

# 行政院國家科學委員會專題研究計畫 成果報告

## 憲法變遷的公民審議：全球化脈絡下的台灣實踐 研究成果報告(精簡版)

計畫類別：個別型  
計畫編號：NSC 95-2414-H-002-008-  
執行期間：95年08月01日至96年07月31日  
執行單位：國立臺灣大學法律學系暨研究所

計畫主持人：張文貞

計畫參與人員：碩士級-專任助理：梁志鳴

報告附件：出席國際會議研究心得報告及發表論文

處理方式：本計畫可公開查詢

中華民國 96 年 11 月 04 日

## 中文摘要

憲法變遷的公民審議，在最近受到國際以及台灣的重視與討論。2005年5月，加拿大的卑詩省完成全球首例的憲改公民團實驗，由隨機抽樣、自願參與的160位公民花三個月的時間來學習並討論選制改革及選區規劃，最後將其審議通過的憲改提案直接交付公民複決。澳洲在1999年進行修憲的公民複決時，也舉行首次直接針對修憲議題的「審議式民調」。2005年，美國耶魯大學講座教授布魯斯·艾克曼來台主張「全國審議日」。他建議，將來台灣在舉行修憲公民複決的前三週，應由政府指定一個星期假日作為「全國審議日」。

很清楚地，從美洲、非洲、亞洲到澳洲，一個強調憲法變遷公民審議的全球化脈絡，已然成形。然而，這些不同的公民審議模式，是否反映出不同的設計理念與功能？更重要的是，其背後的設計與選擇，是否也反映出不同之憲法與民主理論對於民主以及公民社會的不同想像呢？而對台灣來說，在憲法變遷的公民審議上，是否應該考量到其作為一個新興民主國家的特色，而建立一個超越於西方傳統的民主與公民社會的想像與實踐呢？

本計畫就現行各種憲法變遷的公民審議機制，就其制度設計與運行功能，進行詳細的分析與探討，同時比較其與傳統公民參與或公民諮商的不同。在方法上，本計畫將從當代憲法與民主理論出發，探討這些理論對公民審議憲法變遷的基本立場、態度以及其可能的批判。本計畫希望理解全球化與公民審議憲法變遷之間的理論與實際的連結，並分析在憲法變遷的公民審議成為當代憲法的新趨勢之後，是否可能衝擊許多傳統憲政主義的思考，進而影響憲法的規範論與解釋論。最後，本計畫希望對全球這新一波重視公民審議的憲法理論與民主實踐，提出一個從台灣的在地實踐出發、並具有理論批判深度的觀點。

關鍵詞：公民審議、公民參與、憲法變遷、審議民主、國民主權

## 英文摘要

Citizen deliberation on constitutional change has become a key focus in both international community and Taiwan. In May 2005, a randomly selected group of 160 citizens in British Columbia of Canada was called on to deliberate the constitutional reform proposal for electoral reforms, and the result of their deliberation was put for public referendum. In 1999, a deliberative polling was employed together with the Australian people's constitutional referendum. In October 2005, Professor Bruce Ackerman of Yale Law School advocated for his idea of a national day of deliberation and placed forward his advice to the Taiwanese people that when they go to poll for constitutional referendum next time, they must gather three weeks ago for a day of contemplation and deliberation.

Evidently, from Canada, Australia, to Taiwan, a recent global trend of focusing on citizen deliberation has emerged. It is not yet clear, however, whether this trend of citizen deliberation on constitutional change favors any particular mechanism of citizen deliberation and places premises on any particular theory of democracy. Are there any particular imagined public societies and citizens by various theories of democracy and constitutionalism? Is it possible for Taiwan to envision a theoretically sound and at the same time locally adoptable mechanism of citizen deliberation in the coming constitutional moment?

This project aims to first analyze various mechanisms for citizen deliberation on constitutional change and compare them with rather old-fashioned citizen participation or public consultation. It will examine various methods of citizen deliberation from various theories of democracy and constitutionalism particularly theories of popular sovereignty, communitarianism and deliberative democracy. Moreover, this project seeks to understand the driving forces of the recent trend in citizen deliberation on constitutional change and inquires whether it has to do with global constitutionalism that undermines state sovereignty and thus demands more direct legitimacy from citizens. By analyzing citizen deliberation on constitutional change in abstract theory and in local practice, this project seeks develop a critical view on citizen deliberation that transcends a rather traditional western understanding of democracy and citizenship.

Keyword: citizen deliberation, citizen participation, constitutional change, deliberative democracy, popular sovereignty

## 目錄

1. 前言.....	4
2. 文獻探討.....	4
3. 結果與討論.....	8
4. 參考文獻.....	11
5. 計畫成果自評.....	15
附錄：出席國際會議發表論文.....	16

## 1. 前言

憲法變遷的公民審議，在最近受到國際以及台灣的重視與討論。2005年5月，加拿大的卑詩省完成全球首例的憲改公民團實驗，由隨機抽樣、自願參與的160位公民花三個月的時間來學習並討論選制改革及選區規劃，最後將其審議通過的憲改提案直接交付公民複決。澳洲在1999年進行修憲的公民複決時，也舉行首次直接針對修憲議題的「審議式民調」。2005年，美國耶魯大學講座教授布魯斯·艾克曼來台主張「全國審議日」。他建議，將來台灣在舉行修憲公民複決的前三週，應由政府指定一個星期假日作為「全國審議日」。

很清楚地，從美洲、非洲、亞洲到澳洲，一個強調憲法變遷公民審議的全球化脈絡，已然成形。然而，這些不同的公民審議模式，是否反映出不同的設計理念與功能？更重要的是，其背後的設計與選擇，是否也反映出不同之憲法與民主理論對於民主以及公民社會的不同想像呢？而對台灣來說，在憲法變遷的公民審議上，是否應該考量到其作為一個新興民主國家的特色，而建立一個超越於西方傳統的民主與公民社會的想像與實踐呢？

本計畫就現行各種憲法變遷的公民審議機制，就其制度設計與運行功能，進行詳細的分析與探討，同時比較其與傳統公民參與或公民諮商的不同。在方法上，本計畫將從當代憲法與民主理論出發，探討這些理論對公民審議憲法變遷的基本立場、態度以及其可能的批判。本計畫亦希望理解全球化與公民審議憲法變遷之間的理論與實際的連結，並分析在憲法變遷的公民審議成為當代憲法的新趨勢之後，是否可能衝擊許多傳統憲政主義的思考，進而影響憲法的規範論與解釋論。最後，本計畫希望對全球這新一波重視公民審議的憲法理論與民主實踐，提出一個從台灣的在地實踐出發、並具有理論批判深度的觀點。

## 2. 文獻探討

憲法變遷<sup>1</sup>的公民審議(citizen deliberation on constitutional change)，在最近受到國際以及台灣的重視與討論。2005年5月，加拿大的卑詩省(British Columbia)完成全球首例的憲改公民團(citizen assembly)實驗，由隨機抽樣、自願參與的160位公民花三個月的時間來學習並討論選制改革及選區規劃，最後將其審議通過的

---

<sup>1</sup> 憲法變遷(constitutional change)，在英語世界的使用上，可以包括形式與實質的變遷，前者即憲法的制定或修改，後者即憲法解釋與憲政習慣（或憲法政治）。詳參：張文貞，〈中斷的憲法對話：憲法解釋在憲法變遷脈絡的定位〉，《台大法學論叢》，32卷6期，頁61-102 (2003)。本計畫所討論的憲法變遷，僅指形式的憲法變遷，亦即憲法的制定或修改，先予說明。

憲改提案直接交付公民複決。<sup>2</sup> 此一史無前例的憲法實驗，不但帶動了加拿大公民參與憲法決策與公共討論的風潮，也在世界各地、尤其是憲法學術社群間，激起熱烈的討論。<sup>3</sup> 在美國、英國，都有非政府組織、甚或政府部門，主動提議希望能引介加拿大此一憲改公民團的設計，來強化憲法修改的公民審議。<sup>4</sup>

除了加拿大的憲改公民團之外，澳洲在1999年進行修憲的公民複決時，也在美國James Fishkin 教授研究團隊的協助下，舉行首次直接針對修憲議題的「審議式民調」(deliberative polling)。<sup>5</sup> 雖然該次的修憲提案被公民否決(55%)，但參與此一審議式民調實驗的347位公民，卻在充分討論並理解正反雙方的意見之後，呈現出多數(57%)贊成修憲的結果。<sup>6</sup> 位於歐洲的丹麥，也在2000年8月就是否採納歐元舉行公民複決時，進行了一次審議式民調的實驗。<sup>7</sup>

台灣在2005年6月完成第7次修憲。其中一個重要的增修，就是有關憲法修正方式的改變。根據憲法增修條文第12條規定，將來憲法之修改，必須於立法院提出並公告半年後，直接交由公民複決，如有選舉人總數過半的同意，才為通過。亦即，公民複決修憲，正式成為我國憲法修改的方式。也因為如此，2005年10月底，美國耶魯大學講座教授Bruce Ackerman來台參與《新興民主國家的憲政改造：台灣觀點與全球視野》學術研討會，以「審議的公民複決：邁向憲政主義之路」(The Deliberative Referendum and the Future of Chinese Constitutionalism)為題

---

<sup>2</sup> 加拿大卑詩省此一史無前例的憲法實驗的所有程序細節以及其內容討論，可參見加國官方網站。<http://www.citizensassembly.bc.ca/public> (accessed July 1, 2005) 對加國卑詩省憲改公民團實踐的初步介紹，參見張文貞，〈公民複決修憲的意義與願景〉，論文發表於《2005年台灣憲改對國家發展之影響》學術研討會，財團法人台灣民主基金會主辦，2005年10月15日，台北。(投稿《台灣民主季刊》，審查中。)

<sup>3</sup> 在新美國基金會(New American Foundation)網站中就有Dr. J.H. Snider的部落格，將目前各界對憲改公民團的討論完整呈現，也定期出版相關通訊。部落格網址：[http://snider.blogs.com/citizensassembly/2005/11/taiwan\\_now\\_has\\_.html](http://snider.blogs.com/citizensassembly/2005/11/taiwan_now_has_.html) (accessed December 15, 2005)

