

Constitutional Experiments: Representing Future Generations Through Submajority Rules*

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DEMOCRATIC decisions not only affect present people, but also near and distant future generations. This is, for instance, the case when it comes to decisions or policies about the use of various natural resources, biodiversity, new forms of biotechnology and the use and storage of nuclear energy. Despite the fact that voters and their elected representatives have the power to make decisions that can have a serious impact on the living conditions of future people, succeeding generations do not have the opportunity to influence present political decision-making processes. Against this background, I believe that there is a need to consider reforms that can add to the overall representativeness of current constitutional democracies by protecting near and remote future generations who cannot gain access to current political decision-making processes.

The purpose of this article is to propose and consider two new constitutional devices, the aim of which is to give minorities of legislators a political tool to represent and protect the interests of future generations. The common denominator of the proposed reforms is that they represent examples of submajority rules that grant defined minorities of legislators certain procedural rights. The first device empowers a minority of at least one-third of the legislators to demand that the final enactment of a law proposal should be delayed until a new election has been held, if they believe that the law in question can inflict serious harm upon posterity. The second ensures that a minority of at least one-third of the legislators can require a referendum on a bill that can have a serious adverse impact on the living conditions of future people. This proposal can be termed the *submajority rule model*. I will argue that these submajority rules can serve as useful means to encourage more future-oriented public deliberations and decisions. Although the proposals face some important

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problems, I will argue that they can be defended on the basis of central ideas and ideals in recent theory of deliberative democracy.

The article proceeds as follows. Section I sets out some ideas and assumptions about the value of public deliberation that will play an important role in my argument for the suggested reforms. In section II, I will present the submajority rule model and some alternative models for political representation of posterity that can be found in the political philosophy and theory literature. Finally, the aim of sections III and IV is to consider the pros and cons of the proposed constitutional reforms.

I. THE VALUE OF PUBLIC DELIBERATION

Advocates of the deliberative model of democracy emphasise that collectively binding decisions should, ideally, be made on the basis of a thorough process of public deliberation—where all the affected parties (or their representatives) have the opportunity to participate and present critical arguments for and against the proposals that have been put forward. The primary aim is to establish a democratic decision-making procedure that provides an open and free forum for a reasoned dialogue and argumentation that can lead to more rational and impartial decision outcomes.¹

Since it is impossible in modern states to arrange face-to-face discussions across the entire community, it is important to make a distinction between two aspects of deliberation—the interpersonal and the intrapersonal.² The *interpersonal* aspect refers to the process of discussion with others or interpersonal communications—e.g. a debate in parliament or other public fora. The *intrapersonal* aspect refers to an individual's internal reflections (or considerations), for instance, on political issues—e.g. when we read a newspaper or watch a political discussion on TV and deliberate about the pros and cons of alternative policies. Political deliberation involves both these types of deliberation, and they affect each other. On the one hand, interpersonal discussion can induce and shape processes of intrapersonal deliberation when an individual considers the arguments for and against a certain measure. On the other hand, intrapersonal deliberation is a precondition for understanding others and responding to the views and arguments they offer in public debates and conversations. In modern mass democracies, I believe that intrapersonal deliberation inevitably has to do much of the work of political deliberation.

In the theory of deliberative democracy importance is attached to the process of interpersonal and intrapersonal deliberation that takes place among the

¹Important contributions to the recent revival of the theory of deliberative democracy are presented by: Elster 1986; Manin 1987; Cohen 1989; Dryzek 1990; Rawls 1993; Habermas 1996; Gutmann and Thompson 1996; and Goodin 2003.

²A similar distinction between the 'external-collective' (i.e. interpersonal) and 'internal-reflective' (i.e. intrapersonal) aspect of deliberation is drawn by Goodin (2003, ch. 9).

decision-makers *before* the issue in question is decided through voting. One can make a distinction between three kinds of value of deliberation—the intrinsic, the instrumental and the legitimating value. Here I will only give an account of central aspects of the instrumental and the legitimating value of deliberation, since these are the most important for the present purposes.³

A. THE INSTRUMENTAL VALUE OF DELIBERATION

Public deliberation and discussion can in several ways produce valuable results. First of all, a thorough process of deliberation prior to voting can improve the quality of collective decisions. It can expand the information basis of decision making and enhance the level of reflection among the participants. In a process of open and free public discussion, people who have different perspectives, interests and social positions will have the opportunity to put forward their proposals, values and arguments, and this is likely to expose both other citizens and politicians to a broad range of perspectives. Moreover, it enables others to subject these views and perspectives to critical scrutiny and offer new and alternative solutions to shared problems. Debate among individuals and groups with different opinions can be a creative and productive force, and it can be regarded as a dynamic educative process (or learning process), where people who have different backgrounds and vantage points will get access to views and information that they have never considered or thought of.⁴ In this way, public deliberation can have positive effects with regard to the distribution and dissemination of information, knowledge and ideas, and this can in turn lessen the impact of bounded rationality.⁵

Among proponents of deliberative democracy the hope is that reasoned dialogue and inputs of new information will enhance the level of reflection among decision-makers and have a bearing on people's preferences and the way they vote. Public deliberation is assumed to have a *transformative effect*, in the sense that the initial or pre-deliberative preferences of the participants will undergo a change that can lead to more rational and impartial decisions.⁶

Second, public deliberation can be valuable because it can 'force' or encourage participants to put forward proposals and arguments that are impartial and public-spirited in the sense that they are acceptable or reasonable to all the parties involved. This point rests on the assumption that when we are defending our

³Public deliberation is sometimes said to have intrinsic value independently of the results of deliberation, because participation in public deliberation is an essential part of a good life.

