

# THE ROLE OF DELIBERATIVE PEACE REFERENDUMS IN THE CONSTITUTIONAL SETTLEMENT OF CONFLICT

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## I. Introduction:

Many societies experiencing severe inter-communal conflict hold referendums.<sup>1</sup> Some of these referendums are “peace referendums” aiming to secure the settlement of a conflict. A peace referendum relies on its perceived popular legitimacy to give a mandate and impetus to the larger process of peacemaking of which it is a part. By engaging directly with the people affected by the conflict, a referendum might also sideline political and other “elites”<sup>2</sup> – precisely the people who, insulated from the conflict’s direct effects, are often most likely to oppose a conflict settlement. In addition, if well designed, the referendum may generate common feeling across disparate societal groups. By relying on its democratic credentials to legitimate a settlement, the referendum may even help the settlement to endure and guard against breaches in the long term.

Some peace referendums have indeed been part of successful peacemaking (e.g., in France/Algeria, Ireland/Northern Ireland and South Africa). Yet peace referendums’ institutional design remains haphazard, and their effects mixed. Referendums pose risks such as elite capture and manipulation of the voting process (e.g., in Crimea).<sup>3</sup> The referendum ballot may be designed to mislead. Authorities in charge may intimidate some groups of people and exclude them from voting. Most worrying, even a fairly administered referendum

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<sup>1</sup> Examples include referendums or plebiscites held in Algeria, Colombia, Croatia, Cyprus, the Democratic Republic of the Congo, Eritrea, Iraq, Kenya, Kyrgyzstan, Montenegro, New Caledonia, Northern Ireland, Papua New Guinea, Somalia, South Africa, South Sudan, Ukraine, Tanzania and Timor-Leste. We use “conflict” to denote a circumstance in which wide-scale inter-communal violence is either occurring or poses a significant risk of occurring (or recurring).

<sup>2</sup> “Elites” here can refer to people with outsized influence in the public arena by virtue of their roles in government, media, business, military or paramilitary, and ethnic, religious or nationalist organizations.

<sup>3</sup> Stephen Tierney, ‘Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies’ (2015) 16 *German Law Journal* 523.

might provide a platform for inter-group contestation and violence (e.g., the 1999 Timor-Leste independence referendum, which sparked large-scale unrest and killing).<sup>4</sup>

Clearly, then, peace referendums do not always realize their lofty objectives. Yet a developing line of research on “deliberative referendums” considers whether the design of referendums can be revised to promote deliberative democracy as a means of increasing the referendum’s chances of success. Deliberative democracy conceives of democratic decision making not as a competitive “winner-takes-all” game, but as a cooperative process of discussion of the issue at stake. It defines the political legitimacy of a decision as the extent to which that decision has been arrived at through a free and open exchange of reasons and the extent to which people have seriously considered the arguments on all sides.

Deliberative democracy is a broad school of thought.<sup>5</sup> But one prominent strand stresses the idea that, since collective decisions are collectively binding, they ought to be mutually justifiable. Accordingly, the reasons that we give to one another should be cast in “public” terms, in particular in terms of political values such as freedom and equality that any reasonable person might be expected to endorse.<sup>6</sup> In turn, this normative expectation is usually understood to presuppose that public deliberation will be well-informed, other-regarding, open-minded and flexible.<sup>7</sup> Another key condition is that public decision-making will be driven not chiefly by coercive force – such as the force of superior numbers, or the force of arms – but by “the unforced force of the better argument.”<sup>8</sup>

Besides an appealing reconceptualization of politics and political legitimacy, deliberative democracy also purports to deliver important social and political benefits. Deliberative scholars claim that deliberative democracy can, among other things, promote mutual understanding, encourage civic mindedness, and foster faith in the democratic process.<sup>9</sup> So conceived, it is easy to see how deliberative democracy presents a favorable alternative to violent intercommunal conflict. But what is harder to imagine is how we might reconstruct referendums to promote deliberative democracy – and, in so doing, to lend

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<sup>4</sup> Neophytos Loizides, ‘Negotiated Settlements and Peace Referendums’ (2014) 53 *European Journal of Political Research* 234, 235.

<sup>5</sup> For an overview, see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004).

<sup>6</sup> John Rawls, *Political Liberalism* (Columbia University Press 1996); John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64(3) *University of Chicago Law Review*, 765; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996).

<sup>7</sup> Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge 2016) 21-24.

<sup>8</sup> Jürgen Habermas, *The Inclusion of the Other* (MIT Press 1998), 37.

<sup>9</sup> For an overview, see Jonathan Kuyper, ‘The Instrumental Value of Deliberative Democracy – Or, Do we Have Good Reasons to Be Deliberative Democrats?’ (2018) 14 *Journal of Public Deliberation*, article 1.

referendums the legitimacy that deliberative democracy seeks to deliver. Indeed, standard peace referendums are deliberatively faulty: they tend to be blunt majoritarian exercises that only undermine the kinds of reasoning and reflection that characterize deliberative democracy. However, based on the emerging deliberative referendums literature, perhaps the common peace referendum can be recast as a more effective and predictable peacemaking tool. That possibility animates this chapter.

Using deliberative democratic design to channel deep and often violent conflict into more reasoned, argument-based methods of managing disagreement has obvious appeal. A number of authors in what may be called the field of “deliberative conflict studies” have thus suggested how deliberative democracy can aid the management of conflict.<sup>10</sup> But, for the most part, these authors still neglect any possible role for deliberation in improving the conduct of referendums as tools of conflict settlement. Until recently, works on deliberative referendums<sup>11</sup> and peace referendums<sup>12</sup> lacked express links to each other.<sup>13</sup> In this chapter we summarize recent work, including our own,<sup>14</sup> that seeks to combine the two literatures. The chapter explores the design and prospects of “deliberative peace referendums.” Before proceeding, it is important to stress that, while we will use examples from peace referendums generally, our main focus is on the prospects of these specifically *deliberative* peace referendums. Some of that discussion will necessarily be speculative; after all, no deliberative peace referendum has yet run in practice – at least not in the full sense in which we will describe this model. Yet while speculative, we will show why the deliberative peace referendum is more feasible than it might initially seem.

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<sup>10</sup> See, eg, Ian O’Flynn, ‘Pulling Together: Shared Intentions, Deliberative Democracy and Deeply Divided Societies’ (2017) 27(1) *British Journal of Political Science* 187.

<sup>11</sup> See, eg, Ron Levy, “‘Deliberative Voting’: Realising Constitutional Referendum Democracy’ (2013) *Public Law* 555; Stephen Tierney, ‘Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox’ (2013) 12(4) *Election Law Journal* 508; John Gastil and Robert Richards, ‘Making Direct Democracy Deliberative Through Random Assemblies’ (2013) 41(2) *Politics & Society* 253; Ethan J Leib, ‘Can Direct Democracy be Made Deliberative?’ (2006) 54 *Buffalo Law Review* 903, 911; Alice el-Wakil, ‘The Deliberative Potential of Facultative Referendums: Procedure and Substance in Direct Democracy’ (2017) 4(1) *Democratic Theory* 59; Lawrence LeDuc, ‘Referendums and Deliberative Democracy’ (2015) 38 *Electoral Studies* 139; Hélène Landemore, ‘Referendums are Never Merely Referendums: On the Need to Make Popular Vote Processes More Deliberative’ (2018) 24 *Swiss Political Science Review* 320.

<sup>12</sup> See, e.g., Loizides, n 4, 235; Joanne McEvoy, ‘Letting “The People(s)” Decide: Peace Referendums and Power-sharing Settlements’ (2018) 25 *Democratization* 864-881.

<sup>13</sup> The main exceptions are sections in Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 241-259.

<sup>14</sup> See, e.g., Ron Levy, Ian O’Flynn and Hoi Kong, *Deliberative Peace Referendums* (Oxford University Press, forthcoming); Ron Levy, Amelia Simpson, Ian O’Flynn and Georgina Flaherty, ‘Designing Referendums for Peacemaking: The Case of Bougainville,’ (2018) 33(1) *Australasian Parliamentary Review*; Ron Levy, “‘Shotgun Referendums’: Popular deliberation and constitutional settlement in conflict societies’ (2017) 41 *Melbourne University Law Review* 1237.

