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The Referendum in the Portuguese Constitutional Experience

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Citation

Rodrigues, A. F. G. (2013, December 18). *The Referendum in the Portuguese Constitutional Experience*. *LUP Dissertations*. Leiden University Press, Leiden. Retrieved from <https://hdl.handle.net/1887/22936>

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Title: The referendum in the Portuguese constitutional experience

Issue Date: 2013-12-18

Chapter 2

The Local and Regional Referendum

1. Proposals to Introduce the Local Referendum Before 1982

The Constitutional draft drawn by Jorge Miranda proposed, under the title 'popular initiative', that a number of citizens (not less than one-twentieth of those who voted the last election or referendum) could submit any deliberation of the local authority bodies to a referendum under the terms laid down by law (Miranda, 1975, p. 59). This idea reinstated, to a certain extent, the models for local referendums that came from the First Republic and the beginning of the 1936 Administrative Code. A significant number of citizens could submit the local authorities' deliberations to referendum.

Jorge Miranda's proposal would have applied to all local authority deliberations. These would be provisional in nature, since they were dependent on an eventual referendum. In practice, the local referendum would be dependent on legal regulations. It was not clear if the results of the popular initiative would be binding, or if their implementation would depend on the decision of any State body.

The same draft included two other forms of local referendum. The first was the creation or extinction of local authorities, as well as alteration of their boundaries. The second was the organic statute of each municipality. The first case once again reinstated an idea that came from the First Republic, where the creation of new municipalities demanded a local referendum. Jorge Miranda's draft included that possibility, but the proposal did not seem to consider that procedure as obligatory. The idea of approving the organic statute of the municipalities through referendum would have been impracticable in any case, since the Constitution foresaw no such document. In fact, the regime of the local authorities is established in general terms by the Constitution and by law, and is the same for all the local authorities at the same level. There are no individual documents specifying the regime of each one. Nonetheless, the Constituent Assembly did not discuss Jorge Miranda's draft.

The only proposal for local referendums introduced to the Constituent Assembly appeared in the *PPD's* Constitutional draft. It proposed that the deliberations of the representative bodies of local authorities could be dependent on a resident citizens' referendum and the Government's approval. The *PPD* therefore revived the idea of the local

referendum as a way to limit the decision-making powers of the representative bodies. However, the 1976 Constitution did not allow the referendum by any means.

On 6 June 1980, the subscribers of the *Manifesto Reformador*, which were elected in the *AD* lists, introduced the first Bill of Referendum Law. This initiative, which was essentially concerned with the Constitutional referendum, was deemed unConstitutional because the Constitution did not permit the referendum. The Assembly of the Republic did not consider the bill, which contained references to the regional and local referendums.

2. The Local Consultations in the Constitutional Revision of 1982

Soon after the legislative elections of October 1980, and before the first Constitutional revision, several theoretical works proposed making provision for the local referendum in the Constitution. Jorge Miranda's draft published in 1980 included a provision under the title of 'direct local democracy', which foresaw that the law could admit referendums on deliberations taken by municipal bodies. According to the author's own note, this proposal had Article 66(4) of the Republican Constitution of 1911 as its antecedent. The idea was to test some forms of direct democracy at a local level, which, in his point of view, could be a useful experiment. (Miranda, 1980, p. 172).

Three of the five draft amendments to the Constitution introduced to the Assembly of the Republic in 1981 proposed introducing local referendums: **a)** the Draft Amendments to the Constitution No. 1/II, from the *ASDI*, which were set aside in favour of the *FRS*⁹⁵ draft. These proposed the inclusion of a new article in the Constitution and allowed popular consultations at a local level in the cases and terms established by law [*DAR* (Off-print 6/II) 26 June 1982, p. 26]; **b)** the Draft Amendments to the Constitution No. 2/II, from the *AD*, in the article on local authorities, provided that the law should determine the circumstances under which the referendum could take place at parish, municipality and regional levels when issues of important local interest were at stake [*DAR* (Off-print 6/II) 26 June 1982, p. 53]; **c)** the Draft Amendments to the Constitution No. 4/II, introduced by the *FRS*, proposed a new Constitutional provision that would allow, in the cases and terms established by law, popular consultations at a local level. These could be

⁹⁵ The *FRS* was a coalition that included the *PS*, the *ASDI* and the *UEDS* from 1980 to 1983.

held on matters that were the exclusive responsibility of the local authority bodies [*DAR* (Off-print 6/II) 26 June 1982, p. 90].

In the sub-committee's preliminary consideration of the drafts there was no consensus between the *PS* and the *PSD* regarding these proposals, with the *PCP* adopting a supportive position, in principle, towards the *FRS* proposal. The first reading in the Ad Hoc Committee of Constitutional Revision (*CERC*) showed that the divergences put the *AD* on one side, and the *PS* and the *PCP* on the other. Differences of opinion centred around three concerns.

The first question whether the designation would be a 'referendum' or a 'popular consultation'. The *PS* preferred the expression 'popular consultation' to distinguish it from the concept of referendum for known historical reasons. However, others thought the term 'consultation' was too vague. It was a wide concept that could vary according to the circumstances.⁹⁶ Deputies of *AD* argued that a vague reference to 'popular consultation' was unacceptable, and that 'popular consultation' must take the form of a direct ballot.⁹⁷

The second divergence between the *PS* and the *PSD* was the extent of the referendum. This matter attracted much political debate. For the *PS*, consultations could only happen on matters under the exclusive auspices of the local authority bodies. The *AD* referred to questions of important local interest, which, according to Almeida Santos, could lead to a national referendum in practice through a juxtaposition of local referendums [*DAR* (II) 49 – 3rd Supplement, 5 February 1982, p. 1020-(83)].

The third problem concerned the right to initiate local referendums. In the *FRS* proposal, the popular consultation must be called at the level of local authorities and by their own bodies, in the terms established by law. The *AD* proposal allowed local referendums to be called by the State, but only if their scope was local [*DAR* (II) 3rd Supplement, 49, 5 February 1982, p. 1020-(84)].

However, Vital Moreira still posited the question of whether or not there should be prior review of the Constitutionality and legality of the local referendum before it was called in order to prevent the use of the

⁹⁶ In this sense, see Almeida Santos's speech [*DAR* (II) 49 - 3rd Supplement, 5 February 1982, p. 1020-(85)].

⁹⁷ See Francisco Sousa Tavares's speech [*DAR* (II) 49 - 3rd Supplement, 5 February 1982, p. 1020-(85)].

referendum for aims not allowed in the Constitution or by law. It would be easier to prevent that possibility than face the results of an illegal or unconstitutional referendum. This idea received widespread acceptance [DAR (II) 49, 3rd Supplement, 5 February 1982, pp. 1020-(85-86)].

In an attempt to negotiate positions, Sousa Tavares declared the AD willing to accept the restriction of popular consultations or referendums regarding matters of exclusive responsibility to local authorities, since it was expressly stated that the consultation should be of an electoral type [DAR (II) 49, 3rd Supplement, 5 February 1982, pp. 1020-(87-88)]. The question was approached again in the meeting of 13 January 1982, concerning the prior review of constitutionality to institute in the framework of the creation of a Constitutional Court [DAR (II) 69 – Supplement, 20 March 1982, pp. 1288-(6-7)]. In the plenary sittings of 21 July 1982, the AD and the FRS thrashed out the points of convergence and divergence between them [DAR (I) 124, 22 July 1982, pp. 5231-5235].

On 26 July 1982, the Committee arrived at a text [DAR (II) 136 – Supplement, 3 August 1982, pp. 2438-(1-3)], sent to the plenary on 29 July for approval as Article 241(3)⁹⁸ of the Constitution. It stated the following:

‘The local authority bodies may submit matters that are included within its exclusive responsibilities, in such cases and under such terms with effect as the law may lay down, to the direct consultation of the citizens registered to vote in the respective area in the form of a secret ballot.’

