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# **Direct democracy and lawmaking: Initiatives and referenda at local level in the USA**

## ***Democracia directa y potestad normativa: Iniciativas y referendums a nivel local en Estados Unidos***

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### ABSTRACT:

Democracy implies participation by the public, whether through elected representatives or directly by the people themselves. Such participation may be exercised in different ways, depending on people's entitlements. The right to vote is the first and most important of these, but it is not the only one. Direct democracy also creates opportunities for citizens to contribute to the decision-making process.

In the USA, initiatives and referenda are two mechanisms for direct democracy, which allow voters to play an active role in the legislative process. An initiative allows citizens to enact legislation which bypasses the representative process. A referendum enables voters to decide for themselves whether legislation passed by their representatives should be enacted. By means of these two mechanisms, citizen participation supersedes representation in decision-making.

The majority of the states in the USA make provision for these mechanisms at a local level, and this empowers citizens to participate in the decision-making process. It also gives rise to direct legislation (i.e. legislation by initiative or by referendum) at a municipal level.

This paper aims to analyse the foundations, legal framework, scope and repercussions of local-level direct democracy procedures as legal mechanisms intended to engage citizens in the law-making process in the USA.

## RESUMEN:

El término democracia implica participación de los ciudadanos en los asuntos públicos, tanto indirectamente, a través de sus representantes, como directamente por sí mismos. Dicha participación puede ser ejercida de distintas formas, en función de los derechos conferidos a los ciudadanos. El ejercicio del derecho de sufragio activo es la forma más frecuente de ejercicio de la democracia, pero no es la única. A través de los mecanismos de la democracia directa, los ciudadanos están legitimados para intervenir, por sí mismos, en la adopción de actos jurídicos de carácter normativo. En Estados Unidos, iniciativas legislativas y referendums son instrumentos al servicio de la democracia directa que permiten al electorado adoptar un papel activo en el proceso de producción de normas. Por medio del derecho de iniciativa los ciudadanos pueden proponer y decidir la adopción de normas jurídicas prescindiendo de los procedimientos legislativos propios de la democracia representativa. Por su parte, los referendums les permiten decidir por sí mismos si una norma aprobada por sus representantes ha de ser promulgada y ha de entrar en vigor, o si ha de mantener su vigencia. A través de estos dos instrumentos jurídicos, la participación ciudadana directa en los asuntos públicos queda elevada a la máxima potencia, puesto que permiten a los ciudadanos recuperar puntualmente el ejercicio de la potestad normativa que cedieron a sus representantes en el momento de su elección democrática por sufragio. La mayoría de los estados norteamericanos contemplan ambos o alguno de los mecanismos de la democracia directa a nivel de gobierno local, confiriendo de esta manera a sus ciudadanos la capacidad de aprobar, derogar o modificar normas jurídicas *per se*.

Este trabajo pretende analizar la fundamentación jurídica, el marco legislativo, el ámbito objetivo y las repercusiones del ejercicio de los derechos de iniciativa y referendums en cuanto mecanismos que involucran directamente a los ciudadanos en los procedimientos de producción normativa.

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## 1. OVERVIEW

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### *A. Theoretical approach to the three dimensions of the idea of democracy.*

There are three dimensions of the idea of democracy. Representative democracy is a form of democracy in which political power is exercised by representatives who have been elected by the citizens of a country<sup>1</sup>. In the case of legislative power, laws are made by a legislative body, be it at a local

1 This paper is based on a talk given at Harvard University during the time I spent as a scholarship recipient in Harvard Kennedy School. The scholarship was awarded to me by the Real Colegio Complutense for the purpose of conducting research on "Future perspectives and evolution of citizens' participation".

or a state level. Direct democracy implies that political power is exercised by the electorate, that is, by those citizens entitled to vote. There are different manifestations of direct democracy<sup>2</sup>. However, when it comes to the exercise of legislative power, direct democracy takes the form of initiatives and referenda, through which legislative power is kept in the hands of citizens. Direct democracy is considered a means of supplementing or strengthening representative democracy, not of replacing it. Finally, participatory democracy is a form of democracy in which legislative power is exercised by representatives through legislative bodies. However, unlike representative democracy, citizens collaborate with the government in the lawmaking process but do not exercise any political power.

It is worth saying here that these forms of democracy are not mutually exclusive, rather, they supplement each other. Several reasons explain this approach. Representative democracy is in crisis at this moment in time. Citizens have a feeling of disaffection towards politicians and feel that the decisions taken by their representatives are not always the most effective ones. This triggers a crisis of legitimacy. Citizens have the feeling that their representatives do not always fulfill their expectations. Trust in government has been eroded as a consequence of growing inequality, which has been exacerbated as a consequence of the economic crisis. Also, representative democracy is undergoing a process of adaptation and faces new challenges that demand the involvement of new actors. New government systems try to ensure more effective deliberation and democratic legitimacy, which make it necessary to involve the public and also private actors. Democracy needs to meet new requirements, such as transparency, accountability, legitimacy and efficiency. Citizens judge public powers and governments on the impact of their actions. Increasing forms of public participation have an influence on new forms of legitimacy in public governance. New technologies bring

2 Initiatives and referendums are not the only form of direct democracy in the USA. Town meetings are also a form of direct democracy, unique to and practiced by New England states, in which local voters assemble to enact laws and authorize appropriations for their communities. Town meetings are often characterized as pure democracy. The legal framework derives from a combination of state law, found in General Laws, local chapters and bylaws that vary from town to town, and local traditions and customs passed on from meeting to meeting. Chapter 43 of Massachusetts General Laws authorizes representative town meetings as an alternative to traditional open town meetings. Direct democracy not only leads to mechanisms to make or repeal legislation, but it is also a form of government, which is the case with town meetings.

citizens closer to the decision-making process by giving them the opportunity to take a more active role in the process. As a consequence, it is necessary to look into innovation in governance in order to implement new systems of citizen participation, intended to bring democracy to the highest level of quality and commitment towards citizens.