In the first section below we summarize what we see as the two main objectives behind the use of a deliberative referendum amid peacemaking. In Section IIA, we discuss *settlement achievement*: the aim of bringing parties accustomed to disagreeing in violent or highly conflictual ways at least marginally closer to signing an agreement to end (or manage) their conflict. Referendums – especially deliberative referendums – bring the voice and deliberation of non-elite people to the fore. Importantly, these people are often better than certain elites at engaging in *public-value* deliberation, and this in turn is a critical feature of some successful conflict settlement. (Of course, this will depend on which types of elites we have in mind. When presenting evidence we will aim to be clear about this.) The arguments here diverge from standard assumptions in the conflict and deliberation literatures, which tend to assume the deliberative superiority of elite-led peacemaking.<sup>15</sup> Yet, as will be discussed, many elites undermine their own deliberation by engaging in relatively narrow, rigid and self-interested reasoning about values.

In Section IIB, we introduce the objective of *settlement endurance*. A peace process should not merely encourage the signing of a settlement agreement, but should also facilitate the agreement's persistence for longer than a trivial length of time. To consider some of what it may take to fulfill this second objective, we rely on deliberative democratic theoretical and empirical perspectives, and on constitutional theory. Given the far-reaching implications of any permanent peace (e.g., on territorial boundaries, distributions of power or rights of minorities), conflict settlements typically engage constitutional subjects.<sup>16</sup> From suggestive empirical evidence to be seen, it appears that one effective way of encouraging the endurance of new constitutional norms may be to hold a deliberative referendum.

Having introduced the two key objectives of the deliberative peace referendum, the chapter then focuses – in Section III – on the how we think, in generic terms, such a referendum should be designed and run. As already indicated, we think it should be principally geared to generating public-values deliberation. Some of the design features we will suggest are well tested while others remain speculative. In either case, they respond to

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<sup>15</sup> See, e.g., Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (2nd edn, University of California Press 1975) 111; Brendan O'Leary, 'Debating Consociational Politics: Normative and Explanatory Arguments' in S. Noel (ed), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (McGill-Queen's University Press 2005) 3-43. Cf. Ian O'Flynn and David Russell, 'Introduction', in Ian O'Flynn and David Russell (eds), *Power Sharing: New Challenges for Divided Societies* (London: Pluto Press, 2005), 1-11.

<sup>16</sup> Christine Bell, 'Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective' (2016) 110 *American Journal of International Law* 165, 170.

the habitual deliberative shortcomings of referendums held in places of conflict and concomitant doubts about their legitimacy.

Running a deliberative peace referendum raises the prospects of more effective peacemaking, at least by degrees. This is a relatively modest goal, and one in keeping with other institutionalist deliberative democratic scholarship that aims “not at institutional rupture but at incremental improvement in a deliberative direction.”<sup>17</sup> Some referendums seem to have aided peacemaking, but repeat success is far from guaranteed. We will take care neither to overstate the consequences of referendum redesign, nor to understate its difficulty. More robust popular deliberation is not easily achieved, and when achieved it is not necessarily influential on peacemaking. Nonetheless, at least some of the uneven results of peace referendums in the past seem attributable to hasty, or ill-thought-out, institutional design. Efforts to address referendums’ habitual deliberative and other faults are thus especially worthwhile, especially if – as seems likely – referendums continue to be prominent tools of peacemaking.

## II. Two Objectives of a Deliberative Peace Referendum

The designs to be seen later in this chapter will chiefly aim at promoting public reason – that is, reasoning about broad “public values.” For instance, with the “public-values voting” feature of a deliberative peace referendum, a voter acknowledges that all of the communities in conflict are entitled to the benefits and protections of the same broad public values. These values are, by definition, reasonably justifiable to all who stand to be bound by them.<sup>18</sup> The deliberative peace referendum ballot therefore challenges, and ideally counters, non-public framings of values, for example, framings that appeal to religious interpretations over which reasonable people are assumed to disagree.<sup>19</sup> In turn, the referendum’s promotion of deliberation about public values has two main objectives: *settlement achievement* and *settlement endurance*.

### A. Settlement Achievement

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<sup>17</sup> Archon Fung, ‘Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World’ (2005) 33(3) *Political Theory* 397, 403.

<sup>18</sup> John Rawls, *Political Liberalism*, above n 6.

<sup>19</sup> See, eg, Jonathan Quong, ‘Public Reason’ (2017) *The Stanford Encyclopedia of Philosophy*. Available from <https://plato.stanford.edu/archives/spr2018/entries/public-reason/>.

A first key rationale for holding a peace referendum, and doing so with institutional support for deliberation (especially public-value deliberation), is that it may help the conflicting parties reach the point of signing a putative settlement document. Here there is a two-step argument: (1) that reasoning about public values is, in at least some cases, required for the resolution of conflict; and (2) that non-elites may be superior to certain elites at this kind of reasoning, particularly if they vote in a purpose-designed deliberative referendum.

Theories of public reason offer insights into the nature of at least some constitutional settlements in conflict settings. A peace process that highlights common ground among warring parties may be relatively effective at settlement achievement. Public-value focused peacemaking makes the values that all parties can reasonably be expected to endorse more prominent. The values in question can vary, but typical examples include freedom and equality, inclusion, the rule of law, peace and prosperity, personal security, toleration and respect. Of course, while the force of these values may be plain to see, they can still be understood in different and competing ways. Under some conditions, our competing interpretations can become bound up with our more specific cultural, religious or philosophical worldviews. When that happens in a conflict society, the public values in question may run to the core of the conflict. Consider the case of Northern Ireland. For decades the conflict focused narrowly, and largely in technical terms, on what kind of governmental models to adopt in a settlement – whether consociationalism or any of about ten other models.<sup>20</sup> However, the debate also implicated many of the values listed above – albeit selectively, and often with the aim of deploying those values in order to provide an advantage to a group in its struggle with the other side. Ironically, the values largely remained “private values,” purportedly applicable only to the side invoking them.

A key challenge was getting the two sides to recognize each other’s validity. The clash between Irish nationalists and British unionists was for a long time a clash regarding each group’s claims to legitimate presence or domination over parts of Ireland.<sup>21</sup> Thomas Hennessey writes that “Many Unionists regarded Nationalists as British whether they liked it or not. ... Many Nationalists could not accept that Unionists were British with the implications this had for the concept of the Irish nation.”<sup>22</sup> When progress finally came, in part it was because the parties embraced a principle of liberal accommodation – recognizing

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<sup>20</sup> Thomas Hennessey, *The Northern Ireland Peace Process* (Gill & Macmillan 2001) 7–9.

<sup>21</sup> Johan Elkind and others, ‘Understanding the 2015 Marriage Referendum in Ireland: Context, Campaign, and Conservative Ireland’ (2017) 32(3) *Irish Political Studies* 361, 365.

<sup>22</sup> Hennessey n 20, 7–9.

as legitimate multiple overlapping sovereignties, multiple equality and inclusion claims, etc. We do not claim here that all of the progress was attributable to the 1998 referendum, nor even that the referendum was substantially deliberative in design. The broader point, rather, is that in this case peacemaking had required a certain understanding of how values such as those above could be framed in genuinely public terms – that is, in ways that applied to all parties to the conflict. The values did not need to be selective, or defined narrowly from within the confines of one or another worldview, but could be entitlements and protections enjoyed on all sides.

To resolve at least some conflicts, it may be necessary to find a way of defusing particular clashes of value – or clashes over how a given public value is best interpreted. The aim is not to resolve all such clashes, since that would be neither possible nor desirable. The aim is to resolve those clashes that are likely to be central to any future constitutional settlement. Again, these values may vary from case to case, but reaching common ground on basic constitutional values may set the tone for all to follow.

An obvious critique of a public-values focused approach to peacemaking is that the alternative might be easier: discussing specifics and technicalia. However, as the Northern Irish case demonstrates, such technical deliberation may lead down a blind alleyway. While far from simple to achieve, public-value deliberation may be a condition-precendent to the resolution of at least some conflicts. Public values set the parameters within which any future agreements may take place. As the ground-rules of law-making, they are requirements of peacemaking.<sup>23</sup> In at least some cases, then, a peace process should primarily focus on clashes of value, even if these are the hardest differences to overcome.

If public-value deliberation should be at the center of peacemaking, the next question raised is how it can be achieved – and, relatedly, who should seek to achieve it. The most common assumption is that elites of various descriptions should take the lead.<sup>24</sup> Commentators are particularly wary of referendums, given the obvious point that non-elite deliberation is frequently flawed. The referendum voter is generally under-informed about legal and other technicalities, considers the issues underlying the conflict only briefly and superficially, and is prone to manipulation by empowered (e.g., governmental and media)

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<sup>23</sup> As Zartman notes, ‘Individual notions of justice act as a substantive veto on agreement, and must be coordinated and accepted as the first stage of negotiation’. I. William Zartman, *Negotiation and Conflict Management: Essays on Theory and Practice* (Routledge 2008) 83.