This provision had 152 yeas votes, (PSD, PS, CDS, PPM, ASDI, UEDES and MDP/CDE), one nay (UDP) and 34 abstentions (PCP).⁹⁹ Article 213d established the Constitutional Court’s responsibility to conduct prior reviews of the constitutionality and legality of direct consultations of citizens at a local level, with 34 abstentions (PCP and UDP).¹⁰⁰

⁹⁸ All references to articles of the Constitution follow the actual numbering at the time to which they referred.

⁹⁹ Concerning the declarations of vote, Amadeu Ferreira (UDP) considered that the direct consultations could pressure the local authorities, and Vital Moreira (PCP) reserved a definitive position for the moment when the law would define the concrete outlines of the popular consultations [DAR (I) 124, 22 July 1982, p. 5483].

¹⁰⁰ The abstentions of the PCP in all the provisions regarding the responsibilities of the Constitutional Court were explained by reticences as to its creation and composition [DAR (I) 124, 22 July 1982, pp. 5484-5485].

It is therefore important to systematise the Constitutional framework for local consultations, which came from the Constitutional revision of 1982 (Pinto, 1988, pp. 92-95; Bon, 1997, p. 467):

- 1) The responsibility to hold direct consultations of the citizens registered to vote belongs to local authority bodies. Citizens cannot make direct calls for referendums (the citizens' initiative), but they can lobby local authority bodies to that purpose.
- 2) The local authorities, in the terms of the Constitution, are municipalities (*municípios*), parishes (*freguesias*) and administrative regions (Article 238). The latter were never instituted for reasons that are explained [in chapter 5]. The Constitution therefore admitted direct consultations at parish and municipal levels. If the administrative regions foreseen in the Constitution had been created, direct consultations at regional level would have been permitted by the Constitution.
- 3) The responsibility to promote local consultations would belong to the local authority bodies, in other words, to the deliberative bodies (*assembleia municipal* and *assembleia de freguesia*) and to the executive ones (*câmaras municipais* and *juntas de freguesia*), in accordance with their respective responsibilities.¹⁰¹ The responsibility to decide on the accomplishment of the referendum rested with the body responsible for deliberating on the subject under consultation, or in the case of shared responsibilities, to both (Pinto, 1988, p. 93).
- 4) The right to vote should be given to the citizens registered in the area where the consultation was promoted.
- 5) The general provisions of electoral law established in the Constitution (Articles 49 and 116), namely the personality, universality, equality and secrecy of vote, as well as the provisions regarding the electoral registration, election campaigns, duty to cooperate with the electoral authorities

¹⁰¹ Canotilho & Moreira [1993 (II) p. 39] expressed the opinion that only the deliberative bodies (the assemblies) could call local referendums. There seems to be no Constitutional basis that prevents the executive bodies of local authorities from calling local consultations on matters exclusively under their responsibility.

and correctness and validity of electoral acts, should apply to the local referendum.

- 6) The prior review of the Constitutionality and legality of the consultation should remain in the Constitutional Court.
- 7) The local consultations should concern matters included within the exclusive responsibilities of the local authority bodies that would call on them. The local consultations could not be held on subjects of relevant local interest not included in those responsibilities.
- 8) The Constitution did not establish other boundaries as to the matters that could be the subject of consultation. Ricardo Leite Pinto (1988, p. 87) points out, however, that the acts that in the terms of the law had to be decided on by local authorities in the exercise of bound powers and the decisions that could not be revoked as well could not be submitted to local consultations, under the penalty of illegality.
- 9) The Constitution was silent on whether the referendum would be binding or merely advisory, leaving such matters to be established by legislation.

3. The Attempts to Legally Regulate Local Direct Consultations

In the III Legislature, after the elections of April 1983, which gave place to a *PS/PSD* coalition Government, the first initiatives to legislate on local direct consultations were introduced. On 23 June 1983, the *UEDS* presented Bill No. 169/III [*DAR* (II) 10, 28 June 1983, pp. 424-442]. On 15 March 1984, the *CDS* presented Bill No. 302/III [*DAR* (II) 98, 16 March 1984, pp. 2500-2501]. Finally, on 21 March 1984, the *PS* and the *PSD* jointly presented Bill No. 306/III [*DAR* (II) 101, 22 March 1984, pp. 2540-2545].

The debate on the general principles of all of the bills took place on 2 May 1984 [*DAR* (I) 99, 3 May 1984, pp. 4211-4241]. All of them were approved with yea votes from the *PS*, *PSD*, *CDS*, *UEDS* and *ASDI*. The *PCP* voted nay. The *MDP/CDE* and independent MP António González, elected within the *PCP* list, abstained. The ad hoc committee that was created to debate the bills in detail did not finish its work, given the dissolution of the Assembly of the Republic in July 1985.

In the IV Legislature, which began in 1985 with a *PSD* relative majority, Deputy Lopes Cardoso, former leader of the *UEDS*, returned to the *PS* and introduced Bill No. 66/IV [*DAR* (II) 12, 7 December 1985, pp. 385-390] while essentially maintaining the *UEDS* bill. The *PS* presented Bill No. 107/IV [*DAR* (II) 25, 23 January 1986, pp. 784-790] reintroducing the contents of the previous *PS/PSD* bill. The *PSD*, in turn, presented Bill No. 139/IV [*DAR* (II) 34, 22 February 1986, pp. 1416-1421] containing some changes in relation to its previous position. The *CDS* presented Bill No. 146/IV [*DAR* (II) 36, 28 February 1986, pp. 1493-1495] essentially reviving the initiative of the previous legislature.

The general debate took place between 15 and 17 April 1986 and ended with the approval of all bills with yea votes from *PSD*, *PS*, *PRD*, *CDS*, *MDP/CDE* and four independent MPs, and with nay votes from *PCP* [*DAR* (I) 55, 16 April 1986, pp. 2106-2113 and *DAR* (I) 57, 18 April 1986, pp. 2164-2181 and 2193]. However, once again, the initiatives lapsed due to the dissolution of the Assembly of the Republic in April 1987, before the conclusion of the legislative procedure.

4. The Idea of Local Referendums to Create Municipalities

On 13 October 1983, the *PS/PSD* Government introduced Government Bill No. 45/III on the creation of municipalities [*DAR* (II) 38, 14 October 1983, pp. 967-970]. The Government proposed that the creation of new municipalities should be organised through a direct consultation of the citizens. The civil governor of the respective district would schedule the consultation, and the process would follow, *mutatis mutandis*, the Electoral Law for the Assembly of the Republic. Then the Government would make the necessary regulation within the 30 day time limit.

The political context of that proposal was defined by a fierce controversy over the creation of a new municipality in *Vizela*, which was bravely fought for by the local population, but that the Government wished to avoid. The idea of a local referendum as a precondition for creating new municipalities had implications not only on the creation of the municipality of *Vizela*, but also for the appearance of other proposals encouraged by that precedent.

However, there was no law, at the time, on the application of a local referendum. Furthermore, the Constitutional system, according to which the local referendum could only be held on matters within the local government bodies' exclusive responsibility, did not allow the pattern of

local referendum proposed by Government. The ultimate responsibility for the creation of a new municipality would always belong to the Parliament, as laid down in Article 249 of the Constitution. Thus, the proposal was strongly criticised in the parliamentary debate [*DAR* (I) 34, 18 October 1983, pp. 1494-1499 and *DAR* (I) 35, 19 October 1983, pp. 1505-1559], namely by the *PCP* members. The Government abandoned the idea.

