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Abstract

The growing number and relevance of non-majoritarian bodies in modern democracies casts doubt on the legitimacy of resulting policy-decisions. This doubt is commonly responded to by highlighting the potential deliberative and thus epistemic qualities of appointed bodies. At the same time, the paradox consisting in the fact that empirically, deliberation is rarely democratic, while democracy is rarely deliberative, poses a challenge to theories of deliberative democracy. This paper explores the systemic perspective on deliberative democracy, asking whether non-majoritarian forums, to which decision-making is delegated, can be legitimated in a democratic system or even contribute to the deliberative quality of it. The paper points out the necessity of democratizing institutional design and addresses the opportunities and problems democratic meta-deliberation would have to face if it is to generate legitimacy for non-majoritarian decision-making within majoritarian democracy.

Keywords

Delegation - Deliberative Democracy - Institutional Design - Legitimacy

Introduction

Since the theory of deliberative democracy has taken an empirical turn, the debate on how deliberation can and should be institutionalized has gained new momentum. However, proponents of deliberative democracy face an apparent paradox. On the one hand, we are, in Western democracies, surrounded by deliberative institutions of different kinds: ethics councils, expert committees, stakeholder forums, and the like. While the mode of interaction in these forums seems to be clearly deliberative, their composition is equally clearly not democratic. On the other hand, the paradigm democratic institution, the parliament, is characterized by interaction that is not, in the ideal Habermasian sense, deliberative.

This paper tries to combine the systemic perspective on deliberative democracy proposed by Mansbridge et al. (Mansbridge et al. 2012) with a focus on new modes of governance and delegation and thus applies a deliberative system-approach to the analysis of deliberative, but non-majoritarian bodies within democratic systems. I argue, first, that we need to achieve a better understanding of those non-majoritarian, but deliberative institutions that have become so abundant in modern democracies in order to clarify their role within the deliberative system at large. Secondly, we need to seek ways to deliberate upon the institutional design of these bodies publicly and democratically. This kind of deliberation takes place at a meta-level, and I argue that democratic meta-deliberation is required to democratize deliberative systems.

The structure of the paper is as follows: section 2 will outline the paradox faced by deliberative theories and discuss the different escape routes. Section 3 points out why the institutional design of non-majoritarian bodies is a significant issue in modern democracies and why the choice of institutional parameters must be expected to have effects on outcomes. In section 4, I discuss the problem of delegating distributive and normative decisions to deliberative forums and ask what kind of independence from majoritarian bodies these forums can be granted and what kind of procedural justice they can realize. Section 5 sketches the kind of democratic meta-deliberation that would be essential to democratizing institutional design and argues that a democratic public sphere would have to play a dual role in this process: a constructive and a critical one. The conclusion winds up the argument and points towards the kind of political research programme I regard as a desideratum.

The Deliberative Paradox and Escape Routes

What is the paradox faced by proponents of deliberative democracy? If we define deliberation as a mode of interaction that has both discursive qualities – enabling the dialogical assessment of arguments and justifications – and that promotes the coordination of different interests and perspectives – enabling ‘deep compromises’, if not consensus, then we find ourselves surrounded by institutions in which communicative interaction of this very type takes place.¹ However, while the mode of interaction in the different types of extra-parliamentary bodies we find in modern democracy, including ethics councils, expert committees or stakeholder forums, is clearly deliberative, they are just as clearly not very democratic. Appointed bodies outside the parliament are also non-majoritarian bodies in which the democratic principle of ‘one person one vote’ is out of force. The composition of these forums is elitist: members are nominated for their expertise, their veto power or even as a ‘reward’ for holding public offices. Sticking to Gutmann and Thompson’s dictum that deliberation is democratic in so far as it is inclusive (Gutmann and Thompson 2004), those advocating deliberative *democracy* will not find what they advocate in appointed non-majoritarian bodies.

On the other hand, it is somewhat difficult to describe the paradigmatic democratic institution, the parliament, as deliberative. Interaction in parliament is obviously better described as arguing than as bargaining (Holzinger 2005) and early proponents of deliberative democracy like John M. Bessette regarded the parliament as an institutionalization of deliberation (Bessette 1980). However, if we seek to ground deliberative democracy in Habermasian discourse ethics, it becomes difficult to hold up the parliament as an example of deliberation. What we witness in most parliaments is not a *process* of argumentation, but the presentation of *products* of argumentation. While speakers do present arguments (rather than make offers or threats, as in bargaining), they do so in a series of monologues rather than in a dialogue. Typically, members of parliament read out pre-arranged speeches and stick to a strict list of speakers rather than directly respond to one another. Moreover, the eventual decision is, given existing parliamentary majorities, clear in advance, thus depriving the debate of any coordinative potential (see Landwehr 2010). This may be more so in Westminster-style parliaments than in working parliaments like the American congress. Nonetheless, the conflict between publicity on the one hand and discursive quality and coordination on the other, which has so aptly been pointed out by Elster (1998) and Chambers (2004) is apparent: the parliament is a stage for the justification of legislative

¹ On discursiveness and coordinativeness as aspects of deliberative interaction, see Landwehr 2010. On deep compromises, see Richardson 2002, chapter 11.

acts and proposals, not a forum for the exchange of arguments in which preferences can be formed and transformed (see Rummens 2012).