<sup>24</sup> See, e.g., Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (2nd edn, University of California Press 1975) 111; Brendan O’Leary, ‘Debating Consociational Politics: Normative and Explanatory Arguments’ in S. Noel (ed), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (McGill-Queen’s University Press 2005) 3-43.

elites – the very actors whose influence the referendum sought to minimize.<sup>25</sup> However, these observations, while accurate to a point, neglect the observation above that it is not deliberation generally, but public-value deliberation specifically that should be at the center of peacemaking. Importantly, *when the subjects of deliberation are public values*, key empirical evidence indicates that the comparison of elite versus non-elite deliberative competencies yields a unique result.

A study by Céline Colombo found that education exerts “a surprisingly small effect” on an individual’s ability to provide robust justifications for their political positions.<sup>26</sup> The implication is that education bears only very slightly on a person’s ability to engage in deliberation at a foundational and normative level. There are several possible explanations for this. Studies by Dan Kahan show that elites are often relatively unable to reconsider their basic normative commitments. They are more likely to be “motivated reasoners” – that is, to draw on their superior formal learning and analytic skills not to reconsider their positions from first principles, but to reaffirm what they already believe. They may do this by relying on factual cherry-picking or logical sophistry.<sup>27</sup> Thus it is unsurprising that, as others show, long-running conflicts often are sustained in part by “intra-group outbidding.”<sup>28</sup> Outbidding refers to the competition *within* groups to demonstrate toughness against external opponents. The contest generally involves elites from the same group calculating that there is political benefit to being the purest and most uncompromising champion of the group’s cause.

On the other hand, and importantly, public-value deliberation is often the forte of non-elites, in comparison with deliberation about more technical reasoning (legal, factual, scientific, etc.). Focusing on values per se amid a referendum, and amid peacemaking, obviates much of the need for broad social learning about technicalities – a need that is usually difficult to meet, given most voters’ constrained time and limited relevant education.<sup>29</sup> Moreover, almost no one wholly lacks or ignores values: one does not need

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<sup>25</sup> Elite manipulation of peacemaking attempts could come in the form of a proposal overborne with content and detail, effectively making it inaccessible to the general public. See Lawrence Leduc, ‘Referendums and Deliberative Democracy’ (2015) 38 *Electoral Studies* 143 on the risk of ‘deliberative overload’. For an example of such an agreement, see, Christine Bell, ‘Lex Pacificatoria Colombiana: Colombia’s Peace Accord in Comparative Perspective’ (2016) 110 *American Journal of International Law* 165, 166.

<sup>26</sup> Céline Colombo, ‘Justifications and Citizen Competence in Direct Democracy: A Multilevel Analysis’ [2016] *British Journal of Political Science* 787-806, 789.

<sup>27</sup> Dan M Kahan, ‘Ideology, Motivated Reasoning, and Cognitive Reflection’ (2013) *Judgment and Decision Making* 8(4) 407, 416–18.

<sup>28</sup> Cathy Gormley-Heenan and Roger MacGinty, ‘Ethnic Outbidding and Party Modernization: Understanding the Democratic Unionist Party’s Electoral Success in the Post-Agreement Environment’ (2008) 7(1) *Ethnopolitics* 43; Donald Horowitz, *Ethnic Groups in Conflict* (University of California Press 1985) 349-360.

<sup>29</sup> For more on this see Levy, O’Flynn and Kong, above n 14, ch 2.



extensive formal education to understand or access them (and anyway only some kinds of education – e.g. philosophy, theology and law – instruct students in ethics and meta-ethics). Granted, to say that non-elites are capable of engaging in public-values deliberation is not to show that they will do so. But two important considerations should be borne in mind. First, non-elite individuals are less likely than elites to have rigid party or other political allegiances, or the entrenched vocabulary and assumptions about the conflict in question.<sup>30</sup> Many elites' professional positions, careers and status within a group are tied to the struggle with the "other side."<sup>31</sup> Secondly, governmental elites are often relatively insulated against the consequences of war such as violence, economic collapse and forced-migration.<sup>32</sup> In contrast, non-elites are often the ones that suffer most and who therefore have the stronger incentive to bring the conflict to an end. Of course, some conflicts are more socially pervasive than others, and therefore even non-elites may share in the felt need to sustain a conflict. Yet, even in the most pervasive conflicts (e.g., the conflict of Kirkuk in Iraq), in practice the assumption that a sense of conflict is shared among wider populations is overestimated.<sup>33</sup>

Hence, while elites of many kinds often have greater formal education and may be superior deliberators on applied matters (the "specifics and technicalia" mentioned above), the elite deliberative advantage may diminish given a referendum-led peace process focused on values – and particularly one with adequate supports for public-value (and other) deliberation. As we will see, the deliberative peace referendum promotes public-value deliberation and, at least in part, bypasses elites; it therefore diminishes the role of those who are often the main barriers to conflict settlement.

An important proviso is that the scope of value reasoning involved should be confined to just the several key values lying at the root of a conflict. The referendum ballot to be seen requires voters to rank values.<sup>34</sup> However, the ballot should not query too many values as this may jeopardize voter engagement. The deliberative peace referendum model we prefer does

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<sup>30</sup> See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity 2001) 129.

<sup>31</sup> Stuart Kaufman, 'Symbolic Politics or Rational Choice: Test Theories of Extreme Ethnic Violence' (2006) 390(4) *International Security* 45.

<sup>32</sup> Surveys conducted in conflict societies often show ordinary citizens as less committed to sustaining conflict, and more interested in reaching an agreement. See, eg, ARK. 'Northern Ireland Life and Times Survey, 2017' (*NILT* June 2018) < [www.ark.ac.uk/nilt/2017/](http://www.ark.ac.uk/nilt/2017/)> accessed 23/01/2019.

<sup>33</sup> As Natali argues, 'Contrary to popular perceptions, the overriding concern of Kirkukis, like most populations in the Kurdistan region, is ... the provision of services, education and effective administration'. Denise Natali, 'The Kirkuk Conundrum' (2008) 7 *Ethnopolitics* 438.

<sup>34</sup> Ned Augenblick and Scott Nicholson, 'Ballot Position, Choice Fatigue, and Voter Behaviour' (2015) 83(2) *The Review of Economic Studies* 460, 477-479.

not require that voters achieve common ground across many different subjects. Such a maximalist approach could be unworkable for being too complex, and in any event is likely unnecessary. For example, in the successful Northern Ireland settlement, there was no expectation that individuals would move closer in identity to one another. Nor was there an expectation that citizens would become more politically accommodating in general. Instead, the settlement saw a momentary re-consideration of the group commitments that should be understood as legitimate: a far narrower matter.<sup>35</sup> This marks where our preferred referendum model departs from past suggestions, such as those of Bora Kanra and Adeno Addis, who assert that peacemaking must rely on a gradual process of broad and unforced general social learning.<sup>36</sup> This is of course desirable but again may not be necessary. In the next section, we will suggest that even an initially brief moment of agreement might endure as a lasting settlement if legitimated by a deliberative peace referendum.

### *B. Settlement Endurance*

The achievement of a settlement is not always equivalent to the successful management of conflict. A settlement that quickly dissolved would be of little value. But the use of the deliberative peace referendum might help transform a fleeting moment of agreement into a more durable settlement.

The constitutional nature of conflict settlement norms underlies the discussion here. A constitutional norm, on Jon Elster's well-known definition, is one that is fundamental, binding and *enduring*.<sup>37</sup> That a constitutional norm is "fundamental" means that it enjoys priority over other laws, norms and actions. Fundamental norms can powerfully shape the values and collective goals of a polity. Constitutional norms also follow "stringent amendment procedures," which partially account for the ability of constitutional norms to endure. Onerous amendment procedures in theory prevent the amendment or revocation of written constitutional texts.

But if constitutional norms have the special capacity to direct other norms and actions, and to endure, how and when do norms acquire such characteristics? Put another way, why do only some conflict settlements become what we may call binding "constitutional

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<sup>35</sup> Hennessey n 22, 18.