⁴It is important to stress that diversity, disagreement and dissent can be a positive force for and promote deliberation. The outlined positive effects will not necessarily arise in discussions among like-minded people.

⁵The problem of *bounded rationality* refers to the effects of the fact that our reasoning abilities, knowledge and imaginations are limited and fallible. This problem is discussed in more detail in section III.B.

⁶This presupposes that preferences are not fixed and stable. I will return to this in section II.B.

views and proposals publicly, we tend to highlight public-spirited reasons and suppress narrowly self-interested reasons. The reason for this is that we cannot expect to convince our audience if we present narrowly self-interested reasons for our proposals instead of offering public-regarding arguments. According to Robert Goodin, ‘there will always be a certain amount of *anticipatory internalization* in such settings. Those choosing actions and knowing that they will have to be defended in the public forum will ask themselves, ‘How would I justify this to X?’, even before X asks for an explanation’.⁷

These assumptions about the effects of public deliberation and anticipatory internalisation do not rule out that the participants might be hypocritical or strategic. However, as pointed out by Jon Elster, the ‘civilizing force of hypocrisy’ may produce desirable results.⁸ First, it may ‘launder’ preferences, in the sense that certain views and arguments (e.g. narrowly self-interested arguments or racial prejudice) are foreclosed in the public domain.⁹ Second, the psychological mechanism of self-censorship that is at work in public discussion may even prevent self-interested proposals from coming onto the voting agenda.¹⁰ Third, over time, self-censorship might induce hypocritical participants to actually adopt ‘reasonable’ positions to which they earlier paid only lip-service. In these ways, the combination of anticipatory internalisation and the civilizing force of hypocrisy can provide an ‘input filter’ in public debate and agenda-setting that can have positive effects on outcomes.¹¹

Third, public deliberation can be valuable because it can improve the moral and intellectual qualities of the participants. More precisely, participation in public deliberation can have good effects on the people who participate with regard to the development of both human and civic virtues (e.g. a concern for the public good), independently of the effects discussion have on the quality of decisions.¹² Despite the fact that these empirical assumptions are open to doubt, I agree with William Galston when he points out that it is at least plausible to conjecture that under appropriate circumstances, political engagement helps develop civic virtues, as well as intellectual and moral capacities.¹³ The following discussion—especially about the value of citizen involvement (see e.g. section III.C)—will be based on this more modest version of the claim.

⁷Goodin 1996, p. 846, italics added.

⁸See Elster 1986, pp. 112–113 and Elster 1995. See also Gosseries (2008) for a critical discussion of Elster’s theory.

⁹See also Sunstein 1993, p. 244. According to Sunstein, the civilizing force of hypocrisy might also ‘bring about a transformation in preferences and values, simply by making venal or self-regarding justifications seem off-limits’.

¹⁰See Fearon 1998.

¹¹See also Goodin (1986) on the idea of input filters.

¹²Similar ideas play an important role in John Stuart Mill’s discussion of the value of citizen participation in public debate and political decision-making. See, e.g., Mill 1991/1861, chs 2 and 3.

¹³Galston 2004, p. 263.

B. THE LEGITIMATING VALUE OF DELIBERATION

From the point of view of deliberative democracy, the normative legitimacy or the worthiness of recognition¹⁴ of collectively binding decisions is not only the product of majority rule. Democratic decisions should also result from a free and open process of thorough and reasoned public deliberation, where all affected parties or their representatives have had the opportunity to participate.¹⁵ For present purposes, one can make a distinction between two aspects of this view on the normative legitimacy of democratic decisions. The first concerns the legitimating force of deliberation, while the second concerns the all affected principle.

The reader should bear in mind three assumptions about *the legitimating force of public deliberation* that are in the background of my argument for the proposed submajority rules (see sections III and IV). First, a process of open and free public discussion confers legitimacy on democratic decisions, because it is essential for making political processes and decisions subject to public scrutiny and criticism. In this way, public deliberation also has an important power-checking function. Second, the legitimating force of public deliberation is closely related to its epistemic value. For example, a thorough and reasoned process of public deliberation confers legitimacy on democratic decisions, because thinking together in a communicative way can improve the information base and understanding of the decision-makers, and lead to more informed and enlightened decisions.¹⁶ Third, the legitimating force of deliberation is related to respect for those who are affected by the decisions. If a group of persons makes a collectively binding decision without a prior process of interpersonal and intrapersonal deliberation where alternative courses of action and their impact on various affected parties are considered seriously, then the decision-makers do not treat those affected with respect, and the legitimacy of the decision is undermined.

The second aspect of the outlined view on the normative legitimacy of democratic decisions concerns a principle that plays an important role in democratic theory—*the all affected principle*.¹⁷ For present purposes, this

¹⁴The term ‘normative legitimacy’ refers in this context to what Habermas has called *Anerkennungswürdigkeit*.

¹⁵Some advocates of deliberative democracy also claim that the process of deliberation must satisfy certain procedural norms that are supposed to promote rational and impartial discourses. See, for example, Habermas (1996). Such norms are discussed more closely in Alexy (1990) and Ekeli (2005). See also Peter (2007) for an interesting taxonomy and discussion of different views on the normative legitimacy of democratic decisions that can be found in recent theory of deliberative democracy.

¹⁶Several aspects of the epistemic value of deliberation are discussed in more detail in sections I.A and III. See also Estlund (2008) for an interesting discussion of why the epistemic value of public deliberation confers normative legitimacy on democratic decisions.

