

AUB DREPT

Din sumar

Colocviu internațional CDCIP / Gilberto BERCOVICI, Reforma statului în Brazilia: mai mult din același lucru?

Monica HERMAN CAGGLIANO, Dreptul la bună guvernare. Instrumente și rezultate. Experiența din Brazilia

Rubens BEÇAK, João Victor ROZATTI LONGHI, Tendințe pentru democrația participativă: influența internetului în ceea ce privește reprezentarea politică și bugetarea participativă

Tineri cercetători / Elisabeta SLABU, Transparența – condiție a bunei administrări în spațiul administrativ european

Jurisprudență / Elena-Simina Tănăsescu, Curtea Constituțională și sistemul judiciar: raporturi de forță?

Facultatea de Drept, Universitatea din București

ANALELE UNIVERSITĂȚII DIN BUCUREȘTI

Seria Drept

4

2012-II

EDITURA C.H. BECK

CUPRINS

I. COLOCVIU INTERNAȚIONAL CDCIP

- Gilberto BERCOVICI**, Reforma statului în Brazilia: mai mult din același lucru?
(*în limba engleză*) 136
- Monica Herman CAGGIANO**, Dreptul la bună guvernare. Instrumente și rezultate.
Experiența din Brazilia (*în limba engleză*) 145
- Rubens BEÇAK, João Victor ROZATTI LONGHI**, Tendințe pentru democrația
participativă: influența internetului în ceea ce privește reprezentarea politică și
bugetarea participativă (*în limba engleză*) 154

II. DOCTRINĂ

- Lavinia LEFTERACHE**, Executarea măsurilor educative prevăzute în noul Cod penal 165
- Cristina Mihaela NICOLESCU**, Considerații privind lichidarea regimului
matrimonial în sistemul Codului civil român..... 193
- George ILIE**, Despre un caz de eroare în materia vânzării de participații sociale 209

III. TINERI CERCETĂTORI

- Elisabeta SLABU**, Transparența – condiție a bunei administrări
în spațiul administrativ european 219

IV. JURISPRUDENȚĂ

- Elena-Simina TĂNĂSESCU**, Curtea Constituțională și sistemul judiciar:
raporturi de forță? 240

V. VARIA

- Ingrid POPA-MOCANU, Ramona POPESCU**, Participarea la conferința
100 de ani de excepție de neconstituționalitate în România - 12 mai 2012 252
- Răzvan DINCĂ**, Zilele internaționale chiliene ale Asociației „Henri Capitant”
a prietenilor culturii juridice franceze 255

SOMMAIRE

I. COLLOQUE INTERNATIONAL DU CDCIP

- Gilberto BERCOVICI**, La réforme de l'Etat au Brésil: plus du même? 136
- Monica Herman CAGGIANO**, Le droit à la bonne gouvernance.
Outils et résultats. L'expérience brésilienne 145
- Rubens BEÇAK, João Victor ROZATTI LONGHI**, Tendances pour la démocratie participative: l'influence de l'Internet dans le profil de la représentation politique et sur la budgétisation participative 154

II. DOCTRINE

- Lavinia LEFTERACHE**, L'exécution des mesures éducatives prévues dans le nouveau Code pénal 165
- Cristina Mihaela NICOLESCU**, Considérations sur la liquidation du régime matrimonial dans le système du Code civil roumain 193
- George ILIE**, Un exemple d'erreur grave dans un contrat de vente des participations sociales 209

III. JEUNES CHERCHEURS

- Elisabeta SLABU**, La transparence – condition d'une bonne administration dans l'espace administrative européen 219

IV. JURISPRUDENCE

- Elena-Simina TĂNĂSESCU**, Cour Constitutionnelle et système judiciaire: des rapports de force? 240

V. VARIA

- Ingrid POPA-MOCANU, Ramona POPESCU**, Participation à la conférence 100 ans d'exception d'inconstitutionnalité en Roumanie - 12 mai 2012 252
- Răzvan DINCĂ**, Journées internationales chiliennes de la Association „Henri Capitant” des amis de la culture juridique française 255

TABLE OF CONTENT

I. CDCIP INTERNATIONAL COLLOQUIUM

- Gilberto BERCOVICI**, State Reform in Brazil: More of the Same? 136
- Monica Herman CAGGIANO**, The Right to Good Government.
Instruments and Results. The Brazilian Experience 145
- Rubens BEÇAK, João Victor ROZATTI LONGHI**, Trends for Participatory
Democracy: The Influence of the Internet in the Profile of Political
Representation and on the Participatory Budgeting 154

