

Debate

The Institutional Design of Referendums: Bottom-Up and Binding

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Introduction

Contemporary democratic theorists generally argue that “referendums,” understood as popular votes on political issues as opposed to elections in which citizens select representatives, are not fit for democracy. For instance, they “[provide] no opportunity for human contact or mutual persuasion” (Mansbridge 1983: 275), “take place under conditions that are even less deliberative than ordinary election” (Gutmann and Thompson 2004: 60), or “[constitute] a *fait accompli* that can no longer be challenged” (Offe 2017: 21; for other examples, see e.g., Achen and Bartels 2016: 85–86; Gastil and Richards 2013: 254; Parkinson 2009: 1; Shapiro 2017: 82; Sunstein 2001: 7; Weale 2018: 36). These all-encompassing, unifying claims however rely on a reductive conception of “referendums” that focuses on the one feature that all referendum and initiative processes share: the voting moment.

This dominant conception has little in common with differentiated political analysis and practice of what we here call popular vote processes.¹ Its exclusive focus on the popular vote hides other aspects of these processes that importantly vary from one institutional design to another. Once we also pay attention to what happens beyond the vote itself, it becomes possible to see important distinctions. We here wish to highlight three of them. First, the initiative, a collective right to statute or propose a piece of legislation or policy for popular vote, differs from the referendum, a collective right to refuse (or accept) a decision or proposition of elected authorities. The former leads to a popular vote on a text proposed by citizens or civil society organizations; it is an agenda-setting or authorship device of the citizens. The latter leads to a popular vote on a text adopted or proposed by majorities of elected representatives; it is a device of control and issue-based accountability of the executive and legislative. We consider that, because they have different and specific advantages and disadvantages, these two devices should be evaluated separately. In order to respect the limited scope of this contribution, we leave initiatives on the side to insist here on what referendums can contribute to democratic systems.

Second, some referendums are mandatory, in which case they are required by constitutional law, while others are optional. The latter can be either triggered top-down,

¹ 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 processes and referendum processes strictly speaking; the latter term unnecessarily links these processes to the contested notion of “direct democracy.” We therefore favor the descriptive notion of “popular vote processes.”

by the government, or bottom-up, by nonelected actors gathering citizens' signatures. Third, the result of the popular votes are either legally binding or consultative. These are only some of the many institutional lines of variations that characterize popular vote processes, and that impact the kind of effect that these processes can have in democratic systems (for an overview of these lines, see el-Wakil and Cheneval 2018).

We consider that democratic theory can benefit in three main ways from replacing the conflated conception of popular vote processes with a more differentiated one that accounts for such variations. First, taking diversity into account should prevent us from making over-generalizing claims that too often wrongly support a general bias against all processes associated with "direct democracy" (Cheneval 2015; el-Wakil 2017; Lacey 2017; Saward 2003). Second, a differentiated conception of popular vote processes encourages us to go beyond the question of whether they should at all be implemented in democratic systems to focus on how to best design these processes so that they contribute to democratic systems.² It acknowledges that whether popular vote processes are a means that favors powerful interest groups (see e.g., Ferejohn 2008; Goodin 1996) or that better connects elite-driven politics with citizens in a time when this nexus is becoming ever more fragile (see e.g., Cheneval 2016; Lacey 2017) depends greatly on the institutional design of these popular vote devices. Third, adopting a differentiated conception sets the basis for a more productive dialogue between political theorists and empirical researchers. As the latter have already widely acknowledged the diversity of popular vote processes (see e.g., Altman 2011; Kriesi 2005; Mendelsohn and Parkin 2001; Mendez et al. 2014), the former can better benefit from the large existing empirical literature, provide conceptual and normative guidance to inform the evaluation of empirical results, or raise new questionings by adopting this differentiated conception too (Teorell 2006: 788).