<sup>4</sup> 美國是加州，英國正式有國會議員的正式提案。相關新聞，參見：[http://snider.blogs.com/citizensassembly/2005/11/bill\\_proposing\\_.html](http://snider.blogs.com/citizensassembly/2005/11/bill_proposing_.html)

<sup>5</sup> 進行方式的詳細說明與結果討論，參見Robert C. Luskin et al., *Deliberation and Referendum Voting*, available at <http://cdd.stanford.edu/research/papers/2005/referendum-voting.pdf> (accessed December 1, 2005) 國內目前也有引入「審議式民調」此一制度，但在實踐面向上仍限於公共或科技政策的討論，而而還未及於憲法規範政策的層次。「審議式民調」在國內政策討論的相關實踐，參見林國明 陳東升，〈公民會議與審議民主：全民健保的公民參與經驗〉，《台灣社會學》，第6期，頁61-118(2004)；黃東益，〈民主商議與政策參與—審慎思辯民調的初探〉，台北：韋伯文化(2003)。

<sup>6</sup> 後來在2001年以及2002年，此一研究團隊針對其他重要的憲政議題，又進行兩次的審議式民調。參見<http://www.utexas.edu/depts/cas/fall00.html>(accessed December 1, 2005)

<sup>7</sup> 參見<http://www.utexas.edu/depts/cas/fall00.html> (accessed December 1, 2005)

進行主題演講時，建議台灣應該採納「全國審議日」(National Day of Deliberation)<sup>8</sup>的觀念。他建議，將來台灣在舉行修憲公民複決的前三週，應由政府指定一個星期假日作為「全國審議日」；在那一天，所有人都可以在社區或鄰里的活動中心裡，和其他人或是他們的鄰居一起共同討論、思考關於修憲複決所涉及的重大議題。<sup>9</sup>

不論是憲改公民團、審議式民調或全國審議日，雖然其進行方式各有不同，但對憲法變遷的公民審議理念卻都同樣地予以強調。其實，雖然最近因為憲改公民團、審議式民調或全國審議日等具體公民審議機制的提出，突顯了憲法變遷的公民審議的理念主張與實踐；但嚴格來說，公民積極參與憲法變遷，早在1990年代中期新興民主國家的憲政改造工程中，即可略見端倪。南非的制憲，就經常被引來當作是其中的成功典範。<sup>10</sup> 在南非國會於1997年正式通過新憲法之前，在1994到1996的二年間，密集展開對於公民、草根社會團體的「公民參與新憲」計畫，以擴大公民諮商(public consultation)的方式舉辦各式辯論以及憲法聽證會。而根據憲法學者的調查，此種擴大公民參與的新憲程序，的確成功地營造了南非人民對於憲法的認同與歸屬感。<sup>11</sup> 同時間，亞洲的泰國，也是在國會組成憲改委員會之後，與民間的公正團體協力，到各地舉辦憲改論辯與公聽會，徵詢人民對於制憲草案的意見，才在1997年正式通過新憲。<sup>12</sup>

此外，歐盟憲法條約起草與簽訂，也相當程度地反映出公民參與及審議的理念。因為對於制憲程序民主化與公民參與的強調，一個包括歐洲各國政府、國會議員、歐洲議會與執委會等一百多位代表所組成的歐洲制憲大會因而成立，並由前任法國總統季斯卡擔任主席，在2002年3月到2003年6月間密集地舉行會議，討

---

<sup>8</sup> 全國審議日的觀念，係Ackerman與Fishkin兩位教授在2004年所共同出版之新書所提出。See generally Bruce Ackerman & James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

<sup>9</sup> Ackerman, *The Deliberative Referendum and the Future of Chinese Constitutionalism*, keynote speech delivered at the international conference on “Constitutional Reengineering in New Democracies: Taiwan and the World”, held by Research, Development & Evaluation Commission of the Executive Yuan & National Taiwan University, College of Law, Public Law Research Center and Human Rights Research Center, October 28-29, Taipei, Taiwan. The speech script is available at <http://www.cpbac.nccu.edu.tw/tra/CRND/index.php> (accessed December 1, 2005) 其後，Ackerman教授與行政院研討會主委葉俊榮亦聯名以中英文在報端撰文提出此一主張。Bruce Ackerman & Jiunn-Rong Yeh, *A National Day of Deliberation?*, *China Times*, November 22, 2005.

<sup>10</sup> Vivien Hart, *Democratic Constitution Making*, Special Report 107, United States Institute of Peace, available at <http://www.usip.org/> (accessed December 1, 2005). 張文貞，〈憲政改造的方式與程序〉，台北：行政院研究發展考核委員會編印(2005)。

<sup>11</sup> Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 UNIVERSITY OF ARKANSAS LITTLE ROCK LAW REVIEW 809 (2001).

<sup>12</sup> 泰國制憲過程的探討，參見 Uwanoo & Burns, *The Thai Constitution of 1997: Sources and Process*, 32 U. B. C. REV. 227 (1998).

論各項憲法議題。所有的歐洲公民不但可以參與或旁聽這些會議，更可以直接連接到歐洲制憲大會的網站中具體表達各項意見。<sup>13</sup>

很清楚地，從美洲、非洲、亞洲到澳洲，一個強調憲法變遷公民審議的全球化脈絡，已然成形。受到這一股跨國實踐以及思潮的影響，台灣在目前第二階段憲政改造的規劃中，也已清楚納入由下而上、公民參與的理念。<sup>14</sup> 雖然目前尚未看到直接針對憲改議題的審議式民調、憲改公民團或全國審議日的具體規劃，但由五十多個民間團體所組成的21世紀憲改聯盟已經開始積極運作，密集討論憲改議題，並初步提出人權清單的憲改建議。<sup>15</sup>

不過，台灣目前在第二階段憲政改造程序採行以「社會團體」為導向的公民審議，與前述各國以隨機抽樣、志願參與之公民為主體的公民審議，並不相同。而在這一、二年來，針對許多公共政策的議題如代理孕母、二代健保等，不少學術團體或政府機關亦開始採行前述以隨機抽樣、志願參與之公民為主體的審議式民調或公民會議。<sup>16</sup> 這些不同的公民審議模式，是否反映出不同的設計理念與功能？更重要的是，其背後的設計與選擇，是否也反映出不同之憲法與民主理論對於民主以及公民社會的不同想像呢？而對台灣來說，在憲法變遷的公民審議上，是否應該考量到其作為一個新興民主國家的特色，而建立一個超越於西方傳統的民主與公民社會的想像與實踐呢？

其次，在這新一波公民審議憲法變遷的實踐與討論沸沸揚揚之際，我們也不能忽略潛在質疑的聲音。對於公民是否真能積極熱情參與憲法時刻的審議與討論，有學者從歷史與實證的觀點提出懷疑，更指出公民透過選舉代表（菁英）來參與憲法變遷，才是當代憲法與民主理論的原型與常態，公民審議的憲法變遷是憲法學者一廂情願或過於浪漫的理想。<sup>17</sup> 同樣地，對於歐盟憲法條約起草過程

---

<sup>13</sup> 值得注意的是，學者間對歐洲制憲大會以及歐洲憲法條約起草與簽訂過程的公民參與，究竟是否充分反映並符合公民審議的精神，有許多的爭論。初步討論，參見Grainne de Burca, *The Drafting of A Constitution for the European Union: Europe's Madisonian Moment or A Moment of Madness?*, 61 WASH. & LEE L. REV. 555 (2004)。在2005年中研院歐美所針對歐盟憲法條約舉辦的學術研討會中，學者對此即有正反雙方完全對立的見解。

<sup>14</sup> 第二階段憲政改造的基本理念與原則，參見總統府網站資料，available at [http://www.president.gov.tw/2\\_special/2004constitution/index.html](http://www.president.gov.tw/2_special/2004constitution/index.html) (accessed December 15, 2005)

<sup>15</sup> 21世紀憲改聯盟的運作與初步成果，參見網站<http://www.cra21.org.tw> (accessed December 1, 2005)。

<sup>16</sup> 對這一、二年台灣在公共政策採行公民審議等先驅性實驗的總體檢討與反省，參見：台灣民主基金會、台灣智庫與亞洲創制公投中心，《審議民主國際研討會》，2005年8月29、30日，台北。

<sup>17</sup> Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 Wm & Mary L. Rev. 595 (2003); Andras Sajó, Remarks on Constitution Making and Amending, paper presented to the international conference on “Constitutional Reengineering in New Democracies: Taiwan and the World”, held by Research, Development & Evaluation Commission of the Executive Yuan & National Taiwan University, College of Law, Public Law Research Center and Human Rights Research Center, October 28-29, Taipei, Taiwan, available at <http://www.cpbac.nccu.edu.tw/tra/CRND/index.php> (accessed December 1, 2005)

的制憲會議(European convention)以及公民的參與與討論，究竟是否因而提高了歐洲公民對於憲法條約的接受度或者某種程度型塑歐洲公民的憲法認同，雖然有許多肯定的意見，但也有愈來愈多強烈的懷疑論述出現。<sup>18</sup>

第三，公民審議的憲法變遷在很短的時間內成為一個各國所接受的典範，其背後的原因又是什麼呢？是否受到全球化的影響呢？是否在某程度因為全球化使得當代憲法與民主理論在國民主權、直接民主、公民權利與公民身分(citizenship)等概念上開始發生典範性的轉移，而產生這一波重視公民審議憲法變遷的全球化脈絡呢？

最後，倘若憲法變遷的公民審議進一步成為當代憲法變遷的典範時，又會如何根本地改變許多傳統上對於憲政主義內涵的思考呢？經由公民審議的憲法變遷是否因為其正當性的提高，而改變我們對於傳統修憲界限的思考或是違憲審查的態度呢？亦即，憲法變遷的公民審議，對憲法的規範論與解釋論又會發生何種影響呢？