*B.- Direct democracy at local level in the USA.* Direct democracy lawmaking is possible at two levels of government in the USA: at state level and at local level<sup>3</sup>. The federal Constitution does not make any provision for mechanisms of direct democracy<sup>4</sup> involving the making of Law<sup>5</sup> at the

- 3 Under the Spanish local government Act, citizens are entitled to initiate a rulemaking process by submitting a draft regulation to the council, from which a duty on local government arises, according to which, the council is under obligation to consider making a regulation on the topic submitted. Citizens are also entitled under Spanish Law to promote public consultation on matters affecting local interests. When this right is exercised, local authorities are under a legal obligation to grant a public consultation to be held where the application meets the formal requirements, which include endorsement by the required number of signatures. Under these circumstances, holding a public consultation is not discretionary, but statutory. The right to initiative and the right to promote public consultation do not result in the right of citizens to enact or repeal legislation by themselves. As a consequence, initiative and public consultation are not institutions of direct democracy, but institutions of participatory democracy, as citizens in Spain are not empowered to decide for themselves whether a piece of legislation must be passed or repealed. These mechanisms do not imply decision-making by the public. The two aforementioned institutions are intended to allow citizens to collaborate in the decision-making process, by putting their views in public matters. However, by no means are citizens allowed to exercise public power by themselves. Referendums and public consultation processes are not equivalent institutions.
- 4 Levinson, (2014): 2644. The author alleges: "The United States Constitution, though written (and ratified) in the name of "We the People," nonetheless adopts a theory of "representative democracy" that is purposely designed to minimize to the vanishing point the ability of "the people" to have any direct role in making national-level political decisions. They are restricted to electing purported representatives, who will make decisions in their name, with or without genuine consultation. One can contrast this to American state constitutions, almost all of which include at least some aspect of direct democracy and many of which, with California being the most prominent example, allow vigorous popular participation in governance through initiative and referendum. A proposal to introduce direct democracy within the USA Constitution was made by Ackerman, B.: "We the people rise again", Slate (June 4th, 2012). His suggestion for a popular sovereignty initiative to amend article v is as follows: "The president, after gaining election to a second term in office, may propose amendments that, if approved by the House and Senate, shall be placed on the ballot of the several states for consideration at the next two presidential elections. If sixty percent of the nation's voters approve the amendment at both elections, it shall become a part of this Constitution". The growing role of citizens in constitutional making and constitution-changing processes across many states in the world through the proliferation of referendum has also been stated. (Tierney, 2013).
- 5 The framers of the Constitutions were wary of popular democracy. However, enthusiasm for direct democracy increased during periods of major social change. Consequently, the general initiative and referendum were first adopted in South Dakota in 1889, and other states soon followed. Cali-

national level<sup>6</sup>. In contrast to the extensive attention that has been paid to initiative and referendum lawmaking at state level, little attention has been paid to these mechanisms at local level. However, Local Government plays an important role when it comes to the making of decisions, the formulation of policies and the delivery of public services across a wide range of areas. At this level, governmental action covers the particular needs of localities and local citizens. The proximity of local government to the electorate and to the needs and interests of citizens makes it clear that citizens must be given the opportunity to shape local policies and to take part in the decision-making process. Local government is the best scenario of trying out new ways of citizen participation. The closeness of local authorities to citizens makes it easier for citizens to become involved in policy-making. Decisions made at local level have a greater impact on citizens' lives, so it seems like a logical consequence that they are empowered to participate in the decision-making process.

There are two arguments that support this idea:

- First, direct democracy lawmaking at local level came into practice prior to the same mechanisms at state level. The first Constitution to articulate direct democracy lawmaking at state level was that of South Dakota in 1898. By then, many states were already making use of initiatives and referenda at a local level. Therefore, these mechanisms predate the application of the same mechanisms at a state level. This is the case with localities in California and Nebraska. By the time South Dakota became the first state to permit its citizens to legislate through the ballot, every county in California and all of the cities and municipalities in Nebraska already had this capacity<sup>7</sup>.

ifornia adopted direct democracy in 1911, due to the perception that the state legislature had been corrupted by lobbyists, especially by the Southern Pacific Railroad.

In 1978 Senator James Abourezk proposed that an amendment to the Constitution established a national initiative and referendum process; however, the proposal was never adopted.

6 In Spain, direct democracy institutions stem from the Constitution. All forms of direct democracy must be enshrined in the Constitution, because municipalities are vested with local autonomy and local powers that are conferred on them by the Constitution.

7 Expanding the role of voters has remained a constant in USA history. Use of direct democracy was substantial from 1910 to 1919. Its use remained relatively high throughout the 1930s but was then dropped systematically from the 1940s through to the 1960s. It started to rise again in the 1970s and has increased in use since that time. Magleby, (1995): 46.

- Secondly, initiative and referendum lawmaking at local level has been more widely used than the same mechanisms at state level<sup>8</sup>. The number of states whose legislation makes provision for some mechanism of direct democracy at local level is larger than the number of states whose constitutions make provision for lawmaking by means of referenda or initiative at state level. In the USA, twenty-six states (many of them in the west) have constitutional provisions dealing with direct democracy at state level. Massachusetts is one of twenty-six states that allow the initiative and referendum process at this level. In contrast, there are just three states whose legislation does not make provision for at least some form of direct democracy at local level.

Local government is comprised of territorial entities in the form of counties, towns and cities<sup>9</sup>. Unlike Spain, where the Constitution recognizes a certain degree of autonomy for local entities and the right of self-governance, the legal status of such localities in the USA lacks a constitutional recognition in that sense.

For a long time localities were only considered “creatures” of the state, subdivisions of the state or business corporations, rather than an integral part of the state<sup>10</sup>. The Federal Constitution does not speak about localities. Therefore, legislation concerning localities is enacted on a state- by- state basis.

Depending on their formal status, municipalities can be divided into two categories: territorial entities and non-territorial entities. Among the former are towns, cities and counties, each with its own governmental institutions. E.g, in Massachusetts, local government consists of 53 city governments, 298 town governments and 5 county governments. Then, there are 412 special districts and 84 independent school districts, which account for non-territorial entities.