II. DOCTRINE

- Lavinia LEFTERACHE**, Executing Educational Measures in the new Criminal Code 165
- Cristina Mihaela NICOLESCU**, Considerations Regarding the Liquidation of the
Matrimonial Property Regime in the Romanian Civil Code 193
- George ILIE**, An Example of Error in Share Sale 209

III. YOUNG RESEARCHERS

- Elisabeta SLABU**, Transparency – a Condition for a Sound Administration
in the European Region 219

IV. CASE-LAW

- Elena-Simina TĂNĂSESCU**, Constitutional Court and Judicial System:
Power Politics? 240

V. VARIA

- Ingrid POPA-MOCANU, Ramona POPESCU**, Participation to the Debate
100 Years of Constitutional (judicial) Review in Romania - May 12th 2012 252
- Răzvan DINCĂ**, International Chilean Days of the „Henri Capitant” Association
of the French Legal Culture Friends 255

Trends for Participatory Democracy: The Influence of the Internet in the Profile of Political Representation and on the Participatory Budgeting

Professor Rubens BEÇAK*

Faculty of Law, University of São Paulo

Professor João Victor ROZATTI LONGHI**

Pontifical Catholic University of Rio de Janeiro

Abstract: *The nowadays communications' reality brought deep changes to many cultural fields. A significant part of interpersonal relations could not stay immune from the innovations caused by the popularization of technologies as the Internet.*

Due to this, many legal scholars started to question about the role of political institutions and legal institutes as the parliamentary representation, the parliamentary mandate and the function of political parties. There are even those who question if the Parliament is necessary to the survival of the democratic system.

Analyzing certain characteristics of the political representation in democratic systems from an evolutionary perspective, first of all, this paper aims to study theoretical justifications of the mechanisms of formation of the will of the state in the modern representative democracies.

In the same context, this scientific research describes the current lack of representativity of the traditional methods by analyzing some specific instruments of participatory democracy. Also, it seeks to analyze the dependence of the representative system on political parties and the distortions caused by this, especially in the current Brazilian reality.

Key-words: participatory democracy, Internet, parliamentary representation, Brazilian Internet framework, e-participatory budgeting

Tendances pour la démocratie participative: l'influence de l'Internet dans le profil de la représentation politique et sur la budgétisation participative

Résumé: *La réalité de nos jours des communications a apporté des changements profonds à des nombreux domaines culturels. Une partie importante des relations interpersonnelles ne pouvait pas rester à l'abri des innovations provoquées par la diffusion des technologies comme l'Internet.*

Pour cette raison, de nombreux juristes ont commencé à s'interroger sur le rôle des institutions politiques et les instituts de droit comme la représentation parlementaire, le

* *Master and PhD in Constitutional Law at the University of Sao Paulo. Professor at the University of Sao Paulo - USP Law School in Ribeirão Preto (Graduation) and the Faculty of Law of São Paulo (Postgraduate). Secretary General of the University of São Paulo.*

** *Master in Private Law at the Rio de Janeiro State University. Professor Pontifical Catholic University of Rio de Janeiro. Advisor in Ministerio Público do Estado do Rio de Janeiro.*

mandat parlementaire et la fonction des partis politiques. Il ya même ceux qui remettent en question si le Parlement est nécessaire à la survie du système démocratique.

Analysant des certaines caractéristiques de la représentation politique dans les systèmes démocratiques dans une perspective évolutive, tout d'abord, cet article vise à étudier les justifications théoriques des mécanismes de formation de la volonté de l'État dans les démocraties représentatives modernes.

Dans le même contexte, cette recherche scientifique décrit le manque actuel de la représentativité des méthodes traditionnelles par l'analyse de certains instruments spécifiques de la démocratie participative. En outre, cet article cherche à analyser la dépendance du système représentatif sur les partis politiques et les distorsions causées par la présente, en particulier dans la réalité brésilienne actuelle.

Mots-clé: la démocratie participative, l'Internet, la représentation parlementaire, le cadre brésilien sur l'Internet, e-budgétisation participative

I. Introduction

Gwenael le Brazidec says that the current pluralist democracies, most of them based in periodic elections and on political representation, with periodic mandates, they articulate, from the standpoint of political science, two different notions.

The first is that the principle of the political representation is based on people's sovereign, who is paradoxically forced to delegate the exercise of power to a small number of representatives. In turn, the second consists in the fact that, according to the liberal principle, the elected candidates are not linked to the interests of the represented electors, which allows them to make operations away of the interests of voters¹.