5. Law No. 49/90, of 24 August, on Local Direct Consultations

In the V Legislature, after the elections of 19 July 1987, which the *PSD* won with an absolute majority, three parties introduced bills, including the *CDS* with Bill No. 86/V [*DAR* (II) 20, 11 November 1987, pp. 422-(3)-422-(5)], the *PSD* with Bill No. 200/V [*DAR* (II) 53, 4 March 1988, pp. 1032-1037] and the *PS* with Bill No. 231/V [*DAR* (II) 68, 27 April 1988, pp. 1280-1286]. The general debate on these bills took place on 20 May 1988. They were all approved with yea votes from the *PSD*, *PS*, *PRD*, *CDS* and *PEV* and with the abstentions from the *PCP* and independent MPs from the civic association of Democratic Intervention (*ID*), elected in the *PCP* lists [*DAR* (I) 91, 21 May 1988, pp. 3692-3703]. The legislative procedure ended on 25 May 1990, with the unanimous approval in the final overall vote of Law No. 49/90, of 24 August. The passing of the law finally happened eight years after its Constitutional inception.

In synthesis, the enactment of Law No. 49/90, dated 24 August, had the following consequences:

- 1) Local consultations could happen on matters that were the exclusive responsibility of the local authority bodies, excluding financial questions or other subjects that the local authorities were bound to decide on in the terms of the law. This also included matters that had been the subject of an irrevocable decision. The legislation excluded financial questions;¹⁰² those questions that had a legal imperative and should be resolved by local authorities; as well as those that had been previously resolved and whose decisions could not be revoked, namely those that created new rights. The phrase that referred to topics that were inappropriate

¹⁰² When Law No. 49/90, of 24 August was approved, the Constitutional Revision of 1989 had already enshrined the referendum at a national scope, and had also excluded the possibility of submitting financial questions to referendum.

consultation, which would indeed be unconstitutional, was not included.

- 2) The local consultations should be binding, with the local authority obliged to respect their results.
- 3) The deliberation on the holding of local consultations belonged exclusively to the deliberative bodies of the local authorities (parish and municipal assemblies).
- 4) The proposals for the deliberative assemblies asking for consultations belonged exclusively to the executive bodies or to a third of their members. The citizens' initiative with respect to the local authority bodies was not accepted.
- 5) Within eight days after deliberation, the chairperson of the local authority body should send an application to the Constitutional Court asking for a review of the Constitutional and legal conformity of the consultation. Once that conformity was verified, the president of the executive body of the local authority should set the date of the consultation within eight days, and the consultation should take place between 70 and 90 days after the date was set.

6. From Direct Consultations to Local Referendums

6.1. The Constitutional Revision of 1989

Before the final approval of Law No. 49/90, there was the second Constitutional revision. In its draft, the *PS* proposed the adoption of the term referendums to replace the designation of local consultations [Draft Amendments to the Constitution No. 3/V, *DAR* (Off-print 1/V) 31 December 1987, p. 4428].

Questions remained, however, about the precise meaning of the *PS* proposal regarding the effectiveness of the local referendum. The expression 'consultation' remained in the text, and it seemed that the *PS* maintained that local consultations should only be advisory. However, in the same draft of the Constitutional revision, the *PS* proposed introducing the national referendum with binding effectiveness. Moreover, when the discussion took place on 22 July 1988 (Bill No. 231/V), the *PS* admitted that the binding effectiveness of local consultations had already been approved in general terms.

In the first reading of the draft amendments to the Constitution, the *PS* representatives, Almeida Santos and António Vitorino, maintained

that the subject remained open. In their opinion, the Constitutional text in force admitted both solutions since it sent the decision on the effectiveness of the local consultations to the law. The *PS* proposed the adoption of the word ‘referendum’, since it would be illogical for a national referendum to have a different designation than a local consultation. Almeida Santos also admitted that it would be illogical for the national referendum to be binding if the local referendum was not. The *PS* was therefore willing to consider the binding effectiveness of local referendums [*DAR* (II) 52 – *RC*, 26 October 1988, pp. 1667-1671]. Later, the *PS* withdrew their proposal [*DAR* (II) 92 – *RC*, 27 April 1989, p. 2691]. The *PRD*, created in 1985 and inspired by President Ramalho Eanes, proposed the elimination of local consultations, but was unsuccessful in this argument [Draft Amendments to the Constitution No. 9/V, in *DAR* (Off-print 1/V) 31 December 1987, p. 4480].

6.2. The Failed Constitutional Revision of 1994

In 1994, a Constitutional revision procedure failed, after few months of debates inside the Had Hoc Committee, for lack of agreement between the *PS* and the *PSD*. On that occasion, the *PS* proposed the further widening of the scope of local consultations. According to the Draft Amendments to the Constitution No. 1/VI [*DAR* (Off-print 24/VI) 7 November 1994, p. 17], the local authorities could hold direct consultations of their citizens on matters other than those of their exclusive responsibility. Consequently, the matters on which local authorities exercised some type of responsibility, although not exclusive, could be subject to local consultation. Therefore, in matters whose decision involved the local authorities and other bodies of the State (namely the Government), the local authorities could use local consultations to build pressure for a decision that suit their purposes, provided those purposes were supported by the result of the direct local consultation.

Luís Fazenda, and independent MP from the *UDP*, who was elected from the lists of the *PCP*, proposed that local authority bodies could hold direct consultations on any matters that affected the population of their respective area [Draft Amendments to the Constitution No. 13/VI, in *DAR* (Off-print 24/VI) 7 November 1994, p. 125]. In this version, the local authorities were able to promote popular consultations on matters outside their specific responsibilities, and use the popular consultations to show the popular sentiment of populations regarding decisions that might affect them.

6.3. The Legislative Procedure from 1996 to 1999

During the VII Legislature, which began in 1996 with a relative majority by the *PS*, several parties introduced legislative initiatives on the subject of local consultations. On 21 March 1996, the *PCP* presented Bill No. 128/VII [*DAR* (II-A) 31, 28 March 1996]. On 13 November 1996, the *PSD* presented Bill No. 237/VII [*DAR* (II-A) 7, 29 November 1996, pp. 101-102]. On 3 April 1997, the *PS* presented Bill No. 303/VII [*DAR* (II-A) 33, 10 April 1997, p. 511]. On 4 April 1997, the *CDS-PP* presented Bill No. 304/VII [*DAR* (II-A) 33, 10 April 1997, pp. 511-513].

A general debate took place on 9 April 1997 [*DAR* (I) 59, 10 April 1997, pp. 2063-2070], and there was unanimous approval for all the initiatives [*DAR* (I) 60, 11 April 1997, pp. 2108-2109]. However, the legislative procedure did not follow. At that time, the fourth Constitutional revision was in progress. That procedure ended in July 1997 and brought some changes regarding local consultations.

On 25 March 1999, the Government presented Government Bill No. 262/VII [*DAR* (II-A) 49, 31 March 1999, pp. 1336-1362] on the local referendum which sought the complete revocation of Law No. 49/90, having in mind the new Constitutional text. On 24 October 1999, all the initiatives lapsed due to the unexpected dissolution of the Assembly of the Republic.

6.4. The Constitutional Revision of 1997

The Fourth Constitutional Revision took place at the same time as the legislative procedure for local direct consultations, and introduced some changes in that regard. In doctrinal terms, Jorge Miranda (1996b, pp. 20-21) published a draft supporting the inclusion of the national and local referendum in the same Constitutional provision, leaving out the designation of local direct consultations. The local referendum could be held on matters not necessarily exclusive to, but within the responsibility of, the local authority bodies, and it could happen in neighbouring local authorities regarding the definition of the respective borders or the creation of a local authority. Besides this, the referendum could be held through the direct initiative of at least 5% of the citizens registered to vote in the respective territory.

When the procedure for the Constitutional revision began in the Assembly of the Republic, the *PS* revived its proposal to widen the substantial scope of local consultations, having included in the Draft

Amendments to the Constitution No. 3/VII a new provision on that subject [DAR (II-A) 27, 7 March 1996, p. 484-(26)]. The Draft Amendments to the Constitution No. 8/VII, presented by the independent MPs elected in the lists of the *PS*, included the very same proposal [DAR (II-A) 27, 7 March 1996, p. 484-(81)]. Finally, in the Draft Amendments to the Constitution No. 4/VII [DAR (II-A) 27, 7 March 1996, p. 484-(43)], the *PCP* proposed that the citizens initiate direct consultations in the territory where they were registered to vote, in the terms laid down by law.