Depending on the legislation that governs a locality, a distinction can be made as follows<sup>11</sup>:

8 <http://www.iandrinstitute.org/states.cfm>

9 Frug *et al.*, (2015).

10 Commons, (1902): 609-630.

11 Frug, (2015): 909.

- Home Rule Charter localities.
- Special Act Charter localities.
- General Law localities. These are further subdivided into charter localities and non-charter localities.

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## 2. - INITIATIVE AND REFERENDUM LAWMAKING

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### A. Definition.

As we said before, direct democracy takes the form of initiatives and referenda<sup>12</sup> when it comes to the exercise of the legislative power<sup>13</sup>.

Lawmaking by Initiative gives the electorate the power to participate in the lawmaking process at local level. An initiative empowers citizens to take an active role in the lawmaking process and is intended to enact or amend legislation.

There are two kinds of initiative<sup>14</sup>:

- Indirect initiative. Direct democracy in the form of indirect initiative allows citizens to draft and propose legislation via ballot. This allows the electorate to propose a piece of legislation to the legislative body before submission to the voters. This kind of initiative gives the local legislature an opportunity to accept or reject the proposal. If the local legislature accepts the proposal, a law is enacted or amended and there is therefore no need to hold a ballot process. On the other hand, if the legislature rejects the proposal, an electoral process is held and voters are given the opportunity to vote on the proposal.
- Direct initiative. This mechanism allows citizens to enact or amend legislation that bypasses the representative process. By means of a petition signed by a legally defined number of voters, a piece of legislation is placed on the ballot and submitted directly to the electorate for its approval or rejection.

12 Frug, (2015): 910.

13 A comparison between initiatives and referendums and how they are used in practice and for what purposes can be read at Damore, Bowler and Nicholson (2012): 367- 393.

14 Davis *et al.*, (1993): 715-746.



Lawmaking by referendum gives the electorate the power to reject legislation previously adopted by a legislative body<sup>15</sup>. A referendum enables voters to decide for themselves whether legislation passed by their representatives should be enacted or repealed. Unlike the initiative, the referendum is an election called after a legislative body has enacted a piece of legislation.

Referendums can be classified into two categories, depending on who calls the referendum.

- Direct referendum is a referendum called by members of the electorate with the intention of vetoing legislation previously adopted by the governing body. The referendum is called by means of a petition signed by the required number of voters. The result of the referendum will decide whether or not the legislation is repealed.
- Indirect referendum is a referendum called by the legislative body. This kind of referendum requires voters' approval. In seeking their approval, the legislative body allows the electorate to control political outcomes. In some cases, it is compulsory for the legislative body to call a referendum because the law requires it, meaning that this creates an obligation on the legislative body to seek voters' approval before a piece of legislation becomes effective. In this case, the referendum is a mandatory referendum. In other cases, holding a referendum is left to the discretion of the legislature.

#### *B. - Effects of initiatives and referendums.*

a) Referendums and initiatives result in the enactment, amendment or repeal of legislation.

##### *1) The enactment of legislation.*

Citizens have the power to enact legislation through an initiative. As an example, we can mention the case in Cleveland Heights, Ohio, where an ordinance was adopted through the use of a ballot initiative. This ordinance created a municipal partner registration<sup>16</sup>. Such registry did not confer any

<sup>15</sup> Frug, (2015): 912.

<sup>16</sup> Biggers,(2004): 124.

outright benefits, but served as a certified record of a couple's relationship that had been used in other jurisdictions to grant health insurance and other benefits reserved for spouses.

Legislation can also be enacted as the result of a referendum called by a public the legislature. This was the case in Sarasota City, Florida<sup>17</sup>. The idea was to adopt a civil rights law that included protection based on sexual orientation. The city commission voted to place the proposition on the ballot and approved an ordinance calling for a referendum. The proposition was passed and enacted into law with 72.9 per cent of the vote.

### *2) The repeal of legislation*

When a piece of legislation is placed on the ballot in a referendum voting process, the outcome can be one of two: 1) Either the referendum is passed, in which case the piece of legislation is ratified by the public and comes into effect, or continues to be in force, or 2) the referendum is rejected by the electorate and the piece of legislation is overruled by citizens.

In June of 2008, the city council of Hamtramck, Michigan, passed an ordinance prohibiting discrimination in housing, public accommodations, employment and city contracts on the basis of sexual orientation or gender identity. Citizens against this ordinance gathered the required number of signatures to initiate a referendum on the issue and the group succeeded in getting a repeal on the ballot in the November 2008 general election.

In December 2008, the city commission of Kalamazoo City, MI passed a proposal that expanded the city's human rights ordinance to prohibit discrimination in housing, employment and public accommodation on the basis of sexual orientation<sup>18</sup>. Citizen opponents collected a sufficient number of signatures to place the issue on the ballot for the May 2009 election. The city commission decided that it did not want to put the matter before voters and instead simply rescinded the ordinance in January. This shows the powerful effect that these mechanisms can have on public powers, even if referendum has not been held.

17 Biggers, (2004): 122.

18 Biggers, (2004): 129.

b) Referenda and initiatives result in direct legislation, that is, legislation that stems directly from citizens.

Legislative power comes from the people and the result of initiative or referendum processes is direct legislation, that is, legislation made by voters. When the constitution or a statute makes provision for direct democracy mechanisms, this implies that they rely on citizens to make Law. Initiatives and referenda are democratic tools that empower citizens to make legislative decisions.

*c) Referenda and initiatives empower citizens to exercise legislative power.*

These mechanisms of direct democracy enable citizens to exercise legislative power by means of a voting process. This is why these mechanisms are known as ballot measures.

*d) The exercise of the right to petition.*

When citizens call for a referendum or initiative, they exercise their right to petition. This is why these processes are called petition processes. The right to petition is not a fundamental right in the USA. In some cases, it is recognized by state constitutions and more often by General Laws. The right to petition is a political right, which empowers citizens to enact, repeal or amend legislation. Since referendums and initiatives are a consequence of the right of petition, they are also called petition processes.

