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Legitimizing Referendums through Deliberative Democracy

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Résumé :

Due to the paradoxical nature of referendums and the underlying controversies that resulted from their misuse, a growing literature has emerged in an attempt to establish a legitimate democratic framework for their proper use. Recent research is now attempting to link means of direct democracy with a deliberative process as a way of enhancing the democratic quality of the whole process and fostering the democratic legitimacy of their outcomes. In this respect, two deliberative models seem to have gained a certain consensus in the literature: 'mini-publics' and 'citizens assemblies.' Our paper, therefore, adopts a theory-oriented approach towards the combination of these two different democratic innovations, mainly in the works of four major authors. Our review highlights the potential framework for adopting a deliberative process before the holding of referendums to promote democratic legitimacy.

Key Words: Citizens assemblies **;** Deliberative process ; Direct democracy ; Mini-publics ; Referendums

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1. INTRODUCTION

The massive use of popular voting devices during the past two decades gave rise to a wave of democratic studies in order to establish a legitimate framework for their proper use. The academic scholarship has long been divided between those who praise the merits of the referendum as a useful device that promotes democracy and citizens' participation, and those who note its limitations. In this respect, a number of authors identified several shortcomings in the information process within referendums.

Due to the diversity in their institutional design, Chambers (2018) contends that it is difficult to make clear statements, mainly normative statements about "the functionality, desirability or democratic legitimacy of referendums in general" (p.305). In this context, several authors (Hendriks and Wagenaar 2023, McKay 2019, Landemore 2018), while evaluating the potential merits of the referendums along with their deficiencies, are now attempting to link means of direct democracy with a deliberative process to enhance the democratic quality of such practices. For these authors, adding a deliberative process to means of direct democracy is perceived as a remedy against the controversies that may derive from popular voting devices. Although means of popular vote have long been perceived by democratic theorists as incompatible with deliberative democracy, considering their contrasting democratic nature, this new flood of democratic research views such a combination as rather complementary (Hendriks and Wagenaar, 2023).

Deliberative democracy, therefore, offers a potential means of securing the democratic legitimacy of means of popular votes, as it enables voters to form their political opinions and voting behaviours in an environment of constructive debates and discussions. Such appealing outcomes can be reached by adding a 'mini-public' or a 'citizen assembly' to the means of direct democracy to work as in the words of McKay (2019) as "information proxies" providing citizens with trustworthy cues and enabling them to overcome elite

manipulation (p.3). Tierney argues that the recent turn to deliberative theory provides solutions to each of the problems that may derive from popular voting devices, by offering ways to initiate good practice in the design and regulation of the referendum based upon principles of popular participation, public reasoning, and pluralism in decision making (2013, p.1). On the other hand, Hendriks and Wagenaar (2023) claim that by combining such democratic innovations, we might benefit from their relative merits, which might be much greater than their benefits separately (p.2).

There has been a common agreement in the literature that a deliberative system requires direct political and policy consequences (Parkinson2012, Thompson2008, Parkinson2020). In this respect, a growing literature is elaborating new approaches in trying to combine deliberative processes with direct means of democracy. (LeDuc2015, Altman2014, El-Wakil2020, Courant2021). Even though the idea of reaching democratic legitimacy through a deliberative process is highly appealing, it has been highlighted in the literature that such a combination is very hard to co-occur in every democratic institution, and mainly in devices of direct democracy such as the referendum. Thus, such a combination requires a whole spectrum of investigations and raises a number of significant concerns regarding their institutional operations (Parkinson2020, Bächtiger and Parkison2019, Chambers2009, Mansbridge et.al 2012, Hendriks and Wagenaar2023). In the literature, two main forms of deliberation seem to have gained a certain consensus among researchers, namely the idea of adding a "mini-public" or "citizens assemblies" to popular voting devices (Hendriks and Wagenaar2023, El-Wakil2020, Courant2021, McKay2019, Landemore2018).

Following a thematic and theory-oriented approach, our paper attempts at shedding light on this new approach towards democratic theory. By framing the discussion around the combination of referendums and processes of deliberative democracy within the works of four major authors: Hendriks and Wagenaar (2023), Mackay (2019), and Landemore (2018).

Our analysis is therefore organised around the conceptual debates that these authors share, which would allow us to elaborate a new theoretical framework for reaching democratic legitimacy within referendums through deliberative processes. In doing so, our paper contributes at highlighting the potential institutional designs for elaborating deliberation within referendums. The idea is to give a clear assumption on how adding a deliberative process to popular voting devices can give a certain democratic legitimacy to popular voting devices, as it encourages ordinary citizens to engage in the political debate and provides them with resources in order to form an enlightened decision.