這些重要的問題，都為本計畫所探討與分析。在當前這樣一個重視公民審議憲法變遷的全球化脈絡下，台灣在未來一兩年亦將面臨一個相當難得的擴大參與及討論的憲法時刻。對於這些如憲改公民團、審議式民調、全國審議日等不同審議機制的設計與提出，我們要如何對其在民主實踐的運作與功能上，有一個適切的理解；甚至同時能夠在憲法與民主理論的面向上，對其進行更深刻的思考與批判，不僅攸關我們進一步設計與選擇台灣憲政改造的公民審議程序；更重要的是能夠對全球這新一波重視公民審議的憲法理論與民主實踐，提出一個從台灣的在地實踐出發、並具有理論批判深度的觀點。

### 3. 結果與討論

本計畫從全球脈絡與在地實踐的觀點探討憲法變遷的公民審議，一方面分析各種憲法變遷的公民審議機制，探究其制度設計的本質與實際運作的功能；另一方面則從當代憲法與民主理論的不同觀點，探討公民審議憲法變遷所彰顯的理論意涵與典範變遷，以及將來對憲法之規範論與解釋論可能發生之影響。分述如下：

#### 3.1. 公民審議機制的分析

現行各種憲法變遷的公民審議機制，如憲改公民團、審議式民調、或全國審議日等，其制度設計與運行功能，不盡相同。除了外國經驗的分析外，本計畫特別著重比較分析過去這一段時間部分學術團體與政府機關針對政策議題所進行

---

<sup>18</sup> 相關論述(尤其是懷疑論)的初步整理，參見 Andrew Moravcsik, What Can We Learn from A Constitutional “Decade of Deliberation” in Europe? A Social Science Approach, paper available at <http://www.people.fas.harvard.edu/~moravcs> (accessed December 1, 2005)

之各項公民審議（如審議式民調或共識會議等）的經驗與成效。雖然這些針對政策議題的公民審議與針對憲法制訂或修改的公民審議，在理論上與制度設計上有區分之必要，<sup>19</sup> 但這些經驗，至少在進一步瞭解台灣社會對公民審議的態度與實踐的相關問題上，仍具有非常重要的分析價值。

而這些不同公民審議機制相互之間是否具有相互補充或替代的可能，也值得密切觀察。在一連串先驅性的民主實驗紛紛在各國試行或採納之際，也開始出現一些將前述公民審議機制混合採行的現象。例如，在加拿大憲改公民團的先驅實驗之後，各國相繼出現仿效的聲音。如美國加州就考慮以正式立法或修憲的方式，將憲改公民團的設計納入既有的修憲程序。對此，美國史丹福大學James Fishkin 教授也在2005年12月中宣布他的研究團隊正在考慮試行一個網路上的審議式民調(online deliberative polling)，給予加州公民充分的資訊後，進一步觀察他們對此一問題的看法。<sup>20</sup>

此外，公民審議(citizen deliberation)的各種機制，與傳統的公民參與(citizen participation)或公民諮商(citizen consultation)之不同，過去第三波民主化國家在進行憲政改造時所採行的公民參與和當前之公民審議，在本質上以及功能上的區別，亦是本計畫擬探討的重點。

### 3.2. 公民取向 v. 社會團體取向

本計畫另外一個探討的重點將是公民審議的主體取向：公民 v. 社會團體。如前所述，不過，台灣目前在第二階段憲政改造程序採行以「社會團體」為導向的公民審議，與前述各國以隨機抽樣、志願參與之公民為主體的公民審議，並不相同。公民取向的公民審議與社會團體取向的公民審議，反映出不同憲法與民主理論對於民主以及公民社會的不同想像。

向來重視社群理念以及社會團體的理論大師Iris Young就認為，當代社會中許多因為種族、文化、語言、性別、年齡、經濟地位、殘障等各種社會原因區隔所形成的社會差異，實際上已經形成一個個不同的社會團體(social group)，而使得這些社會團體在生活經驗與外在世界的感知上，與其他社會團體(others)有非常根本的不同與差異。<sup>21</sup> 在2000年《包容與民主》(Inclusion and Democracy)的新作中，Iris Young 主張審議民主作為當今的新民主典範；更重要地是，她認為社會團體這些根本性的差異並不會危及民主，相反地，不同社會團體間的這些根本

---

<sup>19</sup> Bruce Ackerman & James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

<sup>20</sup> Citizens Assembly News Digest: Stanford's Fishkin contemplates Citizens Assembly deliberative poll for California (December 17, 2005), available at [http://snider.blogs.com/citizensassembly/2005/11/bill\\_proposing\\_.html](http://snider.blogs.com/citizensassembly/2005/11/bill_proposing_.html) (accessed December 17, 2005).

<sup>21</sup> IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 96-121, 160-173 (Princeton: Princeton University Press, 1990).

性的差異，反而是審議民主中進行理性充分溝通的重要素材與來源(social differences as political resources)。<sup>22</sup> 從她的理論來看，社會團體的公民審議不但與公民審議的精神無違，反而才是真正能達成民主與理性溝通的唯一途徑。

在公民取向v. 社會團體取向的思考上，是否要進一步考量到台灣作為一個新興民主國家的特色呢？在2005年6月底的審議民主實務工作坊的討論裡，台大社會系吳嘉苓教授就指出，西方國家的公民審議是以一般公民為參與對象，此一模式在新興民主國家是否要完全接納，應該再加深思。在新興民主國家，社會團體往往感到參與管道不足，民主化所帶來略微開放與暢通的發言空間，應該進一步加以深化，而非那麼快由一般性的公民審議模式所取代。再者，在她所進行以「團體」為中心的審議模式中，也發現社會團體參與審議，在不同團體間的充分對話與溝通之後，往往能夠得到更好的效果，對後來政策決定的接受度也較高。

<sup>23</sup>

### 3.3. 憲法與民主理論以及全球化理論的分析

為了充分回應對憲法變遷的公民審議持懷疑論者的想法，同時深入分析憲法變遷的公民審議之所以在短時間內成為一個主流典範的背後成因，本計畫進一步探討當代憲法與民主理論以及全球化理論，看其是否（以及在何種程度內）影響憲法變遷公民審議等相關機制的出現。

首先，本計畫將深入分析提出「全國審議日」主張之Bruce Ackerman 教授的憲法時刻理論以及其國民主權理論。<sup>24</sup> 誠如Ackerman 教授所言，憲法的制定與修改是國民主權之彰顯；同時，公民審議所能彰顯的國民主權，也不容小覷。<sup>25</sup> 顯然Ackerman將國民主權與審議民主作了某程度的連結。然而，這樣的連結是一個必然的連結嗎？從議會主權或代議民主的觀點來看，其實也不會完全拒斥憲法變遷的公民審議，畢竟任何能夠提升（但非取代）議會代表（菁英）的決定正當性的作法，也不會不見容於議會主權。從而，國民主權理論是否能為公民審議憲法變遷提供堅強的理論基礎，仍有思考批判的空間。

---

<sup>22</sup> IRIS M. YOUNG, INCLUSION AND DEMOCRACY 93-210(Oxford: Oxford University Press, 2000).

<sup>23</sup> 吳嘉苓，〈法人論壇〉，台灣民主基金會、台灣智庫與亞洲創制公投中心舉辦：《審議民主實務工作坊》，2005年6月24日，台北。

<sup>24</sup> Bruce Ackerman & James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

<sup>25</sup> Ackerman, *The Deliberative Referendum and the Future of Chinese Constitutionalism*, keynote speech delivered at the aforementioned conference.

其次，本計畫從自由主義、共和主義、社群主義的民主理論以及當代審議民主理論出發，<sup>26</sup>分別探討這些理論對公民審議憲法變遷的基本立場、態度以及其可能的批判。除了前述代表社群觀點的Iris Young的理論為本計畫研討的重心外，社會哲學理論大師Juergen Habermas晚近從溝通觀點所提出的新民主模式<sup>27</sup>，也另外一個分析的核心。Habermas主張憲法應該提供一套程序的民主機制與安排，讓公民（每個人都在其中）可以不斷地與人民（選民，個別行動者，而每個人都是個別行動者）進行反思對話。而這個有意義的對話程序（而非赤裸裸的選票、虛擬的公民身分或族群資格），才是當代民主憲法的正當性與代表性的來源。<sup>28</sup>如果從此一觀點出發，則憲法變遷的公民審議不僅是可欲(necessary)，而根本上就是一個應然的實踐(a must)。

最後，本計畫亦將探討全球化以及全球化的憲法理論，希望能夠清楚理解當前重視公民審議的全球化脈絡與全球化削弱傳統的國家主權的關係。全球化衝擊、甚至某種程度地削弱傳統國家主權<sup>29</sup>，進一步影響到憲法制定或修改的過程必須要有更直接、更堅強的公民意志作為基礎。在當前這樣一個重視公民審議憲法變遷的全球化脈絡下，可以想見的是，將來在各國憲法變遷的程序中，一個重視公民審議與程序機制的國際憲法社群，會逐漸扮演相當重要的角色。事實上，從前述美國Bruce Ackerman與James Fishkin兩位教授在2005年相繼來台主張台灣的憲政改造應該要加入更多公民審議的思考，就某程度地反映出了此一趨勢。

## 4. 參考文獻

### 4.1 中文文獻

1. 江宜樺(2003)。〈鄂蘭的政治判斷理論與現代審議民主〉，《自由民主的理路》，台北：聯經，頁235-239。
2. 江宜樺(2003)。〈漢娜鄂蘭論政治參與與民主〉，《自由民主的理路》，台北：聯經，頁205-226。
3. 林國明 陳東升(2004)。〈公民會議與審議民主：全民健保的公民參與經驗〉，《台灣社會學》，第6期，頁61-118。

---

<sup>26</sup> 對於這些理論的初步探討，參見：張文貞，《民主憲法的性別圖像：理論考察與在地觀點》，論文發表於第一屆《女性主義法學的理論與實踐》研討會，台大科際整合法律研究所主辦，4月29日，台北(2005)。（投稿審查中）

<sup>27</sup> JUERGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 239-244 (Cambridge, MA: MIT Press, 2001).

<sup>28</sup> *Id.*, at 249-252.