*e) The suspensory effect of referendums.*

If a referendum is called challenging a law that has already been enacted, it has the effect of suspending the application of the law up to the point when the referendum is held. A piece of legislation challenged by a petition will not come into effect until approved by a majority of votes. This petition stops implementation of the Law until it is put to voters as a referendum. As an example, we can mention the case of City of Cuyahoga Fall versus Buckeye Community Hope Foundation<sup>19</sup>. Here, citizens filed a formal petition requesting that the ordinance be either repealed or submitted to a popular vote. The city charter provides that an ordinance challenged by a petition will not come into effect until approved by a majority of voters.

19 Frug, (2015): 922.

Another example is that of Richard DeLeon Left Coast City. Conservative groups blocked the implementation of the law until was put to voters as a referendum<sup>20</sup>.

An exception to this rule is that referenda cannot suspend revenue loan orders.

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### 3. THE LEGAL FRAMEWORK OF INITIATIVE AND REFERENDUM LAW-MAKING

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The aim of this section is to determine the specific legislation that governs initiatives and referenda at a local level.

Two considerations in this regard:

Initiative and referendum lawmaking regulation is done on a state- by- state basis.

As we said before, the Federal Constitution does not make provision for direct democracy voting processes. Therefore, the legislation that governs these mechanisms is on a state- by- state basis. The state constitution or the state legislation determines the rules that govern local governments within the state. This is why any systematic analysis of these procedures at the local level must begin with an understanding of what that particular state permits or mandates regarding local government.

Initiative and referendum lawmaking regulation is done on a city- by- city basis.

Localities also have the power to enact their own legislation on initiatives and referendums. The plurality of local legal systems in the USA results in city- by- city legislation. As a consequence, there are as many regulations on initiatives and referendums as there are localities.

As a result, the plurality of local legal systems that govern these ballot measures, makes any approach to this subject extremely difficult.

The legal framework of ballot measures is comprised of:

20 Frug, (2015): 925.

### a) Constitutions.

There is no need for state constitutional provision dealing with initiatives or referendums. Initiatives and referenda can also be regulated by statutory legislation. However, in some states, the right to petition the government for initiative or referendum stems from their Constitutions. This is the case in Ohio. Its Constitution states: *“The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by Law to control by legislative action”*.

Also, the Constitution of California states that before a state public body can develop a federally financed low-rent housing Project, approval in a local referendum should be granted<sup>21</sup>. This Constitution also states that Californians in every city have a constitutional right to make use of direct democracy

South Dakota was the first State in America to adopt the procedures of initiative and referendum voting<sup>22</sup>. According to the Constitution of South Dakota, these provisions apply to municipalities as well.

### b) Home rule charters.

Home rule charters are a specific kind of legislation applicable to local entities. By means of home rule charters, local entities attain a greater degree of autonomy, as they permit local jurisdictions to make their own decisions regarding electoral or policy- making rules, including the adoption of forms of direct democracy<sup>23</sup>.

Home rule charters stem from constitutional amendments, called home rule amendments. These amendments constitute an attempt to overcome the idea of localities as “creatures” of the state, or simply subdivisions of

21 Under article 34 of the California Constitution “No law rent housing Project shall hereafter be developed, constructed or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct or acquire the same, voting upon such issue, approve such Project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.”

This constitutional article was challenged, but the Supreme Court ruled that the referendum was not unconstitutional, rather a legislative vehicle for ensuring that all of the people of the community would have a voice in the decision. This is an example of a mandatory referendum.

22 Allen and Light, (2015): 1.

23 An analysis of the legal pros and cons regarding home rule charters can be found at Frug, Barron and Su, (2004).

the state. By means of these constitutional amendments, local entities are granted home rule authority, which implies the right of self-government in local matters. This allows cities and towns to exercise power in very broad terms, without any specific state legislative delegation of authority. They can exercise any power that the state legislature can lawfully delegate to them.

The Constitution of Massachusetts was amended in 1966 with the adoption of the Home Rule Amendment<sup>24</sup>. It granted "*to the people of every city and town the right of self-government in local matters*". The Home Rule Amendment, together with the Home Rule Procedure Act, now serves as the touchstone of municipal powers and limitations. Home rule charters do not require state legislative approval. Home rule charters are the result of the granting of home rule authority. They are local legislation and they do not require state legislative approval. Home rule localities can issue and revise charters, and exercise general legislative power, which is not inconsistent with the constitution and general statutes. A home rule charter needs no state legislative stamp of approval to become law. It is entirely a product of local decision. However, as a limitation, a home rule charter cannot contravene a state law.

Such charters are a capital piece of legislation in local government. Prior to the adoption of the Home Rule Amendment and the Home Rule Procedure Act, local governments could not adopt charters without obtaining state legislative approval. The granting of home rule authority changed this situation by authorizing municipalities to adopt new charters of their own.

Charters of this kind are among the laws that rule and govern initiatives and referendums at local level because through them, localities control the kind of legislation that can be submitted to the electorate. Home rule charters allow localities to hold referendums and initiatives concerning local legislation, such as ordinances and bylaws. These charters determine the scope of referenda and initiatives at a local level and make provision for the kind of legislation that can be subject to an initiative or a referendum.

As we will see later, the scope of initiatives and referenda in municipal charters is generally broader than the scope of statutory initiative. While statutes reserve to the electorate the power to amend the municipal charter,

24 The Massachusetts Constitution Article LXXXIX provides for the adoption of home rule charter for cities and towns.

charter provisions generally extend the scope of initiatives and referendums beyond charter amendments to other matters, which may be brought before the legislative body. In fact, it is quite common for municipal charters to reserve initiative and referendum to “all measures” or “all ordinances” presented to the governing body. The procedures for citizen initiatives and referendums are treated similarly, if not identically, in most municipal charters.

c) Special act charters.

It is important to mention that not all localities are home rule localities. There are also special act charter localities<sup>25</sup>, as is the case with Cambridge, MA.

Unlike home rule charters, special act charters are, in fact, state legislation. These are charters adopted by the state legislature for the municipality in question, usually at local request. These special act charters, such as the one that governs the city of Boston, often pre-date the Home Rule Amendments.

There are approximately 60 special act charter localities in Massachusetts. The city of Boston operates under a generous and powerful special act charter. The legislature treats the City of Boston as a separate case in itself.