2. Keeping Referendums democratically safe (Landemore's perspective)

In a response to the work of Cheneval and El-Wakil (2018), Landemore (2018) raised a number of significant arguments advocating the introduction of deliberative processes within popular votes. According to the author, recent experiences of referendums, most notably the Brexit referendum in the UK, demonstrate that "the public sphere", mainly in its online form, is mostly dysfunctional and vulnerable to party, money, or media manipulation and exploitation. Accordingly, she notes that the best way to ensure that referendums are kept "safe for democracy" resides within a proper deliberative process (326). In this respect, attaching deliberative mechanisms to referendum processes would at least guarantee that voters would cast an enlightened vote (326).

Based on the ideas of "deliberative polls" put forward by Fishkin and "deliberative voting" elaborated by Levy (2013), Landemore further enhanced the idea of the "deliberative referendum". In this respect, she suggested two innovations that could be used to supplement popular voting devices. The first one consisted in the introduction of 'open mini-publics', which can be organised across various cities to facilitate an open and detailed deliberation upon the issues to be put to popular vote. These open mini-publics would

consist of randomly yet statistically selected representatives of groups of voters, and would play a crucial role in the framing of a referendum question or debating already existing ones.

Accordingly, Landemore outlined a potential operational framework for these mini publics, which can work both online and offline. Furthermore, participants, who would be connected to the larger public via crowd-sourcing platforms, would be guided by experts and a range of briefing materials, and would first gather for a few days to discuss the pros and cons of the proposal. Therefore, their deliberation would be structured and assisted by trained moderators. Nevertheless, citizens could engage in the debate with the mini-public by asking them questions on submitting information, and suggestions. The debate and discussion that occur in the mini-public could be streamed to the larger public in order to spread their reasoning and conclusions widely (Landemore, 2018, p.323). As for the online part, debate and discussion between registered voters and participants in the mini-public could be in the form of 'chatrooms' where they can register to join the chat or simply follow the debate and be able to comment. Thus, in both cases, a separate space is made for the wider public to systematically follow the debate, provide comments, and ask questions, all without directly engaging with the mini-public.

The second proposal that Landemore suggested was the distribution of pamphlets to all registered voters prior to the vote, as a way of ensuring that citizens are provided with an impartial and objective information delivered by a panel of experts. Accordingly, the author suggested that these pamphlets should be written following the method of the Oregon Citizens' Initiative Review (CIR), which proved to be highly successful, as the assembly distributed its deliberation in the citizens' statement that was distributed to all eligible voters. In this respect, Landemore suggested including the pamphlet in the official voters' guide or just making it widely available, considering that two-thirds of voters affirmed considering the statements made by the CIR, which proved to be highly useful (Gastil, et.al, p.66). Such

procedures would ensure, to a certain degree, that voters will go to the ballot booths at least modestly informed about the issue at hand. Such deliberative procedures, according to Landemore, would not only increase the "wisdom of the crowds" but would also lead to the normative legitimacy of the system as well as its outputs (p.324).

3. Structuring the Deliberative Referendum (Hendriks and Wagenaar's View)

The concept of the deliberative referendum was also discussed in the work of Hendricks and Wagenaar (2023), along with its emerging functional variants, its potential advantages, limitations, and related design questions. For the authors, a deliberative referendum is an idea whose time has come. Nevertheless, they stressed upon the fact that every hybrid design that integrates a popular vote and a deliberative assembly comes with specific design questions that require thorough discussion (p.585).

In this respect, the authors argue that including a citizens' assembly in the creation, assessment, and interpretation of the propositions may likely increase support for a referendum proposition. The same result would happen when a referendum is added to a citizens' assembly process, as it would help the assembly to focus more and produce a more accurate deliberation (Hendricks and Wagenaar, 2023, p.570). Therefore, the authors highlighted the fact that, as an aggregative tool, referendums seem to be part of a "thinking fast" domain, whereas citizens' assemblies and other forms of deliberation belong to a "thinking slow" domain (Hendricks and Wagenaar, 2023, p. 570).