Starting from this conception, we aim at providing here an engaging start for the normative discussion about the institutional design of popular vote processes that unfolds in the present Debate. In a first step, we sketch important points of our approach to popular vote processes. We then outline the role that referendum processes in particular can play to enhance democratic systems. In the next two sub-sections, we propose two claims about referendum processes: they can positively contribute to existing representative democratic systems when they are 1) launched bottom-up by nonelected groups, and 2) when they lead to a binding popular vote decision. This is not to say that there are no other potentially democracy-enhancing effects of other institutional variations (e.g. mandatory referendums, etc.), but they are beyond the remit of this essay.

Approaching Popular Vote Processes: Preliminary Remarks

Before going any further, we would like to insist on four points related to the way in which we approach popular vote processes in general, and referendum processes in particular. First, we consider it a conceptual error to evaluate collective decision-making devices on the basis of desired outcomes. The legitimacy benchmark of evaluation cannot be the outcome of the vote, since the vote is taken to aggregate preferences of citizens by a procedure that is acceptable to participants independently of their own preferred outcome. The acceptable purpose of the collective decision-making device cannot be to manipulate the outcome towards a desired option. The correct benchmark of legitimacy of any democratic decision-

² Rare contributions in democratic theory that have insisted on the importance of institutional design of popular vote processes or focused on it are mentioned in the introduction (Cheneval and el-Wakil 2018).

making device as such is therefore the degree and quality of inclusion of all citizens and the degree of *ex ante* outcome-neutrality of the procedure. Completely undesirable outcomes need to be excluded beforehand by restricting the scope of majoritarian government. Every issue that is put to vote, just as every candidate who has the right to stand for elections, needs to represent a legitimate option for citizens and should not be excluded by procedural bias. We realize that this is a high ideal, but the aim should be to devise collective decision-making procedures as outcome-neutral as possible. We therefore propose that the normative discussion on referendums cannot be determined by an evaluation of individual or cumulative outcomes. Referendums are not “wrong” because Brexit is “wrong,” just like elections are not “wrong” because someone we do not like got elected. Regarding our issue here at stake, this means that referendum devices should not be evaluated on the basis of the undesirability of the outcome, but on issues of procedure.

Second, we wish to insist that popular vote devices are implemented in broader democratic systems. This implies that there is no trade-off between including popular vote processes and preserving the institutions of representative democracy that characterize most existing democratic systems.³ These institutions guarantee at least a minimal form of democracy in these systems by ensuring the availability of a broader constitutional scheme and of checks-and-balances, and the implementation of mechanisms of authorization and accountability. Therefore, our guiding question here is: what designs of referendum processes can contribute to enhancing the democratic character of representative structures?

Third, in our answer to this question, we take into account the scarcity of resources available to both citizens and authorities. Citizens have limited time available to inform themselves, make decisions, and vote. Elected authorities and administrations have limited monetary and organizational resources to set up popular vote processes. As such, we follow Michael MacKenzie and Mark Warren (2012: 97) and aim at recommending designs of popular vote processes that maximize the use of these scarce resources and fit, to a certain extent, existing institutional settings and practices.

Finally, we are aware that the two claims about two aspects of the institutional design of referendum processes proposed below might be revised or readjusted when we consider further aspects of a specific process, such as the kind of issue voted on, or specific contextual settings. But focusing the discussion on specific lines of variations of institutional design makes it possible to both specify what we want out of referendum processes and to limit the number of questions to consider in this Debate.

Referendum Processes within Democratic Systems

What role can referendum processes, as processes involving a popular vote on a decision or proposition of elected authorities, play in democratic systems? We see the main purpose of referendum processes in their role as instruments of control of governmental decision-making by voters. The issues voted on are limited to proposals or decisions adopted by electoral representative institutions, namely texts that have already gone through considerable judicial and legislative expert scrutiny in representative institutions. Referendum processes thus constitute an additional decision-making moment enabling the citizens to exercise a limited editorial right over individual pieces of legislation. As such, they can play a meaningful role in democratic systems as formal and politicized

³ Following H el ene Landemore’s (2017) distinction between representative democracy as an ideal and representative democracy as a set of institutions, we here understand representative democracy in the latter sense.

mechanisms providing opportunities to identify cases of incomplete and imperfect representation by elected representatives and to correct possible failures or distortions of representation. They can also contribute to informing the wide public about what is decided by their representatives and why, to enhancing participation, or to giving visibility to a diversity of opinions in campaigns preceding the vote.