<sup>29</sup> 張文貞，〈面對全球化：台灣行政法發展的契機與挑戰〉，《當代公法新論（中）：翁岳生教授七秩誕辰祝壽論文集》，台北：元照出版，頁1至26(2002)。

4. 洪家殷(2002)。〈憲法修正之程序與機關〉，《憲政時代》，頁4-14。
5. 張文貞(2003)。〈中斷的憲法對話：憲法解釋在憲法變遷脈絡的定位〉，《台大法學論叢》，32卷6期，頁61-102。
6. 張文貞(2004)。〈憲改的正當程序：從國民主權與民主原則的面向來分析〉，「新世紀台灣憲改學術研討會」論文。台北：台大法律學院，10月31日。
7. 張文貞(2005)。《民主憲法的性別圖像：理論考察與在地觀點》，論文發表於第一屆《女性主義法學的理论與實踐》研討會，台大科際整合法律研究所主辦，4月29日，台北。
8. 張文貞(2005)。〈台灣第二階段憲改的程序思考：從新興民主國家的經驗談起〉，《總統府國父紀念月會專題報告》，7月20日。  
<http://www.president.gov.tw/php-bin/prez/shownews.php4?Rid=10923> (2005/10/1)
9. 黃東益(2003)。《民主商議與政策參與—審慎思辯民調的初探》。台北：韋伯文化。
10. 黃昭元(1998)。〈我國修憲程序與方式的檢討與建議〉，《新世紀智庫論壇》，頁59-69。
11. 葉俊榮(2004)。〈從全球憲法變遷的趨勢看台灣憲政改造的定位〉，《總統府國父紀念月會專題報告》，12月24日。  
<http://www.president.gov.tw/php-bin/prez/shownews.php4?Rid=10309> (2005/10/1)
12. 蔡英文(2002)。〈人民主權與制憲權〉，《政治實踐與公共空間：漢娜鄂蘭的政治思想》，台北：聯經，頁191-208。
13. 盧倩儀(2005)。〈歐洲制憲會議對歐洲民主化之影響〉，《問題與研究》，44卷1期。
14. 蕭高彥(2002)。〈崇高與美善的政治--評蔡英文著<政治實踐與公共空間--漢娜·鄂蘭的政治思想〉，《政治與社會哲學評論》，2期，頁197-207。
15. 蕭高彥(2004)。〈國民主權在台灣：一個政治理論的詮釋〉，《政治與社會哲學評論》，11期，頁1-33。
16. 顏厥安(2000)。〈國民主權與憲政國家〉，《政大法學論叢》，63期，頁47-80。

## 4.2.英文文獻

17. Ackerman, Bruce & Fishkin, James S. (2004). *Deliberation Day*. New Haven: Yale University Press.

18. Ackerman, Bruce & Yeh, Jiunn-Rong (2005b). A National Day of Deliberation? China Times: November 22. (originally published in Chinese)
19. Ackerman, Bruce (1991). *We the People: Foundations*. Cambridge: Harvard University Press.
20. Ackerman, Bruce (1998). *We the People: Transformations*. Cambridge: Harvard University Press.
21. Ackerman, Bruce (2005a). *The Deliberative Referendum and the Future of Chinese Constitutionalism*, paper presented at the International Conference on Constitutional Reengineering: Taiwan and the World, held by the Research, Development & Evaluation Commission, National Taiwan University, College of Law, Public Law Research Center & Human Rights Center, October 28-29, Taipei, Taiwan.
22. Arato, Andrew (1995). "Forms of Constitutional Making and Theories of Democracy." *Cardozo Law Review*, 17:191.
23. Brand, D.J. (2002). "Constitutional Reform: The South African Experiences." *Cumberland Law Review*, 33:1.
24. Burnham, Margaret (1997). "Cultivating A Seedling Charter: South Africa's Court Grows Its Constitution." *Michigan Journal of Race & Law*, 3:29.
25. Butler, David & Ranney, Austin, ed.(1994). *Referendums around the World: the Growing Use of Direct Democracy*. AEI Press.
26. Chander, Anupam (1991). "Sovereignty, Referenda, and the Entrenchment of A United Kingdom Bill of Rights." *Yale Law Journal*, 101: 457-480.
27. Dahl, Robert A. (1979). "Procedural Democracy." In Laslett Peter and James Fishkin (eds) *Philosophy, Politics and Society*. New Haven: Yale University Press.
28. de Burca, Grainne (2004). The Drafting of A Constitution for the European Union: Europe's Madisonian Moment or A Moment of Madness?, 61 WASH. & LEE L. REV. 555.
29. Defeis, F. (1995). "Armenian Constitutional Referendum: Towards A Democratic Process." *Temple International & Comparative Law Journal*, 9:269-290.
30. Elster, Jon (1995). "Forces and Mechanisms in the Constitution Making Process." *Duke Law Journal* 45:364.
31. Elster, Jon (2000) "Arguing and Bargaining in Two Constitutional Assemblies." *University of Pennsylvania Journal of Constitutional Law*, 2: 345.

32. Freeman, Mark (2000). "Constitutional Framework and Fragile Democracy: Choosing between Parliamentarism, Presidentialism and Semi-Presidentialism." *Pace International Law Review*, 12: 253 (2000).
33. Fritz, Christian G. (1997). "Alternative Version of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate." *Hastings Constitutional Law Quarterly*, 24:287-357.
34. Habermas, Juergen (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press.
35. Gassman, Seth (2002). "Direct Democracy as Cultural Dispute Resolution: The Missing Egalitarianism of Cultural Entrenchment." *New York University Journal of Legislation and Public*, 6:525-559.
36. Hart, Vivien (2003). *Democratic Constitution Making*, Special Report 107, United States Institute of Peace. <http://www.usip.org/>(accessed January 14, 2005)
37. Jacobson, Arthur (1994). "Transitional Constitutions." In Michel Rosenfeld (ed.) *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives*. Durham: Duke University Press.
38. Ku, Raymond (1995). "Consensus of the Governed: The Legitimacy of Constitutional Change." *Fordham Law Review*, 64:535-585.
39. Luskin, Robert C et al. (2000) *Deliberation and Referendum Voting*, available at <http://cdd.stanford.edu/research/papers/2005/referendum-voting.pdf> (accessed December 1, 2005)
40. Murray, Christina (2001). "A Constitutional Beginning: Making South Africa's Final Constitution." *University of Arkansas Little Rock Law Review*, 23:809.
41. Smith, Benjamin N (2001). "Using Popular Referendum to Declare Fundamental Rights." *Boston University Public Interest Law Journal*, 11:123-139.
42. Somin, Ilya (2003). "Voter Knowledge and Constitutional Change: Assessing the New Deal Experiences." *William & Mary Law Review* 45:595-670.
43. Young, Iris (1990). *Justice and the Politics of Difference*. Princeton, N.J.: Princeton University Press.
44. Young, Iris (1997). "Difference as a Resource for Democracy Communication." In Bohman James and Rehg William (eds.) *Deliberative Democracy: Essays on Reason and Politics*. Cambridge: MIT Press.
45. Young, Iris (2000). *Inclusion and Democracy*. Oxford: Oxford University Press.

## 5. 計畫成果自評

本計畫就現行各種憲法變遷的公民審議機制，如憲改公民團、審議式民調、或全國審議日等，就其制度設計與運行功能，進行詳細的分析與探討。就此部分研究成果，以達預期，計畫主持人更已指導以此主題進行研究之碩士論文。參見：李怡俐，憲法修改的公民審議機制，台大國發所碩士論文（2005.7）。

此外，本計畫從當代憲法與民主理論出發，探討這些理論對公民審議憲法變遷的基本立場、態度以及其可能的批判。分析重點包括Bruce Ackerman 之民主權理論、Iris Young的社群與審議民主理論以及Juergen Habermas的溝通與審議民主理論。同時亦從實踐觀點，比較分析公民審議的主體取向：公民 v. 社會團體。本計畫探討這些不同的公民審議模式，其背後所反映出之憲法與民主理論對於民主以及公民社會的不同想像。就此議題，已初步達成研究成果，並以Changing Faces of Deliberating Citizens: A Thesis of Social Groups為題，撰寫論文，於國際憲法學會第七次年會發表，參見本計畫報告附錄。

同時，在台灣的實踐脈絡下，本計畫花費相當多時間心力整理過去台灣在公共政策上之公民審議，進一步比較在憲法層面上的公民審議之利弊與實踐可能性。本計畫發現：1) 臺灣現有公民審議機制，絕大多數均係由政府部門(行政院所屬各部會及北高兩市)主辦，再委由各大專院校承辦，而少由民間自主發起。2) 針對討論議題，在大方向上多能達成共識，然而一旦涉及具體行動，則多半並陳雙方意見而未有共識。3) 針對資源分配的議題時，則多半未能達成共識。4) 針對高度倫理爭議性議題，例如代理孕母、人工生殖，所達成之共識較為保守。5) 現有公民審議討論議題多半涉及人民之基本權利，而少有涉及政府組織者；亦少有性別議題。

在過去臺灣於公共政策面的審議民主實踐上，雖然本計畫從理論層面認為以社會團體為核心的憲法公民審議，是將來之必然趨勢，但在實踐上如何避免過去在公共政策面所遇到之困境，則仍須作更進一步在制度設計及討論議題設定上予以深化，這點也是此一方向之研究將來可以繼續深入探討的議題。

## 附錄：出席國際會議發表論文

在本計畫所通過之出席國際會議差旅費的資助下，申請人參與2007年6月11-15日國際憲法學會(International Association of Constitutional law)於希臘雅典所舉行第七次年會，提出論文並獲該次年會接受，於「制憲之人民參與」(Popular involvement in Constitution-making)場次中發表。

國際憲法學會為目前國際憲法學界中唯一且最重要的學會，1999年在荷蘭舉行的第五次年會首次有多位臺灣憲法學者的參與，2003年於聖地牙哥舉行年會卻很可惜地並沒有任何臺灣學者發表論文。此次在本計畫經費補助下，能參與該次會議，並與來自各國憲法學者認識、交流，殊為難得。

