7. Spain

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1. INTRODUCTION

Direct-democratic instruments were introduced in the Spanish constitutional system by the Constitution of 1931, which enabled the popular ratification of the Statutes of Autonomy of Catalonia (1931), the Basque Country (1933) and Galicia (1936). After the fall of the Second Republic, the instrument of the referendum was used by the Francoist dictatorship (1939–75): provided for by the Fundamental Law of 1945, it served for the popular ratification of two fundamental Francoist laws (Law of Succession in the Head of State of 1947 and Organic Law of the State of 1966) and the political transition to democracy (Law for Political Reform of 1976). Francoist referendums were, however, far from meeting democratic standards and reflecting faithfully public opinion, since they took place when freedoms of expression and the press were neither recognized nor protected. Instead, they were used to lend democratic legitimacy to the dictatorship.

The authoritarian use of the referendum during the dictatorship, as well as the intention to establish a system in which citizens participate in public affairs mainly through their political representatives, led direct-democratic instruments to be viewed with distrust during the drafting of the Constitution of 1978 (Spanish Constitution or Constitution).¹ Thus, the Socialist Gregorio Peces-Barba, one of the *fathers* of the Spanish Constitution, maintained that ‘the referendum may entail the manipulation of the question; may divide, in some aspects, the country into two large blocks – which is not positive at this moment [transition from the dictatorship to democracy].’² For his part, the

¹ The Spanish Constitution was ratified in the referendum of 6 December 1978 and entered into force on 29 December 1978, <<https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>>, English translation, <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>, accessed 8 August 2020.

² Official Journal of the Congress of Deputies (Lower House; hereinafter: BOCD), 6 June 1978, no 81, 2943, http://www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_081.PDF, accessed 8 August 2020.

illustrious framer José Pedro Pérez-Llorca, a member of the centrist party, stated that ‘basically we are facing an evaluative problem of whether it is more worthwhile to establish the parliamentary system in all its purity in our Constitution or we can make it coexist with other systems whose effectiveness in a parliamentary system is not proven.’³

Despite these concerns, the drafters finally opted for the regulation of direct-democratic instruments in the Constitution, a decision that, as will be seen later, does not seem to have negatively affected the settlement of the party system in Spain. These instruments were later developed through Organic Law 2/1980, 18 January 1980, on the Referendum (Referendum Act) and Organic Law 3/1984, 26 March 1984, on the Popular Legislative Initiative (Popular Initiative Act). This chapter will mainly focus on the analysis of these two laws as they regulate the exercise of these instruments at the national level.

2. DIRECT-DEMOCRATIC INSTRUMENTS IN SPAIN

The Spanish Constitution regulates four types of direct-democratic instruments at the national level, namely, the mandatory referendum (law-initiated referendum), the consultative referendum (executive-initiated referendum), the legislature-initiated referendum and, finally, the popular initiative (citizens’ agenda initiative). Other mechanisms, such as the subnational entity-initiated referendum or the citizen-initiated referendum, do not exist in Spain.

To explain the direct-democratic instruments existing at the regional level, it is necessary to make a distinction between *popular consultations* and *referendums*. This distinction is also essential to determine the competent body for the regulation of said instruments: whereas the central government has the competence to regulate the instrument of the referendum, popular consultations are placed within the regional competency framework. The Spanish Constitutional Court has provided some clues to distinguish the two instruments, stating that, regardless of its binding or advisory nature, the referendum is characterized by its formal guarantees: strict procedural rules, official register of voters, supervision by the Electoral Administration and judicial control.⁴ The relevance of this distinction has also been defined by the Constitutional Court, which maintains that the holding of a referendum involves a call to the holder of the sovereignty for participating in political decision-making.⁵ The Constitutional

³ B OCD, 13 July 1978, no 109, 4213, http://www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_109.PDF, accessed 8 August 2020.

⁴ Decision 137/2015, 11 June 2015, 4th Legal Ground (hereinafter: LG).

⁵ Decision 137/2015, 11 June 2015, 4th LG.

Court adds that this participation constitutes a way of exercising the fundamental right of political participation (Article 23.1 of the Constitution), which entails the activation of judicial mechanisms for the protection of fundamental rights (Article 53 of the Constitution).⁶ In contrast, popular consultations that do not meet the formal guarantees mentioned above cannot be included in the concept of the referendum; they are not a way of exercising the fundamental right of political participation but an expression of participatory democracy (Article 9.2 of the Constitution).⁷

The Autonomous Communities can regulate as many types of popular consultations as they desire, provided that they do not have the features of the referendum.⁸ Besides popular consultations, the direct-democratic instruments existing at the regional level are the citizens' agenda initiative, the law-initiated referendum and the executive-initiated referendum.⁹

Finally, even though the Constitution does not regulate the municipal referendum, the Spanish legal system also allows mayors to submit municipal issues to the vote of their residents as long as these issues satisfy, as will be seen below, a series of conditions.

3. REFERENDUM

Only two years elapsed from the promulgation of the Constitution to the approval of the Referendum Act. This legislative velocity does not stem from the interest of the legislator in regulating direct-democratic instruments to compensate for the constitutional predominance of the party system, but rather from the role that the Constitution gave to citizens in shaping the new territorial model. The building process of the autonomous system demanded the urgent regulation of this instrument, especially one of its types: regional law-initiated referendums. This explains the noteworthy role of this type of referendum in the Referendum Act, as well as its use during the first years

⁶ Decision 137/2015, 11 June 2015, 4th LG.

⁷ Decision 137/2015, 11 June 2015, 4th LG.

