A NORMATIVE MODEL FOR DELIBERATIVE CONSTITUTION-BUILDING

Jordi Pacheco i Canals[*]

Abstract

Constitution-making in Western Europe has shifted from the traditional post-war model and taken a deliberative turn, seeking full democratic legitimation, though most constitutional initiatives incorporating ordinary citizens have not been fully successful. To overcome this lack of efficiency, this article offers a normative model for deliberative constitution-building. The model formulates citizens deliberating systematically and massively in minipublics with formal institutions, epistemocracy, political parties, officials, and mass communication. It also transforms most of the normative ideals to those that can be regulated only by legal norms, avoiding dependence on citizens' ethical behavior. Only a few of them remain as recommendations for political consensus before starting constitutional change. The first part of the article describes general issues related to constitution-building from a deliberative perspective, such as the strengths and weaknesses of minipublics, political commitment before starting, and the scope of the future constitution. The second one describes its practical deployment and the role of each actor such as the parliament or constituent assembly, political parties, scientific and monitoring committees, the executive operator, participants, and general public; the design of the deliberative system and how to frame the debate; massive deliberation in equatable minipublics and their link with politicians, public opinion, and representative institutions; and, finally their connection to posterior constitutional decision-making phases through accountability.

Key words: deliberative democracy; constitution-building; constitutional law; participation; representation.

UN MODEL NORMATIU PER A PROCESSOS CONSTITUENTS DELIBERATIUS

Resum

Els processos de redacció de constitucions a l'Europa occidental han deixat enrere el model de posguerra tradicional i han pres una deriva deliberativa, buscant una plena legitimació democràtica, malgrat que la majoria d'iniciatives constitucionals que han incorporat la ciutadania no ha reeixit del tot. Per vèncer aquesta manca d'eficiència, aquest article ofereix un model normatiu per a processos constituents deliberatius. El model es basa en petits grups de ciutadans que deliberen sistemàticament i massiva amb institucions formals, epistemocràcia, partits polítics, dirigents públics i comunicació de massa. També transforma la majoria dels ideals normatius cap a aquells que només poden ser regulats per normes legals, evitant la dependència del comportament ètic dels ciutadans. Només algun d'ells es manté com a recomanació per al consens polític abans de començar una reforma constitucional. La primera part de l'article descriu assumptes generals relacionats amb els processos constituents des d'una perspectiva deliberativa, com les fortaleses i debilitats de treballar amb petits grups de ciutadans, el compromís polític abans de començar, i l'abast de la futura constitució. La segona part descriu el seu desplegament pràctic i el paper de cada actor com el parlament o assemblea, els partits polítics, els comitès científics i de control, el poder executiu, els participants i el públic en general; el disseny del sistema deliberatiu i com emmarcar el debat; la deliberació massiva en petits grups equitatius de ciutadans i el seu lligam amb la política, l'opinió pública i les institucions representatives; i, finalment, la seva connexió amb les posteriors fases del procés constituent a través de la rendició de comptes.

Paraules clau: democràcia deliberativa; processos constituents; dret constitucional; participació; representació.

* Jordi Pacheco i Canals, PhD in law and political science and Dean of the College of Politicians and Sociologists of Catalonia. C. Roger de Llúria, 155, 08037 Barcelona. jpacheco@gencat.cat, @JordiPachecoCol.

Summary

1 Introduction

Since democratic representative institutions working alone do not provide sufficient constitutional legitimation and once a democratic constituent power composed of the physical assembly of all citizens has been discarded (Habermas, 1992), there appears the practical question of who is to be entrusted with formulating and approving the constitution and how. This article presents a normative proposal based on deliberative theories and practices for making the practice of self-determination or consent of the governed through active citizenry in Western Countries truly effective. As a general proposal, it should be adapted to each national context when applied to resolve a constitutional crisis, as would eventually be the case of Catalonia and Spain.[1]

The article is divided into two parts: the conceptual framework for deliberative constitution-building and specific issues in deliberative processes more oriented to a practical application.

2 Deliberative constitution-building

2.1 The constitutional deliberative turn

Traditional constitution-making during the post-war wave in Western Europe (Ghevontian, 1979; Mendez & Wheatley, 2013) consisted of three or four phases: a starting political decision, coming from the parliament[2] or constituent assembly, or other formal institutions,[3] usually in a context of political crisis (Elster, 1995); an epistemic proposal from technical committees;[4] an arrangement between top representatives of political parties, and, sometimes, popular ratification by referendum[5] or plebiscite.[6] This reflected an elitist conception of democracy we can trace back to the representative government ideal born in the late eighteenth century where, originally, the determination of the nation's general interest was conceived as a duty for a few elected men, considered the most wise and prudent. However, referendums were recommended for a full legitimation of the constitution (Morel, 2012).

Nowadays, low confidence in political parties and processes (Whiteley, 2011), declining electoral turn out (Solijonov, 2016), and a more autonomous citizenry[7] mean this configuration is no longer functional. This, along with a growing vision connecting democratic legitimacy to the quality of deliberations of both citizens and representatives, has generated a constitutional deliberative turn (Ackerman, 1991; Mansbridge et al., 2012; Suiter & Reuchamps, 2016). In consequence, innovative experiences including ordinary citizens when drawing up or emending constitutions or similar norms have occurred with variable degrees of success or failure in Iceland (Bergmann, 2016; Bergsson & Blokker, 2013), Ireland (Farrell, Harris & Suiter, 2017), Catalonia (Generalitat de Catalunya, 2006), and Romania (Gherghina, 2014), as well as in Belgium (G-1000), Chile (Diálogos Ciudadanos), Estonia (People's Assembly, Rahvakogu), Scotland (Thinking Together), and the Convention on the Future of Europe. Furthermore, an emergent academic literature describes and analyses them (Elster & Slagstad, 1993; Suiter & Reuchamps, 2016).

