inspection agencies have on consumer decisions.[25] The other central criticism is founded on the hypothesis that full public transparency in the form of open data initiatives and proactive disclosure of government and administrative information may endanger democracy and the rule of law as the basis of democratic states.[26] The research project

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23   Cf. Enquete Commission "The Internet and the Digital Society" op. cit.

24   Cf. Jakob Tischer: Identifikationsdienste für das Management von E-Partizipation auf kommunaler Ebene. *Verwaltung & Management*, 2013/1. 3–12. (7. et seq.).

25   Mario Martini – Benjamin Kühl: Der informierende Staat als Katalysator der Meinungsbildung im digitalen Zeitalter. *Die öffentliche Verwaltung*, 2013. 573–583 (576. et seq.).

26   Ralf Kleindiek: Machen Volksgesetzgebung und Transparenz unsere Demokratie besser? In: Michael Bäuerle – Philipp Dann – Astrid Wallrabenstein (eds.): *Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde zum 70. Geburtstag.* Tübingen, Mohr Siebeck, 2013. 175–198.

"Government Information Activities in the Web 2.0 Age" focuses on these dysfunctional effects of transparent and open government and administration from the broader viewpoint of public administrative sciences.

From this perspective it becomes clear that the ambivalent character of transparency within the public sector is primarily due to the inherited organisational principles of public administration culture.[27] The current increase of transparency, the virulent dissemination of information in a networked society, and the international comparability of administrative systems lessens the government's information advantage and leads to a change in citizens' attitude towards the public administration. The previous hasty belief in and obedience to the wisdom and integrity of public administration has been replaced by a more inquisitorial approach requesting concrete and demonstrative accountability and a stronger responsiveness to citizens' demands and service expectations.[28] If public administration is to cope with the changed relationship between citizens and officials, it has to shift its competences from the hierarchical and control-based approach of paper files and stationary services to a more open and flexible way of conducting administration. To deal with the transparency and openness of the digital age, the public administration needs to acquire a new cognitive approach and collaborative working methods. The public administrative thinking, which has been geared to continuity, predictability and certainty, must gain greater agility, flexibility and openness to innovation combined with improved awareness of current technical and social media risks.[29] The rapidity of innovation processes in the internet age calls for new forms of collaboration, for access to public administrative services at any time and place, and – in exchange – for mobile working possibilities for public administration staff.

With regard to the aforementioned governmental product and service review platforms, the present research project investigates constitutionally based quality standards for information published on such platforms. It could be that the fundamental rights assessment applicable to government's traditional published information material is not transferable to public information that is aggregated from knowledge dispersed throughout society. Following from the constitutional standards framed in the German Federal Constitutional Court's

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(197.); Ari Halachmi – Dorothea Greiling: Transparency, E-Government and Accountability. *Public Performance & Management Review*, 36, 2013. 562–584. (563.).

[27]   For the challenges of electronic and digital administration as an aspect of information policy see Matthias Werner: Vernetzungskonzepte in der Verwaltungsmodernisierung – E-Government und die informationelle Organisation der Verwaltungen. in: Hajo Greif – Matthias Werner (eds.): *Vernetzung als soziales und technisches Paradigma*. Wiesbaden, VS Verlag für Sozialwissenschaften, 2012. 147–168. (159. et seq.).

[28]   Cf. Halachmi–Greiling op. cit. 565.

[29]   Cf. Hermann Hill: Wandel von Verwaltungskultur und Kompetenzen im digitalen Zeitalter. *Deutsches Verwaltungsblatt,* 2013. 85–93. (92. et seq.).

Glycol[30] and Osho[31] decisions, the legality of (offline media) government information and warnings depends on their objectivity, factual accuracy and adherence to the principle of proportionality. These standards, however, are not suitable for information that is aggregated on the basis of citizens' purely subjective assessments of goods and services. Subjective ratings cannot be verified regarding their content. It is only possible to control the formally correct aggregation of the experience reports. Moreover, the ratings are not recommendations by the public authorities; instead they reflect the citizens' estimation of the valuation object. Accordingly, the governmental platform operators are neither able nor required to guarantee the factual accuracy of the published ratings. Instead, they have to ensure the accuracy of the aggregation of the assessments and that appropriate review criteria are respected. Herein, it is necessary to safeguard against improper multiple ratings by one person, self-assessments, and other forms of misuse facilitated by the anonymity of the contributions on the platform. Furthermore, the public operator has to clearly point out that the published assessments do not represent the opinion of the government or administration but a collection of citizens' experiences or lay opinions.[32]

3.3. The Dilemma of the Public Administration When Using Third Parties' Web 2.0 Tools or Big Data Analysis

There are a number of provisions of data protection law that have to be considered when designing e-participation. The German data protection law, for example, stipulates the general principle of data avoidance and data minimisation. Furthermore, the collection and processing of personal data is subject to the principle of explicit permission which requires either the explicit consent of the person concerned or the express permission of the German Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) or other legal provision. Legal provisions regarding the collection and processing of personal data in connection with the use of telemedia are set out in the German Telemedia Act (Telemediengesetz – TMG). The TMG stipulates detailed requirements for informing the person concerned and for the processing and use of data generated when using telemedia.

