
Constitutional Deliberative Democracy in Europe

Edited by Min Reuchamps
and Jane Suiter



© Min Reuchamps and Jane Suiter 2016

First published by the ECPR Press in 2016

The ECPR Press is the publishing imprint of the European Consortium for Political Research (ECPR), a scholarly association, which supports and encourages the training, research and cross-national co-operation of political scientists in institutions throughout Europe and beyond.

ECPR Press
Harbour House
Hythe Quay
Colchester
CO2 8JF
United Kingdom

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Typeset by Lapiz Digital Services

Printed and bound by Lightning Source

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

HARDBACK ISBN: 978-1-785521-45-4

PAPERBACK ISBN: 978-1-785522-58-1

PDF ISBN: 978-1-785522-02-4

EPUB ISBN: 978-1-785522-03-1

KINDLE ISBN: 978-1-785522-04-8

www.ecpr.eu/ecprpress

ECPR Press Series Editors:

Peter Kennealy (European University Institute)

Ian O'Flynn (Newcastle University)

Alexandra Segerberg (Stockholm University)

Laura Sudulich (University of Kent)

More from the ECPR Press Studies in Political Science series:**Global Tax Governance**

ISBN: 9781785521263

Peter Dietsch and Thomas Rixen

‘Tax specialists may think they have little to learn from a book on global tax governance, especially one that concludes that the best solution is to create a new International Tax Organisation (ITO). They would be wrong. Anyone concerned with international taxation will benefit from this excellent collection of essays about the nature and possible resolutions of the conflicts within and between states about fiscal sovereignty, tax competition, and domestic and international equity that underlie the international tax discussion. The authors do not always agree with each other and few readers are likely to agree with all of them. But this book makes clear what is really at issue in this discussion and shows why even the recent prodigious efforts of the OECD-G20 BEPS group are most unlikely to produce any lasting solutions. For nation-states and economic globalisation to coexist, something like an ITO may indeed prove necessary.’

Richard Bird, University of Toronto

Decision-Making under Ambiguity and Time Constraints

ISBN: 9781785521256

Reimut Zohlnhöfer and Friedbert W. Rüb

‘Associated with the work of US political scientist John W. Kingdon, for more than three decades, the Multiple-Streams Framework has informed the work of numerous policy scholars from all over the world. Featuring an excellent line-up comprised of well-known and more junior contributors, this edited volume offers a timely overview of key comparative, empirical-methodological, and theoretical issues raised by the Multiple-Streams Framework. This coherent book will interest the many policy scholars who draw on this now classic Framework.’

**Daniel Béland, Johnson-Shoyama Graduate School of Public Policy,
University of Saskatchewan**

New Perspectives on Negative Campaigning

ISBN: 9781785521287

Alessandro Nai and Annemarie Walter

‘The study of negative campaigning has mostly been about American elections. Refreshingly, the essays in this book look at what happens in other countries. By so doing, they truly offer new perspectives and thus advance our understanding of attack politics. Recommended to anyone interested in elections and campaigns.’ **John G Geer, Vanderbilt University**

Please visit www.ecpr.eu/ecprpress for up-to-date information about new and forthcoming publications.

Chapter One

A Constitutional Turn for Deliberative Democracy in Europe?

Jane Suiter and Min Reuchamps

Deliberative democracy and its constitutional turn

In recent years, public authorities and civil-society organisations, driven by increasing public disengagement and a growing sense of distrust between the public and their representatives, have been instituting exercises in public deliberation, often using ‘mini-publics’, that is relatively small groups of citizens, selected according to various criteria and representing different viewpoints, brought together to deliberate on a particular issue. From small-scale experiments, mini-publics have recently taken a constitutional turn, at least in Europe. Iceland and Ireland have turned to deliberative democracy to reform their constitutions. Estonia, Luxembourg and Romania have also experienced constitutional processes in a deliberative mode. In Belgium, the G1000, a citizen-led initiative of deliberative democracy, has fostered a wider public debate about the place and role of citizens in the country’s democracy. At the same time, the European Union institutions have introduced different forms of deliberative democracy as a way to reconnect with citizens. These empirical cases are indicative of a possible ‘constitutional turn’ in deliberative democracy in Europe. These examples of constitution-making happened in a particular time and place but they may also serve as models for other events.