It started with some deliberative polls concerning institutional arrangements and citizens' assemblies on electoral reforms[8] apparent best practices with ordinary citizens deliberating under inclusiveness, fairness, and reciprocity, and with good descriptive representation. But their impact was nil in terms of output-legitimacy (Geissel & Gherghina, 2016); Papadopolulos & Warin, 2007) since referendums denied their

---

1 A deliberative constitution-building process has been on the political agenda in Catalonia from 2015, including a cycle of debates in 2017 collected in López (2017).

2 Iceland, 1944; Italy, 1946.

3 Ministers-president of the West German Länder, 1948; the Presidency of the Republic of France, 1958.

4 The technical committee led by Michel Debré in 1958 in France; the *Herrenchiemsee* Convention in 1948 in Germany. See Becker, Stammen and Waldmann (1979).

5 Denmark, 1953.

6 As many political parties classified the 1958 French Constitutional Referendum due to the lack of the third phase (Rosanvallon, 2015).

7 E.g. the Italian Constitutional Referendum rejected the parliamentarian proposal in 2006 (Pinelli, 2006).

8 Australia on the Republic, 1999, or Denmark on joining the Eurozone, 2000, and British Columbia, 2004, and Ontario, 2006. See Anderson and Hansen (2007), and Fishkin (2009).

recommendations in all cases, proving isolated minipublics do not provide sufficient popular legitimation (Mansbridge et al., 2012). Hundreds of well-informed participants, ex-ordinary citizens trained through several long sessions in small discussion groups are too few (1 per 100,000) to successfully influence broad public opinion. Furthermore, leaving out experts, civil society or political parties contributed to the failure.[9]

2.2 Strengths and weaknesses of minipublics in constitution-building

To overcome this lack of efficacy, public opinion must be integrated alongside minipublics and other formal deliberative arenas (epistemic committees, parliaments, and referendums (Rummens, 2016)) in a deliberative system in Mansbridge's sense (Mansbridge et al., 2012), balancing the strengths and weaknesses of each arena, adding different kinds of democratic legitimacy in a sort of division of labor.

Minipublics are citizens' forums small enough to manage good deliberations. Since there is no unanimity on the definition of a minipublic, we use this term for citizens' forums based on the 'all affected' principle (Smith & Ryan, 2014), which leads us to the central issue of the representativeness of those who are assembled in them. Such forums should be at the center of the deliberative system thanks to their strengths, allowing active and equal citizens reasoning from their own ideas and reinforcing the representativeness of the democratic institutions.

The first strength is the aim to include all ideologies and social diversity[10] searching for common understanding. With the suitable methodology, their representativeness of diversity is superior to parliaments, obtaining vital perspectives otherwise excluded. Furthermore, minipublics provide a form of pluralism especially useful for constitution-building, beyond parliamentary groups' ideological pluralism. Although narrow interests are normatively accepted by the latest deliberative theory if connected to issues at stake (Mansbridge et al., 2010), discovering abstract principles and rights under which the whole society should act becomes a favorable field to put into practice the first deliberative theorists' ideal ethical exigencies.[11] Ordinary citizens have no narrow interests connected directly to constitutional issues; minipublics are more isolated from electoral strategic discourses than parliaments; and lobby influence is limited to statements based on common wealth, stressing the beneficial effects of their interests on society as a whole. Accordingly, there will be only truly ideologically motivated statements, and spurious interests will not interfere.

The second strength is that statements are evaluated by their intrinsic value if participant's reciprocity is truly achieved, neutralizing differentials of prestige or social influence and avoiding aggregation of preferences. The latter will be used in the final phases of decision-making but minipublics only try to elaborate consensus through better argument or determine the reasons behind the dissensus.

If parliaments or constituent assemblies maintain their formal role in decision-making, the third strength is reinforcing transparency and accountability. In a systematic deliberative process, the parliament should work from the recommendations emerging from minipublics and justifying the final decision upon them, thereby removing suspicions of hidden influences from spurious interests.

In terms of weaknesses, the first is the low proportion of *demos* active in minipublics, making it easy to fall into social biases. For this reason, full democratic legitimation for enacting norms cannot spring directly from them, so their proposals must be endorsed by aggregative mechanisms backed by universal suffrage such as parliaments or referendums.

The second weakness is the poor communicative link between minipublics and public opinion; allowing officials and politicians to undervalue or misuse their contributions with no significant electoral cost. Poor accountability for the actual use of the outcome in decision-making is a frequent weakness of institutional citizens' deliberation (Setälä, 2017).

---

9 If the Icelandic Parliament rejected the yes referendum outcome in 2013 it was because major public institutions and political parties did not feel sufficiently engaged. See Bergmann (2016).

10 Gender, age, cultural background, economic status, disabilities, and so on.

11 Habermas's ideal speech situation. See also Gutmann and Thompson (2004).

The third weakness is the fragility of the deliberative system. When politics polarizes, reasons for division can be dealt with through dialogue but if there is a lack of commitment from political parties, the deliberative processes themselves can be the victim of cheap-shots and communicative attacks.

2.3 A strong political commitment as a previous ideal condition

Since constitutions need to be long-standing and accepted by an overwhelming majority, constitution-building through complex deliberative procedures needs all parliamentarian parties ideally to agree on or accept it passively and to not block the process. Otherwise, problems can soon start as participatory practices are vulnerable in the public sphere, where they risk becoming cannon fodder for the opposition's discourses, especially when they are funded by public resources, calling them a waste of money. Public funding such as in the Irish or Chilean cases, is recommendable for paying public participation professionals; compensation for travelling, meals, accommodation, and so on; and technical support for elaborating documents, telematics tools, mass communication, etc. Furthermore, the institutional involvement reinforces the politician's prone to listen. After all, autonomous civil-society led initiatives are usually not synchronized with the political agenda, losing efficiency as in the Belgian G-1000 or the Estonian People's Assembly (Bergmann, 2016; Jacquet, Moskovic, Caluwaerts & Reuchamps, 2016). Other reasons for this commitment are counting on all-party participants allows for reasonable equilibrium in deliberations and, also, enhances a climate prone to constitutional debates. To maintain confidence, a monitoring committee with cross-party politicians, academics, public engagement experts, and civil organizations might be created, controlling the quality of the design and deployment of the debates, and certificating, if necessary, the quality of the whole process.