We consider that referendum processes are especially valuable in one chamber parliamentary systems and in consensus democracy characterized by coalition governments, in which decisions punctually or cumulatively might move away from what a majority finds acceptable. Coalitions are formed after elections. Citizens voting for a party have little to no influence on the coalition program. If they dislike the compromises that the party for which they have voted makes in government, they have no other option than to punish their favored party in the next elections. In such cases, issue specific control rights of citizens enable the latter to hold entire coalitions accountable and recalibrate the system in view of citizen preferences. It also changes the incentive structure for a party to enter a coalition, as it reduces the risk of getting punished for compromise: *via* referendums, citizens can confirm or infirm individual compromises through their ballot. Compromises will be much less attributable to self-serving elite-bargaining as they are checked against majoritarian popular will.

Before going further, we wish to shortly consider two classic objections to popular vote processes in general, which also apply to referendum processes. Our answers echo existing contributions, but we wish to include them here so as to make it possible for the discussion in the present Debate to go beyond these issues and offer new considerations about popular vote processes.

A first classic objection is that citizens are not sufficiently competent to make decisions on issues. Three kinds of answers can be offered to it. First, if we assume that citizens are able to select their representatives on the basis of political programs, we should accept that they can cast their ballots in popular votes. We can wish that they are informed to cast their ballot in both cases, and that they learn how to develop an opinion by participating iteratively in such votes; but we cannot restrict their right to vote if they are not. Second, this objection ignores the context in which popular votes take place (Cheneval and Ferrin 2018). In democratic systems, parties and other political actors structure the public debate preceding these votes and provide voters with cues and arguments that facilitate their decision-making, just as in electoral campaigns. Third, by assuming that elected representatives are better at making decisions on political issues, this competence objection ignores both that the nature of political decisions is that they are a matter of judgment, not of truth, and that elected representatives can also use their decision-making power to serve their own interests (Cheneval 2007). Democracy requires that political decisions reflect citizens' preferences rather than elected representatives' interests. By adding opportunities to control the decisions of elected representatives, referendum processes provide a way to favor outcomes closer to citizens' preferences.

A second objection that we wish to mention here contends that popular vote processes reduce all political questions to single-issue politics. While ballot formats proposing more than two options have been proposed (Barber 1984: 288; Budge 2007: 198), they generally offer two options (usually but not necessarily yes/no) – and no chance to take part in developing law or policy projects. In the case of referendums, the options are ultimately limited to accepting or rejecting a *status quo* changing government proposal. However, this single-issue objection forgets that a vote is, per definition, just a vote. It is one phase of decision-making processes, which can hardly express a nuanced view (Urbinati and

Warren 2008: 402) nor provides tools to develop law or policy proposals. In the case of referendums, this vote is on propositions that have been discussed by elected representatives before, and that will continue to be discussed after – with additional inputs gathered thanks to the vote and during the campaign. Besides, we consider that reducing the decision options to two has advantages for mass public debate. It enables a clear structure of the public discussion between yes and no campaigners. Simultaneously, it does not restrict the diversity of arguments to support the various parties' and civil society organizations' positions. Having two available options at the voting moment does not mean that the arguments in the campaign preceding the vote are not more nuanced. And on the longer term, with repeated voted on various issues, yes/no positioning can clearly signal shifting coalitions to citizens. This way, it promotes an understanding of the democratic debate as an ongoing discussion in which potentially polarizing moments never preclude future possible alliances.

We do not deny that referendum votes might be demanding for citizens with scarce resources when such processes are organized too often. In the next two sections, we argue that such efforts are worthwhile for democratic systems when referendum processes are bottom-up and binding.