在與作者同一場次發表的論文中，理論及比較研究兼有，學者更來自加拿大、美國、南非、臺灣、尤其有許多非洲國家之憲法學者就其新近之制憲經驗作報告，使作者比較視野擴增，也增加將來跨國合作的機會，受益良多。

茲將申請人於該次國際會議發表之論文附如下頁。

***Changing Faces of Deliberating Citizens***  
***-A Thesis for Social Groups-***

Wen-Chen Chang\*

[Table of Content]

I. Forward.....	17
II. Nature & Paradox of Deliberative Democracy .....	21
A. Deliberative Democracy v. Representative Democracy	21
B. Deliberative Democracy v. Popular Sovereignty	22
III. Democratic Deliberation & Citizens of Social Groups.....	24
A. Problematic Deliberation among Citizens of Strangers	24
B. Deliberations among Citizens of Social Groups	26
1. Public Sphere with Citizens of Social Groups.....	26
2. Concept of Social Groups: Thick or Thin? Static or Fluid? .....	28
3. Voluntary Nature of Social Groups & Civic Organizations .....	30
C. Defense against Critics	31
D. Constitutional Deliberation v. Policy Deliberation	33
IV. Conclusion .....	34

## **I. Forward**

Most constitutions were deliberated and enacted by representative assemblies. Some recent ones were deliberated in representative assemblies but enacted with public votes.<sup>30</sup> Very few constitutions, if any, were deliberated popularly before enactment. This is perhaps for two reasons: practical and normative. Practically, it is nearly impossible for such a large group to deliberate on anything, least an abstract and fundamental document called a constitution. Normatively, a constitution rarely demands such a popular deliberative act for its validity and legitimacy. Against such common understandings, however, a recent discourse has risen to emphasize the relationship between a constitution and popular deliberation.

---

\* Assistant Professor, College of Law, National Taiwan University; JSD, Yale Law School

<sup>30</sup> Vivien Hart, *Democratic Constitution Making*, Special Report 107, United States Institute of Peace (2003), available at <http://www.usip.org/> (accessed January 14, 2005)

On a theoretical front, scholars of deliberative democracy have been outspoken in criticizing the problematic concept of aggregative democracy and proclaiming the fundamental legitimacy of democratic deliberation.<sup>31</sup> As fundamental as constitutional governance, it must not be established upon force or disingenuous consent but instead upon a rational, reciprocal deliberation process by which all agree.<sup>32</sup> In this way, the thesis of deliberative democracy is more than the theory of legitimacy, and deliberative democrats have begun to engage in intensive dialogues with theory of justice, communitarianism, popular sovereignty, rule of law, or even new institutional economics.<sup>33</sup>

Similarly in practice, various forms of deliberation, in particular public deliberation, have been installed in recent exercises of constitution making or constitutional reforms. For instance, the role of constitutional convention was stressed in the constitution making of European Union. Public consultations were utilized successfully in South Africa's 1997 Constitution.<sup>34</sup> Carefully designed citizen deliberative polling® was tried several times in Australia on amending proposals of constitution acts.<sup>35</sup> Mostly radically, a citizen assembly was formed in British Columbia of Canada to take up deliberative role and make constitutional amendment proposals that were traditionally at the hand of a parliament.<sup>36</sup> As it seems, a so-called "deliberative turn" in modern democracy and constitutionalism has taken hold.<sup>37</sup>

---

<sup>31</sup> See e.g. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004).

<sup>32</sup> See e.g. Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97-122 (1998); Anne van Aaken, *Deliberative Institutional Economics, or Does Homo Oeconomicus Argue? A Proposal for Combining New Institutional Economics with Discourse Theory*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* (Anne van Aaken et al eds., 2004).

<sup>33</sup> See generally SEYLA BENHABIB, *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (1996); James Bohman & William Rehg, *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (1997); Jon Elster ed., *DELIBERATIVE DEMOCRACY* (1998); Anne van Aaken et al eds., *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATION DEMOCRACY* 3-32 (2004).

<sup>34</sup> Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 *UNI. ARKANSAS LITTLE ROCK L. REV.* 809 (2001).

<sup>35</sup> James Fishkin, *Deliberative polling®: toward a better informed democracy*, at <http://cdd.stanford.edu/polls/docs/summary/#results>

<sup>36</sup> <http://www.citizensassembly.bc.ca/public>

<sup>37</sup> The term of "deliberative turn" appeared in JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2000).

Despite earned acceptance, deliberative democrats still confront serious challenges. Practically, the extent to which citizens were engaged in deliberative process was put into question. The use of public consultation in both South Africa and European Union was seen as rather ceremonial. Many young people showed ignorance about what was going on and the less educated expressed frustrations.<sup>38</sup> In cases where deliberative process was carefully designed to ensure the quality of public engagement, they would have to be limited to only a certain number of citizens. The help from the media or internet in enlarging or disseminating deliberative discourse was rather trivial.<sup>39</sup> The ideal of deliberation day<sup>40</sup> –albeit with the potential in resolving aforementioned technical constraint– remains as utopia. The greatest practical challenge above all is the effectiveness of democratic deliberation regarding its end-result. The questions of effectiveness include whether democratic deliberation has any impacts on its final product –a constitution– and whether a constitution whose birth is through democratic deliberation is more effective in its abidance and successful in its governance.<sup>41</sup>

Theoretical challenges to deliberative democrats are multifold. First, they are criticized as misunderstanding law and politics. Opponents maintain that it is political authority capable of making a founding decision stands at the core of establishing constitutions.<sup>42</sup> Political masses, popular mobilization and in some cases passion were what historically created –even legitimized– any existing polity.<sup>43</sup> Secondly, the thesis of deliberative democracy frustrates the division of labor between political institutions –based upon reasons and representatives– and political will –based upon powers and the people–. Third, by merely highlighting citizens in discursive process, deliberative thesis underestimates the role of social groups and labor unions in a plural polity with socio-economic complex.<sup>44</sup> Last and perhaps strongest is the

---

<sup>38</sup> For the discussion of South Africa, see Christina Murray, *supra* note. For the critics of European Constitution making process, see Neil Walker, *Europe's constitutional momentum and the search for political legitimacy*, 3 I-CON INT'L J. CON. L. 211 (2005).

<sup>39</sup> Almost everywhere, citizen conferences were only covered by local public televisions and their own established websites whose watching and reading audience was very limited.

<sup>40</sup> BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004).

<sup>41</sup> Stefan Voigt, *The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* 199- 229 (Anne van Aaken et al eds., 2004).

<sup>42</sup> CARL SCHMITT, GEORGE SCHWAB TRANS., *POLITICAL THEOLOGY: FOUR CHAPTERS OF THE CONCEPT OF SOVEREIGNTY* (1985, 2005).

<sup>43</sup> *Id.* at 30-31.

<sup>44</sup> See e.g. IRIS M. YOUNG, *INCLUSION AND DEMOCRACY* (2000).

criticism that citizen deliberation –no matter how carefully designed its process– may never deliver what it promises but merely polarizes those with opposing views<sup>45</sup> and even discourages them from participating in politics.<sup>46</sup>

With mounting pressure, deliberative democrats must find new ways to defend their thesis and rejuvenate their position. Some revisions are necessary. This essay does not –certainly cannot– tackle all above challenges. Rather, given the sustained belief in deliberative democracy, it attempts at reconstructing the ways that *citizens* are to be understood in constitutional deliberations. The pre-existing links between citizens and their political/social/economic/cultural/ethnic identities must be formally recognized and reckoned with in deliberative process. In other words, *citizen* deliberation on constitutions should be understood as *citizens of various political/social/economic/cultural/ethnic groups* (hereinafter “social group”) coming and deliberating together in a reciprocal fashion on fundamental constitutional choices. In so doing, neither rationality nor impartiality sought by deliberative democracy would be jeopardized. To the contrary, deliberative process based upon social groups would benefit greatly from the strength and energy of citizens in their respective social groups –rather than overburden each and every isolated citizen at his or her own home. It would also ensure the extent of social mobilization that is necessary to motivate concerned citizens and enlarge public discussion.

In the following essay, I shall first explain why it is better to have citizens of various social groups –instead of isolated citizens– in public deliberation of constitutions. Then I shall argue its institutional advantages and defend potential disadvantages and challenges from classical views of citizen deliberation. Last, I shall hope to advocate a pluralist constitutional regime that is implied in my design and is inevitable in the age of transnational constitutionalism.<sup>47</sup>

---

<sup>45</sup> Cass Sunstein, *Group Judgments: A Statistical Means, Deliberation and Information Market*, 80 N. Y. U. L. REV. 962 (2005); Cass Sunstein, *Deliberating Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71 (2000).

<sup>46</sup> DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY (2006).

<sup>47</sup> Jiunn-rong Yeh & Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism*, paper draft available at <http://law.bepress.com/expresso/eps/1815>.

## II. Nature & Paradox of Deliberative Democracy

### A. Deliberative Democracy v. Representative Democracy

The idea of deliberative democracy affirms the need to justify decisions in any polity.<sup>48</sup> Counting heads or aggregative voting is not considered as a valid or legitimate way of making decisions. Reasons accessible to all must be given in mutually respectful fashion. In this sense, deliberative democracy does not necessarily require any public, popular or citizen deliberation. So long as a deliberative process is undertaken, it is not a concern whether a decision is made by representatives or more popularly by the people. As Gutmann & Thompson make it clear,

“what makes deliberative democracy democratic is an expansive definition of who is included in the process of deliberation—an inclusive answer to the questions of who has the right (and effective opportunity) to deliberate or choose the deliberators, and to whom do the deliberators owe their justifications.”<sup>49</sup>

Hence, deliberative democracy is not necessarily popular or direct democracy. In focusing on reasoned decisions, however, a potential link exists between deliberative democracy and popular democracy. For, it remains considerably paranoid for deliberative democrats that representatives, therefore the deliberators, are chosen by mere preferences or even powers while their decisions must be justified by reasons. After all, representatives obtain mandates to make decisions for all. The indirect link between the people and decisions made by representatives suffices neither that the people cannot be deliberators nor that decisions made by representatives need not be justified to the people.