<sup>36</sup> Bora Kanra, *Islam, Democracy and Dialogue in Turkey: Deliberating in Divided Societies* (Ashgate, 2009);

<sup>37</sup> Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 366.

settlements”? This question is important in peacemaking, because here what counts is the widespread *perception* that settlement norms are constitutionally legitimate and binding.<sup>38</sup> This invites an essentially sociological inquiry (though one with strong normative overtones) about the factors that influence whether and when shared understandings develop about a norm’s constitutional status and legitimacy. For a settlement to be effective, these understandings should be shared by majorities, minorities and elites alike. Only such wide agreement is likely to keep members of each of these social segments from breaching a settlement (or doing so too often). Of course, breaches such as renewed violence (involving either conventional armed exchanges or more targeted assassinations and terror) can spark a settlement’s immediate or eventual collapse.

What, then, might be the sources of sociological constitutional legitimacy in a conflict setting? Of course *formal amending procedures*, where they exist, can be important. Yet this begs the question of what accounts for the legitimacy of the procedures themselves.<sup>39</sup> Procedures have sometimes been set aside amid mass popular movements (consider the founding of the US Constitution through means other than those set out in the Articles of Confederation).<sup>40</sup> This is not to say that formality can never endow sociological constitutional legitimacy; complying with formal procedures might signal that the process is of particular importance and that any norms it yields should be viewed as fundamental.<sup>41</sup> But formal sources of legitimacy are only effective if there is already broad agreement on the legitimacy of the procedures and the constitutional norms that embody them. Clearly this precondition is absent in many conflict societies. In a mature liberal democracy, the consent and trust of the governed in the constitutional norms that govern them can be largely taken for granted.<sup>42</sup> Yet, in a conflict society, consent and trust cannot be assumed. On the contrary, the experience of conflict is often such that at least one group in the society has withdrawn its consent and lost confidence in constitutional norms and institutions.

Thus we must look to a further set of possible conditions for constitutional legitimacy amid conflict. Two other possibilities are *popular sovereignty* and *exclusivity*. Each rests on a

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<sup>38</sup> Jon Elster, ‘Forces and Mechanisms in the Constitution-Making Process’ (1995) 45 *Duke Law Journal* 364, 366.

<sup>39</sup> Peter Oliver, “*The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand*” (Oxford University Press, 2005) 291–292.

<sup>40</sup> Bruce Ackerman, “*We the People, Volume 1: Foundations*” (Belknap Press of Harvard University Press, 1991) 175.

<sup>41</sup> Peter H Russell, “*Constitutional Odyssey: Can Canadians Become a Sovereign People?*” (University of Toronto Press, 2nd ed, 1993) 219.

<sup>42</sup> John Petrov Plamenatz, *Consent, Freedom and Political Obligation*, 2nd ed (London: Oxford University Press, 1968) at 7; cf Anthony Harold Birch, *Representation* (New York: Praeger, 1972) at 33.

partially distinct set of arguments or observations about how constitutional legitimacy develops. Each is also a feature of all or most constitutions. And, importantly, referendums potentially enliven each of these legitimacy sources – especially when designed as deliberative referendums.

### *1. Popular sovereignty*

Popular sovereignty as a source of constitutional legitimacy is a familiar concept, initially from works such as those of Madison, Rousseau, Sieyès and Locke.<sup>43</sup> We can now link these early perspectives – premised largely on intuition and anecdotal experience – to modern empirical methods gauging what democratic citizens view as legitimating. Indeed, if we neglect to consult the available evidence, we encounter the contradiction of elite observers opining over what popular sovereignty entails while ignoring actual popular sentiment about it. In any event, empirical work is more likely to tell us what we most need to know: namely which constitution-making procedures might yield greater sociological legitimacy and endurance. For instance, John Carey’s important study of constitutional formation suggests that democratic enactment of putatively constitutional norms helps to ensure their longevity.<sup>44</sup> Hence the nature and apparent legitimacy of the constitutional drafting moment seems to impact on subsequent constitutional legitimacy and endurance.

But this evidence leaves open questions crucial for our purposes, such as what type of democratization best legitimates a constitution. Should it be direct or indirect? Is referendum democracy or representative democracy preferable? And if so might deliberative institutional features play legitimating roles as well? In polling studies that one of us has conducted, poll questions adopted the terminology of “trust” in constitutional reform – presumably a more broadly understood term than “legitimacy.”<sup>45</sup> Trust denotes an “attitude of optimism” about the willingness of delegates to use power in appropriate ways on one’s behalf.<sup>46</sup> Trust is thus a “bet about the future contingent actions of others.”<sup>47</sup> This echoes definitions of sociological legitimacy. When trust in a putative constitutional reform process and its substantive

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<sup>43</sup> For example, James Madison, *The Federalist* No. 49 (Clinton Rossier ed, 1961); Emmanuel-Joseph Sieyès, *What is the Third Estate?* (M Blondel transl.) (Praeger, 1964) (1789).

<sup>44</sup> John M Carey, ‘Does It Matter How a Constitution is Created?’ in Zoltan Barany Robert G Moser (eds), *Is Democracy Exportable?* (Cambridge University Press, 2009) 172.

<sup>45</sup> Ron Levy, ‘Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change’ (2010) 34 *Melbourne U. L. Rev.* 805.

<sup>46</sup> Karen Jones, ‘Trust as an Affective Attitude’ (1996) 107 *Ethics* 4, 5. See also Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press, 1999) 25.

<sup>47</sup> Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press 1999) 25.

outcomes is relatively high and stable, then many or most people may be content to defer to the settlement rather than continually reopen settled issues themselves. These qualities may be key to a settlement's effectiveness and endurance.<sup>48</sup>

But we should avoid the trap of perfectionism: trust ought not be understood in absolute and binary terms (trust/no trust) but as relative and incremental. Every potential reform process, after all, will have its own set of faults. Who, then, is least or most trusted to lead processes of constitution-making under particular circumstances? Certain attributes may determine the balance of trust here: for example, considerations of who has relevant knowledge, experience, breadth of vision and commitment to deciding fairly and in good faith. In an ordinary (non-constitutional) lawmaking context, the balance usually favours governmental elites. Such elites generally have the deliberative advantages of expertise and the time to reflect.<sup>49</sup> Trust in the delegation of power to such elites is thus generally justified for ordinary lawmaking. Of course, these expectations may not always be borne out. Governmental elites often tend instead to prioritise their own preferences while in office.<sup>50</sup> And elite power roles raise temptations to issue biased, corrupt or otherwise self-serving decisions.<sup>51</sup> Nevertheless, for most ordinary lawmaking, the balance of trust will often continue to favour governmental elites, especially given the overwhelming deliberative faults, in relative terms, of non-elites when the lawmaking task concerns technical arcana and complex regulatory schemes.

By contrast, amid constitution-making the balance of trust generally shifts toward non-elites.<sup>52</sup> Trust in governmental elites may diminish when a law being made is putatively constitutional. "Constitutional reform is often distinguished by the gravity of interests engaged, its relative irreversibility and its wide substantive range."<sup>53</sup> Moreover, constitutional norms are generally broad in scope and thus often public-value based. This returns us to the point that ordinary citizens are familiar with broad values, and that despite generally superior general education, many elites enjoy no particular advantage at getting public-value deliberations "right." If this is so, then for much constitutional reform non-elite value

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<sup>48</sup> Tom R Tyler and Jonathan Jackson, "Popular legitimacy and the exercise of legal authority: motivating compliance, cooperation and engagement" (2014) *Psychology, Public Policy and Law* 20(1) 78-95.

<sup>49</sup> Maija Setälä, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45 *European Journal of Political Research* 699-721.

<sup>50</sup> Sanford Levinson, 'The Political Implications of Amending Clauses' (1996) 13 *Constitutional Commentary* 107, 114-117.

<sup>51</sup> David Ponet and Ethan Leib, *Fiduciary Law's Lessons for Deliberative Democracy* (2011) 91 *Boston University Law Review* 1249, 1256.

<sup>52</sup> Ron Levy, 'The Deliberative Case for Constitutional Referenda' (2017) 16(2) *Election Law Journal* 213.

<sup>53</sup> *Ibid.*

reasoning may be just as good, or indeed better, than that of the elites. A related point is we generally should invest power in governmental elites only to interpret and apply a society's basic value commitments, and not to decide which constitutional values should be adopted in the first place.<sup>54</sup> Complete delegation of the task makes poor sense if sovereignty over the constitution rests with the many, and not the few.