So, the current situation of Technologies of Information and Communication significantly alters the form of manifestation of popular will, freedom of expression and the interests in the political "game". The popularity Internet, for example, has sure provided new experiences on the exercise of citizenship.

This is the main problem of this paper.

1. Parliamentary Mandate: brief statements about the legal aspects

"Especially nowadays [...], it is difficult, almost absurd, to concept constant demonstrations of the people, to let you know quickly what is your will".

*Dalmo de Abreu Dallari*² – In the Theory of State, the classical view about the division of typical functions of power seemed to leave no doubt about the role of each entity in the workings of the National State. It was always up to Legislative to vote laws, to the Executive to carry them and to the Judiciary care for its full application.

Moreover, the modern times' democratic State, designed after the liberal revolutions of the nineteenth century, is structured on the premise (or at least the misconception) that it was

¹ See *Gwénaél le Brazidec*, Régimen representativo e democracia directa, in *Hugo A. Cantú*, Sistema representativo y democracia semidirecta, Memorial del VII Congreso de Derecho Constitucional, Mexico, Instituto de Investigaciones Jurídicas de la Universidad Autónoma de Mexico, 2002, p. 349.

² *Dalmo de Abreu Dallari*, Elementos de teoria geral do Estado, 21ª ed. atual, São Paulo, Saraiva, 2000, p. 90.

impossible to manage public administration under constant direct manifestations of the citizens.

In other words, democracy and representation have been viewed as two sides of the same reality, in an apparently indissoluble union. According to *Norberto Bobbio*, “in this historical context of the [political liberalism], political representation was not presented as an alternative [...], the representative government was not just a complement, but a correction of the political system”³.

In turn, *Vânia Sciliano Aieta* asserts that “as well as we no longer live in a *polis*, but in a *megapolis*, the metaphor of the Ancient Greece’s cities lost its human dimension. This because the People of the polis, and later of the medieval towns, no longer exists with that old organic characteristics”. Therefore, she concludes that the major difficulty is not to define objectively what is democracy as a whole, but “what the Democracy actually is”⁴.

However, it is true that, while the Democracy practiced in Athens during the Age of Pericles is represented mainly as a direct democracy, the Democracy practiced by contemporary and modern states uses to be essentially based on the idea political representation⁵.

1.1. Representation and parliament

The term “representation” is used by the law of contracts as one of the possible instruments for celebrating agreements for one person in name of another, which can be divided in conventional representation and legal representation. This last happen when the Law gives someone the duty or the *onus* to act in name of another.

The notion is crucial to understand the Legal institutes like parental authority (or family power), or business mandates, for example. However, the use of the term, in the field of political representation, brings to peculiarities inherent of the public sphere, taking to a quite different concepts if compared to the mandates of private law.

So, as we said, to transplant democracy for modern and contemporary times, the solution was use instruments from the private law to make it “viable” under the reality of the nineteenth and twentieth century. Thus, for the theoretical justification of all that, it was necessary to build a solid legal discourse⁶ to accommodate the conflicting interests after political revolutions of that period, specially between bourgeoisie and “les sans coulotes”.

In general, the conventional mandate is a contract whereby one party gives the other the power to represent you to perform one or more legal transactions. Carlos Alberto Gherzi scores enumerates three different elements: a) the contract itself, enhanced by the agreement

³ *Norberto Bobbio*, Democracia (Verbete), in *Norberto Bobbio, Nicola Mateucci, Gianfranco Pasquino*, Dicionário de política, Tradução Carmen C. Varriale e outros. coord. trad. João Ferreira; rev. geral João Ferreira e Luis Guerreiro Pinto Cacaís, 11ª ed., Brasília, Editora Universidade de Brasília, 1998. p. 324.

⁴ See *Vânia Sciliano Aieta*, Democracia (verbete), in *Vicente de Paulo Barretto (org.)*, Dicionário de Filosofia do Direito, São Leopoldo/Rio de Janeiro, Unisinos/Renovar, 2006, p. 191-192.

⁵ See *Rubens Beçak*, Instrumentos de democracia participativa, in: Anais do IX Congresso do Conpedi, Manaus, CONPEDI, 2008.

⁶ About legal discourse, see *Eroulths Cortiano Júnior*, O discurso jurídico da propriedade e suas rupturas: uma análise do ensino do direito de propriedade, Rio de Janeiro, Renovar, 2002, p. 5 e ss. The author based lots of its own conclusions to criticize the justification of property law in *Michel Foucault*, Vigiar e Punir, Trad. Raquel Ramalhete, 39 ed., Petrópolis, Vozes, 2011, p. 164 e ss.

of wills b) the power granted by the mandator to the mandatory; c) the representation that arises from the mandate, opening many possibilities to the mandatory⁷.