Bottom-Up Rather than Mandatory or Top-Down

As mentioned in the introduction, referendum processes can be triggered in three different ways: by constitutional law, by elected representatives, or by citizens (Kriesi and Bernhard 2012: 18; Linder 2005: 335; Vatter 2009: 128). Processes triggered following constitutional law are “mandatory” popular vote processes. They are automatically triggered by the passage of certain laws by elected representatives. In the two other cases, they are “optional,” as their launch depends on the action of specific actors. Processes triggered by elected representatives of the majority on the issue of their choice are “top-down” processes. Processes triggered by citizens are “bottom-up.” We wish to refine the rather misleading notion that citizens trigger these processes right away. Bottom-up procedures generally require the actors willing to use them to collect a specified number of signatures within a specified amount of time, which requires a high level of organizational and monetary resources that individual citizens rarely have. It is therefore more appropriate to define bottom-up processes as processes triggered by nonelected minorities, which mainly include civil society organizations and political parties.⁴

Some democratic theorists have advocated for the implementation of mandatory referendums procedures to enable the maximization of political equality or control of citizens over law making. For Joseph Lacey (2017: 43), popular votes should always be organized to ratify “fundamental decisions” about the political community and its basic rules. Ian Budge (1996: 35–36) and Michael Saward (1998: 114) go further, arguing for mandatory referendums on every piece of legislation: for them, in a desirable democratic system, “most referendums would be triggered by the passage of legislation through parliament.”

We find these propositions too burdensome. Mandatory referendum processes might require citizens to vote on uncontroversial issues (Lacey 2017: 196). We have suggested above that referendums can enhance democratic systems by highlighting possible failures

⁴ We are aware that elected minorities are also sometimes empowered to trigger referendums, as in Switzerland where a minority of regional governments can ask for a referendum, or in Italy where minority parliamentarians can do so too. However, considering the limited space available here, we leave this specific case aside.

of representation; but they are of little use to decide on proposals or legislations by which citizens actually feel well represented. The result of “forcing” a referendum may be that these popular votes are preceded by little campaign, and that turnout is low. Therefore, mandatory referendums can be considered an unnecessary use of resources for both authorities and citizens that does not contribute much to democratic systems.

Referendum processes are more appropriate to decide on controversial issues. Hence, they should be optional rather than mandatory. The next question is: what actor should be able to determine when an issue is (sufficiently) controversial and trigger optional referendum processes? Majority elected representatives or nonelected actors? For John Parkinson (2006: 171), for instance, elected representatives should be the actors triggering referendum processes. More precisely, he considers that elected representatives should be able to put specific questions to the popular vote when they cannot find an agreement among themselves. To interpret this argument in our framework, profound disagreement among elected representatives would indicate sufficient controversy to justify a referendum setting the majority of citizens as referee.

However, letting majority elected representatives trigger referendums provides no guarantee that the issues voted on will be ones where there is a failure of representation. The organization of top-down referendums is entirely “dependent on the government’s willingness” (Lacey 2017, 118, 162). Maija Setälä (2006: 713) warns that elected majorities can use this device “to avoid electoral accountability” on a specific issue. In practice, governments generally call referendums at their discretion and at times when it suits them or their parties, using these processes as strategic tools of governmental action. What these considerations ultimately highlight is that government induced referendums amounts to increasing the realm of discretionary executive power. In democratic systems, governments are already authorized, through elections, to decide on all the issues for which they are competent without needing plebiscitary support. In general, we therefore do not see the need for a government-induced referendum and we think that the right of the government to call a referendum would be a legislative prerogative inadequately held by the executive.

Referendum processes best highlight and correct potential misuses of political power by elected actors when the nonelected represented have the possibility to call for bottom-up referendums to challenge specific pieces of legislation adopted by elected representatives. In addition to this, we see the following advantages of bottom-up referendums. First, the availability of bottom-up referendum processes indirectly enhances electoral representation by bringing uncertainty to elected representatives, who have additional incentives to anticipate and stay in dialogue with larger parts of the citizenry. Second, public discussion is enhanced as elites are forced to position themselves with regards to the issue. The signature collection phase required to trigger the process also contributes to enlarging the awareness of the decisions of elected authorities among the population and fostering exchange of views (Lacey 2017: 193).