The purpose of this book is, first, to critically assess these developments, bringing together academics who have been involved in designing these new forms of constitutional deliberative democracy with theorists practised in evaluating normative standards. This combination of contributors allows us the opportunity to speak across the praxis divide, bringing empiricists and those involved in the design and implementation of these processes, together with more normatively engaged theorists. Second, we hope to be able to offer answers or, at least, clues to possible pathways to generalisation as to which kinds of participatory processes work best for constitutional change and under what conditions.

In essence, deliberative democracy is concerned with building and engaging with authentic and reasoned debate in order to decide on a course of action. In other words, if it is deliberative, it is inclusive and consequential (Dryzek 2009). Deliberation can take place in mini-publics and parliaments and among the masses and there are many high-profile real-world examples of innovation in deliberative democracy, notably the participatory budgeting practices that originated in Brazil

(Souza 2001); the deliberative polling exercises that have been applied widely (Fishkin 2009; Suiter, Farrell and O'Malley 2014); and the long tradition in Scandinavia of citizen-deliberation about complex issues at the intersection between science and society (Rose and Sæbø 2010), to name but a few. All share some features: they are based on some form of deliberation among samples of citizens; they aim to foster positive and constructive thinking about solutions (they are not simply protest movements); they seek genuine debate about policy content; they seek solutions beyond adversarial politics; and they seek to identify common ground. What's more, there is cross-fertilisation of existing models and techniques and a rising number of experiments that combine traditional modes of political participation with some elements of deliberation. The field of deliberative democracy is kicking and striving.

But why should deliberative democracy be an appropriate mode for constitution-making? Modern constitution-making started in the late eighteenth century. Elster (1995) describes seven waves of constitution-making, across Europe and North America as well as in their former colonies throughout the world. The first wave came before the end of the eighteenth century, with the novel constitutions that followed the American and French revolutions. The second wave swept through Europe following the revolutions of 1848, when around fifty new constitutions were introduced, including those in the many small German and Italian states. In the third wave, many of the states newly created after World War I, for example, Poland and Czechoslovakia, wrote their constitutions. Under pressure from the victorious allied forces, in the fourth wave, the defeated states of World War II, Germany, Italy and Japan, wrote new constitutions introducing democracy. The fifth wave came with the breakup of the British and French colonial empires, starting in India and Pakistan in the 1940s, gradually gaining momentum and then running through Africa in the 1960s. The sixth wave washed through southern Europe in the mid 1970s, with the end of dictatorships in Greece, Portugal and Spain. The seventh wave broke in Eastern Europe in the 1990s, with the collapse of communism and the end of the cold war leading to the introduction of many new and progressive constitutions; this was also the case in Finland, where the constitution of 2000 is a product of the mini banking crisis in Scandinavia in the 1990s.

Many of these cases of constitutional revision have three characteristics in common. First, they were instigated in response to crises or exceptional circumstances. They each happened at what Ackerman (1998) refers to as a 'constitutional moment', which mobilised social forces for fundamental change. Elster (1995) counts only two instances in which new constitutions were drawn up under non-crisis circumstances: Sweden in 1974 and Canada in 1982. All the others were responses to economic crisis, regime-change or revolution. Second, all involved, though to varying extents, the deliberation of elites. Third, many of the recent bouts of constitution-making have not resulted in long-lived documents (Kellermann, de Zwaan and Czuczai 2001; Albi 2005; Ginsburg and Dixon 2011).

