



Debate

Referendums Are Never Merely Referendums: On the Need to Make Popular Vote Processes More Deliberative

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Referendums have a controversial status in democratic theory. Partisans of so-called “direct democracy” or “strong democracy” built on intense and frequent citizens’ participation see them as hallmarks of genuine democracy and want to generalize them to all kinds of political decisions (e.g., Barber 1984). On the other hand, referendums are often denounced by their critics as, in practice, plebiscites in disguise (Lijphart 1984: 203; Qvortrup 2000, both cited in Tierney 2013). Indeed, the historic use of referendums has often been to allow the powers-that-be to obtain validation of laws or policies they intended to push through anyway, rather than the genuine empowerment of the masses. Where popular resistance is expected, referendums are also used to make the public shoulder the blame of inaction. On the other hand, in the rare cases when referendums fail to deliver what the authorities predicted they would (e.g., as in the now infamous Brexit vote or the earlier rejections of the European Constitution in France and the Netherlands), their outcomes serve as proof that ordinary citizens should not be consulted on sensitive issues. Even deliberative democratic theorists, in principle committed to the need for participatory and open democratic institutions, hold referendums in suspicion, as being too tied to purely aggregative conceptions of democracy and not allowing for enough reflection and deliberation by the citizens (e.g., Chambers 2001; Fishkin 2009).

Francis Cheneval and Alice el-Wakil’s (2018) contribution is an effort to move the debate past this simplistic dichotomy of being either for or against referendums. First, they make the crucially important point that referendums are just one category of what they prefer to call “popular vote processes,” and that such processes are not necessarily straightforward forms of “direct democracy,” a contested notion they prefer to avoid altogether. In their first footnote, they make this important remark:

We refrain from using the broadly adopted terms of “referendums” and “direct democratic mechanisms” to designate all the processes leading to a popular vote on issues. The former term conflates the general category of [democratic] processes and specific referendum processes [...], and the latter term unnecessarily links these processes to the contested notion of “direct democracy.” We therefore favor the descriptive notion of “popular vote processes.” (Cheneval and el-Wakil 2018: 294)

Cheneval and el-Wakil (2018) are right to emphasize the need for better labelling of processes involving popular votes. The term “popular vote *processes*” (my emphasis) has the merit of

stressing the complexity and temporally distributed nature of what often involves other steps besides the voting moment, such as the prior phase of gathering a sufficient amount of signatures. Referendums, to paraphrase John Dewey's famous phrase about majority rule, are never just referendums (Dewey [1927] 1954: 207).¹ They are multi-step processes that culminate in a popular vote. As a result, Cheneval and el-Wakil (2018) are also right to want to stay away from the misleading and problematic vocabulary of "direct democracy." Indeed, "direct" democracy would not be an adequate label to characterize popular vote processes that may well include elements and moments of "representation." Consider that the members of the minority who initiates the process by getting a signature-gathering campaign under way and making a particular issue salient to the rest of the public arguably qualify as "citizen representatives" (Warren 2013), who self-select into the role of speaking and acting on behalf of a larger community. I propose to characterize as "open" rather than "direct" such participatory moments when they only involve small numbers of citizens who can be seen as playing the role of citizen representatives (Landemore 2018). By contrast, I reserve the term "direct" for moments of mass participation (of any kind but typically involving voting), where the expectation (if not the actual turnout) is for the vast majority of the population to show up and where there is consequently no need for anyone to act on behalf of anyone else. If referendums are processes that involve more than the direct moment of mass voting, then they might be a complex mix of open and direct democracy, rather than an instantiation of pure direct democracy. Finally, the concept "popular vote processes" is broad enough to include democratic innovations excluded by the concept of referendum, such as the voting phase of Participatory Budgeting. Participatory Budgeting processes "allow the participation of non-elected citizens in the conception and/or allocation of public finances" (Sintomer et al. 2013: 10). Their voting phase typically involves large numbers of self-selected participants, though only a fraction of the population typically expected in a nation-wide or even local referendum.

Cheneval and el-Wakil (2018) also fruitfully propose a series of distinctions within the category of "popular vote processes." Referendums in their terminology refer to "a citizen right to refuse (or accept) a decision or proposition of elected authorities" – as in a process that leads to a popular vote on a decision or proposition that has been written by the elected authorities. A referendum can then be top-down, mandatory or bottom-up. Only in the latter case is there a signature collection step.