Assigning an inherent value to deliberation, arguing that it respects the moral agency of participants and allows citizens to become authors of the rules they are to obey, is convincing if we assume that all those subjected to the rules can actually participate in deliberation, that deliberation takes place among equals and that no force except that of the better argument prevails. Both assumptions are clearly counter-factual. If, given the sheer size of modern democracies, deliberation has to be delegated to elected or statistical representatives, we need to presuppose some shared sense of a common good, or consensus on ultimate ends, to which it can be instrumental. If such a consensus can be assumed, deliberation will clearly have great advantages as an instrument to the achievement of shared ends. It may not only be expected to enable epistemic progress through information-pooling and rational argumentation, but also to contribute to the coordination and aggregation of conflicting interests into consensual action plans. However, if we either acknowledge a plurality of conceptions of the common good or view deliberation as inevitably power-driven, the inherent virtues of deliberation become too uncertain to base claims to legitimacy on them.

The legitimacy potential of majority voting, by contrast, is unequalled by any other mode of decision making short of consensus. Although no voting procedure is entirely neutral and different voting systems will benefit different groups of voters, the principle of 'one person, one vote' is surely the closest we can get in mass democracy to ensuring everyone equal influence on decisions. While the inherent value of majority decisions among equals is clear, the instrumental qualities of majority rule are uncertain. Proponents of epistemic conceptions of democracy drawing on the Condorcet Jury Theorem argue that if we view votes as expressions of evidence, voting can serve as a truth-tracker. However, given that political decisions are decisions on what to do rather than what to believe, the relevance of the Jury Theorem depends on the existence of a shared standard for what a 'correct' or 'good' decision would be. As argued before, the existence of such a standard (which would entail a shared conception of the common good) cannot easily be supposed. More in line with everyday experience than the hopes associated with the Jury Theorem are worries about tyrannical majorities and plainly irrational majority decisions. In countries with strong elements of direct democracy, evidence for the wisdom of crowds is to be found much more rarely than cases of irrational polarization, negative campaigning and xenophobic decisions.

Does this mean that we either have to accept that deliberation cannot be democratic or that democracy cannot be deliberative? Or is there a way for the

deliberative democrat to maintain the normative ideal in face of the fact that in practice, deliberation is rarely democratic and democracy rarely deliberative? In the now vast literature on deliberative democracy, I see three strategies to escape this paradox.

The first strategy is to adopt a rather wide understanding of deliberation, allowing modes of interaction which are quite far from the Habermasian ideal to qualify as deliberative. Bächtiger et al. (2010) have distinguished 'deliberation type II' from Habermasian 'deliberation type I'. A wide understanding of deliberation is also the basis of the discourse quality index (DQI), applied by Steiner, Bächtiger and now many others to measure deliberative qualities of communicative interaction.² The DQI has been one of the most significant contributions of the last decade to empirical deliberation studies, as it allows to view the deliberative quality as a matter of more or less rather than yes or no. It thus helped the debate to move beyond the somewhat simplistic arguing/bargaining dichotomy and allowed researchers to assess real instances of deliberative interaction instead of focusing on a counterfactual ideal.

At the same time, the strategy of adopting a wide, 'more-or-less' understanding of deliberation also bears risks. DQI-analysis requires at least direct access, but preferably transcripts of communicative interaction. However, certain instances of communicative interaction are much more easily accessible than others. Parliamentary debates are not only public, but also transcribed, with transcripts constituting an easily accessible, free of charge and rich data source for researchers. Other instances of interaction for which transcripts can be obtained include parliamentary caucuses, select public meetings of (e.g. expert) committees or deliberative mini-publics. However, few of the appointed non-majoritarian bodies discussed before meet in public (and if they do, actual decision-making takes place elsewhere), and neither do cabinets, ministerial committees or civil society associations. Given that the DQI constitutes a comparative rather than an absolute measurement, this differing availability of data for analysis is likely to lead to a serious selection bias. In comparison, interaction in parliament will appear to be rather deliberative, given that the very rules of procedure force speakers to behave respectfully and that the logic of the situation requires the presentation of arguments rather than threats or promises. In effect, the use of a wide understanding of deliberation may amount to a re-definition of the concept that eventually serves the purpose of describing existing democratic procedures as deliberative.

² For the latest version of the DQI, see Steiner 2012.