But facts are not ideal conditions and new constitutions usually arise in turbulent circumstances (Elster, 1997). It is quite possible in each constitutional change for there to be competing alternative visions (elitist bargaining, assemblies, etc.) to the deliberative one. Also, changes may be propelled only by a narrow majority with large numbers of minorities defending the status quo, as would be the case of Catalonia. In such a case, deliberative principles like inclusion, neutrality, and reciprocity are useful, with the organizer stimulating the participation of constitutional change opponents and trying to integrate opposing parties into the monitoring committee, looking to save, at least, the participatory phase. Certainly, the lower the political agreement, the higher the risks but the organizer can hardly change these kind of contextual facts and, must assume that factual deliberative processes will always be imperfect.

2.4 The scope of the constitution in deliberative politics

The initial political agreement should also include the scope of constitutional subjects, which has conceptual implications: if virtually all deliberative democrats would agree in proposing public participation and all decisions should be publicly justified from its arguments and contributions, they would disagree about the scope.

From a Habermasian perspective, the essence of constitutional patriotism (*Verfassungspatriotismus*) is the citizens' attachment to the norms, values and legal procedures of enactment and exercise of power. As constitutions constrain further legislation but different political developments should be allowed, the dialogues should determine, besides procedural rules, only universal and stable agreement about values and principles of common good. Ideally, constitutional change only ought to occur when new discursive unanimity appears (Habermas, 1992) but this leads to a certain constitutional rigidity when the political and cultural mainstream changes, making old-fashioned principles, bans and duties maintain validity over time since they cannot be easily deconstitutionalized. This excessive proceduralism favors blocking minorities and leads potentially to an excessive non-democratic gap between the rigid constitutional text and public opinion dynamics.

From a Rawlsian perspective (Rawls, 1997) constitutions are a reflective equilibrium between all moral, philosophical and religious conceptions in equitable expressive conditions. Such an overlapping consensus based upon public reasons, can be justified from each conception and must be reasonable for all by itself. This leads to limited and functional agreements on basic justice, ensuring for all the freedom to live their own lives. Although Rawls does not go so far, limiting constitution-building to extraordinary moments, since doctrines and visions are dynamic, changing over time, means the reflective equilibrium is also dynamic,

leading logically to an ideal scenario where written constitutions would be able to be substituted by all-comprehensive and equitable dialogical procedures. But this expectative is counterfactual because it would require perfectly inclusive and equalitarian forums, where all visions and vital experiences enjoy the same likelihood of being present and equal conditions of expression.

Combining both, written constitutions should be restricted to institutional regulations and principles of justice inciting long-standing consensus, hence avoiding polarized issues, especially those related to nation-building or fundamental philosophical or ideological principles (Bulmer, 2014). If consensus is sought, some principles connected to deep beliefs are too complicated to be dealt with successfully in people's forums because they are often inaccessible to rationality and hard to empathize with. In current multicultural and pluralistic societies seeking to combine political stability and social autonomy, the constitutional common good should be small, to ensure not only many political developments but also the ability to develop different ways of life, leaving the most controversial issues for further ordinary legislation, where disagreement can be managed better. In short, the constitutional scope in deliberative politics should only consist of the principles of justice (basic liberties and opportunities, and their protection) and fair decision-making in institutions and proceedings.

Since consensus is always provisional, constitutions should be clear and flexible, sensitive to *demos'* opinion changes by easy procedures. Constitutions must always be open to reconsideration and revision (Gutmann & Thompson, 2004), but we must distinguish between the introduction of new articles, like emergent rights, and deconstitutionalisation when a significant number of citizens, not necessarily a majority, disagrees with any clause. The introduction of new rights should lead initially to legislative development, restricting constitutional emendation to only if quasi-consensus is reached. However, easy procedures should be foreseen for deconstitutionalisation, which is consistent with the dominant value-based approach in constitution-building processes (Rosenfield & Sajó, 2012).

3 Designing deliberative forums for constitution-building

Once the conceptual framework is defined, the public participative process can be designed. Since deliberating is not chatting, an efficient methodology must be applied, and the organizer must focus on the most prominent aspects for success such as logistics; the framing document; articulation between forums, public opinion and representative institutions; or strategies to achieve equal conditions of expressive freedom.

Figure 1. Deliberative design for constitution-building.

	ACTORS					
	Parliament or Constituent Assembly	Political parties	Scientific Committee	Monitoring Committee	Public administration or another executive operator	Public participation professionals	Macro-communicative dynamics of general public
		Political agreement about constitutional change					Context of political crisis
	Designs the main lines of the constitution-building process; Appoints the Monitoring and Scientific Committees					Support the design	
			Epistemocratic contributions	Supervises the project	Plans public participation and starts the administrative procedures	Support the planning	
	Elaborates the framing document with: - political agreement - epistemocratic contributions						
		Elected officials enter minipublics		Supervises the minipublics deployment and the informative campaign	Opens minipublics and enhances the informative campaign	Facilitation	Informative campaign and diffuse deliberation
				Oversees the outcome document and evaluates the public participation process		Elaborate the outcome document	
	Calls for Constituent elections	Feed the manifestos from the outcome document					Electoral campaign
	Deliberate from the outcome document and draft the final proposal		Supports the parliamentarian debate	Oversees the proper use of the outcome document in the parliamentarian debate and decisions			
	Call for constitutional referendum						Referendum campaign

Note: the leftmost rotated label reads "← PHASES of FULL DELIBERATIVE PROCESS for CONSITTUION-BUILDING ↓"

Source: own elaboration.