More recently, the national jurisprudence about contracts have disregarded the representation as part of a mandate, and vice versa, mitigating its liberal roots⁸. But what is important to enlighten is that, under the liberal notions, to justify how someone can act in the name of other, is to justify whose will is being substituted to create a rule of law, under a contract or a under a legal Act⁹.

The same is the dogmatic about the parliamentary mandate. The legal system refers to the rules of manifestation of the will, just replacing parts. As the mandator, the nation or the people¹⁰. As the mandatory, the members of the Parliament.

Raymond Carré de Malberg analyzes some theories that seek to justify political representation under the institute of the mandate. The French professor says that that fact of replacing the king gave a new Role for the Parliament after the Revolution of 1789. However, if the legislative house ceases to be composed of representatives of people, on the other hand the constitution gives them complete independence of those who have elected the parliamentary. Complements the author:

The essence of modern representation is alleged in the complete independence of deputy in the face of their constituents, when they become systematically excluded from any effective participation in the legislative process¹¹.

Indeed, if the contractual mandate presupposes that someone gives powers to other. So this represents his trustee, but this is not the structure of the parliamentary mandate.

Who represents and who is represented? If in the private relationship between agent and client, for example, we have separate regime of duties and responsibilities, commitments and limits for mainly by the agent, is there any link between the elected and their constituents, or group of voters?

Both answers complete each other. After all, it is known that the French Revolution was responsible for the rupture of the paradigmatic function of the parliamentary mandate. Until this moment, the few existing Parliaments held a stratification's structure, leaving the main role to the monarchs. Their representatives had imperative mandates, yoked to instructions received from their constituents, most of them, to this clan.

In turn, the most important change brought by the Revolution was to overcome the imperative mandate by the representative mandate, in which members of Parliament represent the "whole nation" and not to its electoral college.

In this vein, to achieve this scope it was necessary to surround the parliament of constitutional prerogatives, to guarantee independence of the legislature during the performance.

⁷ *Carlos Alberto Ghersi*, *Contratos civiles y comerciales. Parte general y especial*, T. I. 4. ed. actualizada y ampliada, Buenos Aires, De Palma, 1998, p. 726.

⁸ See *Anderson Schreiber*, *A representação no novo código civil*, in *Gustavo Tepedino (coord.)*, *A parte geral do novo código civil: estudos na perspectiva civil-constitucional*, 3. ed. rev., Rio de Janeiro, Renovar, 2007, p. 232.

⁹ See *Emilio Betti*, *Teoria do Negócio Jurídico*, Trad. Servanda Editora, Campinas, Servanda Editora, 2008, p. 776.

¹⁰ The legal doctrine is not consensual about the distinctions of nation and people. To see some conceptual differences, see *Jorge Miranda*, *Teoria do Estado e da Constituição*, Coimbra, Coimbra editora, 2002, p. 281-282.

¹¹ *Raymond Carré de Malberg*, *Teoría General del Estado*, Traducción de José Lion Depetre, 2ª ed. en español, Mexico, Fondo de Cultura Económica, 1998, p. 986. Free translation.

Furthermore, it was also necessary that the liability for the acts of the typical exercise of this abstract power does not fall on the parliamentarian, nor on the legislative body as a whole.

Jose Afonso da Silva asserts that the representative mandate designed to bourgeois liberal state is a mechanism to keep separate State and Society, an abstract way to make the relationship between people and government. For this reason, it should be free, irrevocable, and insubordinate to subsequent ratification of the voters. A good fiction that could not be maintained for too long¹².

These are the bedrocks of indirect democracy and they were still adopted by most contemporary political regimes, even when formally combined with instruments of direct democracy, as the Brazilian Constitution. However, many legal scholars emphasize nowadays the distance between fact and theory, between reality and discourse, as will be seen below.

1.2. Parliamentary representation and the current crisis of representation in parliaments

“[...] Political apathy is not at all a symptom of the crisis a democratic system [...]. Furthermore, for the parties [...], it does not matter if people are discourage from voting. On the contrary: if fewer people vote, they receive less pressure.”

*Norberto Bobbio*¹³ – On the preambles of many constitutions around the world, ~~nothing is~~ more common than “the power belongs to the people”.

The principle of popular sovereignty, now elevated to structural pillar of the constitutional system in most democratic countries, as well as Brazil, guides all the infraconstitutional discipline of the political representation¹⁴.