⁸ For example, Catalonia provides for the holding of popular consultations whose promoters can be citizens (citizen-initiated), the regional parliament (legislature-initiated) or, even, a group of municipalities that represents a certain number of voters (subautonomous entity-initiated): Art. 29.6 Statute of Autonomy of Catalonia and Art. 4 Catalan Law 10/2014, 26 September 2014.

⁹ Nevertheless, the Statute of Autonomy of Extremadura includes a legislature-initiated referendum similar to that which is provided for by Art. 167 Spanish Constitution: Art. 91.2 of this Statute states that its modification can be submitted to a regional referendum if so demanded by two-thirds of the autonomous parliamentarians.

of the Constitution and its gradual decline as the bases of the new territorial system were established.

The data reveal that, during the first years of the Constitution, six supra-municipal referendums were held in Spain – five regional and one national. The national referendum was held on 12 March 1986. The Government asked its citizens about Spain's membership in the North Atlantic Treaty Organization (NATO), given that the ruling party (Socialist Party) had advocated, while it was in opposition, the rejection of NATO. Its change of opinion when it came to power led to the holding of a consultative referendum, which finally resulted in 56.85 per cent votes in favour of remaining within NATO.¹⁰ Although municipal referendums were held in the following years, the next national referendum did not arrive until 20 February 2005, when Spanish people endorsed the Treaty that provided the European Union with a Constitution.¹¹ In this case, both the ruling party (Socialist Party) and the main opposition party (People's Party) campaigned for a 'yes' vote.

The results of these referendums show ultimately that the decrease of national and regional referendum calls is not owing to bad experiences in the use of this mechanism during the early years of democracy but rather to the completion of the new territorial model; all the issues that have been submitted to national or regional referendums have been approved by the voters.¹²

3.1 Law-initiated or Mandatory Referendum

The Constitution imposes the holding of a referendum in four cases: first, when a constitutional amendment affects the 'hardest' provisions of the Constitution;¹³ second, when a territory becomes an Autonomous Community through the procedure of Article 151.1 of the Constitution; third, for the approval or modification of the Statutes of Autonomy of those Communities that had been constituted through Article 151.1 or the Second Transitory Provision;¹⁴ and, finally, for a hypothetical incorporation of Navarra into the Basque Country.¹⁵ This chapter will focus exclusively on the first type of

¹⁰ The results of the NATO referendum can be consulted at https://app.congreso.es/consti/elecciones/referendos/ref_otan.htm, accessed 8 August 2020.

¹¹ The results of the European Constitution referendum can be consulted at https://app.congreso.es/consti/elecciones/referendos/ref_europa.htm, accessed 8 August 2020.

¹² This trend has not changed in the following years as the approval rate for national and regional referendums currently remains at 100 per cent, <https://app.congreso.es/consti/elecciones/referendos/index.htm>, accessed 8 August 2020.

¹³ Art. 168 Spanish Constitution.

¹⁴ Arts. 151.2.3 and 152.2 Spanish Constitution.

¹⁵ Fourth Transitory Provision Spanish Constitution.

Table 7.1 *Referendums held in Spain*

Decade	National referendum			Subnational referendum			Authorized Municipal Referendum*
	Constitutional amendment	Executive-initiated or consultative	Approval of Statute of Autonomy	Modification of Statute of Autonomy	Others		
1978–90	–	1	4	–	1	5	
1990–2000	–	–	–	–	–	12	
2000–10	–	1	–	2	–	11	
2010–20	–	–	–	–	–	36	
TOTAL	0	2	4	2	1	64	

Note: * The data correspond to the number of municipal referendums authorized from 1985 to May 2020; they have been obtained from <<http://www.senado.es/web/expedientdochblobserver?legis=12&id=86165>> accessed 8 August 2020, and through a consultation (n° 001-43637) formulated to the transparency portal of the Government of Spain.
Source: Congress of Deputies and Senate. The data have been obtained from <<https://app.congreso.es/consti/elecciones/referendos/>> and <<http://www.senado.es/web/expedientdochblobserver?legis=12&id=86165>> accessed 8 August 2020.

mandatory referendum, that is, the referendum on the amendment of ‘hard’ constitutional provisions, since the other types of referendums are only held in the Community concerned rather than the whole of the nation.

A constitutional amendment entails a mandatory referendum if either a total revision of the Constitution is proposed or a partial revision affecting the constitutional system’s fundamental principles (Preliminary Title), fundamental rights (First Section of the Second Chapter of the First Title) or the Crown’s regulation (Second Title).¹⁶ In these cases, the Parliament will have to communicate the draft amendment to the Government, which will be in charge of adopting the referendum call decree.¹⁷ The communication will not have to be accompanied by any request since, in this case, the holding of the referendum is imperative. The result of the referendum is binding, so that if the draft amendment is rejected, it cannot be carried out.¹⁸

3.2 Institution-initiated Referendums

3.2.1 Legislature-initiated referendum

Article 167 of the Constitution includes the only case in which Parliament can initiate a referendum. This referendum is again connected to the constitutional amendment procedure. A draft constitutional amendment may be submitted to a referendum, provided that at least 10 per cent of either deputies or senators request it. The request must be made to the President of the Spanish Government (Prime Minister) within 15 days following parliamentary approval of the draft amendment.¹⁹ Even though the Spanish Constitution and the Referendum Act use the word ‘request’, the Government cannot refuse to call a referendum if it has the required parliamentary support.²⁰ In short, the holding of this referendum, unlike the mandatory one, does not result from the Constitution but from the will of Parliament. Its result will equally be binding on the state authorities.²¹

¹⁶ Art. 168 Spanish Constitution.

¹⁷ Art. 7 Referendum Act. A part of Spanish doctrine has criticized this provision, arguing that the call decree should not be countersigned by the Prime Minister but by the President of the Congress of Deputies: Eva Sáenz Royo, *El referéndum en España* (Marcial Pons 2018) 39.