We wish to shortly consider three classic objections to bottom-up referendums. First, it is often argued that such processes favor resourceful interest groups, which can more easily contest decisions of the authorities. We made clear in our definition of “bottom-up” that it is misleading to think of these processes as tools for individual citizens. Nevertheless, we consider that this important consideration calls for setting thresholds for signature requirements attainable by a variety of minority groups disposing of different sorts of resources, so that a variety of interests are empowered from all sides of the spectrum. In particular, minority groups willing to launch referendums should be granted organizational resources. Besides, it is important to note that interest groups can trigger

the process, but that the final decision is made by the majority of citizens, which needs to be convinced in the campaign preceding the vote.

A second objection argues that bottom-up processes will cause too many referendums to be organized, thus abusing the resources of citizens and authorities. This raises the general question of what issues should be brought on the political agenda. As Simone Chambers (2017: 270) argues,

“democracies function properly when they respond to and act on problems, concerns, and issues that confront real people in civil society. But not all ideas, claims, positions, and demands raised in the periphery can be justifiably translated into legislative agenda so the systems must ‘launder’ the claims and demands by putting them through an ever more rigorous process of justification.”

We think that the signature requirement threshold to trigger bottom-up referendums is such a necessary “claim-laundering” process. It guarantees that only controversial, high stakes issues are voted on. And only minority groups that successfully convinced a sufficient number of citizens to support their attempt to challenge the elected authorities are authorized to take action.

The third objection insists that too many referendums will impede good governance by slowing down the decision-making process and prevent the adoption of political reforms and adjustments (Papadopoulos 2001: 52). But there is no empirical evidence that purely representative decision-making procedures go faster (Hug 2009: 258), and the possible inclusion of a multiplicity of actors promoted by bottom-up referendum processes might on the long term lead to more consolidated and stable decisions.

Bottom-up referendum processes should therefore be favored over mandatory and top-down ones. Of course, one design of referendum does not exclude the other, and it might be appropriate to have the two other processes where bottom-up ones are not available. But we have shown that they are more inclined to cause a waste of resources and put inappropriate issues to the popular vote.

Binding Rather than Consultative

The result of the referendum can be legally binding or non-binding. We argue that legally binding popular votes should be favored. If the government can use the result at its discretion, the empowering nature of the referendum for nonelected actors is cancelled in favor of a governmental prerogative increasing strategic options of the executive. As the bottom-up referendum is a minority empowering instrument, the minority gets the chance to appeal to a majority and win them over. Disregarding a vote in which the majority of voters has spoken, does not only cancel out this minority right, it amounts to the highly problematic disempowerment of the majority. Governments that disregard results of consultative referendums undermine the citizen’s systemic trust in democracy. Governments that follow the results of consultative referendums they do not stand for, although they are not really obliged to do so, can be held responsible for doing something that they had promised not to do. The binding force of results of referendums sets everybody free of all sorts of masquerades and self-contradictions. Furthermore, the binding nature of the referendum is the logical consequence of the bottom-up condition as it really pushes governmental actors to anticipate the effect of their legislative decisions and to argue a position vis-à-vis the legislative text contested.

We see two counter-arguments to our claim. First, there is what Chambers (2001: 247) names the “lobster trap” argument: binding referendums would create the illusion of irreversibility that impedes appropriate mass deliberation before the vote (Chambers 1998: 165). We think this is not a good argument. First of all, at face value it would mean that there could be no good deliberation in parliament either when legislators make binding decisions after deliberating. This would be an argument against binding decisions and for permanent deliberation in general, but binding decisions happen to be part of the circumstances of politics and demanded by the principle of legal security and predictability.