In the first reading of the drafts, the *PSD* announced its support for the *PS* proposal to enlarge the substantial scope of local consultations to matters that were not the exclusive responsibility of local authorities, and for the *PCP* proposal to admit the popular initiative of local consultations.¹⁰³ Meanwhile, the chairman of the Committee, Vital Moreira, assumed the job of unifying the terminology by replacing the designation of popular consultations for local referendums [DAR (II – RC) 61, 4 December 1996, p. 1849].

On behalf of the *PCP*, Luís Sá agreed with both proposals, and considered the local consultations bound to the exclusive responsibilities of the local authorities to be practically useless. Because Portugal had restricted local autonomy, the most important subjects were not within the exclusive responsibilities of the local authorities. Therefore, they were out of the referendum's remit, pitting proposals for popular consultation against the judgement of unConstitutionality by the Constitutional Court. Therefore, the way to strengthen local popular consultations would be to extend the exclusive responsibilities of local authorities, or to allow the local consultations on matters that were not within their exclusive responsibilities [DAR (II – RC) 61, 4 December 1996, p. 1851].

In that phase of the debate, the *PS*, *PSD* and *PCP* accepted the adoption of the designation 'local referendums', to include the substantial scope of the local referendums on matters not included in the exclusive responsibilities of the local authorities, and to admit the popular initiative of a local referendum in the terms laid down by law. The *PS* proposal was also accepted, so the reference to the 'local authority bodies' was replaced by reference to 'local authorities', because the substantial scope of the

¹⁰³ See the speech by Miguel Macedo (*PSD*) in *CERC*, on 3 December 1996 [DAR (II-RC) 61, 4 December 1996, p. 1850]. The *PSD* draft did not include any provision on the local referendum. However, the draft introduced by a group of *PSD* deputies, members of the workers tendency (*TSD*) included a proposal on it, which was later withdrawn [DAR (II-A) 27, 7 March 1996, p. 484-(87)].

referendum should refer to the responsibilities of local authorities and not just the specific ones of each body.

In the second reading, the *PS* and *PSD* introduced a specific proposal that was unanimously approved. It Stated that ‘in such cases, under such terms and with such effect as the law may lay down, local authorities may submit matters that are included within the responsibilities of the local authority bodies to referendum by those of their citizens who are registered to vote. The law may grant the initiative of registered electors.’ [*DAR* (II – *RC*) 116, 9 July 1997, p. 3405]. This proposal was unanimously approved in the plenary sittings of 30 July 1997 [*DAR* (I) 104, 31 July 1997, p. 4014].

7. Organisational Law No. 4/2000, of 24 August

7.1. The Legislative Procedure

In the VIII Legislature, the Assembly of the Republic considered three legislative initiatives on the local referendum. On 22 December 1999, the Government revived its previous initiative, introducing Government Bill No. 8/VIII [*DAR* (II-A) 12, 6 January 2000, pp. 189-216]. The *PSD* presented Bill No. 85/VIII on 21 January 2000 [*DAR* (II-A) 18, 2 February 2000, p. 369], and the *PCP* presented Bill No. 108/VIII on 23 February 2000 [*DAR* (II-A) 23, 3 March 2000, pp. 471-473].

All the initiatives sought to update the regime of the local referendum, having in mind the Constitutional text approved in 1997, even if they followed different methodologies. The Government proposed to draw up a law on local referendums *ex-novo*, thus adapting the regime of the national referendum approved by Law No. 15-A/98, of 3 April and replacing Law No. 49/90, of 24 August, in its entirety. On the other hand, the *PSD* and the *PCP* proposed amendments to Law No. 49/90.¹⁰⁴

7.2. The Legal System Passed

The result of the legislative procedure was Organisational Law No. 4/2000, of 24 August, which approved the legal system for the local referendum currently in force in Portugal (Rocha & Filipe, 2003, pp. 81-132). The main changes were as follows. [Amaral, 2009 (I) pp. 606-614]:

¹⁰⁴ On the differences among the proposals, see the report drawn for the Constitutional Affairs, Rights, Freedoms and Guarantees Committee by António Filipe (*PCP*), [*DAR* (II-A) 24, 15 March 2000, pp. 518-520].

1 – Substantial scope

The local referendum can occur on subjects of relevant local interest, which should be resolved by the local authority bodies of municipalities or parishes. Relevant topics must be included within their responsibilities, which can be either exclusive or shared with the State and/or with the autonomous regions [Article 3(1)].

Therefore, proposals submitted by local authorities could be decided by a local referendum. In that event, the deliberations of the local authority would be halted and the proposal sent to the Constitutional Court. If the Court declared the referendum valid and the referendum took place, the deliberations would resume after the referendum gave approval. (Article 5).

The following matters were excluded (Article 4):

- a) Matters that are the exclusive responsibility of the sovereignty organs;
- b) Matters regulated by the legislative act or by the State regulation binding the local authorities;
- c) The options of the plan and the activities report by local authorities;
- d) Questions and acts of budgetary, tax-related or financial contents;
- e) Matters that have been the subject of an irrevocable decision, namely acts that are constitutive of rights or of legally protected interests, except in the cases where they are unfavourable to their addressees;
- f) Matters that had been the subject of a judicial decision that passed a definite judgement;
- g) Matters that had been the subject of a contract between the State and the local authority.

2 – Effectiveness

The referendum shall be binding on the local authority bodies if the number of voters exceeds half the number of registered electors (Article 219). If the result involved the production of an act on the question or questions submitted to referendum, the local authority that is responsible must approve it within 60 days (Article 221). During the same term of office, the local authority bodies cannot revoke or change its essential definition, and cannot approve any act opposed to the result of the referendum (Article 222). The drafts of the referendum whose answer

involved the continuity of a situation could not be renewed during the same term of office (Article 223). The disregarding of the result of the referendum by a municipal or parish assembly would be punished with the dissolution of that body, under the terms of the law (Article 220).

3 - Initiative

The initiative for the local referendum belongs to (Article 10):

- a) The members of municipal assemblies (*assembleias municipais*) or parish assemblies (*assembleias de freguesia*);
- b) The municipal or parish assemblies;
- c) The municipal authorities (*câmaras municipais*) or the parish authorities (*juntas de freguesia*);
- d) A minimum of 5,000 (or 8%) of the citizens registered to vote in the respective area. In the municipalities and parishes with less than 3,750 registered voters, the initiative has to be proposed by at least 300 (or 20%) of local citizens (Article 13).

The deliberation regarding the holding of the referendum is always the responsibility of the municipal assembly or of the parish assembly, depending on the circumstances of the case. It must occur within 15 days after the exercise, or the reception, of the initiative, in the case of a representative initiative, or within 30 days, in the case of a popular initiative. If the question submitted to referendum is not included within the responsibility of the municipal or parish assembly, and the initiative was not taken by the body of that responsibility, the deliberation needs the opinion of the latter, which shall be sent within five days of the receipt of the request (Article 24).

4 - Other aspects

Each referendum has only one subject matter [Article 6(1)]. No referendum can include more than three questions. It must be formulated with objectivity, clarity and precision. The answers can only be 'yes' or 'no', and it is forbidden to suggest possible answers, either directly or indirectly. The questions cannot be preceded by any motives, preambles or explanatory notes (Article 7).

It is acceptable to hold several referendums during the same day and in the same autarchy, since each is formal and substantially autonomous [Article 6(2)]. There cannot be simultaneous local

referendums on the same matter, and the local referendums cannot be held alongside regional or national referendums [Article 6(3)].

Any practice of an act related to the call or the accomplishment of a local referendum between the dates of general elections for the sovereignty organs, elections for the self-government bodies of the autonomous regions, local authority bodies, members of the European Parliament, or national or regional referendums are not allowed (Article 8). The call or accomplishment of local referendums during a State of siege or a State of emergency, or before the installation or after the dissolution of elected local authority bodies, is also prohibited (Article 9).