¹⁸ Art. 168.3 Spanish Constitution.

¹⁹ Art. 7 Referendum Act.

²⁰ José Antonio Alonso de Antonio and Ángel Luis Alonso de Antonio, *Derecho Constitucional Español* (5th edn, Dykinson 2013) 296.

²¹ Art. 167.3 Spanish Constitution.

3.2.2 Executive-initiated or consultative referendum

This referendum is set out in the chapter of the Constitution related to the drafting of laws, more specifically in Article 92 of the Constitution. Its peculiar location is due to the fact that the original text of the preliminary constitutional draft did not only establish the possibility that certain political decisions could be submitted to citizens' approval, but also provided for both types of legislative referendum – abrogative and confirmative. However, an oral amendment posed by the Communist deputy Solé Tura and supported by the majority of parliamentary parties removed the legislative referendum, leaving only the executive-initiated referendum.²²

Article 92 of the Constitution allows the Prime Minister to consult citizens' opinions – without being bound by the results of the referendum – on 'political decisions of special importance'. These decisions are not, however, defined either in the Constitution or in the Referendum Act, giving a wide margin of discretion to the executive. Nevertheless, the drafters of the Constitution have compensated for that margin by requiring that consultative referendums must be authorized by the (absolute) majority of the Congress of Deputies. The Prime Minister must send the final draft of the text to be proposed to the citizens so that it can be debated and voted on in the plenary session.²³

This type of referendum also exists at regional and municipal levels. In both cases it has to be authorized by the Spanish Government.²⁴ The municipal referendum requires, in addition, the agreement of the plenum of the local council.²⁵

4. CITIZENS' AGENDA INITIATIVE

The Spanish Constitution allows citizens to submit legislative proposals, provided that they meet a series of formal and substantive requisites.²⁶ Although the official name of this instrument is 'popular legislative initiative', it has also been defined as 'propositional legislative instrument', given that the participation of citizens in the law-making procedure ends with the proposal.²⁷

²² B OCD, 6 June 1978, no 81, 2937, http://www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_081.PDF, accessed 8 August 2020.

²³ Art. 6 Referendum Act and Art. 161 Congress of Deputies' Standing Orders.

²⁴ Art. 149.1.32 Spanish Constitution and Art. 2.2 Referendum Act.

²⁵ Art. 71 Law 7/1985, 2 April 1985, on the Bases of Local Regime (Local Regime Act).

²⁶ Art. 87.1 Spanish Constitution.

²⁷ Joan Vintó Castells, 'Un punto de partida: el marco normativo de la iniciativa legislativa popular en España', in Joan Vintó Castells and Juan María Bilbao Ubillos (eds), *Participación ciudadana y procedimiento legislativo: de la experiencia española*

Only the Parliament has the power to decide on the transformation of a popular legislative proposal into a law initiative.

This instrument was first regulated by Article 66 of the Constitution of 1931. At that time, Spanish people were empowered to submit legislative proposals to Parliament as long as they were endorsed by 15 per cent of voters. Fifty years later, the drafters of 1978 considered that, albeit the popular initiative should be included in the new constitution, it was necessary to make some changes regarding the legal limits:

On the one hand, the launching of initiatives was facilitated by reducing the required number of signatures to 500,000 (Article 87.3 of the Spanish Constitution).²⁸ However, a part of Spanish doctrine argues that the current number of required signatures still complicates the submission of popular initiatives to Parliament.²⁹ Authors usually allude to the number of signatures required in other European countries such as Italy, where the number required is ten times less than in Spain, even though Italy's population is significantly greater than Spain's.³⁰ The need to review this hurdle certainly finds support in the data provided,³¹ as almost 33 per cent of the registered initiatives expired as a result of not reaching the minimum number of signatures.

On the other hand, Article 87.3 of the Spanish Constitution excludes certain issues from the scope of the instrument and enables the introduction of further limits through the Popular Initiative Act.³² Thus, the legislator has increased the list of prohibited issues, further restricting the exercise of the popular initiative. The original preamble of the Referendum Act revealed the reasons for the constrictive spirit of its provisions, noting that historical experiences demonstrated that direct-democratic instruments can serve *demagogic manipulations* and legitimize the will of the minority through *false popular consensus*.³³

a la iniciativa ciudadana europea (Centro de Estudios Políticos y Constitucionales 2011) 19.

²⁸ As of 1 March 2020, this number was equivalent to 1.35 per cent of the electoral roll (36,966,163). The data have been obtained from <https://www.ine.es/ss/Satellite?c=Page&cid=1254735793323&pagename=CensoElectoral%2FINELayout&L=0>, accessed 30 May 2020.

²⁹ Tomás Vidal Marín, *Regeneración democrática e iniciativa legislativa popular* (Indret 2015) 20, among others.

³⁰ Vidal Marín (n 29) 20.

³¹ See Table 7.2.

³² The Constitution of 1978 states, just as the Constitution of 1931 did, that the popular legislative has to be regulated by an organic law, which ensures a certain consensus on the regulation of the instrument as the approval of the law requires a reinforced parliamentary majority.

³³ The expressions in italics were finally removed from the preamble by Organic Law 4/2006, 26 May 2006.

This perception of the instrument changed after the approval of the Organic Law 4/2006, 26 May 2006, when the legislator made some amendments that facilitated the use of the mechanism – among other changes, the deadline for collecting signatures was extended, signatures could now be collected electronically and a financial compensation for the expenses of promoters of initiatives was introduced.

The data show a progressive increase in the submission of popular initiatives until 2016 and a sudden decrease from that year. However, this decrease can be explained by the end of the bipartisanship in Spain – the incorporation of new political parties has not only modified the organization of the Spanish party system, but it has also served to address citizens' demands through the functioning of the representative system.

