Deliberation and Decision

Economics, Constitutional Theory and Deliberative Democracy

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1 Introduction

Observing a 'deliberative turn' within the debate about democracy means that diverse conceptions of democracy tend to be appraised in terms of their support or opposition to the notion of deliberative legitimacy – i.e., the notion that participation in genuine deliberation constitutes the core of democratic legitimacy.[1] It is questionable whether such a 'turn' really took place or if the current debate about deliberation is just another hype to disappear again in the near future. Irrespective of such reflections on the course of theory building, however, some questions raised by the debate are fundamental enough to be here to stay. They can be structured around the impact of deliberation on contemporary theories of democracy (section 2) and around the role discourse theory plays in this context (section 3).

2 Deliberation in Contemporary Theories of Democracy

Regarding the concept of deliberation in contemporary democratic theories, there are three major questions to be asked, namely: why deliberation might be supportive or constitutive of legitimacy (1), how does deliberation relates to discourse (2), and how does deliberation contribute to decision-making (3).

1) Deliberation as a Link Between Participation, Legitimacy and Legitimation

Does deliberation endorse legitimacy? Among *Tom Tylor's* observations about 'Why People Obey the Law'[2] there is the prominent thesis that giving 'voice' increases the chance of the outcome being perceived as legitimate irrespective of the decision taken. Accordingly, even parties who are defeated in court tend to accept the ruling if they had adequate opportunity to present their view. This observation neatly coincides with *Niklas Luhmann's* sociological definition of legitimacy as 'the generalized preparedness to accept, within a certain margin, a decision whose

[1] Cf. Dryzek (forthcoming), manuscript at p. 2 f.
[2] Tylor, 1990.

content is not yet known'.[3] Generalizing, we can say that participation, at least to some extent, breeds legitimacy.

Granted, the *legitimacy* of sociological studies is nothing but empirical acceptance of something being legitimate. It is quite different from the normative notion of legitimation. From the normative perspective, people can simply be wrong in their perception. They can accept results as legitimate even though some necessary prerequisite of legitimation is missing. The benevolent dictator's rule, for example, does not achieve normative legitimation simply by his subjects' respect and loyal support.

With participation, however, legitimacy might at least work as a strong indicator of the form of legitimation we generally label as 'democratic'. If people believe that their voice is adequately being heard before a political decision is taken, they are not only very likely to actually accept the outcome, but the participation also strongly suggests that the final decision in some way expresses the will of the people, thereby fulfilling the most important *normative* criterion of legitimation in the democratic agenda. Simplifying again, we can summarize that participation breeds legitimacy *and* democratic legitimation.

The picture is still incomplete without considering the alternatives. Actual participation is only one among many procedures to ensure democratic legitimation. The more prominent 'classical' model heavily relies on formal representation rather than permanent participation. Such formality in the political process is inferior neither with regard to its actual acceptance by the people (legitimacy) nor with regard to its normative status (democratic legitimation). However, in the everlasting quest for the perfection of institutional settings, we might have to acknowledge that formal democracy is likely to go awry if the decision making by representatives gets removed from the actual will of the populace. The same is true whenever important decisions are taken with no prior deliberation at all, i.e., neither matched by public discussions nor by debate in the chambers of parliament. In such cases, linking pupular deliberation to the process of lawmaking looks like one of the more promising improvements of the institutional setting. In addition to the formal procedures of democracy, deliberation thereby becomes a material safeguard for legitimacy and legitimation.

2) Deliberation and Discourse as Distinct Concepts

How does deliberation relate to discourse? This plain question gives rise to much confusion when discourse is simply equated with deliberation and thereby warped beyond recognition. Rather, deliberation and discourse are quite distinct concepts:

a) We can define *deliberation* – as used in 'deliberative democracy' – as: public argument and reasoning among equal citizens as preceding decision.[4] This broad meaning of deliberation differs from the republican meaning ('deliberation within

[3] Luhmann, 1975, p. 28 ('eine generalisierte Bereitschaft, inhaltlich noch unbestimmte Entscheidungen innerhalb gewisser Toleranzen hinzunehmen').