¹⁷A number of different versions of this principle have been suggested and defended by political philosophers and theorists, and its implications are contested. See, for example, Dahl (1989, pp. 119–31), Held (1995), Shapiro (2003, pp. 53–5), Goodin (2007) and Gosseries (2007).

principle can be formulated like this: everyone whose living conditions and life-prospects are seriously affected by a collectively binding decision, should also have the opportunity to influence the decision process and participate or be represented in the making of that decision.¹⁸ I agree with Ian Shapiro that this principle is best thought of as a guide for the direction of institutional reform, and that the claim to a democratic say or representation in collective decision-making processes becomes particularly strong ‘when basic interests are at stake, rendering people vulnerable to domination by others’.¹⁹

This version of the all affected principle seems to imply that at least democratic decisions that significantly bear upon the lives of posterity cannot be regarded as legitimate unless future people have been given a voice in the decision-making process. From this line of reasoning, it follows that future generations ought to be represented in political decision-making processes that significantly affect them,²⁰ provided that such representation is possible—and desirable all things considered.²¹ Against this background, I believe that it is important to consider new forms of political representation that can give future generations a voice in present political decision-making processes.²²

II. THE SUBMAJORITY RULE MODEL AND ITS ALTERNATIVES

Over the last few years, the issue of political representation of future generations has received increasing attention in political philosophy and theory. Nevertheless, there has been surprisingly little focus on the issue of institutional design, in the sense that few attempts have been made to come up with proposals for new forms of political representation of posterity. There are, however, a few noteworthy exceptions. In what follows, I will briefly present and consider these alternative models of representation before I give an account of the submajority rule model.²³

¹⁸I will regard this version of the all affected principle as a *prima facie* principle.

¹⁹Shapiro 2003, p. 53. See also Shapiro 2003, pp. 52–5.

²⁰This conclusion also seems to follow from Jon Elster’s claim that the notion of deliberative democracy ‘includes collective decision making with the participation of all who will be affected by the decision or their representatives’ (Elster 1998, p. 8). It should be noted that this line of argument can also serve as a justification for giving a voice to other groups—for example, foreigners who are significantly affected by democratic decisions in another state. However, it should be pointed out that in contrast to future generations, foreigners and their governments do have some opportunities to influence policy-making processes in other states.

²¹See Gosseries (2007) for an interesting discussion of the desirability of representing future generations on the basis of the all affected principle.

²²As a referee has pointed out to me, it is worth mentioning that I believe that one does not have to endorse a deliberative model of democracy in order to find the proposed submajority rule model defensible.

²³In addition to the models presented in this section, there are some other interesting proposals. For example, Agius and Busuttill (1998) contains several different proposals to set up a guardian or an ombudsman to represent the interests of future generations in political and legal fora. Furthermore, Van Parijs (1998) presents and considers a number of different proposals.

A. ALTERNATIVE MODELS FOR THE POLITICAL REPRESENTATION OF POSTERITY

The presumably best-known model for political representation of posterity has been proposed by Andrew Dobson, and it can be termed the *restricted franchise model*.²⁴ This model implies that some seats in legislative assemblies should be reserved for special representatives of future generations (hereafter F-representatives), who should be granted law-making competence. Furthermore, he suggests that these representatives should be democratically elected, but the rights (a) to elect F-representatives and (b) to serve as F-representatives are restricted to what he calls the ‘environmental sustainability lobby’ (i.e. environmental groups and organisations). Thus, Dobson’s model seems to rest on the assumption that environmental organisations and their members are better suited to represent and promote future interests than other persons and groups.

Dobson’s restricted franchise model faces two important problems. First, his model implies that members of the environmental lobby have two votes each, while the rest of the electorate only has one. This is problematic with regard to the democratic ideal of ‘one person, one vote’.²⁵ A second line of criticism is that Dobson’s model appears to close off both debate and reasonable disagreement about the controversial issue of who should be empowered to serve as representatives or spokespersons for future generations, in the sense that it gives one particular group or movement (i.e. the sustainability lobby) with a restricted range of perspectives this privileged responsibility. This seems to be problematic from the point of view of deliberative democracy.²⁶

More recently, I have proposed an alternative *extended franchise model*, and this represents an attempt to avoid the outlined problems confronting Dobson’s restricted franchise model.²⁷ Like Dobson’s proposal, the extended franchise model implies that some seats in the legislative assembly (for instance 5%) should be reserved for future generation representatives who are granted law-making power. But, in contrast to Dobson, I suggest that the whole electorate should have the right to elect F-representatives in addition to present generation representatives (hereafter P-representatives). This means that all citizens who have the right to vote would have two votes each. Moreover, I argue that the right to serve as F-representatives should be open to everyone who cares about the well-being of posterity. More precisely, it should be open to anyone who cares for

²⁴See Dobson 1996. For reasons that will become clear below, it is apt to call Dobson’s model a restricted franchise model. Dobson proposes this model as one possible solution to the problem of how to get the interests of future generations taken seriously in democratic fora.

²⁵Dobson offers the following response to this objection: ‘One way of catering for this might be to deprive the proxy generation of its vote for the present generation and leave it with a vote for future generations. . . . The sustainability lobby might be prepared to accept such an arrangement in respect of the following thought: that a vote for future generations is also (largely but not wholly) a vote for a particular type of present politics—the sustainability politics for which they would vote if they had not forgone the right to do so’ (Dobson 1996, p. 134).

²⁶This problem is discussed in more detail in Ekelı 2005, pp. 435–7.