The agenda initiative also exists at the regional level. The Autonomous Communities have included in their Statutes of Autonomy the possibility that their citizens can present initiatives to the respective regional parliaments. Some Communities, such as Andalusia, Catalonia and Aragon, have even approved their own regional laws, based on national legislation, adapting the exercise of the mechanism to the regional scope.³⁴

5. LEGAL LIMITS

5.1 Referendum

5.1.1 Substantive limits

Neither the Constitution nor the Referendum Act contain a list of issues that are excluded from the scope of the referendum. The limitation of consultative referendums to 'political decisions of special importance' has not been considered as a substantive limit since, due to its vagueness, it does not really work as a restriction. However, if it was considered as a limit, it could be regarded as being controlled by the plenary session of the Congress of Deputies.

There are at least three reasons that could explain the absence of substantive limits. The first reason is the absence of intangible constitutional clauses. The Spanish Constitution allows the modification of all its provisions, so that all draft constitutional amendments approved by Parliament can be subject to referendum. Second, the Constitution submits national executive-initiated referendums to prior authorization by the Lower House. This requirement not only reinforces the dialogue between the legislative and the executive powers but also guarantees a certain consensus in the decision on those political issues

³⁴ Thus, for instance, they have reduced the number of signatures required for the submission of initiatives.

Table 7.2 *Citizens' agenda initiatives of the Congress of Deputies of Spain since 1989*

Terms	Initiatives	Results						Unresolved initiatives	
		Inadmissible	Expired	Withdrawal	Rejected by Plenum	Rejected for budgetary reasons	Approved with modifications	Subsumed in other bill	Passed to next term
1989–93	7	2	4	1	–	–	–	–	–
1993–96	6	3	1	–	–	–	–	–	–
1996–2000	11	1	2	–	3	–	–	1	4
2000–04	13	3	3	–	4	–	–	–	3
2004–08	13	3	7	–	1	–	–	–	2
2008–11	23	8	6	2	–	–	–	–	7
2011–16	36	14	13	1	2	–	1	1	4
2016–16	6	–	1	–	–	–	–	–	5
2016–19	20	8	7	–	–	–	–	–	5
2019–19	8	–	1	–	–	–	–	–	7
2019	8	–	–	–	–	1	–	–	–
TOTAL	151	42	45	4	10	1	1	2	39
									7

Note: Since the focus of the LIDD project is on the period from 1990 onwards, the table only reveals the data for the last 30 years.
Source: Central Electoral Board and Congress of Deputies. The data have been obtained from <<http://www.juntaelectoralcentral.es/jec/ilp/legislaturas>> and <<http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas>> accessed 8 August 2020.

that may be subject to a referendum and impedes its unlawful use by the Government. The deliberative and parliamentary authorization regime could, ultimately, be the reason behind the absence of substantive limits on national executive-initiated referendums. Third, regional law-initiated referendums, that is, those which are regulated in Articles 151.1, 152.2 and the Fourth Transitory Provision, are substantively delimited either by the Constitution or by the bill of approval or modification of the Statute of Autonomy. In other words, the subject of these referendums can only consist in the constitution of a group of provinces as an Autonomous Community or in the approval of the bill of Statute of Autonomy. Thus, given that there is no substantive margin for the elaboration of call decrees in this category of referendums, the addition of further substantive limits seems to be unnecessary.

On the contrary, the competency framework gives some clues to determine the substantive limits that are imposed on regional consultative popular votes. The Constitutional Court has indicated that regional consultations, irrespective of whether they are *referendums* or *popular consultations*, cannot be held on issues that fall within the competence of the central government.³⁵ This was the case of Catalan Law 19/2017, 6 September 2017, on the self-determination referendum in Catalonia, which was declared unconstitutional for competency and substantive reasons, among others.³⁶ The Constitutional Court held that the Law ignored the exclusive competence of the central government for the regulation of the instrument of referendum and aimed at holding a (secessionist) referendum without its mandatory authorization (Article 149.1.32 of the Constitution).³⁷ Besides, the Law contravened the constitutional system's fundamental principles, such as the national sovereignty that resides in the Spanish people, the unity of the nation and the supremacy of the Constitution that binds all public powers, including Catalan ones. Thus, the Law was placed above the rules of the Spanish legal system, including the Spanish Constitution, and declared the sovereignty of the Catalan people to decide on the separation of Catalonia from Spain. It purported to make a constitutional amendment outside the constitutional channels provided for by Article 168 of the Constitution. The Constitutional Court therefore reiterated that regional popular consultations can neither concern subjects that belong to the competence of the central gov-

³⁵ Decision 51/2017, 10 May 2017, 4th LG.

³⁶ Decision 114/2017, 17 October 2017. The Constitutional Court had previously declared unconstitutional some provisions of the Catalan Law 10/2014, 26 September 2014, on non-referendum popular consultations and other ways of citizen participation (Decision 31/2015, 25 February 2015) and the Catalan Law 4/2010, 17 March, on popular consultations by way of referendum (Decision 51/2017, 10 May 2017).

³⁷ Decision 114/2017, 17 October 2017, 3rd LG.

ernment nor deal with issues that were resolved by the constituent power and are removed from the decision of the constituted powers.³⁸ Despite the fact that the Law was declared unconstitutional, the Catalanian government approved the Call Decree 139/2017, 6 September 2017, for the self-determination referendum in Catalonia. Although the call decree was immediately suspended and subsequently declared unconstitutional³⁹ for the same defects as the Law 19/2017, 6 September 2017, Catalanian authorities disobeyed, once again, the decision of the Constitutional Court, and the ‘referendum’ was finally held on 1 October 2017 without formal guarantees.