[4] See Cohen, 1989, p. 21 – without explicitely mentioning that deliberation precedes decision. Cf. Fishkin, 1991, pp. 35 ff. – with reference to Habermas.

parliament') that used to be the focal point of attention before *Cohen* and *Habermas* redefined the issue. As late as 1985, *Sunstein* still relied on the republican concept of deliberation by *Bessette* who, in turn, considered deliberation outside of representative bodies – i.e., as a tool of direct democracy – the 'greatest threat' to the public interest.[5] Searching for the roots of such narrow understanding, we can follow the leads of both *Sunstein* and *Bessette* back to the Federalist Papers where deliberation merely figures as a 'medium' securing the superior orientation of representatives towards public interest ('Republic') as opposed to particular group interest ('pure Democracy').[6]

The broad sense of 'deliberation' that has been employed since the 1990s refers to public argument and reason. It thereby *prima facie* excluding secret discussions (no publicity) and strategic bargaining (no argumentation) even though both are readily acknowledged as pragmatic constraints within procedures that are still called 'deliberative'. While generally broad, the above definition also has a restrictive touch. It excludes arguments of those who are not affected by the decision at issue (no citizens).[7] The concept of deliberation thereby centers around self-government. Accordingly, a dialogue about the matters of another state, community or family cannot be called 'deliberation' whereas it can (and must) be called 'discourse'. Also, whereas deliberation conceptually always precedes decision,[8] discourse has no such pragmatic goal: we can endlessly and meaningfully engage in (scientific, artistic, religious) discourse without any intent whatsoever of taking decisions. In short: deliberation is a democratically pre-formed 'sister' of discourse.

b) But what, exactly, defines discourse? Discourse is any dialogue that approximately satisfies the discourse rules.[9] Depending on the degree to which these rules are satisfied, there are two distinct sub-concepts of discourse: ideal and real discourse – each with a different relationship to deliberation.

An *ideal discourse* is a discourse that fully realizes the rules, i.e., a discourse 'under the conditions of infinite time, unlimited participation and complete absence of coercion by way of complete terminological precision, full empirical information, perfect ability and willingness to switch roles as well as complete absence of prejudice'.[10] This definition by *Robert Alexy* neatly illustrates that there can never be an ideal discourse in real life. And even if ideal discourse were possible, a consensus achieved at some time could not become binding in the sense of contractual agreement. Participants of an infinite discourse must accept any new argument

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[5] See Sunstein, 1985, pp. 45 f.; Bessette, 1980, pp. 112 ff.

[6] Cf. Madison, 1787/1961, p. 62: '...refine and enlarge the public views by passing them through the medium of a chosen body of citizens'.

[7] Cf. Dryzek, 2001, p. 643 ('those subject to these decisions'); p. 652.

[8] Dryzek's suggestion that 'nonelectoral and nonvoting avenues of influence' avoid some problems of deliberations (Dryzek, 2001, p. 651) does not change the decision-centered nature of deliberation itself.

[9] For the content of discourse rules see Alexy, 1978, pp. 233 ff.; cf. Tschentscher, 2000, pp. 222 ff.

[10] Alexy, 1989/1995, p. 113.

coming up later on: in discourse, consensus is never final. Therefore, not only duress, but every definitive decision is a compromise between the discursive ideal and demands of reality. This kind of compromise somewhat parallels deliberation where, similarly, 'consensus is ... neither possible nor desirable'.[11] But the reason for compromising is quite different in both cases: while deliberation omits consensus in order to fulfil its goal of subsequent descision-making, ideal discourse is averse to decisionsmarking itself. Considering deliberation's democratic pre-formation as a pragmatic tool of self-government, we can deduce that deliberation and ideal discourse are mutually exclusive.

c) Regarding *real discourse*, there is no agreement among discourse theorists where the line between ideal rules and pragmatic constraints should be drawn in order to define what still constitutes a real discourse as opposed to other forms of dialogue. In my opinion, a real discourse can be defined as a discourse under conditions that approximate ideal discourse (as far as it is adequate under the circumstances) and that do at least entail that all participants abstain from intentional coercion by force or threats.[12] Vague as this definition may sound, it can at least distinguish between strategic and discursive rationality – a fundamental threshold that *Habermas* has not abolished during all the variations of his theory. Accordingly, *war* cannot be deemed some kind of 'military discourse' and *bargaining* does not constitute 'economic discourse'. Also, an electoral campaign, which is discourse as long as the positions are presented in terms of morality rather than mere self-interest of groups, is distinct from the non-discursive ballot. Equally, parliamentary debate is discourse, while the final vote is not.[13]

