

THE ROLE OF PARTICIPATION FOR UPHOLDING THE RULE OF LAW

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1. Rule of law and the role of participation¹

I should start by stating what is already known: participation is a mainstay of democratic political systems and also an integral part of the rule of law. Not only are rule of law systems based on representative democracy, which entails participation in electoral votes, they also promote several forms of direct participation (deliberative and participatory democracy) as a way to engage citizens in public affairs. Indeed, introducing significant elements of public participation into the system ensures it opens up to society and makes public action more relevant, democratic and trustworthy.

This is recognized in article 10 of the Treaty on European Union. Not only is the European Union founded on representative democracy (direct representation in the European Parliament and “levelled” representation through Heads of State or Government at the European Council and Governments at the Council); but the third paragraph also states that “every citizen shall have the right to participate in the

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¹ This article corresponds, with some additions, to a brief memory of the Author’s oral intervention in the High-Level Conference on the Rule of Law in Europe (session “The role of civil society for upholding the rule of law”), held at Coimbra, on the 17th of May 2021. Therefore, the oral speech is dominantly maintained, with no references, and the informations provided are referred to that date. The Author’s reflections stem from her work as a Professor of Law at the University of Coimbra, Portugal, a former assistant at the European Parliament and are in line with the Commission’s Erasmus + project ECI: From A to Z (agreement number 2020-1-PT-01-KA203-078546) which she coordinates.

democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”.

Article 11 goes further to establish some “exit” and “entry” ways regarding the relationship between the European Union and its citizens, civil society and representative associations, the most innovative of which is the European Citizen’s initiative (paragraph four).

The European Union thus recognizes that participation is a means of contributing to better decision making, once all affected by or interested in an ongoing discussion are able to have their say before a decision is taken. With the involvement of citizens and a variety of other social actors, public policy, legislation and decisions can be made from a wider and richer perspective, with more knowledge of relevant situations, better balancing of interests and more adequate solutions to problems, even one’s of sensitive political nature.

This shows that participation is intrinsically linked to ensuring the rule of law: it is a way to counterbalance the majoritarian rule or mainstream groups, by ensuring that individual persons and minorities are able to make their voices heard and influence policies, and also evidence that representation cannot be the sole means of legitimizing European Union actions. Given the increasing significance of threats to the rule of law leading to a “rule of law backsliding”, participation is all the more important since this “citizen-centred” approach also balances the dominantly “State-centred” approach to rule of law taken by the European Union (visible from the rule of law toolbox or from instruments such as the Recovery and Resilience Facility or the conditionality mechanism).

In the 2021 rule of law report from the Commission [COM(2021) 700 final], there is a reference to civil society organisations as essential actors for the rule of law, both as spokesperson for persons whose rights are infringed by violations of the rule of law and as agents that provide relevant and grass-root information and that raise-awareness to the importance for the respect of the rule of law.

This proposed strengthening dialogue with stakeholders at national and European Union level is naturally welcomed, but it is equally important to dig deeper and further engage citizens in European Union affairs and in all areas that impact the rule of law, since they are the root from which all policies (either seen as good or bad) stem.

2. Why participate and why promote participation?

The first stance we would like to make is that *participation matters*. It is a means of contributing to solving small- and large-scale problems (ranging from local issues to transnational and world-wide concerns). It brings new ideas to the floor and allows for a wider and more relevant discussion on all subjects, bridging gaps and creating common spaces for discussion, eventually overcoming long-term differences and misconceptions.

It is a way to increase membership and empowerment and to contribute to a stronger democracy. In the short, medium or long run – whichever applies – participation is beneficial to all involved, public powers, natural or legal persons and society as a whole.

Furthermore, *participation matters in all areas*. There should be no area immune to participation.

There are of course fields where such participation is more limited, such as security and defence policies, given the need for secrecy and the political, strategic and/or operational nature of some options taken. However, no field should, on the whole and in general terms, be free from public participation and debate, either formal or informal, individual or collective.