In order to ease this tension, two kinds of solution are offered by deliberative democrats. One way is to add deliberative elements in election process by which the people choose their representatives –future deliberators. For instance, a deliberative polling® was held with the aide of the Center for Deliberative Democracy directed by James Fishkin before a British general election.<sup>50</sup> In Taiwan, an experimental citizen deliberative conference was conducted before the city and county mayor election in 2005.<sup>51</sup> Ackerman & Fishkin advocate for a national day of deliberation before

---

<sup>48</sup> Amy Gutmann & Dennis Thompson, *supra* note, at 3.

<sup>49</sup> *Id.* at 9-10.

<sup>50</sup> James Fishkin, *supra* note.

<sup>51</sup> The introduction and analysis of the event is provided by Taiwan Think Tank, available at [http://www.taiwanthinktank.org/tt/servlet/OpenBlock?Template=Article&lan=tc&category\\_id=55&article\\_id=519](http://www.taiwanthinktank.org/tt/servlet/OpenBlock?Template=Article&lan=tc&category_id=55&article_id=519) (visited April 1, 2007).

people go to the poll for next elections of Congress and President.<sup>52</sup> The other way is to have citizen deliberations on major policies as supplements for representative deliberative decision making. Public consultation, citizen conferences, citizen juries or deliberative polling® exemplifies some of ways in which the rational and legitimate deficit of representative democracy may be rescued by extended deliberations into those who are ultimately bound by public decision making. In this way, deliberative democracy works like participatory democracy – despite the difference being that the latter emphasizes participatory power from the people while the former focuses on supplementary reasons offered by citizens.

In what other more direct ways, then, would deliberative democracy find its popular element? Or whether deliberative democracy has any popular root?

## **B. Deliberative Democracy v. Popular Sovereignty**

Jürgen Habermas, a great thinker of our time, is perhaps the first to link expressively deliberative politics into popular sovereignty.<sup>53</sup> Mindful of Schmittian critique that separates politics from law,<sup>54</sup> Habermas argues for an internal link between law and politics, that is, *discursive politics*.<sup>55</sup> He further defines popular sovereignty as procedure in that popular sovereignty embodied in public discourse would “mediate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives”.<sup>56</sup> To justify popular sovereignty as the fundamental source of legitimacy in modern constitutional states, Habermas relies upon a popular discourse by which a collective judgment is made through a reciprocally reason-giving process. The normative foundation of “We the People” thus comes from the discursive act of the people in forming their own polity but not from their decisive act.

It is in this Habermasian sense that constitutional decisions must be more akin to popular deliberation than normal policy decisions. Modern constitutions, no matter made by parliaments or by direct popular votes, must ground ultimately their

---

<sup>52</sup> BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004)

<sup>53</sup> Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 35-65 (James Bohman & William Rehg eds., 1997)

<sup>54</sup> Carl Schmitt, *supra* note.

<sup>55</sup> JÜRGEN HABERMAS, WILLIAM REHG TRANS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO DISCOURSE THEORY OF LAW AND DEMOCRACY* 133-151 (1998).

<sup>56</sup> Jürgen Habermas, *supra* note [*Popular Sovereignty as Procedure*], at 49.

legitimacy in this popular discursive act in order to resolve the fundamental paradox between human rights, democracy and popular sovereignty.<sup>57</sup>

Another link between public deliberation and constitutions is found in contractual theory of modern constitutional democracies.<sup>58</sup> In contractual terms, modern constitutions are justified by consents. Public deliberation developed by discourse theory rescues such a fundamental contract from being deceitful or hypocritical. Procedural requirements by deliberative democrats are seen as external constraints upon which all parties enter into contract on equal and reciprocal terms. While contractual theorists may maintain that social contract is reached as a result of outcome-oriented utility, procedural utility during contractual process ensure a successful decision making process without which contract cannot be reached.<sup>59</sup>

There also exists a rather practical reason why popular deliberation should be emphasized even in the context of institutions being trusted to decision making. According to him, “*it is because the institutions are designed in such a way that representatives normally do not want to expose themselves to the criticism of their voters.*”<sup>60</sup> Thus it is no surprise that Habermas has labored considerably to advocate citizen deliberation for European constitution making while knowing that it is only to be ratified by separate governments.<sup>61</sup>

Thus, it is fair to conclude that public deliberation –the embodiment of popular sovereignty in both political and normative senses– generates a primary source of legitimacy in constitution making but delivers supplementary legitimacy in ordinary policy making. The latter is supposed to be confined by a rather classical division of labor between representatives and their voters. The remaining issue, however, is how should this “public discursive act” be properly understood, designed or even realized. Is *popular* deliberation necessarily *citizen-based* deliberation? Is it possible for this public deliberation to be *institutionalized* or to have relations with formalized institutions? Should we distinguish public deliberation in constitution making from that in policy context? How exactly should this line be drawn?

---

<sup>57</sup> *Id.* at 48-9.

<sup>58</sup> Anne van Aaken, *supra* note.

<sup>59</sup> *Id.* at 17.

<sup>60</sup> Jürgen Habermas, *supra* note, at 60.

<sup>61</sup> Jürgen Habermas, *Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”*, 1 EUR. L. J. 303 (1995).

### III. Democratic Deliberation & Citizens of Social Groups

#### A. Problematic Deliberation among Citizens of Strangers

In the beginning of this essay, I have mentioned a recent trend in incorporating public deliberation into constitutional process. Public consultations in European Union and South Africa, deliberative polling® in Australia and citizen assembly in Canada were mostly cited practices. Intriguingly however, in all these cases, “*the public*” called on for deliberation included only “*citizens*”. Citizens scattered and isolated at their own homes were invited to submit their proposals or comments on constitutional drafts and at times called up to ask whether they would like to spend one day or two –or even several weekends– to join in a randomly selected group for deliberation.

Having received sufficient information prepared and articulated by experts and engaged in reciprocal reason-giving conversations, some citizens have completed with better understandings of debated issues and consequentially change their minds.<sup>62</sup> Their confidence and interests in engaging in public debates and civil activities are once again reestablished, and a genuine sense of citizenship is felt.<sup>63</sup>

Others may not. According to recent studies done by political and social psychologists, having exposed to opposing views may have a silencing effect on those who are initially uncertain about their own views or do not feel strongly about them. Worse yet, it is discovered that some people, having realized the fact that others hold very strongly views against their own, may begin feeling not very enthusiastic to discuss them in fear of social confrontation or undermining harmonious relationships. Certain distancing effects or even retreating from political conversations and active political participations appears at times as a result of being exposed to opposing views.<sup>64</sup> In addition, Cass Sunstein has contended that group polarization and information cascade as detrimental to deliberative process.<sup>65</sup> In some cases, deliberating groups end up in a more extreme position in line with their tendencies before deliberation. It is because people receive and process better views or facts they are originally oriented at. The phenomenon of information cascade points to the fact that people tend to agree with the view agreed or expressed most often, and that

---

<sup>62</sup> Fishkin, *supra* note.

<sup>63</sup> Bruce Ackerman & James Fishkin, *supra* note.

<sup>64</sup> Diana C. Mutz, *supra* note, at 89-124.

<sup>65</sup> Cass Sunstein, *Group Judgments*.

common knowledge exercises greater influences upon deliberating groups than individuals deliberating privately.<sup>66</sup>

The seemingly conflicting findings of citizen deliberation practices, in my view, are not surprising at all. Both positive and negative findings point to a diverse nature of individual citizens. It is only common that some of us are more inclined to stand up speaking for their own minds in public while others are more likely to be very conscious of others, have doubts of their own and easy to make compromises. In this modern society of strangers,<sup>67</sup> politeness and even distancing are becoming general attitudes –or even virtues– in public, business or even rather intimate settings. Immersed in such a modern complex, it is only easy for us to feel isolated, unsupportive, confused and insecure about our own selves and others. Only very few –perhaps those *public* citizens– are exceptions.<sup>68</sup> Even if we are very much inspired and at times feel obliged in the sense of *our common good*,<sup>69</sup> we do not always pay attention to public issues due to various conditions and life struggles. Nor are we all capable of thinking through important issues and making our points clear to our friends and colleagues. As a consequence, we rely heavily upon politicians and techno-bureaucrats while at the same times distrusting them strongly.

This modern (or perhaps already post-modern) syndrome of self-conflicting and retreating public is precisely what triggers the recent rise of deliberative democratic theory that aims at re-bounding citizens together. What deliberative democrats fail to recognize, however, is that simply calling on individual citizens for deliberation is not a panacea. The mostly popular method employed by recent deliberative practices is to call on citizens scattered at their own homes on the basis of residence, age, income and gender and assemble them as a deliberating group with sufficient information aided by experts.<sup>70</sup> So long as this group is supposedly mirrored as the larger society, some passive or negative attitudes towards discussing strangers are not easily transformed in any magical fashion. The sampled variables of age, residence, income, gender and in some cases race do not represent any categorical differences (or sameness) of opinion attitudes in deliberating citizens.<sup>71</sup> Neither are they genuine

---

<sup>66</sup> *Id.* at 999-1006.

<sup>67</sup> LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* (1999).

<sup>68</sup> Bruce Ackerman distinguishes “public citizen” from “private citizen” and defines most of us as private citizens who would be coming together in a unprecedented mobilization at extraordinary constitutional moments. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)

<sup>69</sup> Gutmann & Thompson, *supra* note, at 26-29.

<sup>70</sup> James Fishkin, *supra* note.

<sup>71</sup> It is emphasized not to presuppose sampled citizens’ attitudes.

standards by which a reflected community can be drawn.<sup>72</sup> Is our community really composed of citizens according to these selected variables? In what particular sense we are certain these variables are valid pertaining to assembling a deliberative group for any public policy making? If chosen variables are defended by a common modern social scientific method,<sup>73</sup> perhaps it inevitably exposes the arbitrariness embedded in its collaborators, libertarian or classical liberal understandings, which have already been criticized and revised further.