The second strategy is in my eyes also one of re-definition, namely of re-defining democracy in such a way that the idea of democratic equality, institutionalized in the principle of one person, one vote, loses its central status. Dryzek and Niemeyer, for example, have argued that the representation of arguments (discursive representation) may be more important, and in effect equally democratic, as the representation of people (Dryzek and Niemeyer 2008). Bohman (2007) has pointed out that where majoritarian institutions are not feasible and effective, rethinking the democratic criterion may be necessary (Bohman 2007: 10). The alternative that suggests itself is an understanding of democracy as non-domination, where legitimacy is granted if the 'right to justification' (Forst 2011) is fulfilled. However, having the rules one is to obey sufficiently justified is a different and separate criterion from actively choosing these rules, which democratic autonomy requires. Forst's suggestion is not to trade in autonomy for justification but to conceive of the exertion of autonomy as a reciprocal exchange of reasons. This exchange is situated within the institutional structures of majoritarian democracy rather than a replacement for them. The redefinition strategy pursued by Bohman therefore seems attractive only where majoritarian institutions are not (yet) realistic, but should not be misunderstood as an argument to undermine or replace them where they (still) exist. Reducing democracy to accountability, where the role left to citizens is that of passive recipients of arguments, may thus make democracy more consonant with deliberation, but it does not remove the tension between the non-inclusive practice of deliberative decision-making and more demanding conceptions of democratic autonomy.

A final escape route, which might avoid such redefinitions, is a deliberative system approach. Most prominently, Mansbridge et al. (2012) have argued for such an approach that assesses the overall deliberative quality of a political system instead of focusing on the deliberative and democratic quality of single institutions within it.³ They argue that:

[...] a systemic approach allows us to analyze the division of labor among parts of a system, each with its different deliberative strengths and weaknesses, and to conclude that a single part, which in itself may have low or even negative deliberative quality with respect to one of several deliberative ideals, may nevertheless make an important contribution to an overall deliberative system.

(Mansbridge et al. 2012: 2-3)

³ Mansbridge et al. 2012. Their approach has some similarity with Habermas' two-track model of deliberative legitimation, but is more accessible for empirical analysis and eventually more constructive. Other authors adopting a systemic perspective include Goodin 2005, Thompson 2008 or Landwehr 2010.

From this perspective, a deliberative system may, besides deliberative ones, entail non-deliberative institutions and modes of interaction, in particular bargaining and majority voting. These non-deliberative moments do not necessarily impede on the deliberative quality of the system as a whole, but might, on the contrary, even further it. In a 'complementary relationship', Mansbridge et al. argue, 'two wrongs can make a right. Two venues, both with deliberative deficiencies, can each make up for the deficiencies of the other.' (Mansbridge et al. 2012: 3) Thompson argues that deliberation may, from a systemic perspective, might well be distributed, decentralized and iterated (Thompson 2008: 514-5). In essence, not every democratic decision must be taken through deliberation and not every deliberative forum in a democracy must be inclusive and democratic. From this perspective, a system can qualify as deliberative and democratic even if no single institution or forum within it is both at the same time.

Although attractive, the deliberative system-approach also bears the risk of dissociating deliberation and democracy altogether. It may thus not only amount to a justification of existing and deficient institutions and practices by qualifying as both deliberative and democratic. What is more, it might be even be read as vindication of a post-democratic order in which decision-making in elitist expert bodies is shielded by a mere facade of electoral democracy. Nonetheless, the macro-perspective on deliberative democracy that the deliberative system approach adopts is promising in that it avoids the redefinition of its central concepts: deliberation and democracy. Moreover, it enables us to assess the democratic and deliberative capacities of a system in comparison, showing at which points priority is given to democratic legitimation and accountability and where to deliberative decision-making. Most importantly, however, it can indicate ways to democratize deliberation within the system which I want to explore in this paper.

Institutional Design Matters

A central question that remains to be addressed by deliberative system-approaches is how deliberative and non-deliberative, majoritarian and non-majoritarian processes and institutions are to be combined in practice and how we are to choose between them when engaged in institutional design. As Thompson puts it: 'The key question [...] to dealing with the problem of the division of labor in deliberative democracy, is what are the most effective and desirable relationships among the various bodies that operate within the structure of deliberative democracy - those designed to deliberate, as well as those constituted to decide in other ways.' (Thompson 2008: 516). My suggestion in section 5 of this paper will be to move deliberation up one level and

deliberate not only on substantial issues but also on how we are going to decide at specific points within the political system in order for the system to qualify as deliberative and democratic. What is at stake is, in other words, a theory and practice of deliberative and democratic institutional design.

Thompson calls for a process of meta-deliberation that deliberatively justifies the structure of the deliberative system, in which deliberation is distributed, decentralized or iterated (Thompson 2008: 515). While I agree with Thompson both on the importance of deliberative institutional design and on the necessity to assess the effectiveness and desirability of relationships between deliberative and non-deliberative processes and institutions, the research program I wish to advocate here goes beyond this, following Dryzek's argument that 'the design of social and political practices can be itself a discursive process in which all the relevant subjects can participate.' (Dryzek 1987: 665) In order to explore ways to democratize institutional design in the following sections, I first want to show why and how institutional design matters.