²⁷See Ekelı 2005.

the welfare of future people to establish what can be termed F-parties ('Future-parties'), that is, political parties founded with the purpose of protecting the interests of future generations. If such an electoral system is adopted, the voters can elect F-representatives from F-parties in addition to P-representatives from ordinary political parties. The perhaps most important problem facing this model concerns its effectiveness: given the outlined institutional framework, to what extent will voters and F-representatives take the interests of future generations into account when they cast their votes?²⁸

A third model for political representation of posterity has been proposed by Tine Stein, and this can be termed the *ecological council model*.²⁹ Her suggestion is to establish an ecological council ('ein ökologischer Rat') that should function as a consultative chamber of the legislature, and its role can in certain respects be compared with that of the British House of Lords. Like the House of Lords, the council should be granted suspensive veto power (i.e. the right to delay legislation), and its main task is to review the impact of law proposals and regulations on the environment and recommend revisions or amendments. If the ecological council reaches the conclusion that a given bill passed by the legislature can cause serious environmental harms, it can use its suspensive veto power to slow down the process of decision-making and public deliberation. The hope is that this can improve the quality of decisions made in the legislature. Furthermore, Stein suggests that the members of this council ought to be elected by the legislature. Therefore, the voters cannot hold the members of the council directly accountable by means of periodic elections. Despite the fact that this move can be regarded as problematic from a democratic point of view, Stein views this as an advantage because the purpose is to establish a deliberative chamber of the legislature, where the members should not have to worry about their popularity and re-election. Her aim is to design a system that can help secure the independence of the members of the council from political parties and the political branches of government. In this connection, she suggests two devices. First, the members of the council should not have the opportunity to be re-elected. Second, they should be elected for longer terms than ordinary legislators who are usually elected for four or five year terms. More precisely, she recommends that the members of the council can stay in office for nine year terms.

I believe that this constitutes an interesting model for the political representation of posterity that deserves more attention. In addition, the delay device that Stein suggests can have some of the same positive effects as the two proposed submajority rules that I will consider below. Having said this, Stein's ecological council model is open to two important objections. Since these are relevant for an assessment of the ecological council model as compared with the

²⁸See Ekeli (2005, pp. 438–47) for a more thorough discussion of this problem.

²⁹See Stein 1998a; 1998b.

proposed submajority rule model, it is worth considering them before proceeding. First, Stein does not describe the function and powers of the council in detail. For example, she does not specify how long the council should be allowed to delay legislation. The second objection is related to the selection of the members of the council and whether her model is adequate to secure independence. If the goal is to establish an independent deliberative body that should be shielded from the struggles between political parties and partisanship, Stein's proposed election procedure seems to face at least one serious problem. Since the members of the council are elected by the legislature, it is not unlikely that the party alignments and blocs in the legislature will be reproduced in the council. The more power the council is granted (e.g. the longer the council has the power to delay the final enactment of bills), the stronger incentives political parties will have to select and elect people who are likely to support their party's views and policies. If party alignments are reproduced in the council, it will lose any plausible claim to independence. This can be an obstacle to the establishment of an independent deliberative forum that is not marked by party politics. Moreover, if the ecological council becomes a clone of a legislative assembly dominated by partisan struggles, this would undermine the new system, since much of the point of introducing this reform seems to disappear.

Finally, it might be worth mentioning an experiment from real life. In 2001, the Israeli parliament—the Knesset—enacted a law that created a commissioner for future generations, but this position has now been dismantled again. The position was called the *Knesset Commissioner for Future Generations*.³⁰ The Knesset Commissioner was an organ of the parliament, and her primary role was to function as an advisor in the legislative process. Among the most important powers of the Knesset Commissioner was (1) to evaluate bills and regulations and give opinions regarding bills and regulations before the parliament and parliamentary committees; (2) to participate in the debates of the parliamentary committees; (3) to initiate bills that can promote the interests of future generations; and (4) to demand information from governmental agencies and government corporations. The Knesset Commissioner was appointed through a two-step process. First, a public committee composed of three members of parliament and three experts (i.e. faculty members from institutions of higher education) selected and recommended two or more candidates for the position to the Knesset. Thereafter, the Knesset Speaker made the final decision.³¹ The Knesset Commissioner's term of office was five years, but the Knesset Speaker had the right to appoint him/her for one additional term of office.

³⁰See also Shoham and Lamay (2006) for a presentation of the Knesset Commissioner for future generations.

³¹This process is described in more detail in the *Knesset Law*, Section 8, Clauses 36 and 38. This law is included as Appendix 13.1 in Shoham and Lamay (2006).

B. THE SUBMAJORITY RULE MODEL

The task of assessing these alternative models of representation in detail is too large to undertake here. Instead, I will propose and consider two new constitutional devices, the aim of which is to give minorities of legislators a political tool to represent and protect future interests. The common denominator of the proposed constitutional reforms is that they represent examples of what can be termed *submajority rules*, that is, ‘a voting rule that authorizes (i) a predefined numerical minority within a designated voting group (ii) to change the status quo (not merely to prevent change) (iii) regardless of the distribution of other votes’.³² In a recent interesting analysis of submajority rules, Adrian Vermeule points out that submajority rules are rarely or never used directly for final substantive decisions, such as the passage or defeat of legislation. Rather, they are used for procedural matters—for example, to set procedures and agendas for public deliberation and voting. This also applies to the submajority rules that I propose, which can be regarded as procedural rights ascribed to minorities of legislators.

(1) *The Right of Minorities to Demand Delays*

A minority of at least one-third of the legislators should be granted the right to demand that the final enactment of a law proposal should be delayed until a new election has been held, if they believe that the law in question can inflict serious harms or risks upon posterity. In other words, a minority is allowed to require that the bill must be enacted after an intervening election.

(2) *The Right of Minorities to Demand Referendums*

A minority of at least one-third of the legislators should be empowered to require a referendum on law proposals that can have a serious adverse impact on the life-conditions of posterity. In this way, a minority can place an issue before the people for final approval. With regard to this proposal it is important that the electorate get sufficient time to gather relevant information as well as to consider and discuss the bill. Therefore, there should be a time interval of at least one year from the minority calls for the referendum until it is held. On the other hand, in order to avoid a too time-consuming process, I believe that there should be a limit to the time allowed between the minority’s call for a referendum and the referendum itself—e.g. two years.³³

At this point, it is important to make two clarifications with regard to the proposed reforms. In the first place, a minority of legislators should only be allowed to demand a delay or a referendum if they present a *prima facie* case for

³²Vermeule 2005, p. 76.