Applying this definition, deliberation is at the same time narrower and wider than real discourse. It is narrower in that it is democratically pre-formed as a tool of self-government which excludes the voices of those people who are not affected and which also excludes those dialogues that are not geared towards decision making. It is wider wherever strategic or coercive elements are accepted as pragmatic constraints of deliberation, compromising the ideal of public argument and reason. Therefore, deliberation is neither a sub-class of real discourse nor its super-class; it is a similar, but still quite distinct 'sister' concept. At most, deliberation can be called a *discursive feature* of contemporary theories of democracy.

3) Deliberation and Decision as Distinct Procedures

Perhaps the greatest similarity between deliberation and real discourse lies in their strict separation from the decision itself. As a procedure of argumentation (albeit pragmatically reduced as compared with real discourse) deliberation or real discourse necessarily end when any procedure of decision making is started. Deciding a case after legal proceedings, voting on a statute after debate in parliament, executing a decree after public discussion – all these are formal decision procedures

[11] Dryzek, 2001, p. 657.
[12] For details see Tschentscher, 2000, p. 219.
[13] Cf. Tschentscher, 2000, pp. 347 ff.

distinct from the material procedure of deliberation preceding them. Deliberation and decision are related as mutually exclusive alternatives: one can either deliberate or decide, not both.

Where, then, lies the contribution of deliberation to decisionmaking? In the framework of deliberative theory, the decision inherits most of its legitimation from the preceding deliberation. When extensive deliberation has taken place, the decision, within a specific range of constitutionally admissible results, is legitimate no matter what the outcome might be. If, on the other hand, there has been no deliberation at all, the following decision procedure alone can only generate very limited democratic legitimation – if any at all. Therefore, the function of deliberation in the proceedings of democratic decision-making turns out to be that of background fairness as a prerequisite of procedural justice.[14]

3 The Impact of Discourse Theory on Contemporary Theories of Democracy

Regarding the impact of discourse theory on contemporary theories of democracy, one of the more obvious mistakes is the tacit understanding among some authors that discourse theory might be used as a tool to legitimize deliberative democracy while de-legitimizing other democratic approaches (1). Also, explicitly anti-deliberative measures like institutional fiat can be legitimate instruments of democratic organization (2). This leads to the question of whether real discourse has any place at all in contemporary models of deliberative democracy (3).

1) The Compatibility of Discourse Theory With Diverse Theories of Democracy

Classical theories of democracy, i.e. those formally reducing the legitimacy of collective decisionmaking to voting procedures and personal representation, can also be defended by discourse theory as concepts of deliberative democracy. Discourse theory is quite compatible with non-discursive procedures for deliberation and decision. Therefore, it does not require that institutionalized democracy take some form of deliberative democracy.

Take the bargaining that leads to a binding contract enforceable by law: no discourse theorist would claim that contractors ought to involve in non-strategic action in order to render the resulting instrument legitimate. Not even within the proceedings of parliament, discourse is always present or required by discourse theory: decision making without prior deliberation is, for example, often explicitly prescribed by the constitution whenever officials are to be elected. Regarding democratic legitimacy, discourse theory does not claim that institutionalized democracy must take some form of deliberative democracy.

[14] Cf. Tschentscher, 2000, p. 121 – with further references.

2) The Legitimation of Institutional Fiat in Theories of Democracy

Frequently, institutional fiat is acknowledged as a central decision procedure in democratic states. The president, for example, may have the final power to decide issues no matter what kind – if any – of public or parliamentary deliberation took place before. A court ruling is equally decisive no matter what the expectations of the parties might be. And even in lawmaking the majority decision about a statute is binding no matter how much deliberation took place beforehand.