But the main change from the French Revolution’s representative democracy to the present days’ is the mediation of the electoral process by political parties.

Gilmar Ferreira Mendes gives to the party the role of a kind of “mediator between people and State”. For the author, this is the reason why the legal system should give them special characteristics, as a way to avoid confusing the political party with mere private associations. Its legal nature is much more complex, once that they can be considered “something between the private and the public”¹⁵.

The emergence of the political party as we know dates back to the nineteenth century, at the Reform Act of 1832 in England. After all, *Ana Oppo* highlights that, until this moment, the political party was a simple label, with representatives of some groups, which were not

¹² *José Afonso da Silva*, O sistema representativo e a democracia semi-direta: democracia participativa, in: *Hugo A. Cantú*, Sistema representativo y democracia semidirecta, Memorial del VII Congreso de Derecho Constitucional, Mexico, Instituto de Investigaciones Jurídicas de la Universidad Autónoma de Mexico, 2002, p. 11.

¹³ *Norberto Bobbio*, O futuro da democracia: uma defesa das regras do jogo, Trad. de Marco Aurélio Nogueira, Rio de Janeiro, Paz e Terra, 1986, p. 70. Free Translation.

¹⁴ Restricted to the current Brazilian reality, the Constitution brought even sophisticated mechanisms to combine representative democracy with direct democracy, which is also called semi-representative or semi-direct democracy.

¹⁵ *Gilmar Ferreira Mendes*, *Inocência Mártires Coelho*, *Paulo Gustavo Gonet Branco*, Curso de direito constitucional, São Paulo, Saraiva, 2009, p. 819. The legal concept of political party, in Brazil is at the art. 1º of federal Law number 9.096/95.

divided by conflicts of interest or substantial ideological differences, who adhered to one or another group mostly by local traditions and families¹⁶.

On the other hand, in the twentieth century, the idea of the “partitocracy”¹⁷ gets strong for many political scientists. In other hands, for many, the maintenance and survival of the representative democracy depended on political parties, who orchestrates mass citizen participation in public activities.

A different tributary, registry and organizational legal treatment even to the associations and foundations linked to political parties, comes from this principle. In the same sense special rules regarding to their funding.

Restricted to the current Brazilian system, the Constitution brings the structural patterns of the discipline of legal political parties. Article 17 establishes principles as a multi-party control by the Electoral Court, free access to the media, among others. Moreover, the Constitution also establishes a basic requisite to participate on the elections: to be membership of any party as a condition of eligibility.

About the function of the political parties, it is important to emphasize the current positioning of the Brazilian Supreme Court about party loyalty. By majority, in the judgment of ADI 3999/DF, the Constitutional Court considered under the constitution the possibility of losing the mandate when the parliamentary changes the political party right after being elected, what is called partisan infidelity. At the end, the message is: the mandate belongs to the party and not to the parliamentary.

For this reason, many legal scholars conclude that, after this precedent, the mandate binds the representative to comply with the guidelines of the political program of their respective party, making it more imperative. Therefore, it seems that the parliamentary mandate, nowadays, heads in the opposite direction from its origins in the French parliament, but thought the political party.

It should be noted that the political party has an important ideological role. It is a way to perpetuate and disseminate of ideas, something essential to the democratic system. However, the current multi-party system has its problems. The proliferation of parties without political content, which is made just to participate on the elections, is a sad reality, at least in Brazil.

Accordingly to the former Minister of Science and Technology, professor *Roberto Amaral*, in our parliaments, the proliferation of “benches” is inexhaustible [...]: the ‘bench’ of evangelicals, health, private medicine, laboratories, private schools, the “*ruralists*”, police and military, among others. Those interests keep above the political representation or the party program, and are what determines the votes in plenary. Those are some of the reasons that force the author to conclude that the “representative democracy is dead”¹⁸.

¹⁶ See *Ana Oppo*, Partido Político (Verbetes), in *Norberto Bobbio, Nicola Matteucci, Gianfranco Pasquino*, Dicionário de política, Tradução Carmen C. Varriale e outros, coord. e trad. João Ferreira; rev. geral João Ferreira e Luis Guerreiro Pinto Cacaís, 11^a ed., Brasília, Editora Universidade de Brasília, 1998, p. 899.

¹⁷ See *Gianfranco Pasquino*, Partitocracia (Verbetes), in *Norberto Bobbio et alli.*, Dicionário de política. (cit.), p. 906.

¹⁸ *Roberto Amaral*, Apontamentos para a reforma política: a democracia representativa está morta; viva a democracia participativa, in: *Revista de Informação Legislativa*, no. 151 jul./set. 2001, Brasília, 2001, p. 51. Disponível em (http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/461/analise_partidario_lima.pdf?sequence=8), acesso em 11 set. 2011.

