

**Randomized Minipublics, Popular Will-Formation, and the Societal
Conditions of Deliberative Learning Processes**

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Abstract

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Randomized Minipublics, Popular Will-Formation, and the Societal Conditions of Deliberative Learning Processes

Hauke Brunkhorst

No question, Cristina Lafont has written a path-breaking book, and I agree with almost everything she says. However, I have two points that I would like to address. My first point is a clarification of the exact role that randomized minipublics (deliberative panels) can play within the process of popular will-formation. The second point concerns the societal conditions that might trigger deliberative learning processes, such as national and international higher courts.

(1) I think that there is an internal relation between *revolution*, *legislation* and the *truth* (or correctness) of the *volonté générale* in democratic societies. “Figuring out the truth” is the basic epistemic idea of “deliberation” (Lafont, 164), and it should not be understood representationally but normatively (and “transparently epistemic”). Rousseau was right if we understand his theory of the *volonté générale* (general will) as not representational but first, as a *method of constructing the general will* (hence procedural), and second, as a theory of *universal* (or cosmopolitan) will-formation.

The latter is just an implication of Rousseau’s basic idea of *autonomy* (self-legislation), i.e. the all-affected principle. For instance, *every* illegal migrant who crosses the borders of a country must have some participatory rights, e. g. the right to *participate in the concretization of legal norms* by launching proceedings in a court.¹ Even a national law that allows the contamination of national, and, as a side-effect, international waters, generates a right of affected foreign agencies to participate at a certain point in the procedure of democratic legislation (hence, the formation of the general will).

The legislative power depends on the conjecture that the procedural participation of everybody affected by a legal norm guarantees that the norm is legitimated by the voice and vote of all of us; hence it is *true* (correct), or at least transparently epistemic. Such a Rousseauian, Kantian and Habermasian theory of legitimization implies that the *pouvoir constituant* is permanent. This is so because not only explicit changes or interpretations of constitutional law, but also every ordinary legal act of public will-formation and enforcement, *changes the constitution* – however imperceptible and evolutionary. As Kelsen has argued, we are living and acting politically and legally always already in a continuum of constituted and constituent power (see

Brunkhorst 2011).

The continuum of constituent and constituted power does not blur all differences, in particular not the difference between the constituent and constituted use of power, in the same way as the continuum of practically being in the world does not blur the differences between thinking and talking, or between the use of language and the use of force.

The continuous public procedure of *democratic legislation* begins with political small talk and disputes at the kitchen table, goes through national and international legislative bodies, and ends with always already interactive law-enforcement in the streets. Because of its internal connection with the *pouvoir constituant*, the legislature is a *latently revolutionary power*. We know of it through its manifestations. According to the young Marx, “the legislature has made the French revolution,” and “all great, organic, universal revolutions” (Marx 1843, 260). However, once institutionalized, legislatures do not make every day a great revolution. There is a crucial difference between *revolution* and *evolution* within the legislative continuum. However, there is *no dualism* between the two. Therefore, no democratic legislature exists any longer once the “heartbeat of the revolution” is silenced within everyday legislative will-formation, and only technocracy is left (Habermas 1989).

Dewey was right, and Lafont quotes it as a mantra of her own theory, that “majority rule, just as majority rule is as foolish as its critics charge it with being” (Lafont 2020, 34). However, in a functionally and normatively working democratic regime it is based on inclusive and egalitarian deliberative procedures. These procedures are (and should be) “anarchic”, hence in a way *revolutionary* procedures of *problem-solving* learning processes. But they are interrupted ever again by electoral, direct-democratic, parliamentary, legislative, contractual and administrative *procedures of decision-making*. They firstly transform the present and contingent deliberative state of will-formation into *changeable binding decisions* (positive law). At the same time, secondly, they satisfy the ravenous hunger of functionally differentiated capitalism for an ever higher legislative scaffold.

My point is that the difference between *voice* and *vote* (problem-solving and decision-making) is a clear criterion for deciding when randomized deliberative panels are good for democracy, and when not. They are as *bad* for democratic decision-making as every other randomized procedure that might be useful in non-democratic and functionally specified contexts, simply

because, (and here I agree completely with Lafont), we, the people have to decide. However, these panels are *good* for democracy as a means to “re-politicize” a “dried-up public sphere,” and to break the power of the manipulation machinery of media conglomerates and “cartel-parties” (Katz & Mair 1995), which put themselves in the service of the capitalist state. They are good because and as far as they are strictly *egalitarian*, and as far as they *include* not only citizens but also all available voices from wherever. Public debate must be *anarchic and borderless*, as rightly emphasized already in Alexander Meiklejohn’s criticism of McCarthy (Meiklejohn 1979, 94).² Borders matter for vote, not for voice. To come to the right decision, all arguments are equally important, and all arguments available wherever and by whomever articulated, should be taken into account equally. The foreigner’s voice matters as much as every other voice for those who have the right to election and vote. At least in this respect the freedom of us (every “us”) is always already universal: “The freedom in question is ours.” (Meiklejohn 1979, 53). The realm of voice is the realm of discourse, and the “discourse is not an institution but the counter-institution per se.” (Habermas 1971, 201).