3.1 Managing the project

Constitutional participation processes need a mass communication campaign and technical and logistical support, meaning they must be managed as professional projects and sufficiently funded. The precise cost changes according to the specific circumstances of each country, but it will be high enough for there to be a significant public budgeting implication. Such a project must be designed by experts and supported by professional mediators or, possibly, well-trained volunteers able to expertly manage debates and systematize all the proposals and grounds being submitted into a schematic and useful document to feed decision-making in parliament or the elected assembly. All practical issues which are key for success ought to be resolved in this phase: those related to minipublics and others, such as connecting citizens to politicians or bonding minipublics to public opinion, and organizers should start to plan the project at the earliest possible stage allowing sufficient time for legal administrative procedures (public procurement, internal reorganization, etc.). Thus, designing the participative phase while the framing document is still being drafted is recommended.

3.2 Framing the debate

To improve their efficiency, citizens' debates should be framed by a document containing the initial political agreement and previous epistemocratic contributions. This framing document drives the dialogues on appropriate topics, mainly those the political parties are more predisposed to pay attention to, eluding dispersion and giving rise to productive outcomes. It should contain:

The initial political agreement, anticipating the range of institutions, norms, and shared values, which will obtain reasonable consensus, mainly regarding the structure and operation of public institutions, and basic principles of justice and fundamental rights and duties (Elster, 1995). Nothing, however, can be excluded thereby allowing the opportunity to submit new ideas for constitutional innovations.

Second, to obtain better decisions,[12] democracy and epistemocracy must be combined. Inputs from experts matter because they are the specialists with regards to the implications of constitutional regulations but experts' statements expressed directly in citizens' forums overwhelm ordinary participants. The solution is to create a scientific (epistemocratic) committee providing ideas for the framing document, encouraging reflection in citizens and improving their capacity for argumentation.

Third, the document should warn of the real value of the conclusions, as a raw material for feeding parliamentarian debate, avoiding unrealistic expectations which could lead to citizens' frustration.

3.3 Bringing politicians and formal institutions closer to citizens

When deliberative democrats talk about inclusiveness they usually refer to disadvantaged groups (Karpowitz & Raphael, 2016), assuming ideological plurality will appear in further parliamentarian work. However, opinions expressed early on usually have greater influence; so any ideological vision absent from the first stages will be disadvantaged, breaking the fairness of the process. This leads to the question: can partisanship be used in citizen's forums for the purpose of deliberative fairness? This is controversial due to low public confidence in political institutions[13] so that some experiences will be bottom-up, excluding political parties.[14] But ignoring what Elster (1995) called institutional interests excluding political parties, would lead to low or nil impact of public participation on final decisions (Hendricks, Dryzek & Hunold, 2007).[15]

An ideal condition would be appointed parliamentarians rising above ordinary partisan discourses and adopting long-term perspectives (Elster & Slagstad, 1993) but this is counterfactual as maximizing their own vote is the main goal of political parties even in constitution-making periods. The alternative is involving all partisan visions from the beginning of the participative phase and using accountability tools to supervise the

---

12 The epistemic function (Mansbridge et al., 2012).

13 According to the 2017 Edelman Trust Barometer, public trust in the status quo is collapsing worldwide, coming from, among other reasons, the use of strategic discourses by political parties seeking to demobilize an alien electoral base.

14 G1000 in Belgium.

15 In Iceland, the exclusion of parties and elected officials could explain the parliamentarian majority obstructing the approval of the new crowdsourced Constitution despite its basis being previously ratified by a six-question referendum (Talpin, 2016).

proper use of the participative outcomes, which gives rise to two kinds of benefits; one kind is pragmatic and the other is with regards to deliberative fairness.

From a pragmatic point of view, engaging parliamentarian groups favors a sound reception of public recommendations due to them containing dialogically improved proposals from the whole ideological plurality. With such characteristics, no political force will plead that the participative consensus is biased, and no-consensual proposals could become starting material for pluralistic-debates in parliament. A second pragmatic benefit is that partisan participants will constitute an internal lobby watching over the use of public recommendations, overcoming the main weakness of the participative processes: the lack of accountability for citizens' deliberative outcomes.

From the fairness point of view, the organizer can obtain a pluralistic equilibrium more easily counting on political parties but must avoid unsuitable effects, such as strategic manipulation. Elected officials should be invited to join citizens' deliberations, just as the Irish Convention on the Constitution did, assuring all political parties supply participants to the same degree. In massive participative processes, many ordinary members of parties can be invited.

Finally, representative institutions also include senior bureaucratic, judicatory, and other institutions, with their own agendas and sufficient capacity to hinder the progress of the participative outcome if they feel left out, as occurred in Iceland (Landemore, 2015). A proper deliberative constitution-building should give them a role, the same as experts when framing.

3.4 Connecting citizens' forums to public opinion

Taking inspiration from Habermas's (1992) two-track model, public deliberation can be split into instrumental decision-oriented deliberation, as in the institutional participative processes, and informal political communication (Gutmann & Thompson, 2004). The later includes citizens speaking and writing about politics in street life, shopping, social and mass media, workplaces, communitarian facilities, civic and voluntary associations, families, and academia. In fact, political opinion exchange can be found in many everyday interactions, leading to theoreticians such as Cohen (1998) or Mansbridge (1999a) to propose deliberations linked to decision-making should take place both in formal institutions and civic organizations.