The chairperson of the deliberative body shall send the deliberation to hold a local referendum to the Constitutional Court within eight days, and the review of the Constitutionality and legality of the referendum ought to be held by the Court within 25 days (Articles 25 and 26). If the referendum is considered Constitutional and legal, as soon as the chairperson of the deliberative body has been notified of the decision of the Constitutional Court, he/she shall notify the president of the executive body of the local authority within two days. A date for the referendum shall be set within the next five days. This should occur within 40 and 60 days (Articles 32 and 33).

8. The Specific Experience of Local Referendums

8.1. The Jurisprudence of the Constitutional Court

Between 1990 (when Law No. 49/90, of 24 August on local consultations came into force) and 2011, there were 27 deliberations from local authority bodies requesting the Constitutional Court (*TC*) to review the Constitutionality and legality of local referendums (see appendix 1 for a detailed description). The Constitutional Court declared the drafts of the local referendum unConstitutional and/or illegal in 23 cases. The *TC* permitted only four to be held.

On 30 April 1991, a few months after Law No. 49/90 came into force, the Municipal Assembly of *Peniche* deliberated on a local consultation for the first time. The proposed purpose of the consultation was the creation of a new parish.

In 1991, three deliberations on popular consultations were registered, but none were authorised by the *TC*. Only in 1998, after the Constitutional revision of 1997, did the local authorities take other deliberations that sought out local referendums: three in 1998, eight in

1999 and three in 2000. The two first referendums authorised by the Constitutional Court were deliberated in 1998 and 1999. This boom in local referendums subsequent to 1998 did not happen by chance. The referendum became increasingly important in the Portuguese political life after the first referendum of a national scope took place in 1998. Moreover, the Constitutional revision of 1997 had reformulated local referendums, seeking to make them more viable. After the introduction of Law No. 4/2000, of 24 August, which brought the legal framework up to date following the Constitutional changes of 1997, there were nine deliberations (two in 2004, one in 2006, two in 2008, one in 2009 one in 2010 and two in 2011) but the Constitutional Court only admitted two of them.

The parish assemblies took 14 deliberations and the municipal assemblies took 13. In geographical terms, more drafts were presented in the northern area. The local authorities in the northern part of the country presented 13 drafts, seven were presented in the central area, two in the surrounding areas of Lisbon, three in the southern areas and two in the autonomous regions.

The initiatives in the assemblies were taken, for the most part, by the executive bodies (in 13 cases). 11 deliberations were taken by the initiative of the members of the assemblies themselves, and in three cases the deliberations omitted the authorship of the initiative. Despite the possibility of popular initiatives on local referendums after Law No. 4/2000, this opportunity has not yet been taken up.

As to the political majorities in the local authority bodies where the deliberations were taken, there is a significant variation. Eight of the 13 deliberations taken at a municipal level, had its origin in the municipal assemblies of the *PS* majority (two in *Viana do Castelo* and two in *Cartaxo*); four in the *PSD* majority and one in the *CDU (PCP/PEV coalition)* majority. Four of the 12 parish assemblies¹⁰⁵ that approved drafts for local referendums had a *PSD* majority, another four had a *PS* majority, one of them had a coalition between *PS* and *CDS*, another one had a *CDU* majority, and still another one had a majority that resulted from a candidacy promoted by a group of citizens that were not politically affiliated.

¹⁰⁵ There were 14 deliberations. However, two of them were second attempts to promote the same referendum.

As to the subject proposed for the referendums, six cases concerned the creation of parishes or the transfer of parishes from a municipality to another. Two cases discussed the creation of a protected area for environmental reasons.¹⁰⁶ 10 cases concerned the construction, the demolition or the location of several infrastructures: in *Riba de Ave*, the construction of a treatment plant for solid residues; in *Serreleis*, the construction of a playing field in a certain location; in *Tavira*, the demolition of an inoperative reservoir of water; in *Portimão*, the demolition of an old market for a boulevard with a green area; in *Louredo*, the location of a cross; in *Barcelos*, the trajectory of a highway; in *Gaula*, the retreat of industrial units; in *Guarda*, the localization of a hospital; in *Costa da Caparica*, the construction of houses and collective equipment on parish grounds; in *Santa Cruz da Graciosa*, the demolition of a bandstand; in *Mirandela*, the maintaining of a railway line. In *Viana do Castelo*, both deliberations entailed the integration of the municipality into an intermunicipal community. The three remaining cases referred to: choosing whether to hold a municipal holiday in *Torres Vedras*; the holding of bullfights and putting the bulls to death (in the arena) in *Barrancos*; and to proposals for a private company to operate a car park in *Cartaxo*.

Finally, it is worth analysing the reasons why the Constitutional Court rejected 23 referendum drafts. The Constitutional Court declared that 10 proposals for local referendums were unConstitutional and illegal because their subject was not included within the exclusive responsibilities of the local authorities, thus infringing Article 241(3) of the Constitution and Article 2(1) of Law No. 49/90, of 24 August. These were the cases of **a)** the creation of parishes; **b)** the change of parishes from one municipality to another;¹⁰⁷ **c)** the construction of a treatment plant for solid residues in the parish of *Riba de Ave*; **d)** the creation of the protected area of *Corno do Bico*;¹⁰⁸ **e)** the bullfights with the bulls being put to death in *Barrancos*; **f)** construction on grounds belonging to the parish authority of *Costa da Caparica* in terms of a programme contracted

¹⁰⁶ The protected area was the same in both parishes (*Bico* and *Vascões*, in the municipality of *Paredes de Coura*). These two cases gave way to four deliberations, given that after the declaration of unConstitutionality in the first attempt, both parish assemblies moved forward with new deliberations that obtained, nonetheless, the same result.

¹⁰⁷ See Appendix 1, the referendums proposed by the Municipal Assembly of *Peniche*, Parish Assembly of *Arazede*, Parish Assembly of *Asseiceira*, Parish Assembly of *Caramos*, Parish Assembly of *Abação (S. Tomé)* and Parish Assembly of *Moita*.

¹⁰⁸ See Appendix 1 for the referendums proposed twice by the Parish Assemblies of *Vascões* and *Bico*.

between the municipal authority of *Almada* and the State (*POLIS* Programme).

In Ruling No. 238/91, which refused a local consultation in *Peniche* about the creation of a new parish, Judge António Vitorino voted against the refusal and gave a dissenting judgement supporting the admissibility of that consultation. In his opinion, the Municipal Assembly of *Peniche* had the responsibility to deliberate on the process of creating that parish, even if only advisory in nature. Nothing should prevent the Assembly from consulting the population and deliberating on the agreement with the will expressed in the consultation.

António Cândido de Oliveira (1993, pp. 276-277) also criticised this *TC* decision. This author agreed with António Vitorino and considered the position of the Constitutional Court to be too restrictive. In his opinion, the popular consultation should be admitted, not only on a subject that involved just one local autarchy, but also when it involved other autarchies or sovereignty organs. He believed that a local authority body had the exclusive responsibility to take a deliberation even if it was merely advisory. The Constitutional Court, when restricting the exclusive responsibility of the local authority bodies to local subjects, risked turning the local consultations into something useless.

After the Constitutional revision of 1997, Article 240 of the Constitution Stated that the local authorities may submit matters included within the responsibilities of their bodies to referendum in the cases, terms and effects laid down by law. The reference to the exclusive responsibilities of the local authorities disappeared. In the case, for instance, of the creation of new parishes – whose procedure required the local authorities' opinion by law – nothing should prevent them from submitting the exercise of that responsibility to referendum. The results of the referendum oblige the local authority to follow the popular will. However, as the Constitution left the regulation of that matter in the hands of the law, while Law No. 49/90, of 24 August was left unchanged, the cases, the terms and the effects of the local referendums remained the same. Although the Constitution allowed other solutions from 1997 onwards, the law would have to specify them. Thus, the Constitutional Court declared some drafts for the referendum proposed even after the Constitutional revision of 1997 to be illegal, since it was considered that Law No. 49/90 was in full force despite that change.¹⁰⁹

¹⁰⁹ In this sense, see Ruling 390/98, of 26 May 1998.