In light of democratic innovations, Hendricks and Wagenaar identified two contrasting currents. Thus, because of the scope of their study, the authors examined additional unifying perspectives on how to connect referendums and mini-publics by following a "heterophilia" that "cares for the institutionally different and related interests in hybrid innovation." (p.571). Similar approaches have been distinguished from the literature

by El-Wakil (2020), such as the 'additive' approach as advocated by Bächtiger and Parkinson, aiming at adding a deliberative process in order to enhance the deliberative quality of popular vote processes. The second approach that El-Wakil emphasized is the 'summative' approach, where deliberation would be a quality of political systems that results from the interaction between its various parts (p.38). Nevertheless, Hendriks and Wagenaar built up their model following Gastil and Richard's (2013) deliberative design, which mainly included: priority conference, design panel, citizens' assembly, citizens' initiative review, policy jury, each contributing differently to different stages of direct democracy.

The authors employed two criteria regarding the link between the citizens' assembly and the referendum. The first one revolves around the deliberative efforts of the assembly, which relate directly to the ballot proposal(s) in the referendum. The second tackles the combination of citizens' assemblies and referendums, which is not merely hypothetical but which has actually been applied in practice. Therefore, the authors distinguished three types of citizens' assemblies combined with referendums. The first one is 'preparatory citizens' assembly', which, as the name denotes, prepares the conduct and holding of a referendum. It mainly puts together a selected representative group of citizens to discuss a particular policy issue and prepare the referendum issue that would be presented to the electorate. Thus, by deliberating as a mini public, the preparatory assembly, according to the authors, will lay the ground for a referendum vote by the 'maxi public', hence resulting in either an advisory or binding public decision (Hendricks and Wagenaar, 2023, p.574). In this first instance, Hendriks and Wagenaar gave the example of the Irish citizens' assembly model, which they viewed it as the most prominent and productive one since it is considered a world leader in bridging deliberative democracy (mini publics) with direct democracy (referendums). They argued that it sets an ideal for the most meaningful combination of deliberation and referendums (Hendricks and Wagenaar, 2023, p.576).

The second type that Hendriks and Wagenaar established is the referendum-scrutinizing citizens' assembly. This deliberative process, according to them, occurs after a referendum question has been decided but before the vote takes place. The scrutinizing citizens' assembly's main task is to tackle the question at hand, enlighten the wider public about the issue, and the consequences that may occur. The statements made by the assembly are distributed to all eligible voters, emphasizing the position of each side and their arguments. According to the authors, in the scrutinizing citizens' assembly, deliberation may produce, although not required to, non-unanimous voting recommendations. In such circumstances, it is common practice to report how the participants in the assembly debated their positions for both sides (Hendricks and Wagenaar, 2023, p.576).

To highlight this type even further, the authors gave the example of the Citizens' Initiative Review (CIR). Therefore, such assemblies work through different stages, the first stage is mainly an informative stage where participants get acquainted with the topic of the initiative, hear from experts from both sides to reach the deliberative stage where they would discuss the information and arguments in moderated discussion groups to finally be able to formulate their citizens' statement in which they would highlight the most significant conclusions and factors. The statement is then distributed as a voter information pamphlet to the electorate. Hence, the authors argue that the scrutinizing citizens' assemblies have been tested in different parts of the US and Finland, where it was concluded that voters agreed that the assembly's pieces of advice are reliable and useful and that the assembly's deliberation "improved their factual knowledge, issue efficacy and perspective-taking." (p.577).

The third type discussed by Hendriks and Wagenaar is the referendum-elaborating citizens' assembly. Such an assembly is mainly designed to tackle the post-referendum process. Its primary goal is to interpret the referendum outcomes and their operational

implications before the process of implementation by policymakers (p.578). Even though the citizens already voiced their choice, the referendum-elaborating citizens' assembly would give additional support to the representative body in order to make the outcomes go in the right direction and not be open to multiple interpretations. Therefore, the assembly would ensure that the most supported operationalization is in line with the referendum outcomes and thus would serve to do justice to the underlying intentions of referendum voters. The Brexit Citizens' Assembly was given as the major example to highlight the work of such an assembly.

Overall, the authors established three main ways of linking deliberative democracy with referendums, where each type was discussed thoroughly, distinguishing their advantages and limitations. Nevertheless, all three types aim at ensuring the well-conduct of referendums, adjusting policies with societal preferences in an environment of discussion and deliberation. Hence, there's still one area that requires further investigation in this context, which revolves around the information process. Thus, the conduct of the referendum requires an independent body to transfer information to the public, make sure of the legitimacy of campaign messages, make an equilibrium between the two camps, and discuss all the options given and the possible consequences of each.