We go further; the public sphere involved in constitution-building should cover the whole of public opinion since citizens' ratification by referendum is required. But the link between minipublics and mass communication is too weak, as the British Columbia and Ontario Citizen's Assemblies demonstrated (Rummens, 2016). In general, the media coverage of citizen forums is minor and while participants learn from being exposed to expert information and divergent opinions, most citizens usually live in their communicative sphere of affinity, cleaving the participants' refined opinion from mass raw opinion, more influenced by strategic discourses. Even if some efforts are made by broadcasting or opening up public meetings,[16] they fall short of reaching all nodes of the deliberative system (Mansbridge et al., 2012). In addition, the *no* side possesses an advantage in referendums because negative campaigning is often more effective at persuading a frequently skeptical and poorly informed public (Leduc, 2011).

It is hardly surprising unexpected results occur when the draft comes from so few minipublics, meaning people need to be massively involved in the early stages of constitution-building. The two tracks, informal macro-communicative dynamics and instrumental deliberation, and more specifically minipublics, should be parallel, generating high levels of public awareness. Integrating casual communication allows most people to feel included in constitution-building (Kroll & Swann, 2015), even mostly inactive individuals and groups, who usually do not attend workshops. Thus, the participative process needs to be done along with an information campaign to: (1) raise awareness among the citizenry and give information about constitution-building, the participative process, and the main issues framing the deliberations; and (2) stimulate conversation in civil society and informally among citizens. This communicative campaign is usually the most expensive action,[17] and should be more than paid ads, since mainstreaming media can condition a positive or negative social climate regarding constitution-building.

16 In Ontario there were 41 such meetings receiving 2,152 written submissions (Leduc, 2011).

17 Nearly 80% of the budget (Generalitat de Catalunya, 2006).

The organizer ought to seek alliances with all communicative systems, columnists, and TV programs and so offer opinion on concrete constitutional issues. With full respect to freedom of speech, an intensive public relations effort should be made even when there is political consensus for legitimating constitution-building beyond the most politicized circles. Besides, this media engagement shows the political cost of neglect of the participative outcomes; it stimulates attendance in forums, incentivizes the reflective transformation of immediate preferences, and improves citizens' argumentative skills.

3.5 Recruiting participants for massive, intense representative deliberation

Assuming the whole population will not participate in the citizens' dialogue, universality can be discarded, and the recruiting strategy should maximize representativeness and equilibrium. The three main ways of recruiting are open notice, sortation, and co-opting civil organizations. All of them have pros and contras in terms of descriptive[18] and substantive[19] representation (Warren, 2009).

Open notice allows the assembling of many citizens in open venues. If constitutions are like social contracts (Ginsburg, Elkins & Blount, 2009), it is easy to think the more people involved, the more legitimation. But public notices leave the decision to attend or not to the citizens, damaging political inclusiveness and biasing minipublics (Anderson & Hansen, 2007) due to self-selection.[20] This must be corrected ensuring all vital perspectives be present, otherwise, participants will not be true representatives of diversity and the outcome can not be considered as true deliberative equilibrium.

Sortation gives apparent control of descriptive representation, making the group as diverse as the whole population. But in the real world, differences in the tendency to participate remain among those chosen, making the effective group different from the formally chosen group. Stratified sample, replacing those who fail to participate with others of the same characteristics, is an alternative but sortation does not offer satisfactory substantive representation because participants talk only as a result of their conscience, weakening communitarian and other bonds. The consequence is more isolation for minipublics, which end up less able to legitimate the transformation of their recommendations into decisions.

Co-opting civil organizations improves substantive representation. Participants coming from them are usually more able to argue efficiently and this allows forums to be connected to casual deliberations in ordinary activity (newsletters, lectures, informal meetings, formal statements, etc.).[21] But such forums tend to be biased as well because organizations' representatives usually replicate the socio-demographic hierarchy,[22] worsening the descriptive representation of social hyper-diversity, which ends up further deteriorating the actual substantive representation, as Mansbridge pointed out (Mansbridge, 1999).

Thus, what is the best form of recruitment for massive participation? Granting the opportunity to everybody leads to massive deliberations, which can only be obtained by open notice, but people with lower participatory efficiency inclinations tend to be absent or play a passive role. Once the goal of massive participation is achieved, political fairness reclaims improve the representativeness. Although removing social biases is not totally possible, strong efforts to stimulate the less participatory profiles must be undertaken and, also, the participative costs coming from differences in life-burdens ought to be lightened through economic compensation or care services for participants' dependents. Once inside, every participant must have the same deliberative opportunities.

---

18 Presence of all groups and social profiles.

19 Capacity to defend dialogically their visions.

20 Differences in the tendency to participate depending on social and personal characteristics.

21 Called "background culture" by Rawls.

22 E.g. cultural communities' representatives tend to be male and middle-aged; women's representatives tend to be native and middle-aged.

3.6 Equalizing expressive opportunities

Considering everybody as equal, ignoring prestige gaps and differences in cultural and linguistic skills, the groups are split between active and leading participants, and passive ones. To obtain equal conditions of expressive freedom, differences in communicative and persuasive abilities and the domain of rational language must be neutralized. Although deliberative politics claims rational bases,[23] it should not matter that participants' first expressions are emotional or symbolic since citizens' preferences are subjective and often do not answer to rational impulses. They can even be incommensurable, responding to deep moral or religious convictions, and these also deserve to be treated with respect and reciprocity, assuring participants that they will be considered properly by the other participants. When preferences and statements are not incommensurable, non-rationally expressed statements should be translated into rational language; when they are, for example, religious obligations, they must be integrated in the collective discourse as facts, even if controversial, as we will see. In addition, facilitators must ensure everyone talks for about the same amount of time.

To attract and activate less-participative people, the two-step method can be used (Pacheco, 2016). The first step is single community or specific profile-oriented workshops for participants' cultural accommodation. A relatively homogenous environment is prone to a close range of ideas but allows them to be expressed freely, transforming more spontaneous and emotional expressions into rational and argued discourse. These must be injected from the specific group into the general deliberative system to be argued, refined, and assumed, if appropriate, by the collective discourse and those participants most able to rationally defend specific results should be stimulated to participate in the second step or general forums. This method multiplies the number of workshops and, therefore, increases the budgetary cost but obtains more participants and equalizes them communicatively, a central issue for deliberative politics.