Some deliberative democrats defend this particular chosen method with the inspiration from jury system in the common law tradition.<sup>74</sup> But common law jury was initially developed from a group of witnessing neighbors –who are thus familiar with local customs to stand in better position for judgment.<sup>75</sup> It was due to particular historical conditions that juries became a group of strangers. Serious challenges to jury system have been enormous and some of them bear similar relevance to criticism of citizen deliberations.<sup>76</sup> Must deliberating citizens be chosen this way? Certainly not.

## **B. Deliberations among Citizens of Social Groups**

### *1. Public Sphere with Citizens of Social Groups*

Let us reexamine the picture of deliberative politics –laid down by Jürgen Habermas– that extends to normative justifications for polity. According to him,

“[w]ith some institutional imagination, . . . one can think of how existing parliamentary bodies might be supplemented by institutions that would allow affected clients and the legal public sphere to exert a stronger pressure for legitimation on the executive and judicial branches.”<sup>77</sup>

---

<sup>72</sup> It should be also noted that sampled citizens participate voluntarily and thus certain distortions in actual assembled groups are inevitable.

<sup>73</sup> James Fishkin, *supra* note.

<sup>74</sup> ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004) (inspired by both deliberative democracy and citizen juries, arguing for a compulsory service provided by citizens for deliberation in a so-called popular branch.)

<sup>75</sup> Ellen E. Sward, *A history of civil trial in the United States*, 51 U. KAN. L. REV. 347, 347-363 (2003); Note (H. Marlow Green), *Common law, property rights and the environment: A comparative analysis of historical developments in the United States and England and a model for the future*, 30 CORNELL INT’L L. J. 541, 542-544 (1997).

<sup>76</sup> Cass Sunstein, *supra* note [*Group Judgments*].

<sup>77</sup> Jürgen Habermas, *supra* note [*Popular Sovereignty as Procedure*], at 56-7.

In giving a bit further details on what he means by public spheres in addition to the already institutionalized mechanisms of will and opinion formations, he notes:

“It would be realized to the extent that opinion-forming associations developed, catalyzed the growth of autonomous public spheres, and in virtue of the natural visibility such associations enjoy, changed the spectrum of values, issues and reasons. It would both innovatively unleash and critically filter the elements of discourse that have been channeled by the mass media, unions, associations, and parties, according to the dictates of power. . . . [T]he emergence, reproduction, and influence of such a network of associations remains dependent on a liberal-egalitarian political culture sensitive to problems affecting society as a whole...”<sup>78</sup>

It is clear that Habermas views deliberative politics that complements for legitimacy of existing representative institutions in a much more complex way. The deliberating citizenry includes at least media, unions and voluntary associations, and perhaps more importantly, the complicated networks and their respective functions are to be determined not by one-dimensional theoretical articulation but by contingent political cultures. The more liberal, egalitarian a political culture is, the more likely these various networks reason and collaborate with one another towards the common good and the less conflict of interests would be generated.

Although Habermas has not been explicit on how exactly these networks of *various interests* in public sphere would (or should) work together,<sup>79</sup> he nevertheless insists any potential conflicts in interests must be resolved from the use of *public reasons* and from the standpoint of *impartiality*.<sup>80</sup> Despite this rather abstract solution, however, it is clear that the deliberating public envisaged by Habermas is not a random assemble of individual citizens isolated at their own homes but a complex network of civic associations –already engaged in public sphere– whose members are citizens with the common good as well as special interests/concerns/attitudes in mind.

In my view, it is only very common for individual citizens to engage themselves in public discussions through mediated associations or forums. We understand things and issues through our particular frameworks and references,<sup>81</sup> which have been formed over time as a combined complex result of our experiences, education,

---

<sup>78</sup> *Id.* at 60.

<sup>79</sup> JORGE M. VALADEZ, DELIBERATIVE DEMOCRACY, POLITICAL LEGITIMACY, AND SELF-DETERMINATION IN MULTICULTURAL SOCIETIES 61-2 (2001). *See also* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY (1996).

<sup>80</sup> Jorge M. Valadez, *id.* at 62.

<sup>81</sup> Anne van Aaken, *supra* note, at 10-12.

identities, interests and even passions. We are more likely to be concerned with, think through and even speak up for issues that are possibly understood in our referring or perceptive frameworks. We are more confident and willing to talk about matters and issues when we are more aware of them or have certain degree of previous knowledge about them. The various extents of references, perceptions or previous knowledge are related to our respective living experiences, interests, cultural influences and political/economic/social/cultural identities.<sup>82</sup> Consequently, it is only common that we participate in public spheres by way of our own chosen associations, clubs or groups. More importantly, the likelihood and effectiveness of our participation in public discourse increase significantly when we are talking with confident voice and collaborative –thin or thick– perceptions. Knowing at least our views are shared makes us more likely to speak up and exchange with other different views.

## 2. *Concept of Social Groups: Thick or Thin? Static or Fluid?*

Talking based upon some particular –thin or thick– shared perceptions or positions helps us as ordinary citizens begin effectively participating in public discourse and reason with others. It is in this way I advocate for deliberations by citizens of social groups.

Similar advocacy has been done by previous theorists such as Iris Young, Jorge M. Valadez and Michael R. James among others.<sup>83</sup> For example, in advocating for a more inclusive democracy for socially marginalized groups, Iris M. Young combines communitarian ideals with deliberative democracy. She argues:

“Inclusion ought not to mean simply the formal and abstract equality of all members of the polity as citizens. It means explicitly acknowledging social differentiations and divisions and encouraging differently situated groups to give voice to their needs, interests, and perspectives on the society in ways that meet conditions of reasonableness and publicity.”<sup>84</sup>

By inviting citizens of differently situated social differences to join in public discourse, Iris Young makes it clear that public sphere is not composed by homogenous citizens but rather by diverse citizens of various social positions. Political legitimacy is ultimately sustained with such enriched public sphere of

---

<sup>82</sup> Jorge M. Valadez, *supra* note, at 58-67.

<sup>83</sup> Iris M. Young, *supra* note; Jorge M. Valadez, *supra* note; MICHAEL R. JAMES, *DELIBERATIVE DEMOCRACY AND THE PLURAL POLITY* (2004).

<sup>84</sup> Iris M. Young, *supra* note, at 119.

multiple voices trying to seek further political cooperation in ways that are open, civilian and reciprocal.<sup>85</sup>

Communitarian scholars often hold a rather thick and static concept of social groups/identities that are deemed as capable of determining substantive values and providing world views of group members. But communitarian/deliberative democrats such as Iris Young or Michael R. James exhibit a rather thin or even fluid concept of group identities. Young argues that “*social difference is not identity*”<sup>86</sup>, and that any thick conception of social group as identity must “*confront the fact that many people may deny that group positioning is significant for their identity*”<sup>87</sup>. Instead, “*social group differentiation in relational rather than substantial terms*”<sup>88</sup>, and these social differences must be seen as political resources—rather than difficulties—upon which citizens of various social differences may enrich public sphere and seek cooperative efforts.

Similarly, distinguishing four models (instrumental/agent, interpretive/agent, instrumental/structure, and interpretive/structure) of identity construction, Michael James is conscious of fluidity in identity.<sup>89</sup> Recognizing such complex fluidity in identity construction, he argues for a kind of deliberative politic that include all relevant *group perspectives*.<sup>90</sup> The inclusion of group perspectives in public discourse may require some degree of group-based representation but the two are not the same and it may be achieved through more informal or indirect ways.<sup>91</sup>

I agree with Young and James insofar as they understand social groups/differences as a thin concept. It is clear that not all women “identify” themselves with the women group that has a particular view of gender and related cultural perceptions. But it is certainly not a problem to have this particular view held by this women group – insofar as it does not claim to represent all women– to be presented and taken reciprocally seriously at the discussion table. Most importantly, this view is not necessarily expressed even if we randomly sample a group of citizens

---

<sup>85</sup> *Id.* at 108-12.

<sup>86</sup> *Id.* at 87.

<sup>87</sup> *Id.* at 88.

<sup>88</sup> *Id.* at 89.

<sup>89</sup> Michael James, *supra* note, at 17-22.

<sup>90</sup> *Id.* at 49.

<sup>91</sup> *Id.* Michael James focuses here on the design of parliamentary or electoral rules. Since these are not the focus of this essay, I shall omit them.

half of which are women to participate in deliberation. It is either because those randomly selected women do not hold this view or –perhaps most likely– because the few who hold this view feel not strong enough to express it in public before strangers for social or political psychological or personal reasons I have discussed earlier.

Thus, I regard social groups or differently situated social positions as mediated concept that strengthens citizens’ capacity in understanding and deliberating matters and issues with which they are concerned to various degrees. To make my point clear, I do not argue for deliberative politics of social groups for communitarian democracy or the pursuit of social cohesion. Rather, deliberating citizens based upon social groups exhibit greater strength –not politically (due to the constraint of reciprocity) but cognitively<sup>92</sup> in conducting public discourse compared to individually isolated citizens. At the discussion table, citizens of particular social groups may express “representative” views of particular social groups but may not. They do not “represent” their respective social groups nor are they required to play such roles. Their membership in their respective social groups must be taken as facilitating medium for their gained strength in talking and formed perspective in understanding. At the discussion table, they must abide by rational and reciprocal rules required by principles of deliberative democracy.

### *3. Voluntary Nature of Social Groups & Civic Organizations*

As already emphasized, deliberating citizens of social groups are not representatives of their respective groups. Neither these groups are “identity groups” –thickly defined. Hence, in deliberation by citizens of social groups, these groups must be of *voluntary* nature. There are perfectly reasons for an aborigine not to identify him/herself as aboriginal and for some women choose not to join women groups. The medium of social groups/positions is to strengthen deliberating citizens in their capacity of participating in public discussion and to complement as much as possible –but inevitably limited– perspectives by which cognitive understandings and opinions may be formed.