The kind of deliberative bodies concerned here are non-majoritarian ones, to which majoritarian institutions like the parliament or government delegate parts of legislative or administrative decision-making processes. They thus become part of decision-making processes within democracies, but enjoy only an indirect democratic mandate. Why do particularly governments choose to delegate decision-making powers? The justification for delegation is the demand for expertise and the desideratum of an independent assessment of information and arguments that promotes 'policy credibility' (Gilardi 2002). However, more base motives are also insinuated in the literature, such as the wish for blame avoidance or the attempt to shift power from the legislative to the executive (Weaver 1986). In any case, the growing number of necessary decisions and the growing complexity of the policy-making environment increase the perceived need for information and are likely to further delegation. A common view on the legitimacy of delegation is expressed by Majone:

[P]olicies with significant redistributive consequences should remain under the direct control of political executives. The agency model is only applicable in limited, but important areas such as economic and social regulation [...] where expertise and reputation are the key to greater effectiveness.

(Majone 1997: 152)

In other words: purely regulatory decisions, which are mainly about information and expertise, may be delegated to non-majoritarian bodies, while distributive decisions still require a majoritarian mandate. In practice, though,

the distinction between regulatory and distributive decisions is not one to be easily made, even if we leave the difficult case of ethical or normative conflict aside. The differentiation between factual, ethical-political and moral questions and discourses that Habermas made is eventually only an analytical one that leaves it as difficult as ever to disentangle these aspects in any given political conflict and decision-making task. On the one hand, we do expect decisions to be ‘empirically informed’: they should be based on true premises, take all relevant options into consideration and be informed on the consequences of their selection.⁴ On the other hand, nearly all political decisions will have consequences for the allocation of resources and opportunities to different groups and persons, and thus distributive consequences. Moreover, different conceptions of what a just distribution would require are likely to coexist in any pluralistic society.

If we assume that in most political decisions, informational aspects are intertwined with normative and distributive ones and that these may be impossible to disentangle, the delegation of such decisions to non-majoritarian bodies constitutes a legitimacy challenge we have to face. In facing this challenge, we must be aware that there exists no such thing as an outcome-neutral political decision-making procedure. Any conceivable procedure serves certain goals, groups and interests more than others. This is true for both majoritarian and deliberative procedures. We know that majority voting systems have different distributive consequences from proportional representation systems; and the choice of options to be put to the vote as well as the order in which they are put to the vote can determine results.

Legitimacy problems, particularly for delegated decision-making procedures, will arise if there is no democratic mandate for the normative and distributive biases that are necessarily inscribed into procedures, e.g. if we implement a procedure that protects a status quo that is no longer regarded as acceptable by democratic majorities. Legitimacy problems will also arise if governments engage in strategic institutional design that aims to privilege specific groups and interests beyond the governments’ term of office. And more generally, problems seem likely to arise if the biases inscribed into procedures are incoherent with societal values: ideally, biases should reflect such values appropriately. A society with a consensus-oriented political culture, for example, will choose different institutions from one with a more majoritarian political culture.

⁴ Mansbridge et al. identify this as the ‘epistemic function’ that deliberative systems have to fulfill (Mansbridge et al. 2012: 11).

Assuming that the design of delegative decision-making processes necessarily has distributive implications, the choice of institutional parameters becomes an issue to be addressed both theoretically and empirically. It is thus not only the relationship of deliberative bodies with majoritarian institutions that needs to become subject to deliberation and democratization, but also, and equally importantly, their institutional set-up and its consequences on interaction within the respective body and on its resulting decisions. However, the analysis of effects of institutional parameters on deliberation and outcomes cannot be limited to those deemed important as aspects of good deliberation. Rather, we should, on the premise that procedural decisions will to some degree also be distributive decisions, assess all parameters of appointed bodies that are subject to institutional design for their effects. Strong-headed deliberative democrats may assume that the forceless force of the better arguments wipes out the effects of all contextual factors, but this assumption is empirically not feasible: the composition of the deliberating group and the rules of procedure under which it deliberates must be expected to have effects on outcomes (Sunstein 2003; Böhm et al. 2014).

Institutional design will thus have both epistemic and normative aspects. David Wiens (2012) draws the distinction between the 'engineering' and the 'architectural' aspect of institutional design, which aptly describes the challenge. Engineering problems concern applied institutional design, which, according to Wiens, falls into the realm of empirical social science. In order to plan an institution that is to fulfil specified goals, the engineer will have to know how single parameters will affect outcomes. As, in contrast to engineering science, experimental research is difficult in the social sciences, the question of how we are to track causal relationships between design and output and what kind of evidence we can base our engineering on remains an epistemic challenge that institutional design will have to face. The engineering task, however, is only to implement a design that has been drafted by the architect: the engineer sets practical limits to the architect's design (Wiens 2012: 48). In the design of political institutions, the architect's task is to define the values and norms to be inscribed into institutions, or, in the terminology applied above, to legitimately choose the inevitable biases of institutions. The architect thereby limits the range of practical solutions to the ones in keeping with these values and norms (ibid.).