A brilliant example for randomized deliberative panels is Claus Offe’s suggestion for a revised Brexit procedure of referendum (Offe 2017). Carefully institutionalized, equipped with people like us, these panels can operate as one of – hopefully many – voices of the people, which are not yet colonized by money and administrative power. In this case the paradox of institutionalizing discursive anarchy can be solved if, from wherever, not only citizens are allowed as panellists, but also expert voices.

(2) This brings me to the second point. The question is why are there so many interesting and feasible suggestions and successful laboratory experiments with models of deliberative democracy all over the world – yet none has been tried in serious praxis? The answer is simple: because that would require a deep, maybe even revolutionary, change of the political and economic power structure of late-capitalist societies. Deliberative democracy fails because of the “existing contradictions” of the capitalist state, especially the contradiction of capitalism and democracy (Offe 1972). It is hard to imagine the implementation of deliberative panels at prime-time for four hours on all major TV-stations and social media for five or six times during an electoral or referendum campaign period without changing, restricting and regulating the property- and power-relations of all major media of dissemination.

Models as suggested by Offe and many others are not, however, useless, and not only because they show us that small institutional innovations can lead to great change. The repression and denial of deliberative democracy by the political-media class negatively indicates that the established political party system, the established *Rechtsstaat*, the capitalist state, and the capitalist media industry, are destroying the substance of democracy that is concentrated in the latently revolutionary character of the legislative power.

A conceptual remark on legislative power. The legislative power is the gradually differentiated continuum of constituent and constituted power. All *constituted* legislative acts on all levels (referenda, elections, parliamentary decisions, administrative orders, judgments, enforcement orders, and the everyday behaviour of all legal entities), are contributing to *gradual change of constituent* power. On all levels of the legal hierarchy – especially on that of elections and referenda – deliberative panels can contribute to it. This is shown by, for example, the “Me too” campaign on the level of court decisions and the “Black Lives Matter” and “No Justice, No Peace” movements on the level of the anarchic public sphere. The difference between *public discourses* (including now and again riots, occupations of buildings and places, etc.) and *deliberative panels* is that the latter is more like an academic debate covered by formal rules, an agenda of topics, normative exclusion of all kinds of violence and informal pressure, time-limits, egalitarian and representative selection and participation etc., whereas public discourses are much more anarchic, diffuse, inclusive, permeable, holistic and comprehensive. In a working democratic regime, the entire process of constituent and constituted legislative practices (the public sphere) terminates in legislative decisions which sometimes are explicitly constituent and sometimes even formally revolutionary (creating a new constitution). Moreover, in the long course of legislation (from bars and street activities, to parliamentary debates, filibuster, and mutton jump) *rights* and *procedural rules of democratic decision-making* are formally intertwined and overlapping. Courts, including the Supreme Court, are only *one* of the many formal and informal players in the democratic process of legislation. The dense intertwining of rights and democratic self-organization in constitutional law is not designed normatively to save and maintain the existing structure of society, law, and rights, but to save the utopian and (at least conceptually) revolutionary *possibility to realize* – to say it in Kantian terms – *progress for the better* (Wihl 2019, 15,33, 211ff). This is why Kant was so much in favour of, and enthusiastic about, the French Revolution even though it was “filled with misery and

atrocities” (Kant 1979, 159). Kant calls the revolution a historical sign because it incarnated the progressive, permanently revolutionary, reflexive freedom of the real subjects in constitutional law. Therefore he (as Sieyès earlier, and Marx later) interpreted the legislative power as the revolutionary power of the people.

Lafont, as I understand her, follows this track. Therefore, she is right to reject most of the existing models of deliberative democracy (minipublics etc.) as bad abstractions, and to reconstruct what already exists within the gloomy reality of the existing public sphere. At this point, the dialectical interaction between *supreme courts* and *social movements* delivers *some* good examples. However, it should not be *reduced* to that relation. Also, the US Supreme Court is not the legislative power that (under pressure of heavy class-struggles and strong protest movements and riots on the streets) has *made* the great reforms of the New Deal of the 1930s and 40s and the great reforms of the civil rights movements of the 1960s and 70s. It was the American Congress that translated the will of the people and the street fights into a new social and civil law. The Supreme Court (and many other federal and state courts) had an important but *small* part during this comprehensive process of legislation that by far is not comparable with that of the Congress. During the New Deal era the most important decisions of the court came about only through legal blackmailing by the Congress, and the by far greatest successes of the civil rights movement were not such (important) landslide decisions of the Court as *Brown v. Board of Education* and *Times v. Sullivan*, but the *Civil Rights Act of 1964* and the *Voting Rights Act of 1965*. Bruce Ackerman has called the New Deal and the civil rights movement revolutionary, and rightly so because of the role of the movements and the Congress.³ To save the utopian and revolutionary *possibility to realize progress for the better*, democracy must combine (1) social movements and campaigns in a discursive and antagonistic public sphere, with (2) parliamentary legislation and (3) governmental/administrative and judicial etc. concretization. Therefore, the Lafont-style deliberative democracy should be implemented *on the three levels* of (1) will-formation, (2) law-making and (3) norm-creation by the concretization of law.