Besides, to protect equality in deliberations, experts such as bureaucrats, constitutional professors, and others, who would enter advantageously, must be fitted in through other ways such as the framing phase, as we have already seen.

3.7 Orienting the great volume of information generated to actual decision-making

The reason for involving citizens massively is to seek the wisdom of the crowd to help representative institutions make better decisions. Minipublics cannot decide directly due to the weak correspondence between the *demos'* and minipublics' majorities, in part due to participants' self-selection, and in part due to the lack of strong communicative connections. The bond between both is a well-formed outcome document, which maximizes the influence of the public participation. Such a document should reflect the collective discourse generated in forums and be well-structured and user-friendly for posterior debates.[24] Furthermore, it should contain a short evaluation concerning the biases.

When disagreement remains, making a list with champion proposals backed only by part of the participants, even if a majority, tends to be controversial in parliament, especially if there are no reasons explaining the choices, generating a lack of confidence among politicians. Since one source of democratic legitimacy comes from the deliberation of all or at least from representatives of all visions and lifestyles but is not an expression of the unanimous will (Manin, 1997), in pluralistic societies with many ideologies offering "the best" solution, a large amount of disagreement will be maintained. Those disagreements should be picked up by the collective discourse or outcome document, including all proposals with their pro and against arguments, allowing every parliamentary group to use those which are most adjusted to their ideology. This produces political confidence and satisfaction with the participative process for two reasons. First, the participative outcome's impact on final decisions is maximized if the parliament drafts the new constitution from it. Second, the collective discourse can be used as an accountability tool; permitting civil society to control the proper use of the discourse in parliamentarian work and it can provide the basis for returning to participants rational and credible justifications for the final choices (Gutmann & Thompson, 2004).

---

23 Communicative rationality, see Dryzek (1990).

24 With hundreds of workshops, the volume of information seems to be enormous and converting it into a structured document as light and useful as possible is a challenge but, luckily, participants repeat most proposals and argumentations from one workshop to another. See Klein (2010).

There are other methodological aspects we cannot describe in detail here such as the use of telematics. It appears to be an opportunity for wider deliberations but Apps for deliberation produce inferior quality outcomes than face-to-face deliberation.[25] Currently, a constitutional participative process must be based upon face-to-face deliberation and telematics can only be used for previously crowdsourcing the debate with raw proposals and grounds.

3.8 Improving constitutional deliberations in the more aggregative phases

Following the principle of division of work among legitimation producers, once the citizens' refined visions have been obtained qualitatively, it is time for the parliament or the constituent assembly,[26] and the referendum to add their imperfect but strong democratic legitimacies based upon universal suffrage. Their logic is aggregative, by vote, but previous deliberations are present in the parliament, where each article is drafted after the corresponding debate, but also after campaigning in the referendum.

Constitutional elections should be called, inducing new informal and broad debates, expecting the campaign to pivot over the collective discourse, feeding manifestos and statements if partisanship has been integrated in the participative phase. But choosing representatives is different than choosing single preferences due to each candidature presenting a pack of proposals, sometimes ambiguously or not clearly explained. In addition, the partisan strategic rhetoric emphasizes mutual differences, refusing to find common ground and aiming to defeat opponents, eroding deliberative ideals such as mutual respect (Mansbridge et al., 2012). The consequence is that these elections do not provide sufficient legitimation alone.

Although the final draft is a free decision of the elected parliamentarians, and participative biases should be considered, the influence of partisan strategies can be diminished if the outcome document frames the parliamentarian debate. Using its proposals and arguments for mutual reason-giving, makes for more transparent and accountable choices and makes parliament more truly representative. Social consensus can be transformed quickly into constitutional articles, and disagreements can be argued positively from citizens' preferences till a solution is found that, ideally, can be justified from all visions of the common good. In seeking consensus, secret debate is preferable for flexibility and so that changing positions is easier (Elster, 1995). From the epistemocratic point of view, the support of experts when writing the final draft guarantees the quality and the internal coherence of the text (Ginsberg et al., 2009).

When parliament does not reach consensus, it should ask itself if that the pertinent issue must be constitutionalized or left to ordinary law. If it must be constitutionalized anyway due to references to basic institutional rules or fundamental rights, bargain is preferable to majoritarian vote since the latter would mean political opposition of a part of society and, thus, risk institutional instability and social contestation.

The accountability can be reinforced if the monitoring committee described above supervises the final decisions, which are bonded to the collective discourse and justified upon public reasoning. Another technique is to introduce a balanced, diverse and pluralistic group of previous participants into parliamentarian debates before voting, making it easier to center on long-standing values and principles rather than strategic discourses. If these participants are chosen by stratified sample, it will improve both the epistemological quality and the fairness of debates, compensating the imbalances of elected officials regarding descriptive and substantial representativeness.

The last deliberative stage is the referendum campaign (Chambers, 2001). Despite the fact the draft cannot be changed, good deliberative practices should still be introduced to induce citizens' reflection and full awareness when adopting or refusing it. If the final draft has been based on the participative outcome and

---

25 Klein (2010) lays down reasons like the difficulty in processing systemically the great quantity of information; greater tendency to internal polarization in telematics groups; more defective arguments; difficulty in understanding the software; excessive fragmentation of topics, making it difficult to establish complex relationships; and more difficulty in comparing the relative virtue of proposals, beyond showing direct agreement or disagreement among others. Social networking platforms, such as Twitter or Facebook, are even harder to structure discussions on and increase noise.