Wiens conveniently assigns the architect's task in designing political institutions to applied ethics, leaving the engineering task to be fulfilled by empirical social scientists, although he calls for more collaboration between the disciplines (Wiens 2012: 63). In the design of *democratic* political institutions, however, it should be the democratic *demos* rather than the philosopher who assumes the task of the architect, and it should also be

demos who commissions and controls the engineer. While applied ethics and social science can certainly provide advice to institutional designers and input to democratic debates, the practical challenge of democratic institutional design is not theirs, but the democratic public's.

Delegation, Independence, and Procedural Justice

When democratically elected governments, under the scrutiny of a democratic public, engage in the design of non-majoritarian, deliberative bodies, not only questions about the legitimacy and possible democratization of institutional design choice arise, but also, and perhaps primarily, questions about the degree to which non-majoritarian bodies should be 'programmed' or granted discretion and about the kind of procedural justice these bodies can realize. I have argued above that institutions will necessarily entail biases. If, as normatively desirable, these biases are based on societal values (rather than e.g. strategic institutional design), the question that arises where governments delegate decisions to non-majoritarian, deliberative bodies is whether values should be inscribed in the form of explicitly specified goals or whether it is sufficient to design institutions in a way that biases their decision-making towards the prevailing societal values.

A debate that is instructive at this point is that about the independence of central banks. Stanley Fischer (1995) made the distinction between goal independence and instrument independence of central banks. Assuming that monetary policy is delegated to independent central banks in order to prevent the inflationary bias of policy-making under electoral pressures, he points out two models for institutionalizing central bank independence. The 'conservative central banker'-model advocated by Rogoff (1985) entails both instrument and goal-independence: the government (or eventually, the democratic demos), chooses a central banker whom it believes to act in their own long-term interest because he or she is a conservative with a personal preference for monetary stability. Once in office, the conservative central banker is left to her own devices and can choose whatever monetary policy she likes without being held accountable by the government or public. The alternative a principal-agent-model as advocated for example by Walsh (Walsh 1995) entails only instrument-independence. In this case, the central banker is bound by a specified goal, such as an inflation rate that stays within a certain range. On the basis of this goal, the central banker is held accountable by those appointing her and will be penalized through a loss of office, earnings or reputation if she fails to achieve them. The central banker is thus independent only in the choice of the instruments to achieve the goal, but cannot, for example in the case of a deep economic crisis, revise the goal itself.

The distinction between instrument- and goal-independence is of much use for the study of delegative institutions more generally. The question in all these cases is whether we would want to set up a body which we trust to produce decisions in keeping with societal values and a 'common good', for example because its members are renowned experts and their decision-making is highly deliberative, and then leave it to its own devices. Or would we prefer to commission the body with a specific goal and hold it accountable to it, and, if necessary, abolish or replace the body?

There seem to be two possible perspectives on this question, which connect well with a distinction John Rawls (1999 [1971]) has drawn between pure and imperfect procedural justice.⁵ If we regard decision-making by appointed bodies as an instance of pure procedural justice, we deny the existence of an independent standard for a 'correct outcome'. In consequence, decisions arrived at by appointed bodies can claim legitimacy only in so far as the procedure by which they were brought about can be considered as correct or fair. If we do regard the procedure as fair, say, because it fulfils all our requirements for transparency, inclusiveness, accountability and justification, we should accordingly view its outcomes as guaranteed to be right, whatever they are: in pure procedural justice, the fair procedure guarantees right outcomes (Rawls 1999: 75; Lafont 2003: 165). The procedure can then not be criticized on the basis of its outcomes (Lafont 2003: 166). For example, it cannot be challenged on the ground that it produces great inequalities.

Pure procedural justice is sometimes viewed as the less demanding form of procedural justice, and as more feasible in real-world-politics than imperfect or even perfect procedural justice.⁶ It seems realizable even where no independent standard for correct outcomes is available, or where we cannot find a consensus on the goals of policy-making and the standards deriving

⁵ Rawls distinguishes between perfect, imperfect and pure procedural justice (Rawls 1999: 74-5). Perfect procedural justice obtains where there is 'an independent criterion for what is a fair division' and where 'it is possible to devise a procedure that is sure to give the desired outcome.' (74) In imperfect procedural justice there is an independent criterion for the correct outcome, but 'no feasible procedure which is sure to lead to it.' (75) Pure procedural justice obtains where the independent criterion is lacking, but there is 'a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.' (75)

⁶ For example by Norman Daniels, who argues that his model of 'accountability for reasonableness' that describes adequate (delegative) institutions for limit-setting in health care can still be viewed as realizing pure procedural justice if we have no consensus on distributive principles, and as realizing imperfect procedural justice where consensus exists (Daniels 2008: 109).

from them. Rawls emphasizes, however, that what qualifies as a fair procedure is defined by background circumstances (Rawls 1999: 75). In his example of gambling, bets would have to have a zero expectation of gain, they would have to be made voluntarily, and the betting procedure would have to be one 'fairly entered into under conditions that are fair' (ibid.). Under these conditions, there are indeed no reasons to criticize an output in which the millionaire wins and the pauper loses the gamble. Translating the example to the case of policy-making by appointed agencies, however, it becomes clear that in political contexts, realizing pure procedural justice may actually be quite demanding. On the premise (justified above) that there exists no such thing as an outcome-neutral political decision-making procedure, it will, at a minimum, seem dubious whether those disadvantaged by the selected procedure could be expected to voluntarily enter a contract (namely that to accept decisions made by the appointed body) under fair conditions.