There are in addition other areas, more technical, where participation can be more difficult given the need to understand specific requirements (for instance in medical and pharmaceutical regulations and, nowadays, in the fields of international intelligence and algorithms). However, in these cases, technical support should exist, for instance by the adoption and disclosure of non-technical reports or summaries, and public powers should remain open to the possibility that participation might also generate new knowledge and create forums for debate.

There are moments in time where participation may be harder to accomplish, such as in times of emergency (as seen in the recent Covid-19 crisis). Nonetheless, in such a case, procedures must either be suspended until participation is possible or increased forms of participation should be envisaged with a focus on e-participation. Indeed, it is in times of emergency and crisis that participation is more useful given the restrictions imposed upon private and legal persons, and their need to speak out to allow for a higher level of accountability and control over public decisions.

There are also areas where participation is an essential requirement for the adoption of policies, legislation, plans, programmes and projects, since their relevance crosses borders and generations, impacting the very conditions of sustainability and existence. It is noteworthy that the Sustainable Development Goals² build strongly on participation and capacity-building as a way to achieve the objectives of ending poverty and other deprivation, improving health and education, reducing inequality, and encouraging economic growth – all the while tackling climate change and working to preserve oceans and forests.

Moreover, *participation matters to all*. Participation enables citizens, civil society associations and organised interest groups to (try to) influence policy and decisions regarding society, the environment and the organisation of economic life. At the same time, participants assert their rights and interests, publicising them and allowing for their balancing in plural political and societal settings.

People are no longer viewed as mere passive users or addressees of public decisions; they are seen as important influencers or partners in decision taking. As citizens become more affected by public policy, their participation in democratic processes should be reinforced and valued: a transition from passive or stand-by to active citizenship – in which one's actions contribute to democracy and promote its vivacity – is therefore desirable.

Younger people are very important policy makers. Although they may organise themselves differently to what used to be considered usual, resorting more to social media use and new participatory contexts, they are also politically engaged as future custodians of present-day policies. Participation should evolve with them by taking full advantage of the importance of networking, building relationships and developing new forms of communication.

Participation should also be promoted to and facilitated for those who have a more difficulty accessing it or are more disengaged from it (for instance ethnical and language, minorities, persons with disabilities, persons with limited digital access, under-represented local communities, etc.), so that it is far-reaching and far more meaningful.

From the point of view of public entities, participation should also be promoted, even in cases where it is not legally binding already. Par-

² Available at <<https://sdgs.un.org/goals>>.

ticipation is a way of introducing plurality into decision making procedures, allowing for a better balancing of interests and a more thorough deliberation of policies, from the point of view of their effectiveness, efficiency, inclusiveness, legitimacy and accountability.

Despite the fact that introducing participatory moments can make procedures lengthier, more complex and unpredictable, this might be regarded as a small price to pay in order to reach the best decisions possible. Also, such shortcomings can be abridged by a competent and serious design of the participatory process and by a well thought over continuous process of citizen and civil society engagement.

We believe a roadmap should be set and followed in order to integrate participation into public decision-making processes, by defining systematic and not only *ad hoc* forms of participating. They should be practical to use, engaging and adjusted to local communities and stakeholders, who vary immensely in each case. Selecting the right level of public participation is therefore a pre-condition for its success, as is:

- the definition of clear and attainable goals entailed in each participatory stage;
- establishing a clear structure and processes for participation, by defining techniques to be used and audiences to be reached;
- informing interested parties at any given point about the conduct of the procedure; and,
- ensuring inclusive and effective participation, opening the procedure to the full range of relevant stakeholder interests and overcoming any eventual difficulties they may have in participating.

In the aftermath of participation, the repercussions of civic and public involvement should also be discernible, making clear how it translates into decision-making (even if their contribution has not been accepted) and how they have contributed to improving the quality of decision making. Indeed, it is important to avoid participatory frustration and disfranchisement of participants, by the apt design of participatory mechanisms and clear definition of participation outputs.