In municipalities that are governed by special act charters, ballot measures are dictated by state legislation through these special act charters. These cities have a state specified initiative and referendum process for ordinances, which stems from the special act charter.

d) General Laws.

Massachusetts General Laws regulate:

1) Initiatives and referenda held in relation to the amendment, enactment or revision of home rule charters.

There is a state mandated procedure for the adoption, revision and amendment of home rule charters. These provisions apply to home rule charter municipalities. That is, Massachusetts General Laws govern the initiative and referendum process for Home rule charters.

Charter 43 B, Section 3 of the Massachusetts General Laws also governs the petition process for home rule charter adoptions and revisions<sup>26</sup>.

<sup>25</sup> Frug, (2004).

<sup>26</sup> Section 3. The adoption of a charter for any city or town under sections two and three of Article LXXXIX of the Amendments to the Constitution and the revision of any charter so adopted shall be initiated by filing with the board of registrars of voters of the city or town a petition signed by at least

Chapter 43 B, Section 10 of the Massachusetts General Laws provides an initiative process for charter amendments.

2) Initiatives and referendums held in relation to local legislation adopted by General Law localities, i.e., localities that are not ruled either by home rule charters, or by special act charters.

Massachusetts General Laws give these municipalities the powers of initiative and referendum and have ballot measures dictated by these same laws<sup>27</sup>.

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#### 4. THE SCOPE OF INITIATIVE AND REFERENDUM PROCEDURES.

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This section makes reference to the kind of legislation that can be enacted or repealed by referendum or initiative. In other words, this section refers to the kind of legislation that can be placed on the ballot for the approval of voters.

a) Home rule charters.

According to the Massachusetts General Laws, the adoption, amendment or revision of a home rule charter is subject to initiative or referendum. According to this Law, there is a referendum requirement for enacting or amending home rule charters. In this state, the mandated procedure for the adoption of a home rule charter requires local voters to approve the final charter in a referendum<sup>28</sup>.

Such a Law empowers cities to amend a home rule charter, which must be ratified by the voters by means of a referendum. The state constitutional granting of home rule authority permits home rule charters to be amended locally by referendum. State law requires even minor local amendments to be adopted through a local referendum.

fifteen per cent of the number of registered voters residing in said city or town at the preceding state election.

27 General Law cities operating under government types A, B, C, D, E and F, as specified in Chapter 43 of Mass. General Laws, have a state specified initiative and referendum process for ordinances. Chapter 43, Sections 37 and 42, of the Massachusetts General Laws gives authority to general law localities with government types A, B, C, D, E, and F for the powers of initiative and referendum.

28 The aforementioned state legislation is the Massachusetts General Laws, article 43.



The home rule charter procedure transfers the final authority for approval from the state to the municipality's constituents, bypassing municipal governments. For example, in 1978, the voters of Whatcom County, Washington, approved a ballot measure adopting home rule and changing the county government from the three- commissioner form to the council executive form<sup>29</sup>.

The use of Initiative to repeal home rule and return to the three- Commissioner form of government is also possible. This was the case in Whatcom County. In 1988, there was an initiative to repeal home rule and return to this former power structure. Proponents claimed that the charter gave all powers to the county executive, so they attempted to reorganize the government by returning to the three- commissioner structure. The attempt to repeal the charter by initiative failed, as 59.5% of the voters were against repeal.

#### b) Home rule petitions.

Apart from home rule authority, some cities are also granted home rule petition authority<sup>30</sup>. This allows cities and towns, governed by a home rule charter, to ascertain that they have the power to act in a specific area.

The home rule petition is the process by which individual localities may petition the state for legislation affecting only their localities.

Many such petitions are granted on the condition that proposed action will also be authorized by a local referendum. Some localities complain that, with the petition process and the necessary referendum, it can take up to three years before a proposal is actually approved.

#### c) Special Act Charters.

The state often requires special act charters to be approved through referendum.

29 During a debate on the Charter, one proponent said that the Charter would give voters "the power of initiative and referendum".

*"The Charter grants to the citizens the power of initiative and referendum. Under the initiative, a group of voters can petition to have a new county ordinance placed on the ballot for the people to vote on at the next general election. Under the referendum, a group of voters may petition to have a law recently passed by the county council placed on the ballot of the next general election for adoption or rejection by the voters".* Warner, (1995): 56.

30 Frug, (2004).

d) Acceptance statutes or local approval statutes.

This specific legislation applies to non-home charters. Acceptance statutes or local approval statutes are laws enacted by the state legislator that concern some aspect of municipal affairs. They are only effective in any particular city or town if local voters vote to accept these statutes. As a general matter, once a city or town has voted to accept such a statute, it cannot, at a later date, vote to reject it.

The aim of this petitions is for the state legislator to pass specific legislation by means of which the locality is empowered to act in a specific area of local interest.

e) City ordinances and town bylaws.

There are other kinds of local law that can be subject to initiatives and referenda, namely, town laws and city ordinances.

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## 5. REQUIREMENTS

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There are two kinds of requirement that qualify an initiative or referendum for the ballot: formal requirements and substantive requirements.

A. Substantive requirements.

*Initiatives and referendums concern legislative acts, not administrative acts.*

The general rule is that only legislative acts can be subject to direct democracy mechanisms. This excludes administrative acts. To be subject to a referendum or an initiative, the proposal must be one within the scope of the legislative power. Referendums and initiatives are direct democracy procedures authorized in relation to legislative acts, not administrative acts. For example, an initiative promoted by citizens as to whether a trash disposal contract should be awarded to one company or another was considered invalid as an administrative issue<sup>31</sup>.

31 Warner, (1995): 59.

Generally, the initiative/referendum process is limited to legislative matters, as opposed to administrative or executive matters, unless expressly stated otherwise. We are using the word generally because this is not an absolute standard.

Local citizens may amend their municipal chapters to determine clearly the extension of the initiative and referendum power. The scope of referenda and initiatives can be defined by the legal charter. When the municipal charter does not provide a clear definition of what is a legislative versus what is an administrative matter, the courts should not extend the scope of initiatives and referenda<sup>32</sup>. The first Florida Supreme Court case to directly rule on whether or not the administrative functions of a government are subject to initiative or referendum was *Barnes v. City of Miami*<sup>33</sup>.