³³The term ‘submajority rules’ is not meant to suggest that the aim of the proposed devices is to protect a minority. Numerically speaking, future generations are not a minority. The point of the proposals is to give a predefined minority of legislators certain political tools or procedural rights to protect future interests.

the assumption that the law proposal in question can inflict serious harm or risk upon posterity. Thereafter, the burden of proof should shift to those legislators who reject the minority's harm scenario. Second, since conflicts about the reliability of competing harm scenarios involve issues of constitutional law (i.e. such conflicts concern the distribution of powers between minorities and majorities as specified in the constitution), I believe that they should be resolved by a special constitutional court or by some similar body such as the state's supreme court.³⁴ In cases where controversies arise, the legislators who want to prevent a delay or a referendum (for instance 10% of the representatives in the parliament) should be allowed to initiate legal proceedings. But, as pointed out above, in such cases the onus of proof should rest with those who reject the minority's harm scenario after the minority has presented their *prima facie* case. It should, however, be underlined that when controversial cases are brought before a court, the court has the power to reject a delay or a referendum in cases where it does not find the *prima facie* case offered by the minority convincing, that is, if the court assumes that the law in question does not expose posterity to risks that can seriously harm their living conditions.³⁵

Like the alternative models of representation, the submajority rule model is not ideal with respect to normative criteria of representative legitimacy. This is because future generations cannot authorise their representatives to act on their behalf, nor can they hold them accountable through periodical elections. Since future people cannot be *directly* represented like the present voters, authorisation and accountability are absent as sources of representative legitimacy.³⁶ These unavoidable problems of representative legitimacy do not, however, mean that the submajority rule model cannot provide a useful institutional framework for representing future generations. In section III, this claim will be elaborated.

Before proceeding, it should be noted that the following argument for the submajority rule model in section III will rest on two assumptions about the preferences and motivations of citizens and legislators. First, individuals are not entirely selfish or self-regarding in their role as citizens or legislators. In the political sphere, people are partly motivated by selfishness and partly motivated by public-spirited concerns (e.g. considerations of justice and a concern for others, including future generations, and the common good). Although it is an open and controversial question how widespread and significant these motivations are, it is reasonable to assume that citizens and legislators often have other-regarding or

³⁴Here I assume that the proposed submajority rules are incorporated into the state's constitution and that these constitutional provisions provide the legal basis for resolving the conflicts in question.

³⁵In view of uncertainty and disagreement about the future effects of present policies and the reliability of alternative future harm scenarios, judicial review on the basis of this aspect of the submajority rule model will give courts some degree of law-making and policy-making discretion and power. Such issues are discussed more closely in Ekeli (2007).

³⁶Different sources of representative legitimacy are discussed in more detail in O'Neill (2001) and Ekeli (2005; 2006).

public-regarding preferences and aspirations.³⁷ Second, preferences are not fixed and stable (as indicated in section I.A). Both preferences and motivations are formed in society as a result of a wide range of factors, such as the institutions that structure social interaction (e.g. deliberative institutions and processes) and the information people are exposed to.³⁸ When it comes to the role of inputs of information and the educative effects of deliberative institutions, I will assume that, all else being equal, the better informed agents are about intergenerational issues and the possible future effects of alternative policies, the more likely it is that they will make more enlightened and future-oriented decisions that take the interests and needs of future generations into account.³⁹

III. THE CASE FOR THE PROPOSED SUBMAJORITY RULES

The proposed constitutional procedural devices can, in several ways, indirectly affect decision outcomes, because decisions on procedural matters (i.e. on how decisions should be made) can have effects on outcomes. In what follows, I will argue that the reason for this is primarily that these submajority rules will have important effects with regard to processes of agenda-setting, interpersonal and intrapersonal deliberation, and exchange of information (i.e. distribution and dissemination of information). Moreover, it will be argued that the submajority rule model can provide a future-oriented system of checks and balances that can guard future generations against majority decisions that neglect their vital interests. In light of the assumptions about democratic legitimacy outlined in section I.B, the arguments presented here are also important with respect to the normative legitimacy of democratic decisions.⁴⁰

A. AGENDA-SETTING

Agenda-setting will affect decision outcomes for the simple reason that ‘nothing can emerge as the output of a democratic process unless someone has first put it on the agenda’.⁴¹ In this way, the distribution of power to place issues on the

³⁷See, e.g.: Mansbridge 1990; Sagoff 1988; Christiano 1996; and Sunstein 1997.

³⁸These assumptions are widely held in the literature on deliberative democracy and the transformative effects of deliberative institutions and processes. See, e.g.: Elster 1986; Mill 1991/1861; Goodin 2003; and Sunstein 1997.

³⁹According to one of the referees, the proposed submajority rule model faces the following problem. If the majority of voters and their elected representatives are rational and have selfish preferences that are biased toward the present, they will either (a) not adopt the submajority rule model in the first place or (b) simply vote down the proposals of the future-oriented minority. It should, however, be noted that the latter claim (b) seems to presuppose that the selfish preferences of the majority are stable and fixed *or* that their selfish preferences are extremely difficult (or almost impossible) to change. As I have already explained, my argument does not rest on such assumptions about the preferences of voters and legislators.

⁴⁰I will, however, not relate all the relevant arguments in this section explicitly to the previously outlined assumptions about democratic legitimacy.