Two other thoughts before we move further. Participation should be an end in itself, having an intrinsic value (both political and personal) of its own. Public powers should launch participatory instru-

ments and initiatives as a way to recognise and promote citizen's rights, welcome their input and balance it in an unbiased way without any manipulative or hidden motives (which might include simply the will to confirm their initial positions or exploring public divergences on a certain issue).

However, from another standpoint, participation could also be seen a means to an end, since it aims – more or less remotely – to contribute to the best decision possible and to render public powers responsive and responsible for their decisions. It is also true also that participation may increase the acceptability of decisions taken and reduce conflict which, however, must be seen as a mere indirect effect of participation rather than its main purpose.

Balancing these two dimensions is not easy and takes a lot of commitment from Institutions to respond adequately to participation. Translating the ideals of participatory democracy into practical institutions is challenging, but sorely needed especially in times of distress and concern.

3. Participation at the European Union Level

The European Union has developed a framework for participation in which several pathways for citizens to engage with the European Union have been developed, in line with the treaties. Although this is not a closed catalogue and other forms of involvement exist, either at citizen's and civil society initiative (open letters, rallies, etc.) or within the European Union's own organisation and forms of action, the following forms of participation (fig. 1) are the most commonly resorted to.

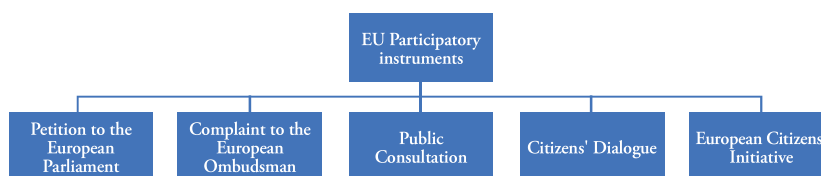


Fig 1: Participatory instruments within the EU.

It is undeniable, however, that it is the European Citizens' Initiative that has received the most attention from all quarters given its

nature, structure and function. Not only is this the first supranational instrument that tends to lead to some sort of direct democracy (in line with the status of citizenship of the European Union, which is also a first in terms of transnational legal forms of citizenship), but also it is highly structured from a procedural point of view in order to function properly (now encapsulated in Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, and also in other complementary provisions). In addition, from a functional point of view, this is an instrument that aims to mobilise European Citizens and groups and has the potential to transform the existing relations between European civil society and European Union institutions, involving them further in European affairs and policies.

The European Citizens' Initiative represents a step forward in the implementation of democratic principles within the European Union, promoting participation on a larger scale, by the required adherence of many (at least one million citizens of the European Union) to a common or shared cause, which is set out and detailed in a joint proposal from a diverse group of organisers. Where successful it will prompt a response from the European Commission and the involvement of other Institutions and organs (mostly the European Parliament), bridging the gap between citizens and the organisational architecture of the European Union.

Through this Initiative, the European Union has moved closer to the citizens of the Union by including them in a (pre)decision-making process on the issues that are important for them, giving them the opportunity to contribute to the amendment, development, and shaping of European Union policies, and to be part of the construction of a more democratic European Union.

The aim of the European citizens' initiative is to enable Europeans to launch a debate and influence the EU agenda by calling on the Commission to propose legislation.

However, this is not tantamount to a legal obligation for the Commission to propose any concrete line of action. The Commission enjoys a good deal of discretionary power in analysing the initiative's substance and whether it requires a line of action and, in the affirmative case, which. So, for a European Citizens' Initiative the term successful can be better translated as "accomplished", since what it means is that

the procedures established in Regulation (EU) 2019/788 are conducted until their finish and are examined and responded by the Commission.

This does not mean that the initiative is without purpose or ineffective, since the Citizens' Initiative is an agenda-setting tool that obliges the Commission to give serious consideration to requests made by European citizens.

Therefore, if the Commission decides not to act (or not to act in the way proposed in the European Citizens' Initiative), it must clearly explain its reasons and give feedback on its stance.

If the Commission decides to put forward a proposal, then the normative procedure begins. The Commission proposal will be sent to the European Parliament and the Council (or, in some cases, only to the Council), depending on the procedure applicable. If adopted by those Institutions, the proposal becomes a legal act of the European Union.