The cases discussed in this book (*see* Bergmann 2016; Suiter, Farrell and Harris 2016; and Jacquet, Moskovic, Caluwaerts and Reuchamps 2016,

Chapters Two, Three and Four of this volume) were also products of crisis, particularly of the global financial crisis of 2008, and of the diminishing trust in institutions among European publics in general. Indeed, both Ireland and Iceland suffered large drops in GDP as a result of the banking crisis. Yet, given the importance of constitution-making, should it not preferably be undertaken at a time when rational reflection and consideration is possible (Elster 1995)? It is possible that the deliberative mode of this recent wave has, at least to some extent, been an attempt to overcome citizens' diminishing trust in institutions and that they can be distinguished from all previous waves in terms of who was deliberating and how they were doing so. This is an issue to which we shall return to in greater depth in the relevant country chapters.

Given the characteristics of the current political context and also of deliberative democracy, is this mode likely to be appropriate for constitution-making? Previous rounds of constitution-making involved the deliberation of elites – principally, constitutional lawyers, senior politicians and so on – who constituted the deliberative component of such assemblies as the framers of the US Constitution and the Constitutional Assembly in post-revolutionary France. In most, decisions were reached by a qualified majority of the delegates, although a few aimed at something close to consensus, for example, during the making of the 1949 German Constitution and the 1978 Spanish Constitution (Elster 1995). In several instances, however, citizens also had a role in constitution-making as well as elites (Fishkin 2011; Mendez and Wheatley 2013).

What is crucial in terms of constitutional deliberative democracy is that, in all cases, the central principle is an attempt to involve the public in deliberation. In this perspective, a version of the deliberative model involving a mini-public was the chosen route for the assemblies to deliberate. In addition, in terms of the how (or the throughput) of deliberation, Elster also noted that in many previous episodes of constitution-making, self-serving arguments tended to dress themselves in the garb of public interest. While there is no guarantee that a deliberative mini-public would not operate in a similar fashion, if it is functioning in conformity with deliberative criteria such as inclusiveness, equality transparency and publicity, it would not.

So why should a deliberative mini-public function in this normatively desirable fashion? Constitutions, as the supreme norms that shape legitimate law-making, must be normatively legitimate if citizens are to be considered under an obligation to obey the laws of their polity (Dworkin 1995). There is agreement in the literature that deliberative democracy is primarily focused on producing legitimate political outcomes (Manin 1987; Cohen 1998). Thus, introducing elements of deliberative democracy to constitution-making ought to make constitutional changes more legitimate. The link between the mini- and the maxi-public (that is, the whole of the people) will also be crucial here and that is an issue we shall return to later. In addition, as Elster (1995) notes, creating a constitution involves making collective choices under constraints, that is, constitutions are works produced by constituent assemblies rather than by individuals. Thus, in general, the goals of individual constitution-makers and

the mechanisms by which these are aggregated into collective choices are vital. In theory, utilising the principles of deliberation should result in a process that functions so as to ground constitution-making in the thought-through will of the people.

In addition, the intrinsic importance of constitution-making requires that procedures be based on rational and logical argument: and the deliberative model is ideally suited to such tasks. Rawls (1999), for example, argued that deliberation should be central to a conception of public reason. Thus we might expect that constitution-making in a deliberative mini-public would result in policies and priorities being adopted that are better solutions than those that can emerge when framers are incentivised more towards horse-trading and log-rolling (Elster 1995). In other words, as Caluwaerts and Reuchamps (2015) argued, discussions that take place in the public sphere should have the capacity to translate the deliberation of the public into normatively valuable public outcomes. Thus, we would expect deliberative democracy to be appropriate for constitution-making, in that it will both give the process greater legitimacy and produce outcomes based on rational and logical argument.

However, there is still the issue of content. Constitutional deliberative democracy deals with issues that might, potentially, lead to a transformation of the polity; these deliberations also, potentially, need to include more abstract issues of principle and theory than some of the political issues traditionally associated with mini-publics. Many of the earlier mentioned examples of mini-publics are rooted in the practical, or the ordinary experiences of the public, focused on local spending, the environment and so on. However, the new wave of large-scale initiatives aimed at changing constitutions either directly or indirectly are, by their very nature, more abstract, less tied to the day-to-day realities of life, for the deliberating public. Yet there is no reason why some of these constitutional issues – from electoral systems, to marriage-equality, to producing new constitutions – should be beyond the competence of ordinary members of a mini-public to decide. The evidence from the wave of citizens'-assemblies in Canada and the Netherlands (Fournier *et al.* 2011) is that citizens embraced the technical elements of the proposals and many became experts. In other, more general mini-publics, such as Ireland's We the Citizens experiment (Farrell, O'Malley and Suiter 2013; Suiter, Farrell and O'Malley 2014), members deliberated on both political reform and redistribution to produce more informed and nuanced opinions.