In 12 cases, the reasons for the unConstitutionality and illegality of the referendums rested on the question or questions that would be submitted to the electorate. Article 7 of Law No. 49/90 Stated that the questions submitted to the citizens be formulated in terms that allowed an unequivocal answer in the simple affirmative or negative form. Article 9 disposed that the proposals for local consultations should contain the questions to be submitted to the citizens. However, in some cases, the deliberations did not even include the questions.¹¹⁰ In other cases, the formulation of the questions did not have the necessary clarity to allow an unequivocal ‘yes’ or ‘no’ answer.¹¹¹ In three specific cases, the Constitutional Court did not allow the referendums because the respective deliberations did not specify their territorial scope.¹¹²

Another reason for non-admission, invoked in two specific cases, was where author’s origin was unclear. This was essential because Article 8 of the law only gave legitimacy to the assemblies, the executive bodies of local authorities, and a third of the members of each of those bodies. Without any reference to the origin of the initiative, it was impossible to know if the authors of the proposal had the necessary legitimacy to present it.¹¹³ In the case of the local referendum proposed by the Municipal Assembly of *Barcelos*, one of the reasons for the non admission was that had been proposed by only one member of the Municipal Assembly.

Two drafts for local referendums were not admitted because they were proposed during the session of the assemblies where the deliberations were taken, thus contradicting the rule of Article 6(2) of Law No. 49/90. According to that rule, the deliberation should be taken

¹¹⁰ See Appendix 1 for the questions regarding the Municipal Assembly of *Torres Vedras* on the municipal holiday; the Parish Assembly of *Riba de Ave* on the treatment plant for solid residues; the Municipal Assembly of *Barcelos* on the trajectory of Highway A11/C14; the Parish Assembly of *Vascões* on the protected area of *Corno do Bico* and the Parish Assembly of *Bico* on that same question.

¹¹¹ See Appendix 1 for the following referendums: the proposal by the Municipal Assembly of *Portimão* on the demolition of an old market; the Parish Assembly of *Louredo* on the localisation of a cross; the Parish Assembly of *Moita* on its change to the municipality of *Marinha Grande*; the Parish Assemblies of *Vascões* and *Bico*, in their second attempt for a referendum on the creation of the protected area of *Corno do Bico*; the Municipal Assembly of *Viana do Castelo* on the integration in the intermunicipal community of *Minho Lima*; the Municipal Assembly of *Cartaxo* on the concession to a private company to operate a car-park.

¹¹² See the cases of the proposals presented by the Municipal Assembly of *Barcelos* and by the Parish Assemblies of *Vascões* and *Bico*.

¹¹³ See the proposals of the Parish Assemblies of *Vascões* and *Bico*.

obligatorily, in an ordinary or extraordinary session, within 15 days after the reception of the proposal.¹¹⁴

Four proposals that were presented during Law No. 4/2000, of 24 August were refused because they coincided with the electoral process for the European Parliament or for the President of the Republic. The Parish Assembly of *Gaula* deliberated about a local referendum on 1 March 2004 and the Municipal Assembly of *Guarda* made the same on 5 May 2004. The Constitutional Court refused these referendums, because the elections for the European Parliament had already been scheduled for the 13 June of that year. On 16 February 2009, the Municipal Assembly of *Mirandela* decided that a local referendum and the elections for the European Parliament should both occur on 9 June. On 29 September 2010 the Municipal Assembly of *Santa Cruz da Graciosa* made a similar decision, proposing to hold both a referendum and presidential elections on 23 January 2011. All of these deliberations were refused as illegal.

8.2. The Local Referendums Actually Held

8.2.1. Serreleis

The first local referendum of the Portuguese democracy happened on 25 April 1999, in the parish of *Serreleis*, located in the north of the country, in the municipality of *Viana do Castelo*. The question submitted to the voters was the following: ‘Do you agree with the construction of a playing field for several sports behind the church of *Serreleis*?’

There were 947 citizens registered to vote, and 726 of them (76.66%) voted effectively. 351 citizens voted ‘yes’ and 366 voted ‘no’. Despite the tight margin, the negative answer prevailed and the parish did not build the playing field at that location. It is notable that the previous elections for the Parish Assembly of *Serreleis* had been won by a list of citizens outside of the parties, which obtained 64.03% of votes, against 22.21% of *PS* votes and 11.85% of *PSD* votes, having voted 78.09% of the registered citizens.¹¹⁵ This unusually high turnout is evidence of high political motivation and a willingness to be mobilised to vote. Both in the

¹¹⁴ See Appendix 1 for the proposals of the Parish Assembly of *Caramos* and the Municipal Assembly of *Barcelos*.

¹¹⁵ The results to the Parish Assembly of *Serreleis* on 14 December 1997 were the following: registered – 940; voters – 734 (78.09%); group of citizens – 470 (64.03%); *PS* – 163 (22.21%); *PSD* – 87 (11.85%). Electoral results available at: <http://www.eleicoes.mj.pt> [accessed 12 June 2011].

local election and in the local referendum, there was a strong participation of the parish voters, much higher than the national average in local elections. This is significant because national participation in the elections for parish assemblies on 14 December 1997 was 59.86%.

8.2.2. Tavira

There was another local referendum on 13 June 1999 at the municipality of *Tavira* with the following question: Do you agree with the demolition of the old water reservoir (inoperative) of *Alto de Santa Maria*? 20,948 citizens were registered to vote, and only 7,585 (36.2%) voted effectively. 2,671 citizens voted 'yes' (35.2%) and 4,122 citizens voted 'no' (54.4%). One should note that in the previous local elections for the Municipal Assembly of *Tavira*, on 14 December 1997, the turnout had been 66.58% of citizens. Consequently, the participation in the referendum did not meet expectations.¹¹⁶

8.2.3. Viana do Castelo

Law No. 45/2008, of 27 August, on the intermunicipal association, proposed that the municipality of *Viana do Castelo* should integrate a wider intermunicipal community, the Intermunicipal Community of *Minho Lima*. A significant majority of the members of the municipal bodies of *Viana do Castelo*, including the President of the local authority, deeply disagreed with that legal purpose. However, the institution of the community required the approval of its statutes by the absolute majority of the municipal assemblies.

Even before the passing of Law No. 45/2008 in the Assembly of the Republic, which happened on 11 July 2008, the municipal bodies of *Viana do Castelo* refused the integration of the Intermunicipal Community of *Minho Lima*. On 13 June, the municipal authority decided that, if Parliament passed the Law on the intermunicipal association, as had been proposed, the municipality of *Viana do Castelo* would propose holding a local referendum on that subject.

When the law came into force, the Municipal Assembly passed a proposal for a local referendum aimed at refusing the integration of the municipality in the Intermunicipal Community. It was sent to the Constitutional Court, but wasn't admitted for lack of an objective, precise

¹¹⁶ The results for the Municipal Assembly of *Tavira* on 14 December 1997 were the following: registered – 21,474; voters – 14,298 (66.58%); *PSD* – 7,176 (41.15%); *PS* – 5,883 (33.42%); *CDU* – 893 (6.25%).

and clear question (see Appendix 1 and Ruling 524/2008 of the *TC*). The Municipal Assembly was then invited to reformulate the question, which it did on 5 November 2008. On 19 November, the *TC* admitted the referendum, which was scheduled for 25 January 2009.