26 The controversy of who is entrusted to draft the final text, whether parliament or a constituent assembly, must be resolved. Elster (1995) defends drafting by a constituent assembly to mitigate institutional interest and dissociate constitution-building from daily strategic struggles. Nevertheless, strategic partisan behavior will be still present after obtaining the maximum of seats and, so, ideological influence over the new constitution. If we add that all representative institutions should be engaged, the best thing is to entrust parliament, eluding potential conflicts between two nation-wide bodies elected by universal suffrage.

parliamentarians' behavior has been accountable, an overwhelming support should be expected. But given that factual processes are not fully ideal, opposition could appear. If that is the case, both sides must have similar chances.

4 Conclusions

This systematic proposal for constitution-building, based upon a deliberative background, offers a guideline for maximizing political legitimacy or consent of the governed, letting citizens be actual constructors of social co-operation. Since most precedent experiences using public participation have failed, it tries to be more realistic seeking more integration between different actors and shifting the normative behavior from ordinary citizens, as Rawls or Habermas did, to public institutions, which work under the rule of law. Moral or ethical exigencies for citizens disappear because trying to convince other participants incentivizes reasonable proposals and arguments, acceptable for all, regardless of their doctrine or circumstances. Despite the above, some ideal conditions still remain, such as the previous political consensus, sometimes difficult to meet when constitution-building starts, as would be the case of Catalonia and Spain in the current crisis. Besides, as each constitution-building design ought to be adapted to its context, this proposal offers elements to be incorporated in constitutional changes even if it cannot be fully implemented.

The model combines several producers of democratic legitimation, separating deliberations from aggregative mechanisms. The latter transfers democratic legitimacy from the universal suffrage but the citizens' degree of freedom when choosing is low. For this reason, they must be qualitatively complemented by public deliberations seeking consensus on principles of justice such as basic liberties and opportunities, and fair institutions and proceedings. Furthermore, experts, officials and partisanship must also feel included.

This needs to be managed as a professional project, and each actor (parliament or constituent assembly, political parties, the scientific and monitoring committees, the executive operator, participants, and general public) has a role in each stage:

- The general perception of crisis leads to a political agreement about constitutional change.

- Parliament designs the main lines of the constitution-building process, with the support of public participation experts and appoints the Monitoring and Scientific Committees.

- The Scientific Committee submits epistemocratic contributions for the framing document and, further, gives support to the parliament or constituent assembly when drafting the final text.

- The Monitoring Committee supervises the project and its deployment.

- Parliament elaborates the framing document, containing the political agreement and the epistemocratic contributions from the Scientific Committee.

- The executive operator can be a public agency or another neutral agent. It plans public participation through minipublics and mass communication actions.

- Minipublics are opened, mixing ordinary citizens with elected officials. Their representativeness must be maximized through pluralistic and diverse participants in equal communicative conditions. Since they ought to be bonded to public opinion, the mass informative campaign starts.

- The citizens' proposals are systemized in an outcome document oriented to improve further parliamentarian debates.

- Constitutional elections are called. Ideally, the political parties feed their manifestos from the outcome document.

- Parliament or the constituent assembly drafts the new constitution from the outcome document and the electoral results, being accountable before the Monitoring Committee and, thus, before public opinion, which limits partisan strategic discourses.

- Call for constitutional referendum, the last deliberative stage and the ultimate decision based on universal suffrage.

References

Ackerman, Bruce (1991). *We the People* (Vol. 1 Foundations). Cambridge, MA: Harvard University Press.

Andersen, Vibeke Normann and Hansen, Kasper M. (2007). How deliberation makes better citizens: The Danish deliberative poll on the euro. *European Journal of Political Research*, (46), 531–556.

Becker, Josef; Stammen, Theo and Waldmann, Peter (Eds.) (1979). *Vorgeschichte der Bundesrepublik Deutschland*. München: UTB Wilhelm Fink Verlag.

Bergmann, Eirikur (2016). Participatory constitutional deliberation in the wake of crisis: The case of Iceland. In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 15–32). Colchester: ECPR Press.

Bergsson, Baldvin Thor and Blokker, Paul (2014). The Constitutional Experiment in Iceland. In: Ellen Bos and Kalman Pocza (Eds.), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* Andrássy Studies on European Research , Vol 13. Baden-Baden: Nomos Verlag.

Bulmer, Elliot W. (2014). *What is a constitution? Principles and concepts*. Stockholm: International Institute for Democracy and Electoral Assistance.

Chambers, Simone (2001). Constitutional Referendums and Democratic Deliberation. In: Matthew Mendelsohn and Andrew Parkin (Eds.), *Referendum democracy. Citizens, elites and deliberation in referendum campaigns* (p. 231–255). London: Palgrave Macmillan.

Cohen, Joshua (1998). Deliberation and Democratic Legitimacy. In: James Bohman and William Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (p. 67–92). Oxford: Blackwell.

Dryzek, John (1990). *Discursive Democracy*. Cambridge: Cambridge University Press.

Elster, Jon (1995). Forces and mechanisms in the constitution-making process. *Duke Law Journal*, (45), 364–396.

Elster, Jon (1997). Ways of constitution-making. In: Axel Hadenius (Ed.), *Democracy's victory and crisis* (p. 123–142). Cambridge: Cambridge University Press.

Elster, Jon and Slagstad, Rune (Eds.) (1993). *Constitutionalism and democracy*. Cambridge: Cambridge University Press.

Farrell, David; Harris, Clodagh and Suiter, Jane (2017). Bringing people into the heart of constitutional design: The Irish Constitutional Convention of 2012–14. In: Xenophon Contiades and Alkmene Fotiadou (Eds.), *Participatory constitutional change: The people as amenders of the constitution*. London: Routledge.

Fishkin, James S. (2009). *When the people speak. Deliberative democracy and public consultation*. Oxford: Oxford University Press.

Geissel, Brigitte and Gherghina, Sergiu (2016). Constitutional Deliberative Democracy and Democratic Innovations. In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 75–91). Colchester: ECPR Press.

Generalitat de Catalunya (2006). *L'Estatut és de tothom. El procés participatiu per a la reforma de l'Estatut d'Autonomia de Catalunya*. Col·lecció Participació Ciutadana, 1. Barcelona: Generalitat de Catalunya.