Ultimately, certain substantive limits can also be observed at the municipal level. Article 71 of the Local Regime Act establishes that municipal consultative referendums must deal with subjects of municipal scope that are relevant to residents’ interests but cannot be related to local treasury issues. According to Spanish legal doctrine, this substantive limit aims to prevent the demagogic use of this type of referendum with regard to municipal finances.⁴⁰

5.1.2 Formal limits

The Referendum Act states that the call decree must contain the entire text of the constitutional provision that is required to be approved or, if it is a consultative referendum, the relevant political decision subject to the consultation.⁴¹ This requirement safeguards the free will-formation of citizens since it allows them to know the subject of the referendum well in advance. The decree must also specify the date of the referendum, which must take place between 30 and 120 days after its publication in the State Official Gazette and the official gazettes of those territories in which the referendum is to be held.⁴²

Besides the former requisites, the call decree has to indicate ‘clearly’ the question or questions of the referendum.⁴³ However, the adverb ‘clearly’ could lead to diverse interpretations: it could imply that the call decree has to establish unambiguously the questions on which citizens are called to express their opinion, or it could refer to the intelligible drafting of the questions. Nevertheless, according to the very express wording of Article 3.1 of the Referendum Act, the clarity requirement has to be understood according to the

³⁸ Decision 114/2017, 17 October 2017, 5th LG.

³⁹ Decision 122/2017, 31 October 2017. The Constitutional Court had also declared unconstitutional the Call Decree 129/2014, 27 September, for the popular consultation on political future in Catalonia (Decision 32/2015, 25 February 2015).

⁴⁰ Joan Oliver Araujo, *El referéndum en el Sistema constitucional español* (no 15, Cuadernos de la Facultad de Derecho 1986) 147.

⁴¹ Art. 3.1 Referendum Act.

⁴² Art. 3.1 Referendum Act.

⁴³ Art. 3.1 Referendum Act.

former interpretation, so that the call decree of the referendum has to formulate expressly the questions of the referendum. There is therefore no limit concerning the intelligibility of the referendum questions.

On the other hand, citizens can express their opinion by voting ‘yes’, ‘no’ or in blank to the question or questions of the referendum.⁴⁴ Thus, one might wonder if a single vote on a multiple-questions referendum is legally permitted. Articles 3.1 and 16.2 of the Referendum Act do not provide for an unequivocal answer. However, given that voting is not a constitutional duty in Spain, it can be stated that a single vote on multiple questions is allowed.

Likewise, it is not clear if a unity of substance requirement for the holding of referendums exists. Although neither the Referendum Act nor the relevant practice provide an indisputable answer, a systematic interpretation of Article 4.2 of the Referendum Act, which disposes a minimum period of 90 days between the holding of referendums, could serve as basis to maintain that this requirement is implicitly provided.

5.1.3 Time limits

The Referendum Act also includes time limits on the holding of referendums. They cannot take place during a state of emergency or siege, or within 90 days after its cessation.⁴⁵ Likewise, the holding of any type of referendum, except for those on constitutional amendments, is forbidden in the period between 90 days before and after the date of parliamentary or municipal elections, or that of another referendum.⁴⁶ In these cases, a referendum will be automatically suspended, so that it will have to be called again.⁴⁷ In the opinion of Spanish legal doctrine, these limits hinder the holding of national referendums as the multitude of electoral processes (European Parliament, Spanish Parliament, regional parliaments and councils) and the lack of synchrony among them make finding available dates complicated. They reflect, once again, the preference for representative democracy over direct-democratic mechanisms as the Referendum Act clearly prioritizes elections over referendums.⁴⁸

5.2 Citizens’ Agenda Initiative

5.2.1 Substantive limits

There are two categories of issues that are excluded from the scope of the popular initiative. The first category comprises those subjects that can only

⁴⁴ Art. 16.2 Referendum Act.

⁴⁵ Art. 4.1 Referendum Act.

⁴⁶ Art. 4.2 Referendum Act.

⁴⁷ Alonso de Antonio and Alonso de Antonio (n 20) 296.

⁴⁸ Oliver Araujo (n 40) 147.

be regulated by organic law, such as fundamental rights, the organization of the judiciary and the electoral system. The second one includes economic or tax issues, as well as those subjects that belong to the prerogatives of the Government, that is, international affairs, the national budget, the planning of economic activity and the granting of pardons.⁴⁹

One of the most disputed substantive limits is the exception of fundamental rights. The Constitutional Court has repeatedly stated that the principle of organic law reservation regarding fundamental rights has to be interpreted restrictively, which means that popular initiatives are only impermissible if they concern the 'direct regulation' or the 'minimum core content' of fundamental rights.⁵⁰ A part of the doctrine maintains that the present definition of the limit grants a wide margin of discretion to the Bureau to decide on the admissibility of popular initiatives.⁵¹ In their opinion, the redefinition of this limit would ensure that the Bureau exercises its power properly without the risk of decisions based on political reasons.⁵²

Otherwise, the Constitutional Court has added, through a systematic interpretation of the Constitution, one more issue to the previous lists: the constitutional amendment.⁵³ Article 166 of the Constitution grants the right to propose constitutional amendments to the Government, the Lower House, the Upper House and regional parliaments. The restrictive nature of the provision gives no opportunity for citizens to propose constitutional amendments via popular initiatives. Moreover, the Constitutional Court has held that this prohibition also extends to those popular initiatives that, trying to circumvent it, urge the respective bodies to exercise their right to initiate the constitutional amendment procedure.⁵⁴ This interpretation of the Court is respectful of the Constitution as the participation of citizens is not completely excluded, but postponed until popular ratification of the draft amendment approved by Parliament.