As a result of this widening of the parameters of what is deemed possible within deliberation, other forms of constitutional deliberative democracy have emerged, especially in Europe. In Iceland, the output of a deliberative process has been presented in a referendum that confirmed the will of the population to change the constitution. In Ireland, the Convention on the Constitution is now done with its first deliberations and two referendums have been held, including one introducing same-sex marriage. These can be seen as examples of deliberative constitutional reform. In Belgium, even though the G1000 was not designed to affect the constitution of the country, it is currently widely replicated in different

settings, in Belgium and elsewhere, and it has fostered a wider debate in society about the role and place of citizens in Belgian democracy (Caluwaerts and Reuchamps 2015). Last but not least, notably with the introduction of European Citizens' Initiatives, the European Union has paved the way for the introduction of new forms of democracy (Auer 2005). These developments also represent a number of forms and practices, including deliberative constitutional reforms (that is, constitutional reforms initiated via deliberative democracy procedures and not only by representative and/or direct-democratic ones); constitutional mini-publics (which are organised to deliberate about – some articles of – the constitution); and also deliberative events on issues that are not directly related to constitutional change but concerned with the nature of democracy in a polity (for instance, whether it should become more participatory and/or deliberative).

To sum up, the first two experiences discussed in the volume – Iceland and Ireland – are true examples of constitutional deliberative reform, while the latter – the G1000 in Belgium – is a *sui generis* form of deliberative democracy with a potential for political and constitutional transformation. We argue that, together, these can be envisaged as constitutional deliberative democracy and that there is now a need for a serious and systematic inquiry into these developments, which go to the heart of democracy. The choice of cases in this volume (Iceland, Ireland and Belgium) makes sense because all these cases were large-scale experiments and were similar from a methodological perspective. They call for a combined research endeavour, bringing together theoretical claims and empirical validations. Thus, this volume brings together not only theoretical and empirical researchers who have studied these cases but others who have been involved in the organisation of this constitutional turn in deliberative democracy.

In other words, we shall explore and reflect on innovations made in deliberative democracy as a result of its application to constitutional reform (Farrell 2014). This can be envisaged as a particular *form* of deliberative democracy – one that harnesses the democratic potential of mini-publics (Parkinson 2006; Pateman 2012) – or as instances of deliberative democracy in service of the masses (Niemeyer 2014). This is important, as the link between the mini- and the maxi-public is not yet fully conceptualised (Grönlund *et al.* 2014) and, in most cases, constitution-making is ratified by 'the people' at some point. Thus, while these constitutional deliberative processes are not themselves decision-making as proxies for mass-publics, they can be utilised for deliberation-making in mass publics. As Niemeyer (2014) argues, these mini-publics can distil, constrain and synthesise relevant discourse to be transmitted to the wider public. In at least two of our cases, in Iceland and in Ireland, this was the purpose of the mini-public: to act as a precursor to nationwide referendums on the same issues. In other words, to bring about a more discursive transmission of information rather than merely being information-providing (MacKenzie and Warren 2012). Importantly, these mini-publics can also act as capacity-builders; the media attention they generate and the open access they provide, at least potentially, means they can serve as deliberative exemplars, building and enhancing the reputation of deliberation more generally in society.