Despite this, an extensive study that one of us conducted of Australian governmental elites' attitudes toward constitutional reform showed that they often prefer inter-elite interactions, rather than fulfilling their presumptive role of gauging and filtering the views of the broader population.<sup>55</sup> In a complementary set of results, respondents to the nationwide poll mentioned earlier indicated that certain governmental elites were relatively distrusted as leaders of constitutional reform. Reform procedures in which elite roles were largely replaced by non-elites in a citizens' assembly (a body described in more detail below) attracted higher trust by an extraordinary ratio of almost 2:1.<sup>56</sup>

Note an important proviso: the kinds of non-elite participation queried in these studies were described as *deliberative* in design. The polling study apparently showed higher trust in a hypothetical non-elite reform process, culminating in a referendum, in part because the process was to enjoy deliberative institutional support. The polling study also included questions gauging which procedural values respondents preferred to see drive constitutional reform. Contrary to some prior assumptions,<sup>57</sup> majority dominance over reform was not the key determinant of trust in reform processes.<sup>58</sup> While majority rule was an important factor, more important were the deliberative values of "fairness and impartiality" in the process of reform.<sup>59</sup> "Fairness" mainly indicates that equal regard should be had to the interests or views

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<sup>54</sup> Ibid 217 (arguing that only interpreting and applying public values, and not choosing values outright, really counts as delegation).

<sup>55</sup> Ron Levy, "The "Elite Problem" in Deliberative Constitutionalism" in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018) 351, 359-362: Results from a 2016 survey show that public servants (elites) are approximately twice as likely to consult senior public servants or ministers/ministerial staff on policy development than they were to consult the general public.

<sup>56</sup> Levy, 'Breaking the Constitutional Deadlock', above n 45, 833-837. See also Gastil et al, 'Assessing the Electoral Impact of the 2010 Oregon Citizens' Initiative Review' (2018) *American Politics Research* 46.3: 534-563.

<sup>57</sup> Levy, *ibid*, 832-838. In Canada, see Cutler et al., *supra* note 10.

<sup>58</sup> See, e.g. A. Moravcsik, "What Can We Learn from the Collapse of the European Constitutional Project?" (2006) 47 *Politische Vierteljahresschrift* 219 (on unsuccessful efforts to secure constitutional change in Europe through simple majoritarian voting).

<sup>59</sup> For instance, in the comparative democratisation literature, "free and fair elections" are often treated as the most important indicators of democratic quality or the most important standard for assessing the legitimacy of emerging democratic arrangements. Yet, while free and fair elections are obviously important, ultimately our assessment of what it is that makes an election fair is not something that can be determined in the absence of deliberation: in short, fairness requires us to weigh competing reasons equally in the balance with our own. Ian

of all people affected by the reform. “Impartiality” relatedly suggests a process that is not partisan, biased or otherwise pre-committed to particular substantive outcomes.

Voters apparently therefore recognize that they themselves may not always deliberate effectively over some aspects of constitutional settlement (particularly if a draft settlement includes more technical rather than public-value content). With this in mind, the appeal of the *deliberative referendum* becomes clear. Reform methods capable of squaring democratic and deliberative goals attract the highest levels of popular trust in a constitutional reform process, out of all the options assessed. To the extent that a deliberative referendum can mitigate concerns about the deliberative capacities of ordinary citizens, it is likely to shift the balance of trust further toward non-elites. While any referendum can potentially legitimate a constitution by relying on popular consent, a deliberative referendum is likely to be a more potent legitimation tool as it may mitigate some concerns about non-elites’ deliberative competence. Those concerns may be greatest – and the need for responses to such concerns correspondingly acute – amid conflict.

Admittedly, the conclusions so far are based mainly on studies of non-conflict societies with developed liberal and democratic institutions. Are they applicable in conflict societies? Evidence here is so far scant and there is a dearth of empirical research on the topic (probably due to traditional emphasis in the conflict literature on elite behaviour).<sup>60</sup> But what we do already know of conflict societies is suggestive.<sup>61</sup> In a conflict context, the observations made here on the inadequacy of elite-driven constitution-making are again relevant, and the same risks seem to arise, only to a greater extent. To give a specific instance of the additional reasons why deliberative institutions may be useful amid conflict, consider first the a heightened risk of partisan entrenchment: elites already in power are more, not less, likely to rewrite the basic constitutional ground rules of power in order to cling to power

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O’Flynn and Nicole Curato, ‘Deliberative Democratization: A Framework for Systemic Analysis’ (2015) 36 (3) *Policy Studies* 36 (3), 298-313.

<sup>60</sup> The ‘classic’ statement of this emphasis is Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press, 1975).

<sup>61</sup> In order to test the support for deliberative democracy in Northern Ireland, and in particular the idea of attaching a citizens’ assembly onto the local legislative assembly, a field experiment was organised involving members of the general public and members of the local legislative assembly (MLAs). When asked about different ways of resolving contentious issues such as flag display and the issue of welfare reform, only 17% of the MLAs thought that ‘get[ting] a cross section of ordinary citizens on a Citizens Assembly to learn about the issue, listen to a presentation of all the main arguments and then reach a decision on the issue’ was a ‘good idea’ (the figure for the general public was 65%). In fact, 39% of MLAs thought that a citizens’ assembly should ‘not be given any role at all in policy making’ (the figure for the general public was 16%). John Garry, ‘Deliberative Democracy in Northern Ireland,’ Northern Ireland Knowledge Exchange Seminar Series 2015-16, 4-5.

Available from:

[http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge\\_exchange/briefing\\_papers/series5/garry-briefing.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series5/garry-briefing.pdf).

“contrary to the preferences of their constituents.”<sup>62</sup> Elite heads of warring parties may seek to amend constitutional norms to entrench their own dominance. Relatedly, constitutional norms can calibrate political systems in favour of dominant ethnically-based political parties, a more acute risk when those parties control the constitutional reform process. Distrust in several types of elites is likely to be more pronounced in many conflict societies, where governing institutions are often seen as tools of clientelism and corruption, or as mouthpieces for a dominant social subpopulation that has captured the government.<sup>63</sup>

In other words, while of course there is an unusually high likelihood that deliberation in conflict societies will be worse than in other places, this provides an argument for the deliberative referendum, not against it. ‘Deliberative referendum’ is a term of art meaning a referendum that seeks to address deliberative faults; whether it succeeds at doing this is another matter, and less predictable. But when the background conditions for deliberation are worse, the need to attempt to improve deliberation is more acute. And, if successful, the benefits of that success – in this case on trust in the process of peacemaking – may be greater.

## 2. *Exclusivity*

We said above that constitutional norms are fundamental: they take precedence over other norms and actions. Constitutions establish a set of ground rules for making and, equally importantly, coordinating laws and social conduct. A key requirement for the establishment of constitutional legitimacy follows from these observations: a process of constitutional reform should establish that a new norm has the *exclusive* claim to binding in a given jurisdiction. This means that a relatively clear and stable hierarchy of laws is in place, which prevents undue dispute over who may or may not do what.<sup>64</sup> A referendum, as we argue here, can be one important way to lock a given normative hierarchy into place.

Our point here assumes that a society has room for only one exclusive set of foundational governing norms. Thus a

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<sup>62</sup> Michael Klarman, ‘Majoritarian Judicial Review: The Entrenchment Problem’ (1997) 85 *Georgetown Law Review* 491, 498.

<sup>63</sup> Lebanon is a classic case: see, e.g., Stephen Deets, ‘Consociationalism, Clientelism, and Local Politics in Beirut: Between Civic and Sectarian Identities’ (2018) 24 (2) *Nationalism and Ethnic Politics* 133-157.

<sup>64</sup> Mia Swart, ‘Constitutions and Conflict Management in Africa: Preventing Civil War Through Institutional Design (Book Review)’ (2016) 14(1) *International Journal of Constitutional Law* 316.



primary job of constitutions is to resolve intractable coordination problems – for example, how political actors with diverse interests might contest for political authority on a regular basis without mutual destruction. Coordination equilibria require stable mutual expectations among actors.<sup>65</sup>

According to Carey, a society is unlikely to select more than one set of norms as constitutional since these might be contradictory.<sup>66</sup> Indeed, one of the defining features of a conflict society is its inability to agree upon a single constitutional framework. It is only at the point at which the parties to the conflict recognizes that they are caught in a “mutually hurting stalemate” that they may seek a way out of that conflict via an agreement on a single set of overarching rules – whether to avoid “mutual destruction,” or perhaps to appease a restive, independence seeking minority.<sup>67</sup> Such recognition signals an acceptance that one exclusive set of norms should take precedence over others; in turn, this reflects the sociological aspect of constitutional legitimacy that we have discussed.