5.2.2 Formal limits

Popular initiatives must meet a number of formal requirements to be admitted by the Bureau of the Congress of Deputies (Article 5 of the Popular Initiative Act): first, the initiative has to contain a text articulating the legislative pro-

⁴⁹ Art. 87(3) Constitution and Art. 2 Popular Initiative Act.

⁵⁰ Decisions 160/1987, 21 October 1987, 93/1988, 8 November 1988 and 173/1998, 23 July 1998.

⁵¹ Vidal Marín (n 29) 48–49 and Aitor Martínez Jiménez, *La iniciativa legislativa popular como instrumento de participación ciudadana en el siglo XXI* (Fundación Ideas 2012) 15, among others.

⁵² Vidal Marín (n 29) 48–49 and Martínez Jiménez (n 51) 15, among others.

⁵³ Decision 76/1994, 14 April 1994, 5th LG.

⁵⁴ Decision 76/1994, 14 April 1994, 5th LG.

posál and an explanation of the motives for the referendum; second, it has to include the personal details of its promoters and the reasons why they consider that their initiative should be processed and approved by Parliament; third, the initiative cannot concern the same subject as another bill that is in the phase of amendment or a more advanced phase; fourth, the subject of the initiative may not coincide with that of another popular initiative that has already been presented in the same term; and, finally, the issues it covers must have a certain homogeneity.

The last requirement, set forth in Article 5.2 (c) of the Popular Initiative Act, has been criticized on the basis that, besides the concept of homogeneity being ambiguous, there are no convincing reasons for demanding more internal coherence from popular initiatives than from government and parliamentary legislative proposals.⁵⁵ This criticism may have inspired the modification made by Organic Law 4/2006, 26 May 2006, which has restricted its application to those initiatives that deal with ‘manifestly’ different subjects. The doctrine considers that this modification advises a restrictive interpretation of the unity of substance requirement,⁵⁶ so that this requirement does not consist in a review of legislative technique but serves to reject those popular initiatives that deal with different subjects without logical relation.⁵⁷

6. INSTITUTIONAL AND PROCEDURAL FRAMEWORK FOR THE REVIEW OF COMPLIANCE WITH THE LEGAL LIMITS

6.1 Referendum

As discussed in previous sections of this chapter, substantive limits exist neither for national referendums (Articles 92, 167 and 168 of the Constitution) nor for regional law-initiated referendums (Articles 151, 152 and Fourth Transitory Provision of the Constitution). However, the constitutional framework of competencies and Article 71 of the Local Regime Act establish certain substantive limits for the holding of regional and municipal consultative referendums. Compliance with them is initially controlled by the Government, which will only authorize such referendums if these substantive limits are

⁵⁵ Juan Alfonso Santamaría Pastor, ‘Comentario al artículo 87’, in Fernando Garrido Falla (dir), *Comentarios a la Constitución* (2nd edn, Civitas 1985) 1264 and Vidal Marín (n 29) 24.

⁵⁶ Enrique Arnaldo Alcubilla, Manuel Delgado-Iribarren García-Campero and Ángel José Sánchez Navarro, *Iniciativa Legislativa Popular* (1st edn, La Ley 2013) 98.

⁵⁷ Arnaldo Alcubilla, Delgado-Iribarren García-Campero and Sánchez Navarro (n 56) 98–99.

respected.⁵⁸ The decision of the Government can be challenged either through a conflict of jurisdiction⁵⁹ before the Constitutional Court, if the referendum promoter is an Autonomous Community, or through an administrative appeal before the Supreme Court, if the referendum is initiated by a council.⁶⁰

If an Autonomous Community disregards the governmental decision and calls a consultative referendum without the pertinent authorization, the Government can react through the appeal provided for by Article 161.2 of the Constitution before the Constitutional Court; this entails an automatic suspension of the effects of the referendum call decree. Suspension is without prejudice to criminal responsibilities that regional public authorities may incur for the illegal holding of a referendum. This possibility must be noted especially after recent events in Catalonia.⁶¹

The formal limits of call decrees of referendums are controlled by the judiciary. Thus, those decrees that do not contain the elements provided for by Article 3 of the Referendum Act or do not respect the time limits set by Article 4 of the Referendum Act can be challenged by an administrative-contentious appeal.⁶² The power to decide on such appeal will vary depending on the scope of the referendum: in the case of national referendums, the competence is assumed by the Supreme Court.⁶³ If the call decree has been adopted by a regional government, the High Court of Justice of the respective Autonomous Community is competent to decide.⁶⁴ The decisions of both judicial bodies may be appealed

⁵⁸ Art. 2.1 and 2 Referendum Act.

⁵⁹ The conflict of jurisdiction is a constitutional procedure that can be used by certain territorial entities (State and Autonomous Communities) to react when their competences are infringed by others (Art. 161.1 (c)) Spanish Constitution and Art. 60–67 Organic Law 2/1979, 3 October 1979, on the Constitutional Court. It is not only a mechanism to claim the titularity of competences, but also to react to damaging conducts of the exercise of said competences, even when they do not strictly entail an infringement and provided that they have immediate legal effects. See Pablo Pérez Tremps, *Sistema de Justicia Constitucional* (2nd edn, Aranzadi 2016) 103–104 and Decision 44/2007, 1 March, 9th LG.

⁶⁰ Art. 12.1 (a) Law 29/1998, 13 July 1998, on the Contentious-Administrative Jurisdiction.

⁶¹ See Section 5.1.1 above.