⁴¹Goodin 2003, p. 163.

formal political voting agenda, and the distribution of rights to determine how those issues are to be decided play an important role in political decision-making.

The proposed submajority rules will affect the distribution of agenda-setting power, because they will to some extent have the effect of distributing the competence to control the agenda away from majorities to minorities. The reason for this is in part that minorities are empowered to influence how long an issue should be on the agenda, and to decide how the issue should be placed on the formal voting agenda. In this way, minorities are allowed to force the majority to pay more attention to certain issues affecting posterity. The suggested submajority rules can also give minorities of legislators the opportunity to increase the political visibility and the public awareness of the issues in question (These points will be elaborated below). In view of the preceding considerations, it is reasonable to assume that these submajority rules can be—to use Vermeule’s terminology—‘accountability-forcing’. In general, submajority rules can have an accountability-forcing effect if they give minorities the right and opportunity ‘to force the majority to make a highly visible, ultimate substantive decision on a given question, rather than disposing of the issue in some less prominent fashion. Increasing the visibility of final decisions will affect outcomes by increasing the ratio of publicity or discursively justifiable decisions to decisions based on private bargaining’.⁴²

There is also another important way in which the proposed submajority rules can affect agenda-setting, or more precisely, what law proposals are placed on the formal voting agenda in legislatures. Given the costs related to the submajority rules, majorities will in a number of cases be encouraged to put forward more future-oriented law proposals that they believe are acceptable also for minorities who are concerned for the welfare of posterity. The costs I have in mind here are the following. (a) Compared with majority rule voting, both submajority rules create increased decision-making costs, that is, the costs (or time and effort) of securing or negotiating agreement on collective action.⁴³ (b) Devices such as delays and referendums are time-consuming, and moreover will create opportunity costs, that is, the cost of something (e.g. postponing a decision) in terms of an opportunity forgone and the benefits that could have been received from that opportunity. In many situations, majorities and groups of legislators might have strong incentives to avoid these costs, and this is likely to have at least three effects. First, it can encourage majorities to take seriously the views of minorities who are concerned for the welfare of posterity. Second, the costs are likely to reinforce the effect of anticipatory internalisation (see section I.A) at the stage of agenda-setting in parliament. More precisely, those who propose a bill

⁴²Vermeule 2005, p. 79.

⁴³This understanding of decision-making costs is based on Buchanan and Tullock (1962, see e.g. pp. 45–6 and 68–9). Typically, decision-making costs increase as increasingly large majorities are required. Both submajority rules and supermajority rules (e.g. a two-thirds or a three-fourths majority) have higher decision-making costs than majority rule, since they make it more difficult to negotiate agreement on collective decisions.

must carefully consider how they would justify this to the minority. Third, the costs of the suggested submajority rules may even prevent proposals that have adverse future effects from being placed on the formal voting agenda, because they create strategic incentives to avoid proposals that a minority assumes have such effects. This does, of course, not rule out hypocritical proposals. However, in these situations the civilizing force of hypocrisy might have positive effects, in the sense that it can encourage more future-oriented proposals and decisions (see also section I.A).

Before proceeding, it is important to bear in mind that the two submajority rules do not privilege any particular minority of legislators. Any predefined numerical minority of legislators, who are concerned for the welfare of posterity, will be given the outlined tools, for instance, to influence the process of agenda-setting.

B. PUBLIC DELIBERATION AND EXCHANGE OF INFORMATION

An important aim of the proposed constitutional devices is to improve the process of deliberation and decision making about issues that can have a serious impact on the living conditions of posterity. The purpose is to improve the basis of information and enhance the level of reflection among legislators and voters. From an ethical point of view, one can argue that we should introduce such constitutional reforms because present moral agents have a duty to build their prognoses about the future effects of their decisions and actions on the best available knowledge. It could also be argued that we, in some situations, have a duty to improve our information base before we make a decision in order to avoid imposing grave risks on posterity.

Since both submajority rules allow minorities to slow down the process of collective decision-making, they can promote a more thorough and well-informed process of interpersonal and intrapersonal deliberation about certain issues or law proposals. First of all, to the extent that minorities use their right to demand delays or referendums in order to protect future needs, this will ensure that both the electorate and politicians have the opportunity to consider the proposals in question more closely before a decision is made by simple majority vote either in the legislature or in a referendum. Second, in this process they will have time to gather and distribute new and relevant information which can in turn affect the subsequent process of deliberation, agenda-setting and decision making. For example, distribution and dissemination of new information can have effects on agenda-setting, because '[l]egislative majorities set their agendas in light of the information known to them and the information known to relevant publics; by changing the latter, submajorities may force a new agenda item upon the majority'.⁴⁴

⁴⁴Vermeule 2005, p. 83.

Third, if a minority requires a delay or a referendum, decision-makers will have more time to come up with, discuss and consider alternative courses of action, which might have more desirable consequences with regard to future generations than the bills that were initially introduced. The hope is that this can initiate a dynamic educative process of public deliberation where relevant decision-makers and publics are exposed to a diversity of ideas, proposals and problems. Moreover, compared with decision procedures which make it possible to make more hasty and less visible decisions in the legislature (i.e. the status quo in most democratic states), the proposed decision rules can also improve the quality of collective decisions, since decision-makers (both citizens and legislators) are given a better opportunity to pool their knowledge, insight and experience prior to voting. In these ways, the proposed devices can lead to a process of interpersonal and intrapersonal deliberation that might lessen the problem of bounded rationality—the problem that our knowledge, imaginations and reasoning abilities are limited and fallible. According to James Fearon, public discussion might lessen the impact of bounded rationality for two reasons. ‘First, it might be “additively” valuable in that you might think of some possibility that hadn’t occurred to me, and vice versa. Second, it might be “multiplicatively” valuable in that in the course of discussion we might think of possibilities or problems that would not have occurred to either of us by ourselves’.⁴⁵