*Initiatives and referenda concern purely local interests.*

Statewide interests are not within the scope of initiatives and referendums at a local level.

Referendums and initiatives can only be held regarding areas on which localities have been conferred power. For example, localities are not empowered to regulate elections, levy assets or collect taxes. They may not assume debt obligations, regulate certain private relationships, such as marriage and succession, define felonies, impose imprisonment or take action infringing on the jurisdiction of the courts. Zoning amendments can also not be enacted by initiative.

Policies concerning the implementation of the death penalty, euthanasia, legalization of stem cell research, abortion, are all state-level decisions. However, propositions addressed to the enactment or repeal of matters related to homosexual and transgender individuals have been placed on the ballot a significant number of times. In many cases, these mechanisms of direct democracy involved discrimination against certain people due to sexual orientation in employment, housing, and accommodation. When it comes to these matters, the tendency has been to restrict rather than expand these people's rights.

32 Davis and Murphy James, (1993): 724.

33 Warner, (1995): 59.

An initiative was promoted in Whatcom County dealing with nuclear weapons. The initiative attempted to establish the County as a nuclear free zone. It was entitled: Shall Whatcom County be declared a nuclear free zone and penalties established for violation thereof?

This initiative qualified for the ballot and was approved by 64.6% of the voters. Its constitutionality has never been tested, but it is easy to make legal arguments against such legislation on the grounds of federal preemption and conflict with the federal government's power to provide for the national defense.

A similar argument was made to declare invalid the referendum that was held in relation to the Critical Area Ordinance that we will explain later. The Court found that the entire purpose of statewide planning would be jeopardized if counties were allowed to repeal state law through referenda. The court held that the ordinance was adopted to promote public health and safety and such ordinances cannot, under the county charter, be amended by referendum.

There is no scope for initiatives and referenda where powers have been delegated to a local entity in order to implement state legislation.

This is the case with a referendum held in Whatcom County. The County had passed a Critical Area Ordinance, which limited owner rights<sup>34</sup>. The ordinance was the result of a state mandated measure under the Growth Management Act. This Act required affected counties to adopt regulations to conserve and protect critical and natural resource areas. In the application of this Act, Whatcom County enacted the CAO (Critical Area Ordinance) dealing with land use.

Land right holders began a signature gathering campaign to submit the CAO to a referendum. Referendum supporters had rewritten sections of the CAO by crossing out sentences, paragraphs and sections that they found objectionable. They sought removal of burdensome regulation that interfered with their use of property.

This referendum was challenged by the County and declared illegal. The Court found that the power to act under the Growth Management Act was delegated to the county legislative body and was, therefore, not subject to referendum.

34 Warner,(1995):71.

Referendums must be called when the decision affects the general public interest, and or can adversely affect the community or give rise to any policy issue of citywide concern.

A proposal that qualifies for the ballot in the context of a referendum or an initiative must be in the local public interest.

B. - Formal requirements: procedure.

The procedures for citizen initiatives and referendums are specified in General Laws and in municipal charters. Each individual charter dictates its own set of procedures.

a) Initial requirements.

In direct referendums and initiatives, citizens start the voting process by presenting a petition. There is a drafting process, which is commissioned to a Committee. Generally speaking, charters specify a committee that can act on behalf of petitioning voters and allow this committee authority to withdraw the petition for initiative and referendum prior to the election. In Massachusetts, the state mandated procedure for home rule charter adoption not only requires local voters to approve the final charter in a referendum, but also requires them to nominate, approve and select a charter commission, which is responsible for drafting the new charter. Home rule charters may be drafted by a locally elected charter commission and may take effect if they win approval by a local referendum. The municipal government must submit the charter commission's final approval to the electorate for a vote.

b) Signature requirements.

One of the procedural constraints relates to signature requirements. Proponents of the initiative or referendum must gather a certain number of signatures endorsing the petition.

There is an implied restriction to registered voters in municipalities. The percentage of registered voters who may submit a petition to the governing body is specified by the municipal charter or the general laws governing a particular state. It also depends on the legislative act that is subject to the initiative or referendum.

For example, under the Massachusetts General Laws (charter 43B), section 3), a petition for the adoption or revision of a chapter must be signed by at least 15% of the number of legal voters who resided in such city or town at the preceding state election. This article triggers a procedure intended to call for a referendum. In other cases, the number of signatures required for qualifying a ballot measure is 15% of registered voters in the case of initiatives<sup>35</sup> and 12% of registered voters for referendums<sup>36</sup> and the petition must be filed within 20 days of final passage of such measure<sup>37</sup>.

35 Massachusetts General Laws, Section 39: Initiative petition; passage and submission to electorate  
Section 39. If any initiative petition is signed by registered voters equal in number to at least fifteen per cent of the whole number of registered voters:

(1) the city council or the school committee shall, within twenty days after the date of the certificate of the registrars to that effect, pass said measure without alteration, subject to the referendum vote provided by this chapter, or

(2) the city clerk shall call a special election to be held on a Tuesday fixed by said clerk not less than thirty nor more than forty-five days after the date of qualification, and shall submit the proposed measure without alteration to a vote of the registered voters of the city at that election; provided, however, that if any city election is otherwise to occur within ninety days after the date of qualification, the city clerk may, at his discretion, omit calling the special election and submit the proposed measure to the voters at such approaching election.

36 Massachusetts General Laws, Section 42: Referendum petition; effect on final passage

Section 42. If, within twenty days of the final passage of any measure, except a revenue loan order, by the city council or by the school committee, a petition signed by registered voters of the city, equal in number to at least twelve percent of the total number of registered voters, and addressed to the city council or to the school committee, as the case may be, protesting against such measure or any part thereof taking effect, is filed with the city clerk, the same shall thereupon and thereby be suspended from taking effect; and the city council or the school committee, as the case may be, shall immediately reconsider such measure or part thereof; and if such measure or part thereof is not entirely rescinded within twenty days after the date of the certificate of the registrars, the city clerk shall submit the same, by the method herein provided, to a vote of the registered voters of the city, either at the next regular city election not less than thirty days after said twentieth day, or at a special election which the city council may, in its discretion, call for the purpose, and such measure or part thereof shall forthwith become null and void unless a majority of the registered voters voting on the same at such election vote in favor thereof.