Institutional fiat is a challenge to deliberative theories of democracy because it claims legitimation even where, according to deliberation theorists, there can be none. If only public argument and reasoning among equal citizens has the power to convey legitimation on subsequent decisions, instances of pure institutional fiat must be called 'illegitimate'. Such decisionmaking becomes the true anti-thesis of deliberation by insulating the formal decision itself from any material considerations preceding it.

Nevertheless, institutional fiat is one of the most important safeguards against decisive deadlock and therefore indispensable to an operative legal order. These pragmatic constraints cannot easily be captured by deliberative theories. Deliberation is only one among many concepts forming the institutional setting of democracies. In discourse theory, however, even non-deliberative procedures can be acknowledged as contributing to an overall picture of legitimate social order. Thus it is discourse theory, not delibative theory that constitutes a comprehensive framework of democracy.

3) Real Discourse as an Element in Theories of Democracy

What, if anything, remains as the role of real discourse in a deliberative understanding of democracy? As a starting point, there will hardly be any doubt that real public discourse does exist both within democratic institutions and among those non-institutionalized interactions summed up in the term 'civil society'. But real discourse not only exists; it is also *valued* at least as a heuristic tool by all contemporary theories of democracy. No theorist assumes that citizens ought to 'sleep between elections'.[15] Taking the case of the current institutional arrangement of democracy in Germany as an example, we are looking at a classical representative framework accompanied by major supreme court decisions that effectively prevent deliberative experiments. Nevertheless, public discourse is considered indispensable for the democratic process, the media are frequently assigned the implicit role of a 'fourth power', and *Ernst-Wolfgang Böckenförde*, an influential scholar of German constitutional law, famously laments the dilemma of the state lacking the means to guarantee active democratic participation while at the same time essentially relying on that participation.[16]

[15] Cf. Dryzek, 2001, p. 655.
[16] Cf. Böckenförde, 1967, p. 93.

So what is the distinctive quality of classical *versus* deliberative democratic theory? It cannot only be the distinction between aggregative *versus* reflective aspects of decisionmaking[17] since all democracies heavily rely on reflective processing of interests even within the representative system. The distinctive property of classical democratic theory lies in the formal constraints it imposes on the relevance of public opinion: that opinion, continuously expressed in random deliberation within political and civil society, ought not to affect state action without being formally acknowledged by the legislature. In this restrictive framework, real discourse has meaning only where it is explicitly acknowledged as a formal procedure within the institutional setting. Rules about mandatory publication and information, regulations enforcing transparency, the participatory rights of members of parliament – all these are ways the legal system formally acknowledges the role of real discourse, thereby incorporating it into the democratic framework. The democracy becomes progressively more deliberative with these procedural safeguards; and real discourse is then a constitutive element in the resulting deliberative democracy.

Discourse theory, however, is not restricted to the small role that real discourse can play within the framework of democracy. When used as the basic rationale for institutionalized democracy, discourse theory explains why new participatory instruments (e.g., *Fishkin's* deliberative opinion polls) are legitimate even if they were eventually to infringe on formal constraints of classical theories, namely the exclusivity of voting and representation. This 'opening up' of democracy is achieved by identifying *continuous discursive control* rather than the formality of democratic procedures as the relevant source of legitimation.[18] Therefore, discourse theory explains why 'counting heads' is a 'needlessly thin conception of democracy'.[19] It broadens the horizon for new legitimate models of institutionalized democracy without challenging classical models.

4 Conclusion

In summary, we can conclude that deliberation is quite distinct from discourse and that deliberative theory differs greatly from discourse theory. It is discourse theory, not the insular notion of deliberation, that constitutes the comprehensive framework and basic rationale for institutionalized democracy. It gives us, among other things, an explanation why participatory instruments are legitimate even if they were to infringe on formal constraints of democratic procedures. Discourse theory provides the new rationale needed for the deliberative reevaluating of democratic legitimacy: the concept of continuous discursive control.

[17] But cf. Dryzek (forthcoming), p. 5.
[18] For the concept of continuous discursive control see Tschentscher, 2000, pp. 220 f., 330 f.
[19] Dryzek, 2001, pp. 657 f.

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