Gherghina, Sergiu (2014). *A constitution by the people? The legitimacy of deliberation in the Romanian 2013 reform*. Paper prepared for delivery at the ECPR General Conference. Glasgow, 3–6 September.

Ghevontian, Richard (1979). *L'élaboration de la Constitution de la Vᵉ République* (Thesis). Aix-en-Provence.

Ginsburg, Tom; Elkins, Zachary and Blount, Justin (2009). Does the process of constitution-making matter*? Annual Review of Law and Social Science*, (5), 201–223.

Gutmann, Amy and Thompson, Dennis (2004). *Why deliberative democracy?* Princeton: Princeton University Press.

Habermas, Jürgen (1992). *Faktizität und Geltung - Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt am Main: Suhrkamp.

Hendricks, Carolyn M.; Dryzek, John and Hunold, Christian (2007). Turning up the heat: Partisanship in deliberative innovation. *Political Studies*, (55)(2), 362–383.

Jacquet, Vincent; Moskovic, Jonathan; Caluwaerts, Didier and Reuchamps, Min (2016). The macro political uptake of the G1000 in Belgium. In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 53–74). Colchester: ECPR Press.

Karpowitz, Christopher F. and Raphael, Chad (2016). Ideals of inclusion in deliberation. *Journal of Public Deliberation*, (12)(2), Article 3.

Klein, Mark (2012). Enabling large-scale deliberation using attention-mediation metrics. *Computer Supported Collaborative Work*, (21)(4–5), 449–473.

Kroll, Jordan and Swann, Juliet (2015). *We, the people. Constitutional decision making through citizen-led deliberative processes*. Edinburgh: Electoral Reform Society Scotland.

Landemore, Hélène (2015). Inclusive constitution-making: The Icelandic experiment. *Journal of Political Philosophy*, (23)(2), 166–191.

Leduc, Lawrence (2011). Electoral reform and direct democracy in Canada: When citizens become involved. *West European Politics*, (34)(3), 551–567.

López, Jaume (Ed.) (2017). Els processos constituents al món. *IDEES. Revista de temes contemporanis*, *44*.

Manin, Bernard (1997). *The principles of representative government*. Cambridge: Cambridge University Press.

Mansbridge, Jane (1999). Should blacks represent blacks and women represent women? A contingent 'yes'. *Journal of Politics*, (61)(3), 628–657.

Mansbridge, Jane; Bohman, James; Chambers, Simone; Estlund, David; Follesdal, Andreas; Fung, Archon; Lafont, Cristina; Manin, Bernard and Martí, José Luis (2010). The place of self-interest and the role of power in deliberative democracy. *The Journal of Political Philosophy*, (18)(1), 64–100.

Mansbridge, Jane; Bohman, James; Chambers, Simone; Christiano, Thomas; Fung, Archon; Parkinson, John; Thompson, Dennis F. and Warren, Mark E. (2012). A systemic approach to deliberative democracy. In: John Parkinson and Jane Mansbridge (Eds.), *Deliberative systems. Deliberative democracy at the large scale* (Theories of Institutional Design) (p. 1–26). Cambridge: Cambridge University Press.

Mendez, Fernando and Wheatley, Jonathan (2013). *Patterns of constitutional design*. London: Routledge.

Morel, Laurence (2012). Referendum. In: Michel Rosenfeld and András Sajó (Eds.), *The Oxford handbook of comparative constitutional law* (p. 501–528). Oxford: Oxford University Press.

Pacheco, Jordi (2016). *Els efectes democràtics de les deliberacions institucionals en la inclusió multicultural* (Doctoral dissertation). Universitat de Barcelona, Barcelona.

Papadopolulos, Yannis and Warin, Philippe (2007). Are innovative, participatory, and deliberative procedures in policy making democratic and effective? *European Journal of Political Research*, (46)(4), 445–472.

Pinelli, Cesare (2006). The 1948 Italian constitution and the 2006 referendum: Food for thought. *European Constitutional Law Review*, (2)(3), 329–340.

Rawls, John (1997). The idea of public reason revisited. *University of Chicago Law Review*, (64)(3), 765–807.

Rosanvallon, Pierre (2015). *Le bon gouvernement*. Paris: Éditions du Seuil.

Rosenfeld, Michel and Sajó, András (Eds.) (2012). *The Oxford handbook of comparative constitutional law*. Oxford: Oxford University Press.

Rummens, Stefan (2016). Legitimacy without visibility? On the role of mini-publics in the democratic system. In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 129–146). Colchester: ECPR Press.

Setälä, Maija (2017). Connecting deliberative mini-publics to representative decision making. *European Journal of Political Research*, (56)(4), 846–863.

Smith, Graham and Ryan, Matthew (2014). Defining mini-publics. In: Kimmo Grönlund, André Bächtiger and Maija Setälä (Eds.), *Deliberative mini-publics. Involving citizens in the democratic process* (p. 9–26). Colchester: ECPR Press.

Solijonov, Abdurashid (2016). *Voter turnout trends around the world*. Stockholm: International Institute for Democracy and Electoral Assistance.

Suiter, Jane and Reuchamps, Min (2016). A constitutional turn for deliberative democracy in Europe? In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 1–14). Colchester: ECPR Press.

Talpin, Julien (2016). How can constitutional reforms be deliberative? The hybrid legitimacies of constitutional deliberative democracy. In: Min Reuchamps and Jane Suiter (Eds.), *Constitutional deliberative democracy in Europe* (p. 93–108). Colchester: ECPR Press.

Warren, Mark E. (2009). Governance-driven democratization. *Critical Policy Studies*, (3)(1), 3–13.

Whiteley, Paul F. (2011). Is the party over? The decline of party activism and membership across the democratic world. *Party Politics*, (17)(1), 21–44.