⁶² The Referendum Act does not provide a specific proceeding to appeal call decrees for referendums. So if a call decree does not meet the former requirements, it may be challenged through the general appeal provided to contest the activity of the Administration (Art. 25.1 Law 29/1998, 13 July 1998). The procedural capacity, legitimacy and representation rules are provided by Art. 17–24 Law 29/1998, 13 July 1998.

⁶³ Art. 12.1 (a) Law 29/1998, 13 July 1998.

⁶⁴ Art. 25 Law 29/1998, 13 July 1998.

before the Constitutional Court in accordance with the general provisions of the constitutional complaint.⁶⁵

6.2 Citizens' Agenda Initiative

The Bureau of the Congress of Deputies⁶⁶ is one of the bodies in charge of reviewing popular initiatives for their compliance with the legal limits.⁶⁷ During this administrative procedure, the Bureau will review whether a popular initiative satisfies the limits set out in Section 5.2. Thus, its decision on admissibility must be based on legal considerations, not political reasons.⁶⁸ If the initiative is submitted without the requisites provided for by Article 5 of the Popular Initiative Act – articulated text, memorandum, personal data of its promoters and the reasons why the initiative is, in their opinion, necessary or beneficial for the citizenry – the Bureau will grant one month to rectify the formal defect with the caveat that otherwise the initiative will definitively be declared inadmissible.⁶⁹ The promoters of the initiative can appeal the inadmissibility decision through a constitutional complaint,⁷⁰ claiming a violation of the right to political participation guaranteed by Article 23.1 of the Spanish Constitution. The Constitutional Court will review whether the initiative violates any material or formal limits and, if this is the case, whether the deficiency extends to the entire proposal or only certain of its provisions.⁷¹ In the latter case, the Bureau shall ask the promoting committee whether it wants to withdraw the initiative or make the appropriate modifications.⁷²

Given that there is no specific proceeding designed to challenge inadmissibility decisions of popular initiatives, the review of the Constitutional Court will be carried out in accordance with the provisions of the constitutional complaint.⁷³ Article 46 of the Constitutional Court Act establishes that persons

⁶⁵ Art. 41–58 Organic Law 2/1979, 3 October 1979.

⁶⁶ The Bureau of the Congress of Deputies is a collective body that governs and organizes the day-to-day of the Chamber (Art. 30.1 Congress of Deputies' Standing Orders). It is composed of the President, four Vice-presidents and four Secretaries (Art. 30.2 Congress of Deputies' Standing Orders) and among its functions are to qualify parliamentary documents and to establish the agenda of the Plenary and Committees (Art. 31 Congress of Deputies' Standing Orders).

⁶⁷ Art. 4 Popular Initiative Act.

⁶⁸ Art. 5 Popular Initiative Act.

⁶⁹ Art. 5.2 (b) Popular Initiative Act.

⁷⁰ Article 6.1 Popular Initiative Act does not establish any instrument to challenge an admissibility decision.

⁷¹ Art. 6 Popular Initiative Act.

⁷² Art. 6.3 Popular Initiative Act.

⁷³ Art. 6.1 Popular Initiative Act and Art. 42 Organic Law 2/1979, 3 October 1979.

who benefit from the object of the constitutional complaint or have a legitimate interest in it can participate as defendants or co-adjuvants in the proceeding. In application of this provision, the promoters of the popular initiative, the Prosecution Service and the Parliament that would have made the challenged decision can participate in the proceeding against an inadmissibility decision.

If the initiative meets all the limits, the period for collecting the signatures begins.⁷⁴ The promoting committee then has nine months, exceptionally extendable for another three, to collect 500,000 signatures and present them to the National Electoral Commission, which is in charge of verifying and counting them.⁷⁵ If, at the end of this period, the promoters have not collected the required amount of signatures, the popular initiative expires. If the initiative has received the required number of signatures, the Electoral Commission informs the Bureau so that it can, in turn, inform the Government and convene the Plenum to decide about the processing of the initiative.⁷⁶

The plenary decision of the Congress of Deputies is preceded by a parliamentary debate, in which the representative designated by the promoting committee has the opportunity to participate and persuade parliamentarians of the necessity of the initiative.⁷⁷ If the plenary session endorses its processing, the appropriate regulatory channels will be followed so that parliamentarians can make changes to the initial draft of the initiative.⁷⁸ On the contrary, rejection by the Plenum entails the end of the initiative and, unlike the decisions of the Bureau, this pronouncement cannot be appealed through a constitutional complaint before the Constitutional Court.⁷⁹

There is another possibility that popular initiatives may not be finally processed, despite complying with the aforementioned legal limits and without being rejected by the plenary session. This possibility is provided for by Article 134.6 of the Constitution, as well as by Articles 126.2 and 127 of the Congress of Deputies' Standing Orders. These articles determine that proposals or amendments that entail an increase in expenses or a reduction in incomes need the consent of the Government. Thus, after receiving notification that an initiative has obtained the required number of signatures, the

⁷⁴ Art. 7.1 Popular Initiative Act.

⁷⁵ Art. 7.3 Popular Initiative Act; the signatures need to be authenticated by the public notary, legal secretary or municipal secretary of the municipalities in which the respective signatories of the initiative are registered (Art. 9.2 Popular Initiative Act).

⁷⁶ Art. 12.3 Popular Initiative Act and Arts 126 and 127 Congress of Deputies' Standing Orders.

⁷⁷ Art. 13 Popular Initiative Act.

⁷⁸ Arts. 126.5 and 127 Congress of Deputies' Standing Orders.

⁷⁹ Arts. 126.5 and 127 Congress of Deputies' Standing Orders; Decision 140/1992, 25 May 1992, 3rd LG.