Chapter Nine

Ideas of Constitutions and Deliberative Democracy: A Conceptual Conclusion

John Parkinson

This volume is dedicated to the idea of specifically ‘constitutional’ deliberative democracy. What does that adjective add? For some of the contributors, the answer to that question is rather obvious – it is a deliberative event or series of events directed to constitution-making rather than policy-making, deliberation about the rules of collective life rather than specific decisions within it. But that ‘obvious’ answer relies on some prior assumptions about what constitutions are and what deliberative democracy is. If we start with different assumptions, new possibilities emerge. This concluding chapter sets out some of the implications of three understandings of constitutions, and three approaches to deliberative democracy, for constitution-making and research

The idea of constitutional deliberative democracy is not new (see Ackerman 1991), although it is certainly not yet a mainstream concern either; as presented here, it is more an application of existing ideas and processes to a less traditional domain than a radical change of approach; and the word ‘turn’ is perhaps overused, as Dryzek (2010: 6) ever-so-gently suggests. But it seems a logical step, given that the systems move in deliberative theory has re-opened room for thinking about how the various parts of democratic systems work together (Bohman 2012); and because there are issues to do with constitutions and constitution-making that deserve more attention, not least because of long-standing but often forgotten arguments between constitutionalists – who, traditionally, want to bracket off the principles of democracy and justice from interference by potentially tyrannical majorities – and proceduralists – who argue either that justice is best secured by democratic means or that what counts as just is, itself, a matter for democratic deliberation. If we move that disagreement to the foreground, constitutional deliberative democracy is far more than an attempt to apply innovative techniques to realms beyond local policy-making.

The chapter starts by setting out what I see as some fundamental disagreements about the meaning of deliberative democracy, resisting a tendency to equate it with particular techniques of public engagement. Instead, it argues that we should treat deliberative democracy as a label for a kind of democratic system that has deliberation as a salient feature. The chapter then picks out three different understandings of constitutions that interact with deliberative democracy in ways which reveal both the limits and the possibilities of applying particular kinds of technique to constitutional issues; and reveals what are, I think, important avenues for future research. It then briefly shows how the cases and, more particularly, the case-studies, fit into that overall scheme, complementing the analysis that Talpin

(2016, Chapter Six of this volume) and Rummens (2016, Chapter Eight of this volume) have already offered. It concludes with suggestions about future analysis of deliberative democracy and constitution-making.