Referendums are thus distinct from another well-established category of popular vote process, so-called "initiatives," which are agenda-setting or authorship devices of the citizens. Referendums, on Cheneval and el-Wakil's (2018) view, are more reactive than constructive, aiming to question an amendment to the status quo rather than create one. Within the still broad category of referendums, Cheneval and el-Wakil (2018) defend referendums that specifically build on the need for self-directed and impactful popular participation as supplements to existing representative institutions. The referendum they favor is thus:

- 1) optional: it is not triggered automatically by the passage of new legislation
- 2) launched bottom-up by non-elected groups (though not necessarily individuals as such):
It is "bottom-up" in the sense of being initiated by a minority of the public that succeeds in gathering a relevant and sufficient amount of signatures

¹ The exact sentence reads: "'Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule.'

3) legally binding, as opposed to consultative, in the sense that the outcome of the popular vote has legislative force.

Cheneval and el-Wakil's proposal has the distinct benefit of enhancing the democratic character of representative structures while maximizing the use of scarce resources (time, attention, money) available to both citizens and authorities.

The idea of a right to resist any given law deemed sufficiently problematic by a sufficiently large number of people seems a justified liberal and democratic ideal. The threshold question is tricky but can probably be answered empirically. Cheneval and el-Wakil's proposal thus gives citizens the ability to push back against unjust laws, whether their injustice is intentional or accidental. It also empowers citizens to express their displeasure more often and in a more targeted way than once every four years by saying "Yes" or "No" to an entire bundle of policies. All in all, I have little by way of criticism to offer.

In a constructive spirit, however, let me suggest that the proposal could be improved by including a reflection about ways of making the whole process more deliberative. While the proposal marks an important conceptual step forward in identifying referendums as "processes" rather than just moments of mass voting, it is surprisingly still too focused on citizens' vote as opposed to a richer notion of "voice." Moreover, it does not give enough thought to ways of connecting the aggregating moment (voting as an input to the legislative process) to the necessary pre-voting deliberative moment, over and above the role of minority groups in setting up the agenda for the vote to begin with. Given the centrality of deliberation to theories of democratic legitimacy in the last 30 years—the constellation of theories known as "deliberative democracy" (e.g., Bächtiger et al. 2018; Cohen 1989; Gutman and Thompson 1996; Habermas 1996), this is something I was hoping to find reflected and even taken up in the proposal. In the previously mentioned quote by Dewey, when he wrote that majority rule "never is *merely* majority rule" ([1927] 1954: 207), he meant to emphasize the importance of public discussion as the necessary precursor to the act of voting—a public discussion that is, importantly, inclusive of and responsive to minority voices and perspectives. In the same spirit, we should think of referendums as not merely referendums, but also the sort of deliberation that takes place, or fails to take place, ahead of the actual moment of voting and which is desirable in order both to inform political judgments and to generalize the interests behind them.

Consequently, my suggestion to Cheneval and el-Wakil (2018) is to expand their notion of what the "process" includes. Since they have already gone quite a long way by moving our focus away from the moment of voting to the steps that lead up to it, which include the minority's work of gathering signatures, there is no reason to stop there. Thinking about ways of making the process that leads from the gathering of signatures to the voting moment more deliberative, that is, carving out space and time for exchanges of arguments between citizens themselves, seems to me one necessary addition.

In other words, I wish the proposal paid attention to the need for one (or several) built-in deliberative modules/moments. Building deliberation into the design would ensure that voters do not unreflectively reject some unpopular yet needed measure (such as pension reform or environmental taxes, etc.). Or, if they do, it would give us some assurance that voters know what they are doing (by contrast with, say, the Brexit case, where there is cause for doubt). I understand that the proposal is not meant to be exclusive of other democratic innovations and that for analytical purposes Cheneval and el-Wakil (2018) focus on one particular enhancement to the system. I also understand that the proposal

assumes a decently functioning public sphere in which the media, civil associations, and other groups would partly facilitate informal deliberations of citizens all around the country and “launder” their preferences that way. Our experience of recent referendums, however, suggests that the “public sphere,” especially in its online version, is rather dysfunctional at the moment and easily manipulated or distorted (by party propaganda, money, the Russians ...). This is why institutional thinking should bear on a unit of analysis that includes both a deliberative and an aggregative moment. My suggestion is thus to think of referendums as always inclusive of some built-in measures to ensure that people vote in a minimally enlightened way. The same way that James Fishkin has rendered familiar the notion of “deliberative polls,” we should spread the more recent idea of “deliberative voting” (Levy 2013) and, specifically, “deliberative referendums.” We can and should do so even assuming tight constraints on resources since many of these constraints can now be circumscribed with the help of digital technologies (which, surprisingly, do not really make an appearance in the proposal).