Government may exercise its ‘veto prerogative’, reasoning that the initiative would alter the budget plan. In this case, the Bureau will adopt a resolution to decide on the processing of the initiative. This resolution can be appealed through a constitutional complaint before the Constitutional Court.⁸⁰ Although this governmental prerogative could be very detrimental to popular initiatives, there is no evidence of an abusive exercise of it.⁸¹

7. LEGISLATIVE PROPOSALS FOR REFORMING DIRECT-DEMOCRATIC INSTRUMENTS

In the last ten years, several proposals have been submitted to reform the regulation of direct-democratic instruments. In this section, we will try to outline and analyse some of them.⁸²

The first proposal was presented on 18 July 2012 by two parliamentary groups – the Mixed Parliamentary Group and ‘La Izquierda Plural’ Parliamentary Group – in the Lower House. Unlike the two following, more comprehensive proposals, this one focused on making mandatory the holding of consultative referendums on those decisions of the Government that harm the economic, social and labour rights of citizens. The proposal was made at a time when the Spanish population was suffering from social and labour cutbacks as a result of the crisis that had struck southern European economies. Its aim therefore was for citizens to have a say in some of the difficult decisions that were being taken at that moment. Nevertheless, this proposal posed several problems as it would have led to a slowdown in regulatory activity when Spain was demanding quick and effective responses. It was finally rejected by Parliament.

On 13 May 2013, the same parliamentary groups registered a new proposal that made some changes to the constitutional provisions regulating the referendum and the popular initiative. With regard to the referendum, it was proposed, on the one hand, that every constitutional amendment should be submitted to

⁸⁰ Art. 23.2 Spanish Constitution and Art. 42 Organic Law of the Constitutional Court.

⁸¹ Nevertheless, this prerogative has recently been used in the ‘legislative proposal for the equal salary and equipment of the Security Forces in Spain’. This case can be consulted at http://www.juntaelectoralcentral.es/cs/jec/ilp/legislaturas/Legislatura?idDocNumExp=3&p=1379061558559&template=ILP/JEC_DetalleBD, accessed 8 August 2020.

⁸² These proposals can be found at <http://www.congreso.es/public_oficiales/L10/CONG/BOCG/B/BOCG-10-B-91-3.PDF>; <http://www.congreso.es/public_oficiales/L10/CONG/BOCG/B/BOCG-10-B-122-1.PDF> and http://www.congreso.es/public_oficiales/L10/CONG/BOCG/B/BOCG-10-B-194-1.PDF#page=1, accessed 8 August 2020.

a referendum. On the other hand, two new types of referendum were to be introduced: a citizen-initiated referendum and a legislature-initiated referendum that, unlike the one provided for by Article 167 of the Constitution, was not connected to the constitutional amendment procedure. Regarding popular initiatives, the proposal removed the regulation of the number of signatures and the list of prohibited issues from the Constitution and confined it to the Popular Initiative Act. This proposal was formulated when citizens, especially young people, were denouncing a lack of representation and demanding greater participation in political life. However, the proposal expired without a decision of the Plenum of the Lower House.

Finally, on 16 May 2014, the Parliament of Asturias registered a constitutional amendment proposal to modify the regulation of direct-democratic instruments with a view to facilitating their exercise, after citizen platforms had collected thousands of signatures asking regional parliaments to initiate the constitutional amendment procedure for this purpose. Regarding the popular initiative, it was suggested that the provision that prohibits popular initiatives on organic law issues (fundamental rights and the electoral system, among others) should be removed. With regard to the referendum, the reform proposals were more far-reaching: it was proposed that 500,000 citizens should be able to initiate consultative and rejective referendums, as well as that a referendum and elections could be held on the same date. This proposal, unlike the previous ones, is still pending resolution.⁸³

8. CONCLUSIONS

Spanish citizens have the possibility of participating in political decision-making either through their representatives or, despite the distrust of the framers of the Constitution, through direct-democratic instruments. This distrust also existed during the first years of democracy, which explains why the legislator introduced new limitations in the regulation of these instruments to prevent their exercise from jeopardizing the establishment of the representative system in Spain.

However, as the Spanish party system matured, the initial restrictive legislative trend has been reversed – a process that has been accentuated given the

⁸³ It can be consulted at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?_piref73_2148295_73_1335437_1335437.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IW14&PIECE=IWA4&FMT=INITXD1S.fmt&FORM1=INITXLUS.fmt&QUERY=%28I%29.ACIN1.+%26+%28%22PROPOSICI%C3%B3N-DE-REFORMA-CONSTITUCIONAL-DE-COMUNIDADES-AUT%C3%B3NOMAS%22%29.SINI.&DOCS=3-3, accessed 8 August 2020.

political, economic and social events of the last ten years. The disaffection of citizens towards the political class due to the effects of the economic crisis and the disclosure of corruption cases led to a crisis of representativeness, causing direct-democratic instruments to play an unparalleled role in Spain's recent democratic history. Citizen movements urged the introduction of new types of referendum and the relaxation of the legal limits on the submission of popular initiatives. Even though some citizens saw the solution to Spain's serious problems in a further and more generous regulation of these instruments, the crisis of representativeness was resolved through its very functioning. Citizens' demands were addressed through the adaptation of the party system to incorporate new parties, so that the historical bipartisanship was replaced by a more fragmented multi-party system.

The future of the regulation of direct democracy in Spain may depend on the evaluation of the former events. If, after more than 40 years of constitutional democracy, the party system is seen as robust enough to support a less restrictive regulation of direct-democratic instruments, then the proposals analysed in Section 7 could be implemented. On the contrary, if the representative system is considered as able to satisfy citizens' demands in such a delicate political situation and without yielding ground to direct democracy, the legislator will lean towards a minor revision of these instruments. In this exercise of reflection, the Spanish legislator may take into account the results of the referendums held in other countries, such as the United Kingdom, Italy and Colombia.