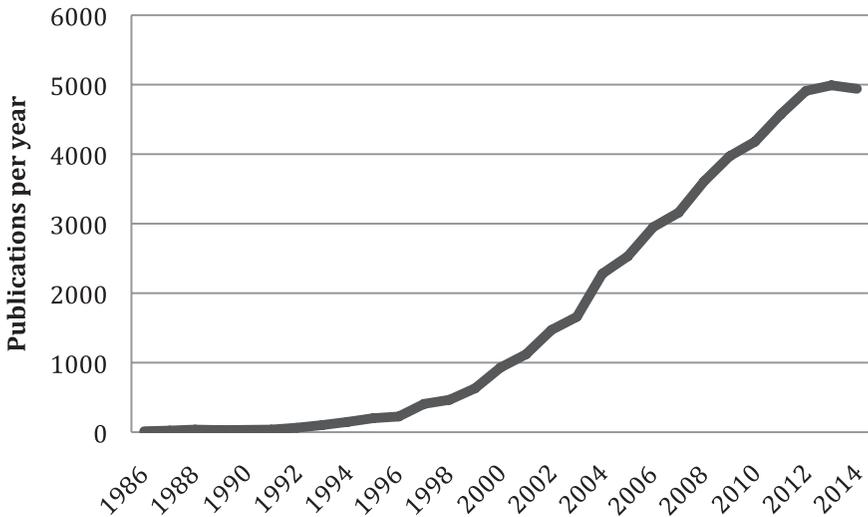
Three models of deliberative democracy

I began with a remark about the meaning of the phrase ‘deliberative democracy’. It has long been asserted – via lists of features derived from Cohen (1986), Elster (1986), Gutmann and Thompson (1996), Fung (2003) and many others – that deliberative democracy is about subjecting proposals for action to public reasoning rather than to majority votes or some market-based procedure. Such a definition would receive widespread academic assent and yet is misleading: it glosses over a variety of early starting-points, aims and developments. Some of the literature has been inspired by Habermas’s (1984) ideal-speech situation and his theory of communicative action more broadly; others have their origins in American federalist, progressive, even Deweyan, traditions. Some has been an attempt to rescue democracy from the devastating attacks of public-choice theorists, by providing a richer description of everything that leads up to a vote; some is rooted in long-standing critiques of technocratic policy-making and planning in a variety of policy domains; some is rooted in more localist, participatory, communitarian traditions; sometimes it is anti-capitalist, anti-corporatist, anti-globalist. Some early literature was explicitly descriptive, particularly that which attacked aggregative models, while other literature was more exclusively normative. And, in the process of arguments over principles, the consensus criterion was downgraded, if not completely discarded, to the point that most theorists now agree that democracy is a system of ‘talk, then vote’ (Goodin 2008: 108), while numerous other challenges from different democrats about the nature and role of rationality,¹ amongst other things, have been integrated into a broader deliberative democratic story.²

Despite that variety of starting points and theoretical developments, the empirical literature, at least in political studies, quickly established a fairly standard set of normative principles – informed, reason-sensitive, other-regarding, equal and inclusive discussion, originally oriented to consensus – and began a search for, or even creation (Fishkin 1991) and analysis of, real-world examples (Bohman 1998). In almost every case, the search focused very quickly on deliberative mini-publics (Fung 2007), small-scale democratic innovations involving randomly selected citizens, a conventional – and therefore to be treated sceptically – list of which seems to be mandatory in half the papers published on the subject.

-
1. The introduction to this volume and other contributions advance a rather hard, Socratic account of rationality, which does not sit well with many deliberative theories. Early statements of competing accounts of rationality appear in Dryzek 1990 and Forester 1984; see also Chambers 2003.
 2. An intellectual history of deliberative democracy is yet to be written, but existing accounts tend to present an implausibly linear story of phases of development from a single starting point (Elstub 2010); or capture some of the variety but not other important strands (Bächtiger *et al.* 2010). All history is simplified, selective; but ideas also swim in chaotic soups (Kingdon 1984), a messiness that my account here attempts to capture.

Figure 9.1: Publications on 'deliberative democracy' in Google Scholar, by year



There have been exceptions, Uhr (1998) among them, but, otherwise, this rush to the small, participatory scale was near-universal and very productive, revealing examples of innovative practice; lessons about good procedure; a revival of belief in the deliberative capacities of ordinary people and the benefits of involving them directly in solving controversies; reflection on and recasting of theory; and a surge of experimentation with and, to a lesser but increasing extent, institutionalisation of participatory practices both in day-to-day governance and – as this volume attests – grander constitutional moments (Niemeyer 2011; Thompson 2008). Increasingly sophisticated empirical tools were developed and the literature has expanded steadily for fifteen years straight (*see* Figure 9.1).

However, important things were lost in the process. First, rather than challenging technocratic visions, a great deal of deliberative effort rapidly became technocratic itself, focused on institutional design and experimentation to the point that, in a great many cases, deliberative practice became more about answering academic questions, or the competitive marketing and deployment of particular technologies of engagement, than empowering citizens.³ This was

3. I have been particularly critical of the deliberative poll method in this regard (Parkinson 2006a: 48, 129–30). While it has been held up as the gold standard by some academics (Mansbridge 2010), its pre-test–post-test structure is better suited to answering academic questions than democratic ones. But similarly technocratic imperatives have been noticeable in deliberative experimentation in health policy-making in the UK (Milewa, Valentine and Calnan 1999; Mort, Harrison and Wistow 1996) and development policy more generally (Cooke and Kothari 2001; Gaventa 2006). See Olsen and Trenz 2014 and Papadopoulos and Warin 2007 for related critiques; Hendriks and Carson 2008 for an interesting discussion of the marketisation of public deliberation; and Niemeyer 2011 for a counter-argument about the emancipatory potential of mini-publics, despite their other problems.