C. CITIZEN INVOLVEMENT AND DELIBERATION

Devices such as delays and referendums can, as indicated above, induce more public awareness and engage citizens more directly when it comes to issues affecting future generations. First, if minorities use their right to require delays, this will ensure that the people have the opportunity to consider the law proposal more closely during election campaigns. Besides, citizens would be given the chance to determine the composition of the legislative assembly before the law proposal can be enacted through majority vote. Second, a direct democratic device such as a referendum can provide a useful institutional mechanism for engaging citizens more directly in public deliberations about environmental and technological issues that can have a serious impact on future people. In this connection, it is worth noting that referendums can change the demand for political information and the supply of it. On the demand side, referendums can increase the incentives of voters to gather information, partly as a result of more intense public discussions before the popular vote. On the supply side, referendums increase the incentives of politicians and the media to provide information. Here it should be pointed out that if politicians and interest groups want to win a referendum, they are forced to inform the public about the reasons why they are for or against the policy in question. During referendum campaigns,

⁴⁵Fearon 1998, p. 50.

these political actors have to provide information on the issue at stake, and they must publicly discuss and critically scrutinize the arguments and information offered by their opponents.⁴⁶

At this point, an interesting question related to both the submajority rules emerges. This is whether, or to what extent, delays and referendums will encourage present citizens to internalise future interests, in the sense that they will take the needs of posterity into account when they cast their votes. This is a difficult question with no easy answer. Nevertheless, in view of the preceding discussion, it is likely that the proposed devices will increase the political visibility and promote more public debate and awareness about issues that affect future generations. There is also considerable evidence that people's preferences and judgements change when they are exposed to new information and diverse perspectives—particularly during political campaigns.⁴⁷ If these assumptions are correct, delays and referendums can make the interests and needs of future generations more 'imaginatively present' in the minds of the voters (i.e. their intrapersonal deliberations)—despite the fact that future people cannot be 'communicatively present' in public or interpersonal deliberations.⁴⁸ This might in turn encourage voters to consider the relevant political issues from a more future-oriented perspective and to behave in a more principled and impartial fashion. It is, of course, an open question to what extent the proposed devices have the ability to change preferences, values and beliefs in this way. More public debate, inputs of information and media attention about issues affecting posterity cannot guarantee that the electorate will, in fact, take the needs of succeeding generations into account when they cast their votes. I do, however, believe that it is an important precondition for achieving this end.

D. A FUTURE-ORIENTED SYSTEM OF CHECKS AND BALANCES

Systems of checks and balances are usually introduced in order to guard against abuse of state power and despotism (or arbitrary use of state power). One central aim of checks and balances is to provide a guard against the danger that the rulers (e.g. majorities of legislators) use the power that is conferred on them against the ruled. The submajority rule model can be regarded as a future-oriented system of checks and balances, the purpose of which is to guard future generations against majority decisions that neglect their vital interest and needs. The main aim of the proposed submajority rules is to empower minorities of legislators to function as watchdogs for posterity in present political debates and struggles—where it is

⁴⁶See Benz and Stutzer 2004, pp. 33–4. An interesting theoretical and empirical analysis of how referendums affect the demand for and the supply of political information is found in Benz and Stutzer.

⁴⁷See, for example, Markus and Converse (1979) and Gerber and Jackson (1993).

⁴⁸The distinction between 'communicative presence' and 'imaginative presence' is discussed in Goodin 2003, chs 9 and 10.

often difficult to hear the future, because the present shouts while the future whispers.⁴⁹ They grant a predefined numerical minority of legislators, who are elected and accountable through periodical elections, at least some power to police and control majorities in the legislature. Thus, the submajority rule model has an important power-checking function, in the sense that it can prevent the process of decision-making about issues affecting posterity from being subject to the immediate and unlimited control of majorities of legislators. Since future generations cannot themselves influence present political decisions that can have a serious impact on their living conditions, minorities of legislators should be granted the suggested procedural rights to represent and protect posterity.

It should be pointed out that these submajority rules do not function as checks that prevent a majority from acting at all. Rather, they only prevent a majority from acting hastily. The right of minorities to demand delays and referendums does not empower a minority to block a majority decision, but only slows down the process of deliberation and decision making. In addition, the proposed submajority rules will ensure the involvement of multiple actors (i.e. citizens, legislators and submajorities of legislators) in this process.

IV. PROBLEMS FACING THE SUBMAJORITY RULE MODEL

So far I have presented several arguments for the suggested constitutional reforms. In what follows, I will consider some problems facing the submajority rule model.

A. STRATEGIC ABUSES

The first problem confronting the suggested devices is that they can be abused by minorities for strategic or egoistic reasons. It might be tempting for a minority in the parliament—who are not concerned for the well-being of future generations—to require for instance a delay in the hope that a bill they dislike or oppose would never be passed. To what extent such strategic abuses of the suggested devices are likely to occur in the real world is very difficult to predict. Nevertheless, the problem of strategic abuses must be taken seriously when assessing the desirability of the proposed reforms.