Therefore, such circumstances have led many to advocate the necessity of overcoming the vicious cycle between political parties and (lack of) representation in parliament by the strengthening of mechanisms that encourage participation in the process of formation of the will of the state.

However, we believe that there is no need without to suppress or loss of importance of any institution.

As *Joaquim Falcão* asserts, the current Brazilian constitutional democracy is not direct or indirect, rigidly. The constituent tried to make possible a constructive dialogue between representative democracy, with parties and democratic elections, and plebiscites, referendums, popular legislative initiative and other participatory institutions as community councils, NGOs, Trade Unions, etc. So, the professor concludes that “[...] the models of democracy are neither sequential nor excess, but complementary and concurrent. The ideal modern political democracy shows a concomitant democracy”¹⁹.

2. Popular participation and participatory democracy

Pointed out some problems and limitations of the current model of political representation based essentially on representative system, it is necessary to focus on direct democracy mechanisms. Furthermore, when combined with representative elements, we can call it the semi-direct democracy.

The Brazilian Constitution of 1988 provides in its article 14, the plebiscite, the referendum and popular initiative. In other countries like the United States there are still “recall” the popular veto²⁰.

The Venezuelan Constitution of 1999 brought other means (political, economic and social) of direct participation, for example, election to public office, public consultation, open meetings, the assembly of citizens – political instruments – and self-management, co-management, cooperatives, business community – social and economic instruments etc.

However, this South American experience is too recent. In the same sense, *Roberto Amaral*: “participatory democracy in Venezuela, although positively valued, meaning a breakthrough for the political life of the continent, is still one project, a remarkable project of a modern constitutionalism”²¹.

In Brazil, moreover, direct participation is scarcely used. At the federal level, there was a referendum in 1993, to choose between monarchy and presidency, or the referendum in 2005,

¹⁹ *Joaquim Falcão*, *Democracia, direito e terceiro setor*. 2. ed.. Rio de Janeiro. Editora FGV, 2006. p. 87.

²⁰ It is noteworthy that the National Constituent Assembly of 1988 defiled the possibility of inserting in the list of provisions of article 14 the possibility of dismissal the representative - a member of Congress or executive - through recall. The constituent has lost a valuable opportunity to insert this important instrument of direct democracy in Brazil. See *Pedro Rubens Jehá*, *O processo de degeneração dos partidos políticos no Brasil*, São Paulo, Faculdade de Direito da USP, 2009 (Tese), p. 407-408 (<http://www.teses.usp.br/teses/disponiveis/2/2134/tde-13112009-150346/pt-br.php>), acesso em 9 set. 2011.

²¹ See *Roberto Amaral*, *Apontamentos para a reforma política: a democracia representativa está morta; viva a democracia participativa*, in: *Revista de Informação Legislativa*, no. 151. jul./set. 2001, Brasília, 2001, p. 62 (http://bd.camara.gov.br/bd/bitstream/andle/bdcamara/461/analise_partidario_lima.pdf?sequence=8), acesso em 11 set. 2011. See also *Rubens Beçak*, *Instrumentos de democracia representativa*. Disponível em (http://www.conpedi.org.br/manaus/arquivos/anais/bh/rubens_becak.pdf).

about the Weapons' Statute. But as we can see, complex questions have not been often submitted to popular consultation.

2.1. The Internet as an instrument of participatory democracy

Either way, we can take as a solid premise that instruments of participatory democracy can be a way to incentivize popular participation in policy-making, thereby increases the legitimacy of representative democracy.

These instruments should not be restricted to that few constitutional instruments. It is necessary to "invent", going beyond the constitutional instruments. And the Internet seems to have a great potential for expansion of new possibilities.

As an example, the Civil Rights Framework for Internet in Brazil, a collaborative draft bill, that establishes principles, guarantees, rights and obligations related to the use of the Internet in Brazil. The draft is a joint initiative of the Secretary of Legislative Affairs of the Ministry of Justice (SAL/MJ) in partnership with the Rio de Janeiro School of Law at the Getulio Vargas Foundation²².

The process happened at two steps. The first was a round of discussions on a *blog*, allowing any user to express their points of view on topics predetermined: individual and collective rights (privacy, freedom of expression and right of access to the net); liability for providers and users Internet, and public policies regarding the Internet. At the end of the first stage a draft was presented, summarizing the discussions article by article at another round of discussions. Every moment happened in 45 days, which may be expressed the views of all stakeholders.