I guess it is mistaken not to take into account the *structural causes of the failure of deliberative democracy* in late-capitalist societies, to reduce the analysis to a normative problem and to leave the empirical problems to positivistic social science and social technology. Critical

theory always had good reasons to reject this separation of intellectual labour, because the *normative (constitutional) justification of deliberative democracy is internally related to the primacy of the legislative power of peoples and parliaments that binds all other powers*, and only then to the legally bound (and secondary legislative) power of courts, governments and police stations to create legal norms by concretizing the law this way, (e.g. right), *or* that way, (e.g. left). Only democratically (hence deliberatively) engendered *law* can transform modern capitalism into capitalism with ever more socialist characteristics from within the capitalist state, which by penalty of its doom must make the world a safe place for investors (as long as we have capitalism - and we have it still).⁴ However, if democracy is reduced to the formula: “NGO’s + judges = democracy” instead of “people + parliaments = democracy” then even the best version of deliberative democracy is only an improvement of a post-democratic and technocratic government of elites. Therefore, Lafont’s brilliantly developed model of deliberative democracy can save democracy from post-democratic technocracy only as far as it is organized within the comprehensive democratic model of “people + parliaments = democracy”. Here Offe’s suggestion to make even anti-democratic referenda like the Brexit one democratic by deliberative panels is convincing, and combined with Lafont-style deliberative panels it could be implemented on all levels of legislation and concretization, but not primarily on the level of courts. As the New Deal and the Rights Revolution proved, the Court is not the primary addressee of radical social movements in the US but the legislative power of the Congress and President which can make laws to enforce socialist ideals – if the public is deliberative enough to form a general will that is not just a will of the “compact majority” (Adorno), like Richard Nixon’s silent – hence pre-deliberative – majority which was unfit to establish a general will because of its lack of deliberation and thus legitimation.

The very problem of the present evolution of the legal system comes to the fore once we switch to international courts as Lafont does on the last pages of her book. The heartbeat of the revolution, the legislative power in transnationally integrated systems like the EU, has already been overcome by the “retrograde” or “reactionary” power (Marx) of the united executive bodies of Europe, but only after the executive power became hegemonic within the democratic, but at the same time counter-democratic, capitalist nation-states. The now united executive bodies are the driving force of the transnationalizing and globalizing capitalist nation-states. It is easier and less dangerous for the increasingly technical rule of the executive branch to do that

together with the establishment of transnational courts than with a democratic legislature.

In the case of the EU the judiciary is bound only to the constitutional law of the Treaty of Lisbon with its primacy of competition law over democratic solidarity. The result is that the subsumption of the judiciary under the law, and not only under the constitution, is abolished and ordinary legislation increasingly replaced by the *constitutionalization of legal norms*.

The heartbeat of the revolution is silenced. Therefore, it doesn't make much sense to implement constitutional legislation as a trigger for deliberative learning before the constitutional and societal structure changes. This does not rule out deliberative learning, but leads to the suggestion of a further distinction between *revolutionary* (system-changing) and *evolutionary* (system-immanent) deliberative learning. Only a deliberative institutional revolution of the EU – i.e. a new foundation – can enable evolutionary deliberative learning within a full-fledged European democracy. Deliberative movements, deliberative NGO's, and deliberative courts cannot achieve this alone.

Notes

1] Even if the constitution reads “Alle Deutschen sind vor dem Gesetz gleich” (as in the Weimar Reichsverfassung) every human being is addressed (Anschütz 1926). On the idea of concretization within the “Stufenbau des Rechts” see Merkel 1926. The role of the plaintiff and the accused person is not just passive, it is implicitly participatory in the process of transforming an abstract into a concrete norm. Very illuminating and progressive is the way Fritz Bauer explains that idea in Alexander Kluge's movie *Abschied von Gestern* (1966).

2] ‘Self-government’ requires to answer: ‘Who are The People of the United States by whose consent and authority our government is maintained’, and within the notion of The People there is always a tension between insiders with all rights and “outsiders” and “aliens” who are clearly ‘subject to the laws’, but ‘with no part in the making of them’. On Meiklejohn, see: Tabbara (2003); Brunkhorst (2002). On Ridder and Meiklejohn see: Tabbara 2020.

3] On the role of the movements and the Congress, see Sunstein (1993); Wright (2013).

4] This is what I call the existing contradiction of capitalist nation-states between democracy and capitalism.

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Biography

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