But where do referendums fit in this picture? Carey conjectures that, to “the extent that the mere occurrence of a referendum clearly signals the adoption of a constitution, one might expect referenda to foster coordination around the new set of rules.”<sup>68</sup> The referendum’s mere use, then, perhaps signals that newly enacted norms are constitutional and fundamental. Yet the referendum can also rely on more specific features to signpost that certain norms should count as fundamental and exclusive. The referendum might use the putative legitimacy and neutrality of popular voting to help sideline competing putatively fundamental norms, putting at least some normative conflict to rest. It might do so via two interlaced routes: (1) by *exposing pre-existing agreement* about which exclusive set of norms should be fundamental; and (2) by *formalizing agreement* about fundamental norms, marking the consensus as less speculative and contested.

In terms of the former, a positive referendum result potentially highlights an existing agreement in favour of peace settlement that would otherwise not have come to light or

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<sup>65</sup> Carey 158.

<sup>66</sup> Carey 158, 160.

<sup>67</sup> In this spirit, O’Leary writes of the Belfast Agreement that “unionists who supported the Agreement were concerned not so much with ending the IRA’s long war. Rather, they were concerned with protecting and safeguarding the Union. Their calculi suggest that only by being generous now could they reconcile nationalists to the Union and protect themselves against possible seismic shifts in the balance of demographic power. Unionists ... made an Agreement to stave off something worse”: Brendan O’Leary, ‘The Nature of the Agreement’ (1998) 22 (4) *Fordham International Law Journal* 1656.

<sup>68</sup> Carey, ‘Does It Matter How a Constitution is Created?’, 176.

would not have been widely believed.<sup>69</sup> Doubts about the good will of one's co-citizens is likely to arise even if only a small subset of people – often just a handful of governmental and media elites, but some non-elites as well – dominate public discussion and set its tenor using trolling and other heated forms of rhetoric.<sup>70</sup> But the referendum potentially spotlights the often more conciliatory – but usually silent – views of the greater part of a population. By elevating more mainstream views, the referendum may expose any bellicose expressions dominating public discourses as reflecting mere outlier perspectives. In the referendum held in 1992 among White South Africans – held to give President de Klerk a mandate to pursue settlement and end Apartheid – the “landslide victory” was unexpected.<sup>71</sup> The outcome of the voting process – a process that included rural and potentially more intransigent Afrikaner communities – surprised de Klerk's “own party officials who had predicted a 55 per cent ‘yes’ majority, at best, well below the 68.7 per cent he received.”<sup>72</sup> A key consequence of the referendum was that it provided greater public visibility to the existing, and overwhelming, majority sentiment in favour of reform and peacemaking. Contrary to elite assumptions, this sentiment had flourished even amid a lengthy and seemingly intractably conflict.

The ability of a referendum (especially a mandate referendum of the sort just described, which may influence later negotiations) to sway a debate by exposing preexisting agreement depends on the weight given to popular views. Such views may carry enough influence to provide a counterweight to the partisan and deadlocked negotiations of certain elites. Popular legitimacy is part of the story here: governmental elites in particular may be unable to act in ways obviously contrary to popular sentiment, or to ignore clear and considered popular views. Also relevant is the perception that non-elites are relatively neutral on matters over which elites tend to bicker and adopt extreme and uncompromizing negotiating positions. This provides what has been called the “circuit-breaking” function of referendums. Voters are thought to come at matters afresh, without the same partisan preconception and self-serving decision-making incentives as certain elites. The “circuit” broken here is the cycle of partisan strike and counter-strike – in other words, the polarization

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<sup>69</sup> For the argument that majority voting can be used to test whether what appears to be a deliberative consensus really is a consensus (eg, some people may simply not have spoken up), see Alfred Moore and Kieran O'Doherty, ‘Deliberative Voting: Clarifying Consent in a Consensus Process’ (2014) 22 (3) *Journal of Political Philosophy* 302-319.

<sup>70</sup> Amy Thomas, Hannah McCann and Geraldine Fela, “‘In This House We Believe in Fairness and Kindness’: Post-Liberation Politics in Australia's Same-Sex Marriage Postal Survey’ (2019) *Sexualities* (advance).

<sup>71</sup> Loizides, n 4, 239.

<sup>72</sup> *Ibid.*

and deadlock that may prevent progress in seeking constitutional reforms acceptable to broad social cross-sections.

Note that deliberative referendums in particular may be especially useful for exposing agreement. We will see that the methods of the deliberative peace referendum seek to make the issues and values underlying the vote clearer to voters. The methods also seek to encourage widespread reasoning and reflection, and hence to lend the referendum a level of legitimacy that it might otherwise lack. Absent deliberative supports, a referendum might show a lack of agreement where there is in fact agreement. Most relevantly for our purposes, since our preferred model of deliberative peace referendum focuses on public values, its outcome may reveal an agreement that is foundational in kind – one that bears on matters that are themselves fundamental to a society. If that agreement is deeply held by a significant portion of the population, it provides the basis upon which subsequent governance decisions can proceed. But in the light of these considerations, and given what we have said about the need for clear exposure of agreement, the agreement itself must not be in doubt. Hence it can be useful to have a modest supermajority vote requirement – such as 55% – or at least a requirement that two simple majority votes be held with a gap of at least several months. The latter option allows voters to continue to deliberate and consider their choices, and also ensures against constitutional changes premised on mere transient majority sentiments.

Unlike a mere opinion poll, the referendum may also in effect *formalize* an agreement, enshrining the latter as a socially salient moment capable of displacing more jaundiced assumptions of the conflict's inevitability. The referendum has the capacity to decide matters in a final way. It may therefore have a formal and not merely hypothetical effect on foundational laws.<sup>73</sup> The referendum vote is no mere snapshot of under-considered opinion, but to some extent reflects considered choices by people who expect their votes to count toward a real-life collective decision. To the extent that a referendum is designed to be deliberative, we can be just that bit more confident that the outcome reflects what people really want.

### **III. Deliberative Peace Referendum Design**

Deliberative peace referendums can adopt a number of institutional supports for deliberation. We review some of these features in the present section (which reprises and

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<sup>73</sup> Setälä, above n 49, 710, 714.

summarizes some of our past work).<sup>74</sup> The centerpiece of our preferred referendum model is the use of “public-value voting,” but other design features can also aim to enhance deliberation both before and during the referendum vote.

### A. *Public-value voting*

Design of the referendum should encourage voter reasoning about *public values*: values that people can reasonably be expected to endorse, whatever their more particular views and commitments, because the values are general in scope and applicable to nearly everyone (eg, values of equality, inclusion, rule of law and non-violence).<sup>75</sup> Both the referendum ballot and the information presented to voters during the referendum campaign should promote public-value reasoning.

The ballot can have two discrete parts, the first of which asks voters to rank a set of public values according to their preferences. Multi-option voting here would depart from the traditional “yes”/“no” vote, presenting voters instead with several options and avoiding the artificial reduction of complex matters into a simple binary.<sup>76</sup> The ballot should make explicit to voters the main values at stake in the peacemaking process. (Which values appear on the ballot should be decided by a mini-public – see below.) Values in this first part of the ballot should be *generalized* in scope – that is, they should be expressed in language indicating that any democratic citizen can be expected to endorse them, regardless of what position they take in the conflict (e.g., “People of all communities should be secure from violence”). The ballot thus asks voters to vote not according to their own narrow interests, but according to the more universal values that they believe should drive the settlement; that is, the ballot should encourage them to see that similar interests should be treated equally. The voter must either

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<sup>74</sup> Ron Levy, “‘Deliberative Voting’: Realising Constitutional Referendum Democracy’ (2013) *Public Law* 555; Levy, O’Flynn and Kong, above n 14; Levy, Simpson, O’Flynn and Flaherty, above n 14.

<sup>75</sup> Proponents of this ‘public reason’ approach include Joshua Cohen, ‘Deliberation and Democratic Legitimacy’ in Alan Hamlin and Philip Pettit (eds), *The Good Polity* (Blackwell 1989) 17-34; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided and What Should be Done about It* (Belknap Press 1996); John Rawls, *Political Liberalism*, above n 6, 212-254 and John Rawls, ‘The Idea of Public Reason Revisited,’ above n 6, 765-807. See also Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press, 2011); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford University Press, 1990); Charles Larmore, *The Morals of Modernity* (Cambridge University Press, 1996); and Jeremy Waldron, ‘Theoretical foundations of Liberalism’, in J. Waldron (ed.) *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993), 35-62.

<sup>76</sup> Lawrence LeDuc, ‘Referendums and Deliberative Democracy’ (2015) 38 *Electoral Studies* 139, 141.

do some conceptual work to justify a narrower view of the value, or realize that a non-public framing of the value is morally arbitrary and cannot be sustained.