Other initiatives such as these have also been carried out in our country. It is the example project code protection of personal data. The procedure follows the same line. The most interesting thing is that, onto discussions through a website, it is possible for interested people to criticize and suggest the future newsrooms bill, later proposed do the Legislative²³.

This is just an example of the potential of participatory democracy and the use of new technologies in achieving citizenship on the twenty-first century.

2.2. The Internet and popular participation in public budget: the e-participatory budget

Another Brazilian experience deserves a separate analysis. It is an instrument already implemented in many spheres of government in the country. But now, it will be analyzed under a new perspective, different from the traditional structure of the participatory budgeting.

We are talking about the popular participation in drafting the public budget, or just the Participatory Budget.

In Brazil, is not a recent phenomenon, used from decades in some cities of the country.

²² See (<http://diretorio.fgv.br/civilrightsframeworkforinternet>). To see the final text purposed to the Legislative see (<http://diretorio.fgv.br/sites/diretorio.fgv.br/files/Marco%20Civil%20-%20English%20Version%20sept2011.pdf>).

²³ See João Victor Rozatti Longhi, Rubens Beçak, Participatory democracy and its implementation – historical perspective and future prospect – the Brazilian Internet Regulatory Framework, in: VIIIth World Congress of The International Association of Constitutional Law, 2010, Mexico City, Papers of the VIIIth World Congress of The International Association of Constitutional Law, 2010.

Ricardo Zugno explains that, historically, the method of purposing and voting the public budgets in Brazil, is very formalist. By this procedure, the budget for the next year is budget of the last year, with some small changes, which rarely connects the government with a concrete program, reflecting a patrimonialistic model, unconnected to the main needs of the population. Finally, he concludes that this complex system is a wonderful weapon for that who are interested just on using the “black box of government” to hide the corruption in this bureaucratic structure²⁴.

As an alternative to this historical overview of repeated anti-democratic practices, an opening perspective became more than necessary, implementing an innovative and democratic structure to the budget deliberations²⁵.

Luciano Fedozzi explains that the Participative Budget work through the “delegates”, who composes representative bodies of regional and thematic meetings each year, open to all the of the community.

The delegates are representatives elected in proportion of one to ten participants in meetings, and are organized “Forums of Delegates”, by each region of the city or a specific theme. The Forums are intermediate decision-making bodies.

Finally, the Forums composes the Participatory Budget Council (COP), also elected by the annual meetings, which is the highest instance decision of the Participatory Budget, functioning throughout all the annual cycle of budget²⁶.

While undeniably innovative experience of the participatory budget, this can not be incorporated into political praxis without reflections. Especially about the role of representatives of local bodies and the defense of other interests, different than those of the community, when making a particular political position.

However, the participative budget is a reality across the country, showing that it is possible to strengthen participatory democracy stimulating people on exercising the citizenship not just in the elections.

The Federal Law nº 10.257/2001 expressly enshrined the participative budget as an institute to be adopted for all the Municipalities of the country. This Law, also called the “Statute of the City” brought the popular participation in the initiation, resolution and control of financial resources employed by the government. It is Article 44 which states:

At the municipal level, the participatory budget management at letter “F”, section III, article 4, of this Act includes debates, public hearings and consultations on the proposals of the multiyear plan, the budget directives law and annual budget as a binding condition for approval by the City Council²⁷.

The normative gave new directions to participatory democracy at the national level. As says professor *Adilson Dallari de Abreu*, the participative budget at the Statute of the City

²⁴ See *Ricardo Zugno*, *Espaços públicos compartilhados entre a administração pública e a sociedade*, Rio de Janeiro, Renovar, 2003, p. 108-110.

²⁵ The roots of participatory budgeting, as known today, dating back to the late 1980s. One of the most famous and well succeed experiences happened in the city of Porto Alegre. See UNESCO, *The Experience of the Participative Budget in Porto Alegre* (<http://www.unesco.org/most/southa13.htm>).

²⁶ See *Luciano Fedozzi*, *Cultura política e Orçamento Participativo*, in *Cadernos Metr pole*, S o Paulo, v. 11, n. 22, p. 385-414, jul/dez 2009, p. 386.

²⁷ See (http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm). Free translation.

represents a corollary of the participatory principle of planning budget, both the Brazilian Constitution (art. 1 paragraph and 29, XIII, CRFB)²⁸.

However, the Internet can also expand the horizons of the participatory budget. We can cite two cases.