Since the European Commission is the Institution in charge of promoting the general interest of the Union and taking appropriate initiatives to that end [article 17(1) of the Treaty on European Union] and given the fact that Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise, it is reasonable that the European Citizens' Initiative has the Commission as its "pivotal" institutional figure, fulfilling a multitude of functions synthesised in fig. 2.

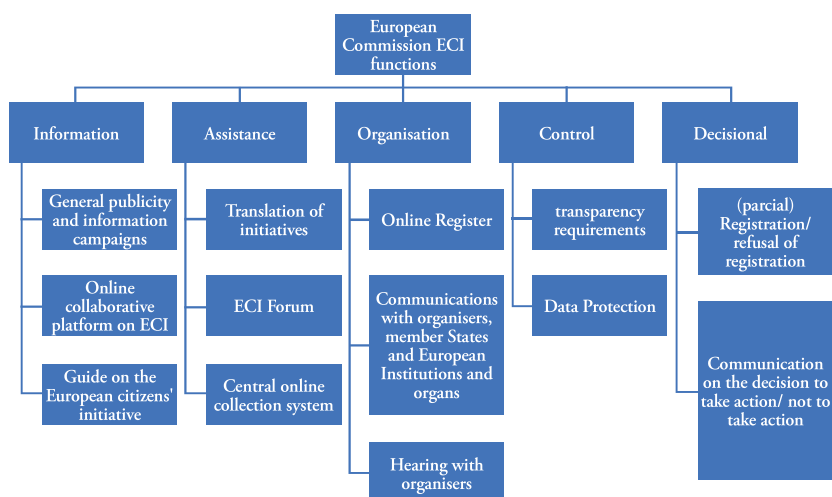


Fig. 2: Powers of the Commission under the European Citizens' Initiative

However, it is also important to ascertain if the role of other institutions and organs, mostly the one's with a more Democratic resonance, should not be increasingly valued within the European Citizens' Initiative framework.

And although the regulation does not itself refer to the role of the Court of Justice of the European Union within the framework European Citizens' Initiative, this does not mean that it should be or has been irrelevant. On the contrary, the Court of Justice of the European Union has already clarified how the Commission should exert its powers in line with the Treaties and the Regulation itself and has prompted waves of change in how the participation under the European Citizens' Initiative should be taken into due consideration and followed up by the Commission.

In fact, at the registration phase, the Commission confines itself to checking the requirements established in article 6(3) of the Regulation. However, challenges have been brought before the General Court, and under appeal, before the Court of Justice (for instance, in cases T-646/13; C-589/15 P; T-361/14; T-754/14; C-420/16; C-336/17), and they have concluded that the lack of registration is subject to judicial control, particularly taking into consideration the principle of good administration and the duty to provide adequate reasons for the decisions taken, and also the judicial oversight of errors of law by the Commission (regarding the scope and extent of its own competences). Nonetheless, following the Court's appraisal, the Commission has lost only once in substance, in the "Stop TTIP" case (T-754/14), and once for the procedural reason of lack of justification, in the "Minority Safe-Pack" case (case T-646/13).

Moreover, the Communication of the Commission, in which it defines the steps to take (if any), is also a reviewable act, despite the fact that it involves discretionary powers and political choices.

This was confirmed by the Court of Justice in case C-418/18 P [the *Puppinck* Judgement, of 19 December 2019 (ECLI:EU:C:2019:1113)]. On 11 May 2012, the Commission registered the proposed European citizens' initiative entitled 'One of us' which aimed at the '(p)rotection in law of the dignity, the right to life and the integrity of every human being from conception in those areas of (Union) competence where such protection is relevant'. On 28 May 2014, following the submission by the organisers and their public hearing by the European

Parliament, the Commission adopted a communication in which it indicated that it would not undertake any action following the contested European Citizens' Initiative.