On 25 January 2009, the municipality of *Viana do Castelo* held its first local referendum with the following question: ‘Do you agree that the municipality of *Viana do Castelo* integrate the Intermunicipal Community of *Minho Lima*?’ From the 88,114 registered electors, only 27,101 (30.76%) voted effectively. 9,934 voted ‘yes’ (37.80%) and 16,347 voted ‘no’ (62.20%). The refusal of the integration in the proposed Community was clear, but the participation in the referendum was very low, particularly if we consider that in the local elections for the Municipal Assembly held on 9 October 2005, 51,450 electors exercised their right to vote, which means 64.89% of the registered citizens.¹¹⁷

8.2.4. Cartaxo

On 1 September 2011, the Municipal Assembly of *Cartaxo*, a municipality of *PS* majority in the centre of the country, unanimously passed a *BE* proposal to hold a local referendum on the intention expressed by the Mayor to privatise 620 parking places, scattered in the streets surrounding the centre, for a period of 30 years. That proposal was sent to the Constitutional Court, which judged it illegal because it lacked a clear and objective question.¹¹⁸ The process returned to the Municipal Assembly and new proposal was passed, reformulating the question in terms accepted by the Court.

The referendum was made on 18 December 2011, with the following question: ‘Do you agree that the Municipal Authority of *Cartaxo* should sign a contract to grant exploitation of public park in covered parking, and over 620 parking places scattered in the streets surrounding the urban centre, for a period of 30 years to a private company?’

The turnout was incredibly low. From the 20,886 registered voters, only 2,629 (12.59%) took part in the referendum. 2,484 (95.32%) voted ‘no’ and only 122 (4.68%) voted ‘yes’. There were nine blank and

¹¹⁷ The results to the Municipal Assembly of *Viana do Castelo* on 9 October 2005 were the following: registered – 79,292; voters – 51,450 (64.89%); *PS* – 22,544 (43.82%); *PSD* – 16,383 (31.84%); *CDU* – 3,706 (7.20%); *CDS-PP* – 2,534 (4.93%); *BE* – 2,478 (4.82%); group of citizens – 1,474 (2.86%).

¹¹⁸ See the question in Appendix 1.

14 null votes.¹¹⁹ The option No, won easily, and the reason is easy of explain. In fact, during the process, the Mayor who had proposed to privatise the parking spaces, resigned before the referendum, and his successor gave up on the idea. On the day of the referendum, all the political groups of the Municipal Assembly supported the option 'no'. Consequently, the privatisation process had no support and defeat was easy. The result was perfectly foreseeable, so the turnout was low. While the vast majority of local residents saw it as a waste of time and money, the opposition used the referendum as leverage whenever proposals to privatise parking were revived.

9. The Constitutional Inception of the Regional Referendum

9.1. The Concept of a Regional Referendum

The first Constitutional revision, in 1982, allowed local direct consultations on matters of the exclusive responsibility of local authorities. In Constitutional terms, there are three layers of local authorities in Portugal: the parishes, the municipalities and the administrative regions. However, while the municipalities and the parishes, which already existed before the Constitution of 1976, were adapted to the new democratic Constitutional framework, and started to work in new terms with bodies being democratically elected and with a new board of responsibilities laid down by law, the administrative regions were never instituted. Regional referendums, in the sense of referendums at the level of the administrative regions, would have been permitted by the Constitution as types of local referendums if the administrative regions had been instituted. However, in the absence of a regional structure, the law only refers to local referendums at the level of the municipality and parish.

After the 1997 amendments, the Constitution stipulated that the creation of administrative regions depends on regional referendums, which should be held simultaneously, at the national level, in each of the proposed regions. This referendum will be treated as a national referendum and discussed more fully in chapter 5. The referendum on the eventual creation of administrative regions, anticipated in the Constitution, has a national scope, in spite of its projection at the level of each region. It is a national referendum on the creation of the regions and not a referendum in the regions.

¹¹⁹ Results available on <http://www.dgai.mai.gov.pt> [accessed 3 March 2012].

Therefore, the regional referendums treated in this chapter are those located at the level of the autonomous regions. The Portuguese Constitution of 1976 established the existence of two regions endowed with political and administrative autonomy and self-government bodies, in the archipelagos of Madeira and The Azores. Those referendums are not local ones, because the autonomous regions are not local authorities, but regional referendums in the sense of autonomic referendums, that is, each one is held in an autonomous region.

9.2. Bill No. 501/I

Although no type of referendum was permitted by the 1976 Constitution,¹²⁰ the subscribers of the *Manifesto Reformador* introduced Bill No. 501/I, on 6 June 1980, which sought to regulate the referendum. This was never discussed. That Bill included the idea of a referendum to approve the political and administrative statute of each of the autonomous regions.

The Constitution of 1976 established a regime of political and administrative autonomy, taking into account the distinct geographic, economic, social and cultural characteristics of The Azores and Madeira archipelagos, and the historic traditions of autonomy of the island populations. The system of autonomy, which was deepened in subsequent Constitutional revisions, establishes the existence of self-government bodies in the regions (Legislative Assembly and Regional Government) and the political and administrative statutes of the regions. The drawing of the drafts of statutes is the exclusive responsibility of the regions' legislative assemblies, but final approval defers to the Assembly of the Republic.

9.3. The Constitutional Revision of 1997

The subject of the referendum in the autonomous regions returned in 1994, with discussions over the fourth Constitutional revision. Then, two draft amendments to the Constitution, presented by *PSD* and *PS* deputies elected by the electoral constituency of Madeira, proposed the inception of the referendum at the level of the autonomous regions.

¹²⁰ The draft of the Constitution from the *CDS* laid down that the Parliament, with two-thirds of the full number of its members, could decide to submit any previously approved law to popular referendum of a national or regional scope, except those on tax-related issues. The proposal did not explain the regional level it referred to (autonomous regions or administrative regions). It is clear that the submission of laws to a regional referendum could only consider regional effects. This proposal, however, was not accepted.

That Constitutional revision procedure was never completed, so the matter of the regional referendum re-emerged in 1996. At that time, seven draft amendments to the Constitution proposed the inception of the referendum in the autonomous regions: Draft No. 1/VII from the *CDS-PP* (Article 233-A);¹²¹ Draft No. 3/VII from the *PS* (Article 235-A); Draft No. 5/VII from the *PSD* [Article 118(11)]; Draft No. 6/VII from the *PSD/Madeira* (Article 236-C);¹²² Draft No. 7/VII from the *PS/Madeira*;¹²³ Draft No. 9/VII from the deputies from the *PSD* members of *TSD* [article 118 (6)(8)]; Draft No. 10/VII from *PEV* [Article 118(9)].¹²⁴

After a first reading happened in the *CERC* on 28 November 1996 [*DAR* (II – *RC*) 60, 29 November 1996, pp. 1809-1818], which maintained the discussion on the main aspects unfinished, the *PS* and the *PSD* agreed on a formulation that they introduced together in the second reading on 3 July 1997 [*DAR* (II-*RC*) 114, 4 July 1997, pp. 3363-3364]. The plenary sittings of 30 July 1997 passed that proposal with the yeas from the *PS*, *PSD* and *CDS-PP* and nay votes from the *PCP* and *PEV* [*DAR* (I) 104, 31 July 1997, p. 4009].

The formulation passed as Article 232(2) on the responsibilities of the Regional Legislative Assembly. It Stated the following: the Legislative Assembly of each autonomous region shall be responsible for submitting a draft regional referendum by means of which the President of the Republic may call upon the citizens, who are registered to vote in the region's territory, to pronounce themselves in a binding fashion on questions that are of importance and specific interest to the region. The provisions of Article 115 (on national referendums) shall apply to such referendums, *mutatis mutandis*.

As for the power to decide on the referendum, the option that prevailed and was supported by the *PS* and the deputies of Madeira, gave this right to the President of the Republic. The *PSD*'s initial proposal to delegate that power directly to the Regional Legislative Assemblies was declined. The *PCP* declared its opposition towards any of the solutions, and defended the possibility, informally suggested by Vital Moreira, of

¹²¹ Article 233-A did not take part of the first version of the draft introduced by the *CDS-PP* on 26 January 1996 [*DAR* (II-A) 21- Supplement, 1 February 1996], having been introduced later as addition on 4 March 1996.