Developing a data protection compliant design for e-participation faces particular difficulties if the internet participation services integrate Web 2.0

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[30]   BVerfGE 105, 25. et seq.

[31]   BVerfGE 105, 279. et seq.

[32]   Martini–Kühl op. cit. 580.

from private providers. Our research project has analysed the usability versus data protection dilemma facing German authorities when considering the embedding of social media widgets like Facebook, Google and Twitter plugins. Herein it could be shown that social media tools, particularly those improving shareability, are an important building block for the success of e-participation initiatives. However, in our legal opinion, any authority embedding private social media tools is jointly responsible for any possible violation of data protection committed by these tools if the private service provider adopts an apparently insufficient data protection approach or illegal business model. The same applies if the responsible public operator configures the integration of the social media plugin in a way that usage data is automatically tracked and transferred without the user's prior consent in the form of clicking the tool-button or any other user interaction.[33] One possible solution in this regard is the so called "Two Clicks For More Privacy"-technique. So as to control the data flow, this solution interposes another plugin that disables the embedded buttons to contact the servers of the private service providers. The buttons become active and establish a connection only after the user agrees to communicate with Facebook, Google or Twitter by enabling the buttons.[34]

As a second aspect of integrating private social media tools into public websites examined by the research project is the validity of the e-privacy directive[35] in this context. Thus, it has been revealed that public authorities, notwithstanding the still missing transposition into national law, already have to seek a prior consent if their websites use permanent cookies for tracking usage information. The need for prior consent applies not only if the public operator itself uses cookies but also if third-parties place them on users' terminal equipment when visiting a public website due to integration of private social media tools. Consequently, the public operator also has to make sure that its users are informed about and have given prior consent to the said third-party cookies.[36]

In addition to the usability-legality dilemma that comes along with the integration of private social media tools, big data analytics are another great challenge for data protection law in the context of government in the digital age. Analysing big data also gives an insight into the society's social developments,

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[33]   Mario Martini – Saskia Fritzsche: Zwischen Öffentlichkeitsauftrag und Gesetzesbindung: zum Dilemma deutscher Behörden bei der Einbindung privater Social-Media-Werkzeuge und Geodatendienste in ihre Internetangebote. *Verwaltungsarchiv*, 104, 2013/4. 449–485.

[34]   The most common solution is a DOM Manipulating jQuery-plugin "socialshareprivacy", developed by the German technology news site Heise, available at www.heise.de/extras/socialshareprivacy/ (accessed: 20. 07. 2014).

[35]   Directive 2009/136/EC of the European Parliament and of the Council of 25. 11. 2009, OJEC No. L 337 of 18. 12. 2009, 11. et seq.

[36]   Martini–Fritzsche op. cit.

interests and needs. Thus the public sector sees great benefits for the communities arising from big data analytics. Big data can serve as basis for (better) political decisions, informatively support planning processes, and help optimise public administration services to better meet needs and demands.[37]

Big data, however, is more than governing with the help of algorithms. It also has a significant potential for abuse. Although big data analytics do not work with personal but rather with anonymised or pseudonymised data, conclusions concerning the identity of a person and their individual social habits and political interests can be drawn from the analytic results based on mass linking and filtering of the data sets.[38] In order to tackle the corresponding privacy risks, we believe there is a need for a specific statutory regulation on big data analytics in the public sector. Such provisions should legally ensure that the intended use is strictly bound to the general interest and will be conducted in compliance with the right of informational self-determination and the general right to privacy.[39]

4. Conclusion

The above overview of the research foci illustrates the legal complexity of the "expedition" e-participation and some challenges of providing legal advice in this regard. The "legal mapping" of the virtual space for citizens' participation should not only survey the legal landscape and map the different relevance of the various area of law. The cartographic material to be created should also set out traffic routes that could be used by the participation initiative without having to fear legal dead-ends or jurisdictional obstacles. This requires both a constitutional "remote sensing" of the fundamental conditions and close-ups of specific sub-constitutional issues. The latter are not restricted to the area of data protection but are also located in copyright law, procurement law and in the law of administrative procedure and administrative organisation. The research project "Government Information Activities in the Web 2.0 Age" will address also these aspects within in the duration of the project (until July 2016).

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[37]   See Klaus-Peter Eckert – Lutz Heckel – Petra Hoepner: *Big Data – Ungehobene Schütze oder digitaler Albtraum*. Fraunhofer FOKUS, March 2014. 15 et seq., and the articles "Big Data – Das neue IT-Paradigma?" and "Beispielszenarien von Big Data" in the Public Sector Blog of Microsoft Germany, available at blogs.technet.com/b/publicsector/archive/2013/04/22/big-data-das-neue-it-paradigma.aspx (accessed: 20. 07. 2014).

[38]   Cf. Claude Castelluccia – Arvind Narayanan: *Privacy considerations of online behavioural tracking*. 9. et seq., available at www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/privacy-considerations-of-online-behavioural-tracking/at_download/fullReport (accessed: 20. 07. 2014).

[39]   Martini (2014) op. cit. 161. et seq.

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