In this case the Court confirmed that the European Citizens' Initiatives constitutes an agenda setting tool and not a way to formally initiate the adoption of a legal act, since the right of initiative remains solely with the Commission. However, the Court went on to add that a referred Communication is subject to judicial review, limited nonetheless to manifest errors by the Commission, given the wide margin of discretion it enjoys. In short, the Court of Justice, in *the Puppinck* judgement, struck a general balance: while the success of the citizens' initiative does not create any obligation of legislative initiative on the Commission, the communication presented by the Commission (containing its legal and political conclusions on the citizens' initiative) is challengeable under Article 263 of the Treaty on the Functioning of the European Union.

The European Citizen's Initiative as an innovative tool in the European Union is still "in the making". With only six successful initiatives to date from the many that have been presented, it seems that it is still a long way from developing its full potential. But change is undergoing and the enthusiasm and engagement with European Union policies within this mechanism seems not to be getting any weaker; compensating, to a certain measure, some lesser degree of political commitment at State level.

4. Where to go from here?

Despite the fact that the European Union understands – sometimes at a much deeper level than Member States – that citizen participation is a much-needed reality and establishes a vast array of participation instruments, the consequences of this approach continue to be frail.

In the very recently available Eurobarometer about the Future of Europe, the vast majority of Europeans (92%) across all Member States demanded that citizens' voices were "taken more into account in decisions relating to the future of Europe"³.

³ Available at <<https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/future-of-europe>>.

This generalized feeling has accompanied the European Union since its inception. And despite the fact that the European Union offers several points of access and dialogue for influencing European Union policies, it seems not to have a full effect in practice.

From our point of view, and as others have already put it, this *deficit* results mainly of a mismatch between policies increasingly operating at the European level while politics still mainly operates at the national level. Therefore, any communication and participation policy regarding the European Union cannot be tackled only by the European Union itself. It demands a continuing effort from Member States to try to give relevance to the role of the European Union in policy making, which however could be imperilled in a moment where some State policies are under strain and do not value dimensions of fundamental rights and the rule of law as an integral part of Democratic systems.

But, more than that, it is important that participation is seen both by public entities and by citizens not as a hurdle but as a promise: a promise of effective joint work and joint results.

If this is not the case, citizens and civil society organizations will not be attracted or even dissuaded from making their voices heard, moreover when some Member-States are themselves disengaged from the European Union and do not internally promote its promise. Enabling, therefore, a path where there is under-representation of some actors, interests and discourses (such as fundamental rights) that might push the European Union forward in the social, political and environmental fields; and an over-representation of other actors, interests and discourses, mostly of a pure economic nature or of certain geographical areas that contribute dominantly to setting the agenda of the European Union.

Therefore, the European Union should develop further its pathways for Citizens to Engage in European Union policies. We are not advocating that the European Union has not done a lot. But it has to improve its policies through better communication and participation that highlights the relevance of the role of citizens and civil society within European Union policy making.

A policy directed at all, no matter whom, and particularly focused on the ones more affected by its decisions such as vulnerable groups, younger and older citizens and representatives of sometimes “silent” or “silenced” interests.

A policy that evidences results, by regularly opening up new participation *fora* or participatory moments as policies are developed and tested and not only at its inception stage.

A policy that shows that participation is not only welcomed, but relevant and effective in influencing European Union policies, for instance by producing reports that evidence clearly and in an understandable way how participation, and particularly some instances of participation, have influenced (or not) the decision-making process.

Also, a focal element of participation should be “consideration”; going beyond merely consultation. The European Citizen’s Initiative has this element at its heart. Nonetheless, it should be perfected in order to set aside some “blocking trends” that render it less relevant.

Recently with the *Puppinck* case of the Court of Justice it was clarified that not only the registration phase of a European Citizens’ Initiative but also the Communication of the Commission according to which it intends or not to take legal action is subject to (albeit limited) judicial control. This represents a great leap in the proper understanding of the European Citizens’ Initiative mechanism and prompts the Commission to be more open to initiate legislative procedures after a successful European Citizens’ Initiative, giving the floor more easily to the European Parliament and the Council so they can have the final decision in what the matter of concern of at least one million citizens (a number which is not easy to reach) was.

Let’s move forward and let the people pave the way.