To be concrete, let me offer here two proposals, which Cheneval and el-Wakil (2018) could tweak as needed. I offer them as distinct alternatives though I think they could easily be made complementary.

- 1) The organization of online and off-line “open mini-publics” that would deliberate about the issue put to the popular vote, and perhaps help frame the question itself.

I define “open mini-publics” as groups of randomly selected citizens large enough to be statistically representative of the public as a whole and connected to crowdsourcing online platforms. The openness of such mini-publics lies in the fact that participation in the lottery that staffs them is open to all, that their deliberations and decision-making processes are as public and accessible as possible, and that they are connected to the larger public via crowdsourcing platforms. These mini-publics would gather for a whole day at minimum (maybe even a few days) to talk over the pros and cons of the law to be voted on. They would have access to experts and briefing materials, as needed. Their deliberation would be structured and facilitated by trained moderators. Other citizens could engage them by asking them questions, asking them to explain or justify certain claims, or just submitting information and suggestions. Some of these mini-publics could be primarily off-line, involving face-to-face meetings. They could be organized in all major cities all around the country, costs permitting, or only in a few major ones. Their actual meetings could be streamed to the larger public to spread their reasoning and conclusions widely.

Open mini-publics could also be organized at much lower cost online, by inviting a random sample of registered voters to join a digital platform in order to debate the same issue(s). The online deliberations would take place in a devoted “chat room” (which could include augmented reality features to make it more visual and engaging to the participants). Other people on the internet would be able to witness these online debates, though they could not engage in them directly. Instead, just as would be the case for the off-line open mini-public, the larger public would have its own space around the mini-public chatroom to comment and ask questions, in ways that do not affect the integrity of the deliberation taking place among the members of the mini-public themselves.

- 2) The distribution of pamphlets written using the method of Oregon Citizens’ Initiative Review.

Oregon Citizens’ Initiative Review (CIR) are citizens’ juries—panels of 18 to 24 randomly selected citizens—that meet and deliberate about a ballot initiative for up to five days.

Their goal is to produce a statement that is meant to be delivered to the larger public and all voters as they prepare to vote. According to Participedia, the pamphlet “sets out the facts about the initiative that they agree on, the number of panelists supporting and opposing the initiative, and the panelists’ reasons for supporting and opposing the initiative.”² My proposal is to include such a pamphlet in the official voters’ guide or simply make it widely available. This would ensure that, at minimum, voters go to the ballot booth with the objective and impartial information they need, as delivered by a panel of their peers. This would increase the chances that the referendum vote is minimally informed.³

More generally, we should *make the legislative process itself more deliberative and participatory*, from the agenda-setting stage to the final passing of the law, including, crucially, the drafting stage. To be sure, this suggestion is beyond the scope of what Cheneval and el-Wakil (2018) propose here but it should meet their approval. Making the legislative process more deliberative and participatory would entail making it more accessible, legible, and transparent to ordinary citizens. An example of how this can be done is the Icelandic constitutional process of 2010-2013 (described in detail for e.g., in Landemore 2015), which included a random sample of hundreds of citizens setting the agenda for the whole process, a constitutional assembly of 25 elected non-professional politicians, a crowdsourcing phase to gather ideas and suggestions from the public on the drafts, and, eventually, a (non-binding) referendum.⁴ In a very different vein, another inspiring example of participatory as well as technologically empowered law- and policy-making is the revolutionary set of procedures called vTaiwan used by the Taiwanese government to involve citizens in, for example, the regulation of Uber and Airbnb.⁵

The benefits of making law-making in general more deliberative and participatory in this broader sense would be at least three-fold:

First, inviting people to participate at every stage would tap the now well-established “wisdom of the crowds” and likely improve the quality of law-making. Bringing many minds to bear on a law-making process would at the very least prevent a poorly conceived law from seeing the day of light.

Second, it would increase the normative legitimacy of the system as well as its output, presumably generating greater compliance among the voters and greater sociological legitimacy of the law, thus engendering political stability.

Third, it would render recall referendums, or what the authors call “bottom-up referendums,” if not useless, then at least much less necessary, because only rarely, or at least much less often, would laws produced by a deliberative and participatory process turn out to have unanticipated flaws. This should be a good thing given that, as Cheneval and el-Wakil (2018) rightly emphasize, we want to be mindful of scarce resources.