In order to analyse how the problem of strategic abuses affects the desirability of the submajority rule model, it is worth keeping the following considerations in mind. First of all, even if certain minorities abuse the devices, the submajority rules can also in such cases create a more thorough, future-oriented and hopefully reasoned process of public deliberation about the issues in question. Second, the requirement that the minority has to present a *prima facie* case for demanding a

⁴⁹Here I have rephrased the former US Vice President Al Gore who has claimed that a significant problem facing democratic systems is that ‘the future whispers while the present shouts’ (1992, p. 170).

delay or a referendum will presumably reduce the danger of strategic abuse. This is because it would make it difficult for a strategically motivated minority to come up with cogent public justifications for demanding delays or referendums for the sake of future generations. And if the minority finds a way to present such a case, it might lead to a public debate in which the civilizing force of hypocrisy can produce desirable effects. Third, minorities who more or less openly abuse the suggested devices will expose themselves to the risk of being punished during elections. Over time, I believe that it is reasonable to assume that voters will punish representatives who more or less openly abuse these devices, since such representatives can obstruct an effective and constructive decision-making process in the legislative assembly. The risk of being thrown out of office at the next election can be a strong incentive to avoid at least obvious abuses.

B. THE BURDEN OF PROOF

As I pointed out above (section II.B), the suggested reforms imply that a minority of legislators who wants to require a delay or a referendum must present a *prima facie* case for the assumption that the bill under consideration can inflict serious harm or risk of harm on future generations. Thereafter, the onus of proof should shift to those legislators who reject the reliability of the minority's harm scenario. Some might object that this distribution of the burden of proof is unfair because the minority is given an advantage (or a procedural advantage) over its opponents.

Although something can be said for this line of criticism, a good case can, in my opinion, be made for the outlined distribution of the burden of proof in view of uncertainty about the future effects of present decisions and considerations of procedural fairness. This argument primarily rests on the previously outlined assumptions about the normative legitimacy of democratic decisions—for example, the assumption that the legitimate claim to a democratic say or representation in collective decisions is particularly strong when vital interests are at stake (section I.B). If we for the moment set aside the problem of strategic abuses, we can assume that the minority sincerely (or in good faith) believe that the law proposal under consideration in parliament can cause serious future harm—despite the fact that other groups of legislators (perhaps the majority) either reject or question the reliability of this harm scenario. Here it should be pointed out that even if a majority of legislators oppose a delay or a referendum demanded by a minority, this does not necessarily mean that a majority of legislators reject or question the reliability of the harm scenario put forward by the minority. This is because there will be those who believe (or agree with the minority) that a law exposes posterity to grave risks, but will nevertheless pass the law in question. This does, of course, not mean that the minority's harm scenario is the correct one—that is the subject of the dispute. Neither can we know for sure that the vital needs of future generations are at stake. Thus, the

justification for granting the minority a procedural advantage does not rely on the assumption that the minority has better access to the truth about the future effects of present decisions. Rather, the main reason for giving the minority the outlined advantage in the decision-making process is that precaution and careful deliberation are called for. There are at least three reasons for this. In the first place, the issues under consideration are often complex, and it is, therefore, difficult to assess the reliability of the alternative future harm scenarios.⁵⁰ Second, in the face of this uncertainty, precaution and careful deliberation are called for since the legislature is making a decision on behalf of a voiceless and vulnerable group that cannot influence the decision process, and a significant number of the legislators (i.e. at least a one-third minority) sincerely believe that the vital needs of posterity are at stake. Third, a process of thorough interpersonal and intrapersonal deliberation will confer legitimacy on the collective decisions under consideration, in view of the previously outlined assumption about how the legitimating force of deliberation is related to respect for those who are affected by the decisions (see section I.B). The preceding considerations provide a weighty justification for the position that the minority should be given special tools to represent and protect the voiceless posterity by requiring extra and careful deliberation before a decision is made.

C. DISAGREEMENT ABOUT WHAT BEST SERVES THE INTERESTS OF POSTERITY

Legislators disagree not only about the reliability of future harm scenarios, but also about what policies will best serve the interests of near and distant future generations. Some might object that the proposed reforms are problematic because of latter types of disagreements about what best serves the interests of posterity. For example, a majority might want to pass a bill that would imply increased use of nuclear energy with the justification that this would reduce CO₂ emissions and the likelihood of future harms related to global warming. On the other hand, a minority might claim that such a policy would expose future people to grave risks. I do agree that such disagreements are likely to arise, but I do not think that such disputes pose a serious problem for the suggested reforms. The proposed submajority rules will not close off debates about what best serves the interests of posterity. They only give minorities a political tool to increase the political visibility of intergenerational issues and to encourage a more thorough and well-informed process of interpersonal and intrapersonal deliberation about issues subject to such disagreements, before a final decision is made through

⁵⁰It is often very difficult, in some cases impossible, to foresee how present decisions will affect the welfare of near and distant future people in view of current uncertainty and ignorance about the future. One important reason for this is that we are in a situation of ignorance with regard to the pace and direction of future scientific and technological development. The problem of how such uncertainty affects our responsibilities towards future generations is discussed more closely in Ekeli (2004).

majority rule in the legislative assembly or in a referendum. As I have already indicated, a diversity of views and perspectives on intergenerational issues should be welcomed in a deliberative democracy. Public deliberation can presumably only improve the quality of collective decisions on the complex issues that can affect posterity, by pooling the knowledge, experience and insight of various decision-makers (i.e. citizens and legislators), if they bring to the collective decision a broad range of diverse perspectives, views, insights and experiences.

V. CONCLUSION

The aim of this article has been to throw light on how submajority rules can be used in order to represent and protect future interests. It has been argued that a good case can be made for the submajority rule model in view of central ideas and ideals in recent theory of deliberative democracy—both concerning the instrumental value of deliberation and the normative legitimacy of democratic decisions. I have also argued that the proposed submajority rules can serve as useful means to encourage more future-oriented public deliberations and decisions. It is, however, an open question to what extent the suggested submajority rules will lead to more future-oriented deliberations and decisions. In this area, there is a need for more research. In any event, the present contribution is intended as a beginning, not the end, of a discussion about whether future interests ought to be protected by means of submajority rules.

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