4. Toward the Multi-stage Referendum (McKay's Conception)

McKay (2019) sought a way to improve deliberative cues through the combination of multi-stage referendums and mini publics, a design which he referred to as "iterated popular vote". On the one hand, mini-publics would foster high-quality deliberation by giving directions to the wider public; on the other hand, the multi-stage referendums would increase the number of possibilities for debate. Such a design allows one part to counterbalance the shortcomings of the other (2). Before discussing the combination of popular vote devices with deliberation, McKay (2019) classified means of direct democracy

into constitutionally required, citizen-initiated, and government-initiated. Therefore, he distinguished several stages of popular votes and how mini publics interact with each stage.

The first stage is the initiation stage, which resembles the referendum preparing citizens' assembly as discussed by Hendriks and Wagenaar (2023). McKay, on the other hand, gave the example of the British Columbia Citizens' Assembly (BCCA), which was made up of 160 randomly selected citizens from across the province. Hence, the BCCA operated in three major phases. The first one was a learning phase where assembly members heard from interested parties and read from different materials. The second phase was a public consultation phase where members of the assembly attended community meetings to engage with other citizens. The final phase was deliberation; here, members of the assembly discussed potential solutions among themselves. Eventually, the BCCA recommended holding a referendum to decide between the existing first -past- the-post system and the single transferable vote (McKay, 2019, p. 3-4).

The second stage, distinguished by McKay, is the campaign stage, where mini publics can play a crucial role at this level of the popular vote process. Mini publics at this stage are able of making their own recommendations to the voters and setting the agenda. This was the case with members of the BCCA, who were capable of persuading voters who knew about the assembly activities, which represented 60% of the population by the end of the campaign (McKay, 2019, p.5). The final stage distinguished by McKay is the implementation stage, which resembles Hendriks and Wagenaar's elaborating citizens assembly. Similarly, the same example of the Citizens' Assembly organized after Brexit was highlighted. Therefore, McKay argued that while the assembly's independence from existing political institutions improved the quality of deliberation, yet, it might limit its influence on real decision-making (p.6).

Through these different stages, McKay argues that the most frequent use of mini publics was during the initiation and campaign stages. Furthermore, he distinguished two credible mechanisms for the impact that mini-publics have on referendum outcomes. The first one is that mini publics have the capacity to set the agenda. Secondly, they can influence public opinion through "deliberative cues" that represent the well-informed opinion of ordinary citizens (p.6). Nevertheless, such capacities might be quite limited in their operation, as several cases demonstrated some limitations with regard to these two potential capacities. This suggests that some assemblies and mini-publics may differ in the intensity of their influence, the extent to which they managed to set the agenda, as it was the case with the Oregon CIR (Citizens' Initiated Review) and the Icelandic case as well. Moreover, statistics also revealed that mini publics vary in their capacity to provide cues to the broader public. (McKay, 2019, p.7).

In the second part of his research, McKay discussed the possible combination of multi-stage referendums with mini-publics, as such a combination was thought of providing a more credible deliberative outcome. Based on Barber's (1984) conceptions of the multi-stage popular votes, McKay argues that, in addition to the traditional yes/no format of most popular votes, the multi-choice format offers a variety of possibilities to choose from. In this respect, McKay gave the example of runoff and two-stage referendums to enhance the deliberative quality of popular votes. He claims that multi-stage votes would provide citizens with greater opportunities for deliberation and agenda setting. Therefore, by adding a mini public to such type of popular vote would ensure that deliberation was held. Hence, McKay argues that combining multi-stage popular votes with mini-publics or iterated popular vote (IPV), as he refers to such a process, may help in narrowing the gap between micro-deliberation and macro-participation (p.11).

McKay's research revealed that adding a mini-public to binary, one-time popular votes is not always capable of easily producing high-quality deliberation among the public. Although such a practice has provided an innovative way of improving the practice of referendums; yet, an institutional design needs to be acquired before the combination of both elements. Therefore, he suggests that combining these innovative procedures into an IPV could minimize the functional shortcomings of both mini-publics and multi-stage popular votes.