The pure procedural justice-perspective thus connects with a policy of granting appointed bodies both goal- and instrument-independence, that is, of granting them complete discretion on the basis that the procedures institutionalized in them qualify as fair and are accepted as fair by those bound by resulting decisions. In my opinion, not only the fact that appointed bodies will necessarily be inscribed with biases, but also the very indirect control citizens can exercise over the appointment renders this perspective, and the policy associated with it, highly unattractive.

A more attractive perspective can result from viewing decision-making by appointed agencies as an instance of imperfect procedural justice. To Rawls, imperfect procedural justice is exemplified by a criminal trial, where we do have an independent standard for a correct outcome (the defendant's guilt or innocence), but there exists no procedure that guarantees that the correct outcome is achieved (Rawls 1999: 74-75). In Rawls four-stage-sequence to applying the principles of justice, decision-making in the legislature is driven by his second principle of justice, meaning that all policies should aim at 'maximising the long-term expectations of the least advantaged under conditions of fair equality of opportunity' (Rawls 1999: 175).⁷ The legislative procedure, however, cannot guarantee laws in keeping with the second principle of justice, although the principle drives decision-making and

⁷ In the four-stage sequence, the first principle of justice (equal liberty) constitutes the basis for a just constitution and drives decision-making in the constitutional convention, while the second principle (difference principle and fair equality of opportunity) comes into play in legislation under this constitution. 'Thus the priority of the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage' (Rawls 1999: 175).

provides an independent standard for evaluating and challenging laws passed by the legislature. In this sense, it realizes imperfect rather than perfect (or pure) procedural justice. Even if we do not buy into Rawls' Theory of Justice and do not accept his particular conception of justice as fairness, it seems clear that most people would be more willing to accept outcomes of a procedure that is driven by consensual principles of justice or instrumental to agreed-upon goals, even if it cannot guarantee correct decisions. In the case of appointed bodies, the imperfect procedural justice-perspective thus connects with a policy of instrument- but not goal-independence of agencies, leaving two important questions to be answered: First, assuming that we cannot, like Rawls, presuppose specific principles of justice as agreed-upon, where do goals and principles come from? And second, what are we to do when confronted with more than one and possibly conflicting goals?

I will try to answer the second question before the first. Coming back to the example of monetary policy, the goal of inflation control is certainly a central, but also not the only relevant goal in policy-making. In economic policy more broadly, goals such as growth, employment, and, more recently, sustainability and environmental protection, coexist. Although most of them are widely shared, they conflict in the choice of concrete economic and monetary policies. In dealing with this conflict, one could, like Rawls does with his principles of justice, define explicit priority rules, saying that, for example, the goal of (fighting un-)employment is only addressed when inflation rates are below a certain threshold. However, priority rankings can lead to apparently irrational decisions if the non-priority, but still important goals are effectively sacrificed to the prioritized ones (Goodin 1995: 47; Harsanyi 1975). In the quite different policy-area of health care priority-setting, the famous example of the Oregon Health Plan provides an example for what happens when, in the face of conflicting social values, goals and principles, an appointed body is commissioned with applying a single principle, in this case that of cost-effectiveness: the original ranking of services produced by an expert commission was fiercely criticized by the public and eventually corrected in a participatory procedure that brought other principles, such as need and urgency, to bear.⁸

If, in a pluralistic and democratic society, not only different values and goals, but also different interests conflict and compete, and if explicit priority-rules provide no solution to the conflict, should we charge appointed bodies not only with the pursuit, but also with the weighting of these values and goals? I would argue that this weighting is precisely what non-majoritarian bodies are appointed for: in the case of monetary policy, independent central banks are

⁸ On the Oregon Health Plan, see, for example Jacobs et al. 1999.

appointed because the weighting resulting from electoral politics is perceived to be lopsided at the cost of inflation control. In the case of health care priority-setting, majoritarian institutions like the parliament would simply be overcharged with the weighting of the conflicting principles of efficiency, need, desert and equity that is necessary in the assessment of every singly technology or service. This is not to question that the weighting of conflicting values and interests is at the heart of electoral politics and majoritarian decision-making: it is what democratic politics is essentially about. It can and should be delegated to appointed agencies only if it is not feasible for majoritarian institutions to engage in all stages of the weighting process themselves. The kinds of appointed bodies that are relevant from a perspective of democratic theory, however, are the ones engaged in such weighting. Others, which are only instrumental to the pursuit of single goals, effectively take on only administrative tasks and are therefore less problematic, but also less interesting to democratic theory.