To an extent, then, the ballot forces parties to meet on common ground.<sup>77</sup> By generalizing values, the voter can only vote for or against a general proposition by giving it either a high or a low rank. The voter cannot make a selective choice that supports only one's own community's claim to the value. In this way the deliberative peace referendum can be expected to emphasize commonalities among groups, rather than prompting division – as discussed further below. However, note a key proviso: value questions on the ballot should be *minimalist*, and thus designed to include only the values that are critical to the conflict in question. The aim of public-value voting should, then, be to enhance deliberation over just a few values – particularly those values that, being central to the conflict, must be addressed in order to move forward in peacemaking. As we saw, achieving agreement around these values is far from simple, but deliberating over them in specifically *public* terms makes the task at least more feasible. Differences will still arise, though, for instance over how the values should manifest in the concrete terms of a settlement; we discuss this below.

### B. *Elite delimitation*

Like any referendum, a deliberative peace referendum has the potential to enhance the expression of non-elite citizens vis-à-vis elites. This is an important function because, as we have seen, elites can be responsible for the creation and sustainment of conflict, and may also be less adept at deliberating in a public way about values. While a referendum can act partially to sideline elites, it is impossible completely to nullify their influence; finalization of a peace settlement will normally require some degree of elite participation to hash out the final details (and in practice this is likely to involve both bargaining and brinkmanship, as opposed to deliberation as we have defined it here).<sup>78</sup> However, a referendum may help to

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<sup>77</sup> Levy, "Shotgun Referendums" above n 14, 1263. Some coercion is arguably an inevitable element of deliberative democracy – particularly in circumstances where the conditions for deliberation are otherwise unfavorable. That is, adopting what Fung calls "activist deliberative democracy," it may be suitable in some cases to arrest the circuit of violent reaction and counter-reaction by imposing a more deliberative alternative on the warring parties: see Archon Fung, 'Deliberation before the revolution: Toward an ethics of deliberative democracy in an unjust world' *Political Theory* (2005) 33(3) 397, 399-401; Jane Mansbridge and others, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *Journal of Political Philosophy* 64, 82.

<sup>78</sup> In the conflict literature, the "assumption has been that, if the parties agree and can live with the agreement, they must have arrived at something like the market-clearing price." Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (University of California Press, 1991), 153. In other words, the assumption is that they must have reached a bargain. However, the deliberative referendum seeks to

lower the relative volume of elite voices. A key element of the deliberative peace referendum model thus can be sequencing – and limiting – elite roles to assume dominant functions only after the referendum has run.<sup>79</sup>

After public-value questions, the referendum can pose questions about concrete courses of action. This can take the form of a broad mandate question – for example: “Should [x government] begin a process of reconciliation with [y group]?”<sup>80</sup> Mandate referendums have a number of precedents, including the 1962 referendum in France mandating Algerian independence negotiations and the 1992 referendum in South Africa mandating an end to apartheid.<sup>81</sup> These cases saw the mandate approach effectively compel certain recalcitrant elites to negotiate a settlement on the terms stipulated by the referendum.<sup>82</sup> The mandate portion of the ballot can be articulated as a simple “yes/no” question asking voters to empower their elite representatives to begin negotiations toward a binding peace settlement. Otherwise, the mandate can include several specific substantive reform options (e.g., in a secessionist conflict, constitutional reform options might be presented to voters including “autonomy within a federation,” “full independence” and “no change”). In the latter kind of case, the mandate to negotiate a settlement also includes the basic parameters of the kind of settlement that should be achieved. Preferential – or ‘preferendum’ – voting could still allow a single option to emerge with majority support.<sup>83</sup>

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keep that bargaining within certain principled parameters, as of course it must: if bargaining is to be fair, then the parameters cannot themselves be the result of bargaining. Ian O’Flynn, ‘Pulling Together: Shared Intentions, Deliberative Democracy and Deeply Divided Societies’ (2017) 27(1) *British Journal of Political Science* 187, 197..

<sup>79</sup> There is of course the question of whether elites can be convinced to cede their power and let the referendum run in the first place. The number of past cases in which referendums ran – and genuinely so, in that they were no mere exercises in dressing up elite control – shows this to be possible: see n 1 above. Would-be peacemakers also may have the option (albeit an option with mixed results so far) to run what we call ‘rogue referendums’ without the approval of recalcitrant elites in power: see Levy, O’Flynn and Kong, *Deliberative Peace Referendums*, above n 14, ch 6.

<sup>80</sup> Sometimes, more complex questions may be included, to be answered after the questions in the second section. These may be required by law, as in the referendum planned in Bougainville for 2019: *Constitution of the Autonomous Region of Bougainville 2004*, pt 17.

<sup>81</sup> Neophytos Loizides, ‘Negotiated Settlements and Peace Referendums’ (2014) 53 *European Journal of Political Research* 234, 237.

<sup>82</sup> *Ibid*, 237. Some peace referendums not conducted in a mandate mode have also been successful, such as the Belfast Agreement, which voters endorsed *after* elite negotiations concluded: Brendan O’Leary, ‘The Nature of the Agreement’ (1999) 22 *Fordham Journal of International Law* 1638-1639. But one of the risks of holding a referendum after the fact like this is that voters will resist endorsing a complex agreement – such as Colombia’s 297-page proposed settlement with FARC in 2016 – that few understand: Christine Bell, ‘Lex Pacificatoria Colombiana: Colombia’s Peace Accord in Comparative Perspective’ (2016) 110 *American Journal of International Law* 165, 166.

<sup>83</sup> Orr, G (2001) ‘Preferenda: the Constitutionality of Multiple Option Referenda’, *Constitutional Law and Policy Review*, 3(4), 68.

### C. Mini-publics

One way to make the goal of delimiting elite roles feasible is to give to non-elites certain key functions that are typically elite preserves. The use of mini-publics in a variety of contexts – but especially in the lead-up to a referendum – is now very common. Hundreds or perhaps thousands of mini-publics have run, especially since their popularization in the 2004 British Columbia Citizens’ Assembly on Electoral Reform. The term “mini-public” is usually taken to refer to a randomly selected (and hence in principle representative) group of people who engage in discussions about a policy issue or set of policy issues over a number of days or weeks.<sup>84</sup> Participants are usually provided with good (i.e., relevant, balanced, comprehensive) information. They also learn from diverse experts, and from each other, in extended periods of deliberation. The costs in time and money of encouraging the same degree of learning and deliberation for a whole public would be prohibitive; but the mini-public, as a demographic microcosm, can be put through stages leading to improvements in their own knowledge and deliberation. That this model can be (though is not always) effective is well-established in numerous studies of experimental and real mini-publics – including some in conflict areas.<sup>85</sup> Empirical studies show for instance that mini-publics can be effective at becoming informed on a specific policy matter.<sup>86</sup> Importantly, membership in political or ethnic parties is relatively rare in most general populations, and in turn that makes such membership similarly rare within mini-publics. These features help to explain further empirical findings that mini-publics can be effective at (1) deliberating in open-minded and flexible ways, without partisan pre-commitment, about the policy matter in question; (2)

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<sup>84</sup> For an overview and critical appraisal, see Ian O’Flynn and Gaurav Sood, ‘What Would Dahl Say?: An Appraisal of the Democratic Credentials of Deliberative Polls and Other Mini-Publics’, in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds.), *Deliberative Mini-Publics: Practices, Promises, Pitfalls* (ECPR Press, 2014) 41-58.

<sup>85</sup> See, eg, Robert Luskin and others, ‘Deliberating across Deep Divides’ (2014) 62(1) *Political Studies* 116; Didier Caluwaerts, and Min Reuchamps ‘Does Intergroup Deliberation Lead to Intergroup Appreciation?: Evidence from two Deliberative Experiments in Belgium’ (2014) 34(2) *Politics* 101. But cf Margarita Orozco and Juan Ugarriza, ‘The Citizens, the Politicians and the Courts: A Preliminary Assessment of Deliberative Capacity in Colombia’ in Juan Ugarriza and Didier Caluwaerts (eds), *Democratic Deliberation in Deeply Divided Societies: From Conflict to Common Ground* (Palgrave 2014) 73–88; Juan Ugarriza and Enzo Nussio, ‘There is No Pill for Deliberation: Explaining Discourse Quality in Post-conflict Communities’ (2015) 22(1) *Swiss Political Science Review* 145.