The first happens in the Legislative Assembly of Sao Paulo State. In addition to public hearings held regularly, discussing the public budget directly with the public, at the various sub-regions of the state, citizens can directly express their will about the allocation of financial resources from State presenting proposes and amendments to the Executive.

Through the “amendments online”, the citizens of Sao Paulo State can use the Internet as a viable way to make concrete the principles of participatory democracy, outside the territorial limits of the municipality, although it doesn’t bind the legislature to do so²⁹.

Moreover, cities such as Belo Horizonte, also a pioneer at the participative budget in Brazil, have adopted the so-called virtual participatory budgeting, or just e-participative budget (the e-OP). The procedure involves numerous stakeholders within the municipality, and uses the database of the Electoral Court as a precondition to the participation by the citizen³⁰.

It is true that the participatory budget is and remains the subject of reflection and criticism. The binding of the legislative deliberations popular, for example, is another way of reducing the discretion of the legislature in a field that traditionally was its role: discussions on the Executive's proposal for the planning of future public policy.

Furthermore, the representation of delegates has already given rise to questions about the instrumentality of the mandate as a requisite of democracy. One of the reasons to see the participative budget as an anomalous species of “delegative democracy”³¹.

Experiences like this keep alive the debates about the true role of parliament as a *locus* of political representation. However, the only thing clear is that Internet brought new questions about the limits of the rigid division between Executive, Legislative and Judiciary as well as brings new challenges to the future.

II. Conclusion

Professor *Bruce Ackerman* established the distinction between monist and dualist democracy. In general, the first is used when the People really take part of the exercise of the political power. The second, on the other hand, shows that the representatives of the people have the political power, but use it for their own benefit.

Historically, the democratic game uses to facilitate the accumulation of power and the formation of political elites away from real concerns of citizens. In other words, we could

²⁸ See *Adilson de Abreu Dallari*, Instrumentos de política urbana (art. 4º). In *Adilson de Abreu DALLARI, Sergio Ferraz*, Estatuto da cidade (comentários à lei federal 10.257/2001), 3. ed. atualizada de acordo com as leis 11.673/2008 e 11.977/2009, São Paulo, Malheiros, 2010, p. 77.

²⁹ See Legislative Assembly of Sao Paulo State (<http://www.al.sp.gov.br/portal/site/Internet/menuitem.ac99e6e66862ad4b3d7b0f10f20041ca/?vgnnextoid=78f150d649467110VgnVCM100000590014acRCRD>).

³⁰ (Município) Belo Horizonte, Portal do Orçamento Participativo. Acesso em (http://portalpbh.pbh.gov.br/pbh/ecp/comunidade.do?evento=portlet&pIdPlc=ecpTaxonomiaMenuPortal&app=portaldoop&tax=17243&lang=pt_BR&pg=6983&taxp=0&).

³¹ See *Guillermo O'donell*, Delegative Democracy?, in (<http://www.ispla.su.se/gallery/bilagor/Delegative%20democracy.pdf>).

verify that the Legal structure of the political mandates, with the guarantees to the representatives and the political parties is being distorted to justify an arbitrary exercise of the power, keeping it away of the true needs of the citizens.

Therefore, we could see that is essential to emphasize and stimulate instruments of semi-direct democracy. The current Brazilian Constitution brought some mechanisms of popular participation. However, the reality shows they are insufficient. For this reason, Internet can be a light at the end of the tunnel to make our democracy more democratic.

However, the Internet cannot be seen just as a way to transpose into the virtual atmosphere the same practices, with the same benefits and mistakes. We need to understand the cultural changes resulting from this new reality to promote practices that exploit its full potential. As professor *Pierre Levy* explains: "The 'electronic democracy', [...] is not about voting instantly a mass of people separated, simple propositions [...], but encouraging continuous and collaborative solutions to face the collective problems, to make it more concrete, closest to all groups involved".

We showed some experiences, as collaborative draft laws as the Civil Rights Framework for Internet Users in Brazil (Marco Civil), or the e-participative budget, but this is not all. Recently, Brasilia received the Open Government Partnership meeting, an initiative in some countries that already uses the Internet as a way to increase transparency, incentivizing popular participation to achieve better solutions, in health, water supplies, discussing and voting draft bills, etc.

Another probable trend for the future in Brazil is the public, free and obligatory transparency for all the public institutions through the Internet. As well as it seemed obvious, just after the law n° 12.527/11, all the public institutions of municipalities with more than 10.000 habitants must guarantee open access to the public information at the Internet.

We know that we are far from an ideal model. But at least we can verify several new procedures which allow us to keep believing that is possible to reduce the distance between the political representatives and citizens, especially in Brazil.