Commissioning appointed bodies with the weighting of conflicting values and principles and competing interests entails adapting a trustee rather than delegate view regarding their mandate.⁹ On the one hand, and in contrast to the 'conservative central banker' mentioned above, the trustee does not have the discretion to change the goal he is commissioned with at will, but is accountable to those entrusting him with these goals and has to justify decisions with respect to the respective goals and relevant values. On the other hand, and in contrast to the delegate in a simple principal-agent model, the trustee is not programmed by the principal to apply a specific algorithm, but has to apply her own judgment in making decisions – after all, that is what she is commissioned for.

If weighting is what the appointed bodies do, where do the weights come from? As long as we cannot presuppose a shared and fully specified conception of social justice, such as Rawls' justice as fairness, whatever goals appointed bodies are to weight and pursue can only derive legitimacy from democratic majority decisions. As in modern, pluralistic societies, consensus on a specific conception of justice is and will remain out of reach, the choice of principles to apply and goals to pursue through institutional design is not a task for applied ethics, but for the democratic public itself. Returning to Wien's analogy (Wiens 2012), not the philosopher, but the demos is the architect of democratic institutions!

⁹ On the trustee- and delegate view of political representation, see, for example, Urbinati and Warren 2008.

Democratizing Institutional Design

What seems to be required is thus a theory and practice of democratic institutional design. My argument here is that democratization of design choices, if empirically feasible, could provide legitimacy for institutions and procedures which are not majoritarian in character themselves. What kinds of conditions would institutional design have to fulfill in order to qualify as sufficiently democratic?

To begin with, the delegation of decision-making competences to non-majoritarian, deliberative bodies requires a clear majoritarian mandate. The kind of indirect democratic mandate that may be seen in the fact that respective bodies are appointed and set up by the government or parliament seems insufficient here. If procedural decisions are at least in part distributive decisions, institutional design that takes place behind closed doors within the administration will hardly qualify as legitimate. While I have adopted a perspective regarding the kind of justice potentially realized by delegative bodies as one of imperfect procedural justice, the design of respective bodies, and thus the selection of values to be inscribed into them, takes place at a different and higher level. Decisions in and by the legislature are bound only by the constitution, which typically does not (and, given the pluralism of conceptions of justice in any modern society, should not) entail specific principles of social justice that legislation is to apply. While in Rawls' conception of a just society, decision-making in the legislature is driven by his second principle of justice, thus realizing imperfect procedural justice, a consensus on Rawls' specific conception of justice as fairness (or any other specific conception) cannot be supposed in a pluralistic society. Whatever values are to be inscribed into appointed bodies through institutional design and whatever goals the bodies are commissioned with must therefore be the result of a democratic majoritarian decision-making procedure, which must be regarded as an instance of pure, rather than imperfect procedural justice.

Even if one does not accept the description of democratic majority decisions as realizing pure rather than imperfect procedural justice, Rawls himself has pointed out a distinctive feature of pure procedural justice that is indubitably shared by democratic procedures: 'A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out; [...] A fair procedure translates its fairness to the outcome only when it is actually carried out.' (Rawls 1999: 75) It does not suffice to legitimize a law to argue that it could have been the result of a democratic decision: it can only be legitimized by the democratic decision itself. Institutional design choices, at least for bodies that play a significant role in the decision-making process or take binding decisions themselves, usually do

have a legal basis. Given that 'decisions how to decide' can have more far reaching consequences than single substantial decisions, the public attention and awareness, and thus the degree to which institutional design choices are justified by representatives, does not do justice to their significance, which is why they often fall short of obtaining a clear democratic mandate. As Clarke and Weale (2012) argue, critical awareness of the way in which decisions are made is important for their legitimacy, and people are unlikely to accept judgments 'if they do not know the process by which it has been made, and who has been involved in making it' (Clarke and Weale 2012: 295).

Moreover, and as argued before, normative and distributive implications that are necessarily inscribed into decision-making procedures must be coherent with societal values. In a sense, this coherence-requirement is part of the more general requirement of accountability directed at mandated bodies. Because authority is delegated to them, appointed bodies cannot be electorally sanctioned for their decisions, and I have argued above that they should act as trustees rather than delegates of majoritarian institutions (and thus eventually of the democratic demos itself). Nonetheless, they are accountable with regard to the goals they are commissioned with and with regard to the values held in the society that mandates them. One possible way to conceive of the kind of accountability exercised by appointed agencies is suggested by Albert Weale (2011), who suggests a conception of accountability as public reasoning, from which he derives standards for the evaluation of institutional arrangements: intellectual robustness and public orientation (Weale 2011: 70–75).

If we assume, however, that norms and interests are not simply given in any society, waiting to be discovered, but that they are socially constructed and reconstructed, their institutionalization in decision-making procedures constitutes a problem. Institutional design not only can and should mirror normative attitudes, but also acts back on a society by entrenching and reinforcing the norms written into it. And because institutional design choices constitute procedural rather than single substantial decisions, their norm-entrenching and -reinforcing effect will be a repeated one constituting a permanent disadvantage to the losers in the procedural decision.