<sup>86</sup> Robert S. Ratner, ‘British Columbia’s Citizens’ Assembly: The Learning Phase’ (2004) 27(2) *Canadian Parliamentary Review* 20.

being perceived as trusted proxies for larger publics; and (3) even setting the (more deliberative) tenor of deliberation in the wider public campaign before a referendum.<sup>87</sup>

In the context of a peace referendum, the mini-public can be charged with writing the specific list of public values to be presented to voters in the first section of the ballot. They can also be tasked with writing information materials presented to voters (discussed next). Of course, participants from minority communities may lack the ‘critical mass’ to confidently voice their views.<sup>88</sup> In order to overcome this problem, equal numbers from each community should ideally be included in the mini-public. This entails a departure from strict randomness. But in conflict societies, where minority communities can easily be numerically overwhelmed by opponents, such a departure can be justified on deliberative grounds. In short, equal numbers are likely to result in deliberations that yield public values generalized and applicable to all.<sup>89</sup>

#### *D. Preliminary instruction*

When seeking popular consent for a constitutional reform, such consent should be as well-informed as possible.<sup>90</sup> Achieving informed consent among hundreds of thousands, or millions, of people is difficult in itself; it is harder still in many conflict societies. For instance, in Bougainville, Papua New Guinea, high illiteracy rates, transport difficulties and a lack of infrastructure have posed significant impediments to attaining informed consent before the referendum set for 2019.<sup>91</sup> However, this is not to say that doing so is impossible. In any case, it should be attempted. Ideally, citizens should be educated through tutorials designed (or at least vetted) by the mini-public. These tutorials can be shown online, on

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<sup>87</sup> Open minded deliberation: James Fishkin, *Democracy When the People are Thinking: Revitalising Our Politics Through Public Deliberation* (Oxford University Press 2018); Christopher Karpowitz and Chad Raphael, *Deliberation, Democracy and Civic Forums: Improving Equality and Publicity* (Cambridge University Press 2014). Trusted proxies and setting tenor of deliberation: Fred Cutler, Richard Johnston, R Kenneth Carty, André Blais and Patrick Fournier, ‘Deliberation, Information and Trust: The British Columbia Citizens’ Assembly as agenda-setter’, in Mark Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (Cambridge University Press, 2008) 168-170.

<sup>88</sup> Michael Rabinder James, ‘Descriptive Representation in the British Columbia Citizens’ Assembly’, in Mark Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (Cambridge University Press, 2008) 106-126 at 120-123; Ian O’Flynn and Gaurav Sood, ‘What Would Dahl Say?: An Appraisal of the Democratic Credentials of Deliberative Polls and Other Mini-Publics’, in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds.), *Deliberative Mini-Publics: Practices, Promises, Pitfalls* (ECPR Press, 2014) 41-58 at 47.

<sup>89</sup> See, eg., Ian O’Flynn, Gaurav Sood, Jalal Mistaffa and Nahwi Saeed ‘What Future for Kirkuk? Evidence from a Deliberative Intervention’ (2019) 26(7) *Democratization* 1299, 1301.

<sup>90</sup> Ron Levy n 20, 563.

<sup>91</sup> Levy et al, ‘Designing Referendums for Peacemaking: The Case of Bougainville’ (2018) *Australasian Parliamentary Review* 33(2) 32-34.



phones, in schools, and in churches or temples. Voting online or at computer voting stations allows for more interactive voting than a mere “yes”/“no” vote. For instance, before they are able to cast their vote, voters can be asked to interact with a 15-minute tutorial informing them of relevant issues and background (e.g., historical and constitutional).

#### E. *Regulating misinformation*

A final, legally controversial (and thus optional) deliberative peace referendum feature could be the enactment of political misinformation laws to prevent elites and others from uttering clearly false statements that are likely to misinform and mislead voters.<sup>92</sup> Such laws are in place in a handful of non-conflict societies.<sup>93</sup> Around the world they have been subject to challenges under constitutional free speech and communication guarantees.<sup>94</sup> But in Australia and Switzerland, political misinformation laws were upheld by judges who cited the value, to voters, of relying on accurate information.<sup>95</sup> Elsewhere, robust anti-misinformation laws would have been useful, for example, in the Brexit referendum campaign of 2016, which featured a number of brazen misstatements.<sup>96</sup> Similar laws are also of course potentially valuable in conflict settings, where referendum campaign speech involving hateful or untrue messages can target minorities and political opponents, further aggravating division.<sup>97</sup> Granted, among many other complications, these laws require trustworthy electoral commissioners /or judges to make sound judgments about factual truth and falsity. In this regard, some useful options may be the use of mini-publics or international observers (e.g., UN agencies and neutral third-party governments) to aid, observe or run these institutions.

### IV. Conclusion

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<sup>92</sup> Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 104-108.

<sup>93</sup> See, e.g., *Electoral Act 1985* (South Australia), s 113; *Electoral Act 2004* (Northern Territory [Australia]), ss 268, 271(2).

<sup>94</sup> See, e.g., *Cameron v Becker* (1995) 64 SASR 238, 243, 247-8, 253-8 (South Australia); *Rickert v Washington Public Disclosure Commission* 168 P 3d 843, 846 (Washington State, 2007).

<sup>95</sup> Levy and Orr n 7, 104-108; [Swiss Supreme Court decision].

<sup>96</sup> Renwick, A, M Palese and J Sargeant (2018) ‘Discussing Brexit—Could We Do Better?’, *The Political Quarterly*, 89(4), 545, 546.

<sup>97</sup> For examples relevant to the 2016 Brexit vote, see: Alan Renwick, Michela Palese and Jess Sargeant, ‘Discussing Brexit—Could We Do Better?’ (2018) 89(4) *The Political Quarterly* 546. Misinformation is also a recurring problem in conflict societies: Barbara Walter, ‘Bargaining Failures and Civil War’ (2009) 12 *Annual Review of Political Science* 243. See also David Lake and Donald Rothchild, ‘Containing Fear: The Origins and Management of Ethnic Conflict’ (1996) 21(2) *International Security* 41; Barry Posen, ‘The Security Dilemma and Ethnic Conflict’ (1993) 35(1) *Survival* 27.

Many of the claims advanced in this chapter run counter to the commonly held sentiment that ordinary people lack the capacity to engage in deliberation, be it a matter of temperament or education. However, deliberative theorists have long argued that deliberation requires appropriate institutional support. As Cohen noted in his seminal paper on the topic,

[i]nstitutions in a deliberative democracy do not serve simply to implement the results of deliberation, as though free deliberation could proceed in the absence of appropriate institutions. Neither the commitment to nor the capacity for arriving at deliberative decisions is something that we can simply assume to obtain independent from the proper ordering of institutions.<sup>98</sup>

As we have argued in this paper, the referendum can potentially serve as one such institution – provided, that is, it is consciously organized to that end and openly promoted as such. Of course, the challenges here are immense, especially amid violent conflict or the threat of violent conflict. Yet as we have sought to show, those challenges need not be insurmountable.

In our view, the deliberative capacity of ordinary people needs to be evaluated relative to the capacity of elites – a point that all too often gets overlooked. It is reasonable to assume that elites are better than non-elites at deliberating about technical matters, including those of a legal or constitutional nature. But when it comes to certain generalizable basic values – “public values,” as we have referred to them in this chapter – that assumption is much more difficult to sustain. When these values are at stake, there is good reason to think the comparative advantage lies with non-elites.

Naturally, the argument presented here is not just about questions of relative deliberative capacity. It is ultimately about peace and the role of referendums in securing the peace. As part of that, it is about ensuring that any referendum outcome or result will be perceived as legitimate by as many people as possible, on all sides of the conflict. A peace referendum may sometimes reveal a pre-existing consensus; for example, it may be that all sides to the conflict want, and have wanted all along, greater levels of equality or autonomy. But insofar as the referendum has been designed with deliberative principles in mind, and in particular a commitment to promoting public-values deliberation, then the outcome of the referendum may have a stronger claim to popular legitimacy. A deliberative referendum may

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<sup>98</sup> Joshua Cohen, “Deliberation and Democratic Legitimacy” in Philip Pettit & Alan P Hamlin (eds.), *The Good Polity: Normative Analysis of the State* (Blackwell, 1991) 26.

reveal pre-existing agreement. But it may also do more than that: it may give us the confidence to believe that, having reasoned and reflected, the outcome is what ordinary people really want. Some elites may object: the outcome may not be what they themselves want. But the fact that the referendum is a deliberative referendum may make it harder for them to spoil the result or undermine the prospects for an enduring peace settlement.