¹²² Subscribed by Deputies Guilherme Silva, Correia de Jesus and Hugo Velosa.

¹²³ Subscribed by Deputies António Trindade and Isabel Sena Lino.

¹²⁴ The Draft Amendments to the Constitution No. 2/VII to No. 11/VII are published in *DAR* (II-A) 27- Supplement, 7 March 1996.

giving that power to the Representatives of the Republic¹²⁵ in the autonomous regions [*DAR* (II – RC) 60, 29 November 1996, p. 1810].

The initiative to propose the referendum to the President of the Republic is an exclusive responsibility of the regional legislative assemblies. The Constitution does not establish who can initiate the procedure in the legislative assembly, since it is up to the law to decide this matter. It is obvious that the deputies and the parliamentary groups of the legislative assemblies of the autonomous regions must have that prerogative. Legislators should decide if that power must also be given to the regional governments, and if (and how) the popular initiative of regional referendum is admitted. The responsibility to legislate on regional referendums was the exclusive responsibility of the Assembly of the Republic, as it happens with the national and local referendums (Article 164b). The law on regional referendums must observe the form of organisational law [Article 166(2)].

The regional referendum can happen on subjects relevant to the regions' specific interests. This delimitation of the subject demands some remarks. Unlike what happens at the level of the organs of sovereignty, in that both Parliament and the Government hold legislative responsibilities, at the level of the autonomous regions only the Legislative Assembly holds these responsibilities. Because the Constitution attributes the exclusive initiative of a referendum to the Legislative Assemblies of the regions, it unavoidably binds its extent. It would not make sense for the Legislative Assembly to propose a subject on which it could not legislate to the voters. Therefore, the regional referendum can only happen on matters whose decision is restricted to the regional legislative competence. As Jorge Miranda and Rui Medeiros (2007, p. 418) highlight, the popular consultation involves the power to legislate on the matter submitted to the electors. Therefore, the holding of a referendum by the region is only understandable if, after the consultation, the regional bodies could act in accordance with the respective result. As a result, the scope of regional referendums is limited to their specific responsibilities.

In the sixth Constitutional revision from 2004, which introduced profound alterations regarding the autonomous regions, the Constitutional regime of the local referendum remained the same. It was approved with only one abstention. There was also reference to the regional referendum in Article 115 of the Constitution, which refers to the referendum in general [*DAR* (I) 78, 23 April 2004, p. 4282]. Nonetheless, regional

¹²⁵ The Representatives were at that time Ministers of the Republic.

referendums must be regulated by organisational law, as laid down in the Constitution [Articles 166(1) and 164b]. Even now, the Assembly of the Republic has not passed such a regulation, despite the Bills introduced by the *PCP* in June 2008 and October 2010. The only legal reference to the regional referendums appears in the political and administrative statutes of both autonomous regions.

9.4. The Regional Referendum in the Statutes of the Autonomous Regions

9.4.1. Madeira

The Political and Administrative Statute of the Autonomous Region of Madeira (Law No. 130/99, of 21 August) refers to the regional referendum in Article 9, which reproduced the Constitutional provision in essence: **a)** the referendum may happen on a question that is important and of a specific interest to the region; **b)** the right to propose belongs to the legislative assembly of the region; **c)** the decision to call the referendum belongs to the President of the Republic; **d)** the referendum has binding effectiveness; **e)** the right to vote is given to the citizens registered to vote in the region; **f)** the Constitutional provisions on the national referendum shall apply to the regional referendum, *mutatis mutandis*.

9.4.2. The Azores

The Political and Administrative Statute of the Autonomous Region of The Azores, in the first version passed in the Assembly of the Republic [Decree No. 217/X, *DAR* (II-A) 121, 27 June 2008, pp. 6-130], included several provisions on the regional referendum. The Constitutional Court declared one of them unConstitutional, which referred to the initiative of citizens. In fact, the text proposed by the Legislative Assembly of The Azores and passed in Parliament established that the referendary initiative of the citizens should be subscribed by a minimum of 3,000 registered electors in the Region. The *TC* declared this rule to be formally unConstitutional. The autonomous regions did not have the power to vary the Organisational Law, which was laid down at the national level. (Ruling No. 402/2008). The President of the Republic vetoed the Statute before that decision.

This question is fundamental from the Constitutional point of view. The Constitution provides that the law on referendums, besides being the exclusive responsibility of the Assembly of the Republic, must assume the form of organisational law, which possesses superior force to

any laws made in the regions. Besides being discussed in detail, and voted on in the plenary session, they have to be approved in final overall vote by the absolute majority of all members in full exercise of their office. The political and administrative statutes of the autonomous regions must obey some formalities in their legislative process. The legislative assemblies of the regions are the only bodies that have the power to initiate the procedure to change their own governing statute, but in the end these acts do not assume the nature of organisational law.

Therefore, the approval of provisions regarding the regional referendums inside the political and administrative statute is a formal unConstitutionality, because that legislative act does not assume the form of organisational law required by the Constitution. In addition, the introduction of draft amendments to the political and administrative statute of a region is the exclusive responsibility of the respective legislative assembly. If such matters were included in the statute, the legitimacy of the Assembly of the Republic to legislate on it without any proposal by the regional legislative assembly could be called into question.

The final version of the Statute, after the expunction of the unConstitutional rules (Law No. 2/2009, of 12 January), permits the regional referendum as follows: **a)** the Legislative Assembly may propose regional referendums to the President of the Republic; **b)** the electoral universe includes the citizens registered to vote in the region; **c)** the regional referendum may ask questions that are of importance and specific interest to the region; **d)** the regional referendum shall be regulated by law; **e)** the right of initiative belongs to the deputies, parliamentary groups, Regional Government and groups of citizens; **f)** no draft to the referendum could involve an increase in the region's expenditure or a decrease in its revenues as set out in the budget; **g)** draft referendums definitively rejected may not be resubmitted in the same legislative session; **h)** draft referendums that are not put up for vote in the legislative session in which they are submitted shall not require resubmission in the following legislative sessions; **i)** the government drafts shall lapse upon its resignation.

Other aspects of legal regulation, besides the Constitutional text, may only be established by organizational law passed by the Assembly of the Republic. Without this law, it is not possible to hold regional referendums.

9.5. Bills No. 545/X and 439/XI (PCP)

On 26 June 2008, the *PCP* introduced the first draft of an organisational law on regional referendums, which was Bill No. 545/X [*DAR* (II-A) 122, 28 June 2008). That initiative aims to implement the Constitutional commands regarding the regional referendum. The legislative assembly of each autonomous region shall be responsible for submitting the drafts on regional referendums to the President of the Republic, who may call upon the citizens registered to vote in the region to pronounce themselves on questions that are of importance, and of specific interest to the region. The provisions regarding the national referendum shall apply to the regional referendum.

The regional referendum can happen on matters in which the legislative assembly may legislate by regional legislative decrees, excluding the subjects under the strict responsibility of sovereignty organs and budgetary, tax-related or financial matters. The initiative in the legislative assembly belongs to the regional government, to parliamentary groups or to groups of citizens with at least 3,000 signatures. The regional referendum has to be submitted to the Constitutional Court for a prior review of its Constitutionality and legality, which shall be demanded by the representative of the Republic in the region. If the *TC* considers the draft Constitutional and legal, the decision belongs exclusively to the President of the Republic. Nevertheless, the legislature ended before the discussion of the bill.

In the XI Legislature, the *PCP* revived the initiative, introducing Bill No. 439/XI [*DAR* (II-A) 19, 21 October 2011, pp. 50-95] with the same contents. *PCP* groups in the Legislative Assemblies of Madeira and The Azores introduced similar initiatives. They sought to pass them locally, introducing the idea of regional parliaments to the Assembly of the Republic. However, more than 15 years after the Constitution permitted regional referendums, none had ever been held because of the lack of an organisational law that actually allowed them.