This is why, as all democratic decisions, not only the decisions taken by non-majoritarian bodies, but design choices themselves must be challengeable and revisable. What matters is that the appointment and the design of these bodies are publicly viewed and discussed as revisable. Legally, any of these bodies can, usually by a simple parliamentary majority, be completely reformed or even abolished. Only if the public is aware of these opportunities for challenge and revision can the mandate that respective bodies are granted be viewed as a truly democratic one.

It is questionable, however, whether only the act of delegation itself and thus the existence of a delegative body, should be challengeable, or whether single institutional properties should be subject to democratic challenge and revision. The problem lies in realizing the 'second-best' option (see Goodin 1995). If an appointed body is deficient in one respect, e.g. if it is insufficiently inclusive, improving inclusiveness does not necessarily improve its overall performance, as a higher degree of inclusiveness typically comes at the cost of higher transactions costs, meaning that the body will take longer and perhaps fail to reach decisions. Similarly, changes in the default outcome can change the entire logic of decision-making in a forum and practically reverse the effects of, for example, inclusiveness. Nonetheless, violation of certain procedural values, such as inclusiveness or transparency, can seriously undermine the legitimacy of an appointed body, which is why single institutional features can and should be subject to critical public debates. In the reform and redesign of a body that cannot withstand these challenges, however, engineering needs to consider second-best problems and adopt a systemic perspective rather than focus on single values and their realization in specific institutional properties.

Where the role and legitimation of non-majoritarian bodies within majoritarian democracy is concerned, the public sphere thus has a dual role to play:

On the one hand, the public should, in a process of democratic meta-deliberation, monitor and drive the appointment and design of these bodies in an inclusive and argumentative debate. The epistemic and ethical aspects, or in Wiens' terminology, the engineering and the architectural challenges of institutional design, should be addressed in a process of democratic meta-deliberation. The epistemic or engineering aspect concerns the effects of institutional design on decisions: if a society seeks to pursue specific goals through institutional design, it needs to know which institutional properties are instrumental to these. In this regard, the democratic public cannot only draw on evidence from empirical social science, but also on own experiences and comparisons between existing bodies or with other countries. The ethical, or architectural, aspect concerns the democratic choice of values, or biases, to be inscribed into institutions and of goals a body is commissioned with. Assuming that consensus is at least theoretically possible in factual questions, irreducibly conflicting conceptions of justice may render the architectural task the greater challenge, although engineering and architectural tasks may only be separable at the analytical level.

On the other hand, the public has a critical task to challenge the design of appointed bodies as well as the very decision to delegate competences to them. The importance of this critical task derives to a significant degree from

the problems of value entrenchment. If minority values and interests are to maintain the chance of winning majorities in institutional design choices in the future, existing bodies and procedures as well as the values inscribed into them must be subject critical scrutiny. In this case, criticism need not be constructive in the sense of Wiens' failure analysis approach, where diagnosis and remedy are two steps in the same process (Wiens 2012). Rather, resolute challenges to institutional structures and decision-making practices, such as, for example, Colin Crouch's 'post-democracy'-diagnosis (Crouch 2004), can spark the kind of debates that are necessary to question, revise and legitimize institutional design in accordance with changing and shifting societal values.

Finally, scholars in applied ethics, democratic theory and empirical social science can and should view processes of mandating and designing non-majoritarian, deliberative bodies and decision-making procedures within and beyond the nation state as a process of continuous re-constitutionalization of the political order and follow this process attentively and critically.

Conclusion

If we want to escape the paradox that in practice, deliberation is rarely democratic and democracy rarely deliberative, without redefining either of the concept of deliberation or that of democracy, we need to move the focus of deliberative democracy one level up. That is, we need to consider ways of democratizing deliberation on institutional design. The appointed non-majoritarian bodies abundant in Western democracies can have strong deliberative qualities. While, given requirements of expertise and professionalism, these bodies themselves cannot feasibly be democratized, the way in which they are set up and designed can and should be. If we find ways to democratize institutional design and if we can ensure accountability of appointed bodies without making them subject to direct electoral control, there may be potential for them to contribute to rather than undermine the deliberative and democratic qualities of the system as whole.

Given that inclusive deliberation is per se notoriously difficult to institutionalize, the suggestion of democratic meta-deliberation may seem to run into a regress by moving it to a higher level. Nonetheless, we cannot dispense with the experiences and perspectives of lay citizens on institutional design, and deliberative institutions will ultimately require democratic support for their decisions to be accepted and implemented. I therefore believe it to be a fruitful strategy to explore opportunities for realizing democratic meta-deliberation in practice: in citizen forums, media debates and everyday conversations. The scientific community itself could lend meta-deliberative

processes momentum by engaging in a discussion on deliberative and democratic institutional design

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