Any defense of any kind of popular vote process should be complemented with a reflection on ways to facilitate the public’s prior deliberation, including during the legislative crafting stage. This is something Beth Noveck and a number of people propose

² <https://participedia.net/en/methods/citizens-initiative-review> [accessed: 18.07.2018].

³ In practice, these Citizens’ Initiative Reviews have been argued to serve a useful trustee role for citizens seeking reflective information and deliberative voting cues but too busy to spend a lot of time on forming a full opinion for themselves (Warren and Gastil 2015).

⁴ As predicted by Cheneval and el-Wakil (2018) the non-binding referendum result ended up being ignored by Parliament.

⁵ See <https://info.vtaiwan.tw/> [accessed: 18.07.2018]. There is unfortunately very little academic literature in English on this movement. But see, in French, Frenkiel (2017).

to call “Crowdlaw” —an umbrella term referring to any kind of public law process that includes ordinary citizens willing to help, where law encompasses policies, regulations, ordinary, and even constitutional law.⁶

Finally, by way of conclusion, let me say a word about two types of referendums Cheneval and el-Wakil (2018) are less fond of.

1) Top-down referendums

The main argument against top-down referendums put forward by Cheneval and el-Wakil (2018) is that they are plebiscitary and manipulative, an objection that carries a lot of weight in many existing representative democracies (except perhaps Switzerland), where a gulf seems to have grown between the elected class and the rest of the population (a case in point, again, is the referendum on Brexit). But we could imagine a fully reformed system in which representatives could be trusted to pursue the common good, and pursue it competently. One way to do this would be to increase government transparency and the level of collaboration between representatives and their constituents, as in so-called “Open Government” measures and initiatives (Wirtz and Birkmeyer 2015) that seek to fight corruption and increase citizens’ participation in the law-making process (including via the mechanisms of Crowdlaw mentioned before). A more radical way to achieve the same end would be to revisit the selection mechanism for representatives to begin with, by looking into sortition as a substitute or a complement to elections. Various sortition-based assemblies have been successfully tried out around the world and recent proposals for “legislatures by lot” have even been floated (e.g., Gastil and Wright 2018; Van Reybrouck 2016). Pluralizing and enriching our institutionalization of democratic representation is also something I advocate as part of what I call the “open democracy” paradigm (Landemore 2017, 2018). Under such a reformed democratic paradigm, we should be able to give democratic representatives the leeway to initiate popular referendums, at least in two domains: where they themselves judge that they need society’s explicit approval, especially on issues where civil society should but is unlikely to mobilize; or where they find themselves incompetent or illegitimate in making the decision (e.g., on electoral reforms or compensation policies for political personnel). From this perspective, defending referendums as merely accountability and reactive mechanisms might not be the right frame of mind, entrenching a suspicion towards representatives that may only be justified in the current system. Again, my perspective is probably different than Cheneval and el-Wakil’s in that I am less interested in developing local fixes to the current system than in envisioning a new and better one.

2) Mandatory referendums

I am just as skeptical of mandatory referendums as Cheneval and el-Wakil (2018) if those are meant to be automatically triggered by any kind of legislation. Mandatory referendums are more plausible, however, if they are meant to be triggered on important and salient issues (although we would have to define what or who determines this, perhaps via constitutional law) and paired up with procedures and technologies to make participation as little burdensome to citizens as possible. In the event that we can eventually all vote on our phones by sliding left or right on some applications, maybe it would not be unreasonable to expect people to vote on a regular basis in these mandatory referendums (with the same frequency, say, that we update software on our electronic devices or change passwords). This would of course be desirable only if this voting option

⁶ See <http://www.thegovlab.org/project-crowdlaw.html>, [accessed: 18.07.2018].

was offered along with a convenient way to consult the summarized results of deliberative mini-publics or the recommendations of Citizens' Initiative Reviews on the relevant issue, and perhaps the possibility, for the willing, to be entered into a lottery to join an online open mini-public of the kind described earlier, or at least access their deliberations in some way. All the while, we would have to assume that the national media are able to offer an exhaustive and reliable coverage of the arguments on all sides. Considering the current issues with our polarized, noisy, and seemingly post-truth digital public sphere, some thought should also probably be given to these larger background conditions. Good quality deliberation is ultimately what is most likely to keep any kind of popular voting process, including referendums, safe for democracy.

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