The petition described in this section shall be termed a referendum petition and section thirty-eight shall apply to the procedure in respect thereto, except that the words "measure or part thereof protested against" shall for this purpose be understood to replace "measure" in said section wherever it may occur, and "referendum" shall be understood to replace the word "initiative" in said section.

37 Massachusetts General Laws, Section 40: Proceedings if initiative petition not properly signed.

Section 40. If an initiative petition is signed by registered voters equal in number to at least eight per cent but less than fifteen per cent of the total number of registered voters, and said measure is not passed without alteration within twenty days by the city council or the school committee, as provided in the preceding section, such proposed measure, without alteration, shall be submitted by the city clerk to a vote of the registered voters of the city at the next regular municipal election which occurs at least thirty days after the date of qualification. As used in this section and section thirty-nine, "date

c) Time to hold the election.

The time in which the election must be held may vary according to the charter. Some jurisdictions require a minimum or maximum number of days, and some set the election at the date of the next scheduled general election.

d) Control over illegal petitions.

There is no mechanism in the initiative process to keep illegal measures off the ballot.

e) The role of the governing body.

The role of the governing body through this process is that of a neutral party. It must vote on the petition presented to it, and if the petition is rejected, it must schedule the matter for a vote of the electors in accordance with the requirements of the charter.

f) Voting.

As a general rule, an initiative or referendum is passed when there is a regular majority<sup>38</sup>, that is, when there are more votes in favor than against the proposal put on the ballot. It is not necessary to obtain a supermajority or a qualified majority. The outcome of initiatives and referendums is majority decision- making.

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## 6. BY WAY OF CONCLUSION: AN ASSESSMENT OF THE INITIATIVE AND REFERENDUM PROCESSES.

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Based on the ideas that have been put forward up to now, it could be thought that initiatives and referendums are perfect mechanisms for exercising democracy at its highest level. There are several arguments that can support this idea:

of qualification” shall mean the twentieth day after the date of the certificate of the registrars, or the day on which the city council or school committee finally decides not to pass the measure without alteration, whichever day occurs first. A proposed measure under this section or section thirty-nine shall become effective if it shall be approved by registered voters of the city equal in number to one third of the whole number thereof and also by a majority of the voters voting on such measure, but not otherwise.

38 Massachusetts General Laws, Section 40.

- It has been suggested that direct democracy enhances the accountability and responsiveness of representatives, as well as turnout and engagement by citizens<sup>39</sup>.
- Direct democracy empowers state and local citizens where these procedures are allowed<sup>40</sup>.
- Direct democracy elections give voters the opportunity to adopt inclusive policies that could benefit the entire community.
- Direct democracy increases the role of the public in the governing process and in decision-making.
- Direct democracy has been used effectively to deal with some of the more pressing issues of the day (e.g. civil rights of the gay community...).
- Permitting voters to legislate via the ballot increases turnout; it can also result in higher levels of political interest and a greater propensity to take part in democracy.<sup>41</sup> Direct legislation is a way of increasing interest in the political process by giving potential voters the opportunity to make decisions other than choosing their representatives every four years, which leads to higher levels of turnout and other forms of political participation as the by-products of these mechanisms<sup>4243</sup>

However, arguments can be made to counter the aforementioned ideas:

- 39 It has been argued that this citizen ability could bypass unresponsive state legislatures and provide a means for voters to enact their own policies when politicians fail to respond to their wishes. Such power would make elected officials more directly responsible and subservient to the public, rather than to a party or machine boss. In addition, its advocates envision the initiative as a means to gauge citizen preferences and grant a voice to the public. By making use of this mechanism, the public could inform legislators of their stances on the issues of the day, and this would hopefully lead to policies that better reflect their interests. Biggers, (2014): 17.
- 40 "Nevertheless, it is extremely hard to establish a causal relationship between the existence of direct democracy and increased voter turnout or debate". Braunstein, (2004): 141.
- 41 "In fact, the positive change in voting rates associated with ballot initiatives is probably the most consistent finding in all of the direct democracy literature". Biggers, (1995): 5.
- 42 Biggers, D. (2004): 18, quoting Barber, B. argues that "political apathy derives from a sense of powerlessness and that empowering citizens (via the initiative and referendum) can increase their involvement and the responsibility taken for governmental actions".
- 43 Barber, (2003): 284.



1) Some argue that direct democracy gives control of the legislative process to special interest groups<sup>44</sup>. Direct democracy gives control of government back to special, and frequently extreme, interest groups<sup>45</sup>. Specifically, initiatives and referenda were first regulated due to the appearance of groups of interest<sup>46</sup>.

2) Initiatives often deal with controversial issues, which can generate conflict<sup>47</sup>. Controversial issues, which have a moral dimension, tend to spark particular interests. Matters such as abortion, the death penalty, euthanasia, stem cell research, drug legalizations, same-sex marriage, homosexual rights and obscenity appeared on the ballot as early as 1972. Of course, the majority of the topics that have been mentioned above do not fall into the competences of local governments, but they can give us an example of the kinds of matter that have been placed on the ballot. At the same time, a great number of localities have also placed legislation on the ballot regarding moral issues, although at a local level such measures do not receive the same level of media attention as statewide ballot measures, neither has the scholarly literature focused its attention on them with the same degree of intensity as statewide ballot measures.

3) The initiative process is not deliberative and tends to produce extreme and divisive legislation<sup>48</sup>. Initiatives and referendums often deal with controversial topics, which lead people to take extreme positions on matters. Voters are driven by emotions and therefore, the more controversial the issue, the more likely it is that the referendum will be held.

44 These groups not only pay to get this initiative qualified, they also spend large amounts of money in attempting to persuade the voters. Magleby, (1995): 34.

45 An initiative industry, which specializes in direct-legislation politics, has grown in several states. Professionals help to draft measures, circulate petitions, manage campaigns, provide polling and produce media. Magleby, (1995): 30.