5. Discussion and Conclusion

The aforementioned authors established a variety of different approaches in attempting to support popular voting devices with a deliberative process. Nevertheless, there appears to exist a certain consensus among these authors on the deliberative institutions that would best suit means of direct democracy, namely 'mini-publics' and 'citizens' assemblies'. Our review addressed such conceptions in the recent scholarship, which proved to share a common theoretical and operational framework for structuring a deliberative referendum. Accordingly, Hendriks and Wagenaar addressed the concept of a deliberative referendum, along with its functional variants, their potential benefits, limitations, and related design questions. Considering the set of controversies that resulted from recent democratic and mainly direct democratic practices, the deliberative referendum is indeed urgently required. For this reason, Hendricks and Wagenaar stressed upon the fact that such a hybrid design that combines popular voting devices and deliberative assemblies raises significant design questions that require further investigation.

On the other hand, McKay praised these innovative practices and their potential in improving referendum processes. However, his research revealed that adding a mini-public to binary, one-time popular votes is not always capable of paving the way to high-quality deliberation among the public. Similarly, he stressed that an institutional design needs to be

acquired before the combination of both elements. In this respect, it is worth noting that the referendum initiation varies from one polity to another; therefore, it is the polity in question that determines the extent to which additional institutional designs are required for a good-quality deliberation and its impact on referendums. The institutional design of deliberative process within a polity where referendums are constitutionally binding differs from a polity where referendums are *ad hoc* and result from a simple parliamentary act. What is lacking in the literature are actual case studies where such a combination would be tested in different polities.

This combination, however, has been observed in certain cases, the most prominent one being the Irish model, which, according to Courant (2021), provides an empirical support for an institutionalised deliberative democracy, which mainly relies on randomly selected mini-publics. According to Courant's research, the Irish experience was mainly successful in terms of output legitimacy. Nevertheless, he similarly identified certain limitations that were mainly due to a lack of institutionalisation of mini-publics and citizens' assemblies. Therefore, if mini-publics and citizens assemblies are to be included in a referendum process, it is imperative that they would be granted some form of amendments and salience among the public, which would enable them to voice their deliberation and inform the wider public.

Tierney (2013) suggested that properly constructed electoral law and models of regulation can help construct a whole framework for a 'deliberative referendum'. The UK case might be a good example in such a context, considering that the PPERA (Political Parties, Elections and Referendum Act 2000) already sets the operational ground for referendum holding, and the Electoral Commission for its operational framework. These same legal procedures can also be applied to the work of mini-publics and citizens' assemblies. However, such legal regulations would not guarantee the salience of such deliberative

bodies among the wider public. In this case, the design suggested by Landemore appears highly convenient, as she proposed open mini-public practices online and offline through face-to-face meetings. Given the fact that online platforms are playing a major role in shaping the political agenda, mainly within referendums, as it was the case with the Brexit referendum, such a procedure might be quite fruitful.

The idea of a deliberative referendum is definitely, as Hendriks and Wagenaar put it, 'an idea whose time has come'. Nonetheless, it's an idea that we believe is able to cope with all kinds of democracies if it is properly designed. Hence, it is worth noting that in contemporary democratic practices, citizens tend to have a passive role in the decision-making process, an aspect that contributed to the citizens' disengagement with politics. Manin (1997) observed that this gap separating the representatives from their represented seems to be expanding (p.193). This explains why citizens are not used to having a main part in the decision-making process, let alone participating in mini-publics and citizens' assemblies.

In this respect, popular voting devices need to not only be supplemented with deliberative processes but also structured with an adequate institutional design that empowers such deliberative bodies. Therefore, it is particularly this area of deliberative institutional design in the context of referendums that requires further academic investigation. Accordingly, it is also worth highlighting that implementing a deliberative process is an extremely costly and time-consuming operation, let alone the costs of the referendum; the combination of these two institutions requires a serious governmental and citizenry engagement. In this regard, further research could also investigate how to form a more politically engaged citizenry that would be encouraged to take part in such political innovations.

As it has been discussed previously, Landemore established an interesting foundation of the online and offline citizens' assembly; therefore, further research could elaborate more on the use of technology and social media in fostering citizens' engagement and interest in politics and political debate. In light of this, Bonvin and Laruffa (2018) elaborated research on the contribution of the capability approach as advocated by Sen to deliberative democracy. They argue that the notion of 'conversion' in the capability approach helps explain why that even in the presence of formal equality, some individuals manage to participate, whereas others remain excluded from public debate (p.228). One can draw from this line of thought a whole conceptual and empirical framework on how to use this capability approach to promote citizens' interests in politics, which would eventually lead to a more legitimate deliberative process. If means of direct democracy are to be a permanent institution, it has to be joined by a fair and legitimate deliberative process.

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