But we would also challenge this objection more substantively on various grounds. Legal force does not imply irreversibility, especially not in democratic systems with their in-built procedural devices of revision and electoral cycles. In democratic systems, a decision is only considered legally binding until it is revised within the rules of democratic procedures. Bottom-up referendums that trigger votes, in which a law is struck down in a legally binding manner, have the in-built device of the possibility to call another bottom-up referendum on a subsequent legislative act. This subsequent referendum will be called or not called following the result of a public discussion on the reasons why elected representatives voted in the way they did during a signature-collection period. So overall, this discussion is not terminated due to binding decisions in popular votes. Rather, giving people an option to make a binding revisionary decision on an act of parliament and to revise subsequent legislative acts enhances the deliberative options in the system. The bottom-up referendum with binding force contributes to the reality of reversibility, not the illusion of irreversibility.

The second counter-argument is that popular votes, in our cases referendum votes, are politically binding for governments and hence do not need to be legally binding (Chambers 1998: 165; Setälä 2006: 707). The political decision to go against the expressed will of the majority of the citizens is very hard, if not impossible, to make for governments (Linder 2005: 335). However, it is not really clear what this argument is based on. If the point is that legal force is redundant, the consequence would be that one could be indifferent as to whether the results of referendums ought to be binding or not. In that case, it would not be an argument against the legal force of results of referendums more than it would be an argument in favor of it. One could go either way. But if it is an empirical argument, it is more problematic if not downright wrong because there are many examples of interpretative manipulation of non-binding referendum results by elected authorities (see e.g., Jäske 2017). This possibility is enhanced in two-level situations in which authorities of different levels can “hide” behind each other and engage in all sorts of blame shifting. The (government-induced, hence in our view problematic) 2015 Greek bailout referendum is a case in point where the result of an advisory popular vote was overturned. Voters should know what they vote on, with the consequences it has, and these consequences are clearer if it is determined *ex ante* that the positive or negative result of a referendum vote is legally binding.

Binding referendum processes represent a real empowerment of citizens. As has been eloquently formulated by Lacey (2017: 118) with regards to European Union membership referendums:

“Citizens with a direct and binding vote [...] have a greater role in shaping the future of Europe than member states where national parliaments have the final say. Those citizens who are treated to a consultative referendum may be also seen to have more political control than

those citizens who are not given the opportunity to vote in any kind of referendum, yet this kind of control is significantly diluted by its contingency.”

Binding referendums also empower a variety of nonelected representatives in negotiations with elected authorities ahead of the popular vote – while also ensuring, contrary to consultative votes (Cheneval 2016: 2; Kaufmann et al. 2006), that both actors have limited chance of manipulation once the result is known. In a time when democracy is accused of being a simulation process rather than having real bite, binding referendums give credible effect to more inclusive decisions while consultative referendums tend to undermine credibility and clarity.

Conclusion

Referendum processes have the potential of enhancing existing representative systems – but the realization of this potential highly depends on the way in which these processes are designed. We have shown that there are a number of very serious drawbacks when institutional design sets what should be a process empowering unelected minorities to challenge decisions of elected representatives as an additional strategic tool increasing the empowerment of elected representatives. Our conviction is that top-down plebiscitary and purely consultative use of referendums should be generally avoided. We are less categorical about mandatory referendums, which are mainly problematic with regards to preserving the resources of citizens and authorities for worthwhile procedures. We suggest that including referendum processes has great chances of being democracy-enhancing if these processes are triggered bottom-up, by nonelected minority groups and through procedures such as signature collections, and if they entail a legally binding popular vote.

This is not all that needs to be said. Of course, our recommendations should be combined with, and possibly adapted to, other recommendations about further lines of variation, such as the kind of texts that can be voted on, the moment of the vote, the ballot format, the campaign regulations, the petition requirements to trigger a bottom-up process, or the aggregation rules. Adopting the differentiated conception of popular vote processes that we proposed in the introduction is a first step to start a discussion about their institutional design, and explore the potential for innovation in these designs and their coupling with other processes (Chambers 2001: 250; Gastil and Richards 2013; Hendriks 2016). With this short introductory essay, we hope to have offered a starting point for the present Debate, but also beyond it; for it is urgent that democratic theorists offer considerations that can inform the institutionalization of popular vote processes as well as the critique of undesirable designs that can threaten democratic systems.

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