46 *"The domination of legislative politics by special interests served as a primary motivation for the response of early twentieth century reformers. The stated goal of these reforms was to contradict the exclusiveness of interest group politics and the, sometimes unscrupulous, behavior of organized interests. The initiative and referendum were introduced as a means of inhibiting the unfair practices of political machines and organized interests competing for dominance in an increasingly industrial society. These reforms were considered as efforts to curtail corruption and restore power to ordinary people. At the turn of the twentieth century, rapid industrialization caused great concern for the legitimacy of existing institutions. Representative institutions were considered by many to be incapable of handling the pressures created by industrial interests competing for dominance in state politics. The surrender of state legislatures to special interests is the main reason direct democracy was brought to the United States".* Braunstein, R. ,(2004): 2.

47 Magleby, (1995): 29.

48 Waner, (1995): 77.

Ballot measures written by one special interest group that attempt to deny the fundamental rights of another group are a good example of this. This is the case with referendums or initiatives that deny illegal immigrants access to certain government services, or that discriminate against homosexuals.

4) Citizen lack information. Citizens sign petitions putting direct democracy legislation on the ballot without understanding the meaning or importance of the issue. They are often uninformed about such issues. Most of them simply sign the petition after hearing a catchy slogan. Voters receive limited information about initiatives and referenda and the information that they do receive is often misleading. In addition, it may lead to the manipulation of the electorate. Although direct democracy carries the concept of democracy to its logical extreme, its success requires a citizenry that is sufficiently informed to make good decisions. One of the arguments that supports the idea that referendums are ineffective is that citizens are unable to interpret what is good for the public interest.

5) Ineffectiveness. Direct legislation is often rendered invalid by post-referendum challenges. An initiative or referendum that is unconstitutional, illegal or invalid cannot be executed. Judges often issue temporary injunctions suspending the operation of the proposition. When the courts address the question of illegal referendums, they focus on the fulfillment of the requirements that qualify an initiative for the ballot.

Referenda and initiatives are often challenged, among other reasons because, as we mentioned before, there is no procedural means of preventing the holding of a referendum. No body or institution has control over what petitions are submitted to citizens. Therefore, it often happens that referendums are challenged after having been held. A court has the power to override the views of the majority when the court strikes down a referendum, which has been held without fulfilling the legal requirements<sup>49</sup>.

These problems make it difficult for direct legislation to accomplish its immediate goals at the local level, and at the state level.

6) Initiatives and referendums have the effect of making governments less responsive<sup>50</sup>. These mechanisms make legislatures more reluctant to

49 In Whatcom County, out of seven exercises in direct democracy, five were manifestly illegal, unconstitutional or invalid. The other two were also otherwise flawed. Waner, (1995): 79.

50 Legislative bodies often turn to the initiative to promote issues that they cannot get passed in the legislature. The temptation to pursue legislation in the public arena not only diverts legislators from the work of the legislature, but also encourages legislators to duck out of issues and let the voters decide.

deal with certain topics. When it comes to controversial issues, the powers that be tend to leave these matters to the public. In this way, the legislature is inclined to shirk its responsibilities and instead waits for citizens to raise questions in the form of an initiative.

## REFERENCES

- ACKERMAN, B. (2012): "We The People Rise Again", Slate (June 4th, 2012). Available in: [http://www.slate.com/articles/news\\_and\\_politics/the\\_hive/2012/06/fix\\_the\\_constitutio\\_n\\_amending\\_by\\_national\\_referendum.html](http://www.slate.com/articles/news_and_politics/the_hive/2012/06/fix_the_constitutio_n_amending_by_national_referendum.html).
- ALLEN, D.; LIGHT J.S. (2015): *From voice to influence. Understanding citizenship in a digital age*. Chicago, The University of Chicago Press.
- BARBER, B.R. (2003): *Strong democracy. Participatory politics for a new age*. California, University of California Press.
- BIGGERS, D.R. (2014): *Morality at the ballot. Direct democracy and political engagement in the United States*, New York, Cambridge University Press.
- BRAUNSTEIN, R. (2004): *Initiative and referendum voting. Governing through direct democracy in the United States*. New York, LFB Scholarly Publishing LLC.
- COMMONS, J.R. (1902): "Referendum and initiative in city government". *Political Science Quarterly*, 17, (4), 609-630.
- FUNG, A. (2003): *Deepening democracy. Institutional innovations in empowered participatory governance*, New York, Verso.
- DAMORE, D.F; BOWLER, S.; NICHOLSON, S.P. (2012): "Agenda setting by Direct democracy: comparing the initiative and the referendum". *State Policy and Policy Quarterly*, 12 (4), 367-393.
- DAVIS, M.S. and MURPHY JAMES, M. (1993): "A participatory democracy with archaic rules: initiative, referendum and recall at the municipal level". *Stetson Law Review*, 22, 715-746.
- FRUG, G.E. (2015): *Local Government Law*, Sant Paul, Foundation Press.
- FRUG, G.E. and Barron, D.J. (2004): *Dispelling the myth of home rule, Rappaport Institute for Greater Boston, Cambridge, Massachusetts*. Available at: [https://www.mma.org/sites/default/files/resources/dispelling\\_myth\\_home\\_rule\\_06\\_0.pdf](https://www.mma.org/sites/default/files/resources/dispelling_myth_home_rule_06_0.pdf)
- LEVINSON, S. (2014): "Popular Sovereignty and the United States Constitution: Tensions in the Akcermanian Program", *Yale Law Journal*, 123, 2669-2672.
- MANIN, J. (2010): *The principles of representative government*, Cambridge, Cambridge University Press.
- RAMOS PRIETO, J. (2010): El proyecto de ley de participación de las entidades locales en los tributos de las Comunidades Autónomas: Algunas consideraciones. *Revista de Estudios Regionales*, 87, 233-251.
- SHKABATUR, J. (2012): *Transparency, accountability and citizen participation in regulatory institutions: the digital era*. Unpublished Thesis, Harvard University.
- WARNER, D.M. (1995): "Direct democracy: The right of the people to make fools of themselves; the use and abuse of initiative and referendum, a local government perspective". *Seattle University Law Review*, 19(47), 47-100.