Since social groups must be understood as a thin concept and of voluntary nature, they are of no difference from other voluntary civil organizations such as environmental groups, labor unions or even professional associations. Hence, members of social groups as well as other civil organizations shall enjoy equal opportunity in joining public deliberation. It is perfectly up to one’s decision for one’s

---

<sup>92</sup> Jorge M. Valadez, *supra* note, at 58.

various *political/social/economic/cultural/ethnic/civic/professional affiliations* mainly based upon which one participates in public discourse. There are perfectly good reasons for a young/female/Asian/animal loving lawyer to spend most of her energy and time in an animal-lover club, with which she has learned and formed mostly her perspectives on public issues. This point may be made similarly to the concept of “*seriality*” by Sartre and Iris Young.<sup>93</sup>

### **C. Defense against Critics**

A number of worries or criticisms run against deliberations by citizens of social groups. First and foremost, it is worried that deliberations by citizens of social groups may turn a reason-giving discourse into a bargaining one. As discussed earlier, when engaged in deliberation, citizens of social groups must abide by rational and reciprocal rule. They must try to make their points and persuade others by referring to mutually acceptable reasons rather than naked preference or tangible interests.<sup>94</sup> Since they are not delegates of their social groups, they need not bargain with one another to maximize their interests. The membership or affiliation of any social groups of their own chosen merely opens the door for their participating in deliberation but not binds them from taking any particular opinions. Even randomly sampled citizens may have strongly hidden preferences or interests. What really matters is the strict enforcement of open, reciprocal, reason-giving discussions. There is no need to worry that deliberation by citizens of social groups would be less rational than citizens of random picks.

The second concern is on the issue of accountability in that the accountability of deliberating person of social groups is put into question. But I must emphasize again that citizens of social groups join in deliberation not as representative of their groups but merely on their own as *citizens*. Thus, they are accountable to no one just as randomly sampled citizens are.

Third, relative strengths or unequal resources of various social groups are of some critical concerns. Michael James, in urging group-based plural deliberation, has signaled a warning on unequal positions of groups that may undermine public deliberation on an equal footing.<sup>95</sup> But the model advocated in this essay is not a plural deliberation on a basis of groups. Citizens of social groups are supposed to

---

<sup>93</sup> Iris M. Young, *supra* note, at 100-01.

<sup>94</sup> Gutmann & Thompson, *supra* note; Anne van Aaken, *supra* note,

<sup>95</sup> Michael James, *supra* note, at 96-7.

participate in discussions as citizens. Their membership in any groups or organizations is merely a mediated concept that strengthens their capacity in joining the discussion. They are supposed to talk with the common good, to which they can only understand through their cognitive perspectives contingently influenced by their various *political/social/economic/cultural/ethnic/civic/professional affiliations*. In this sense, relative strengths or unequal positions of social groups should not be of concerns here. Even if they are, they are perhaps already immersed into relative strengths and unequal weights of *social perspectives*, which are precisely sought to be redressed by reciprocal, rational and reason-giving discourses.

The fourth is a real serious challenge that some groups or their members may not wish to join in citizen deliberations. Jorge Valadez divides ethno-cultural minorities into three kinds: accommodationist, autonomist and secessionist. The willingness to join in democratic deliberations of any given polity, according to him, is strongest with accommodationist, less strong in autonomist while with nearly no incentive for secessionist due to structural conditions and moral incommensurability.<sup>96</sup> In calling on citizens of social groups for public deliberation, it is possible that some are not willing to join. If this creates a democratic deficit in public deliberation, it would equally undermine the validity and legitimacy in the model of randomly sampled citizens.

More importantly, by inviting citizens of social groups for deliberation, a sense of recognition in particular social perspectives held by social groups is formally made and even linked to a new way citizenship is understood. As Iris Young articulates finely, the recognition of social perspectives held by members of social groups creates:

“democratic publicity by acknowledging that they are together and that they must work together to try to solve collective problems. Creation and sustenance of publicity in this sense, ...involves the willingness on the Part of participants to make claims and proposals in ways that aim to achieve understandings by others with different interests, experiences, and situations, and to try to persuade them of the justice of their claims.”<sup>97</sup>

No deliberative democrats—even those who are more inclined in communitarian ideals— would coerce or demand any social groups to join for democratic deliberation. What they can do—facing secessionist struggles—is only to recognize as broadly as

---

<sup>96</sup> Jorge M. Valadez, *supra* note, at 45-67.

<sup>97</sup> Iris M. Young, *supra* note, at 112.

possible in the concept of citizenship and provide as democratic as possible with the platform for a wider array of groups and their members to join with a fair conversation.

#### **D. Constitutional Deliberation v. Policy Deliberation**

The model of deliberation by citizens of social groups advanced in this essay is designed for constitutional deliberation. I remain cautioned in applying this model to policy deliberation for several reasons.

First –and perhaps the most important– is role differentiation in constitutional deliberation and policy one. The role of citizen deliberation is forming and legitimating any existing polity at the level of constitutional politics while at the level of legislative politics it has rather supplementary functions. A settled division of deliberative labors between government and citizenry is rather presupposed in a legitimized constitutional order. In this way, policy deliberation is subject to representative institutions whereas constitutional deliberation is still reserved for citizens.

Secondly, it is more likely that constitutional choices –either presented at constitution making or constitutional revisions– are separate from much more immediate and entrenched interests or preferences. Thus, it is more feasible to ask citizens of social groups not to be influenced by their more immediate tangible interest and to abide by deliberative rules.

Last but not the least is that constitutional decisions often require more profound reflections upon citizens on their basic needs, morals and attitudes for collective lives. Diverse social perspectives brought by citizens of social groups at the discussion table are beneficial for such profound reflections. On the contrarily, these diverse social perspective may divert too much in a rather detailed context of policy making.

The distinction between constitutional and policy deliberations seem to be echoed in practices. In Taiwan, a study on a deliberative forum of civil groups regarding the reform proposal of national health insurance system finds that civil groups with institutional involvements or entrenched interests in the existing system were –to a significantly greater extent– less likely to be affected by deliberations. On

the contrary, civic groups without previous institutional involvements were much more likely to have positive attitudes towards deliberations.<sup>98</sup>

Group-based civic deliberation for constitutional reforms, however, seemed to yield better results. In 2005, responding to a renewed call for substantial constitutional reforms, the 21<sup>st</sup> Century Constitutional Reform Alliance was formed to serve as a deliberating forum for various social groups and civil organization to come up with a reform proposal.<sup>99</sup> Deliberating individuals were members –not necessarily their chosen delegates or representatives– of collaborated groups and organizations. Determined to deliver a concrete reform proposal, deliberations were held at least twice a week and individuals of various social groups were deliberating with various constitutional choices including whether to have special representation for women and aborigines or to recognize a right to die. In one particular issue concerning a special gender proportion in the parliament, it was reported to have extraordinary debates between individuals from women organization and gay group. Divergent social perspectives were understood and reasoned solutions found. Months later, a first-ever constitutional reform proposal by civic groups in Taiwan was born.

#### **IV. Conclusion**

Evidently from Canada, Australia to Taiwan, a recent global trend that focuses on citizen deliberation has emerged. It is not yet clear, however, whether this trend of citizen deliberation on constitutions would be a success. Against a now prevailing model of citizen deliberation, this paper argues for an alternative: constitutional deliberations by citizens of social groups. This new alternative would undermine neither rationality nor impartiality sought by deliberative democracy. To the contrary, deliberative process based upon social groups would benefit greatly from the strength and energy of citizens in their respective social groups –rather than overburden each and every isolated citizen at his or her own home. It would also ensure the extent of social mobilization that is necessary to motivate concerned citizens and enlarge public discussion. Besides theoretical and practical reasons, constitutional deliberation by citizens of social groups offers a rather fluid and pluralist picture of constitutional regime that is inevitable in the age of transnational constitutionalism.

---

<sup>98</sup> Chung-yeh Deng & Chia-ling Wu, *Civic Groups Forum: Implications to Public Participation in New Democracy*, 1 TAIWAN FOUNDATIONS FOR DEMOCRACY 35 (2004). (Chinese article w. English abstract)

<sup>99</sup> The introduction of this forum and its results are available at <http://www.21cra.org.tw/>

## 附錄：出席國際會議發表論文

在本計畫所通過之出席國際會議差旅費的資助下，申請人參與2007年6月11-15日國際憲法學會(International Association of Constitutional law)於希臘雅典所舉行第七次年會，提出論文並獲該次年會接受，於「制憲之人民參與」(Popular involvement in Constitution-making)場次中發表。

國際憲法學會為目前國際憲法學界中唯一且最重要的學會，1999年在荷蘭舉行的第五次年會首次有多位臺灣憲法學者的參與，2003年於聖地牙哥舉行年會卻很可惜地並沒有任何臺灣學者發表論文。此次在本計畫經費補助下，能參與該次會議，並與來自各國憲法學者認識、交流，殊為難得。

在與作者同一場次發表的論文中，理論及比較研究兼有，學者更來自加拿大、美國、南非、臺灣、尤其有許多非洲國家之憲法學者就其新近之制憲經驗作報告，使作者比較視野擴增，也增加將來跨國合作的機會，受益良多。

茲將申請人於該次國際會議發表之論文附如下頁。

***Changing Faces of Deliberating Citizens***  
***-A Thesis for Social Groups-***

Wen-Chen Chang\*

[Table of Content]

I. Forward.....	2
II. Nature & Paradox of Deliberative Democracy .....	5
A. Deliberative Democracy v. Representative Democracy .....	6
B. Deliberative Democracy v. Popular Sovereignty .....	7
III. Democratic Deliberation & Citizens of Social Groups.....	8
A. Problematic Deliberation among Citizens of Strangers .....	9
B. Deliberations among Citizens of Social Groups .....	11
1. Public Sphere with Citizens of Social Groups.....	11
2. Concept of Social Groups: Thick or Thin? Static or Fluid? .....	13
3. Voluntary Nature of Social Groups & Civic Organizations .....	15
C. Defense against Critics.....	16
D. Constitutional Deliberation v. Policy Deliberation.....	18
IV. Conclusion .....	19

**I. Forward**

Most constitutions were deliberated and enacted by representative assemblies. Some recent ones were deliberated in representative assemblies but enacted with public votes.<sup>1</sup> Very few constitutions, if any, were deliberated popularly before enactment. This is perhaps for two reasons: practical and normative. Practically, it is nearly impossible for such a large group to deliberate on anything, least an abstract and fundamental document called a constitution. Normatively, a constitution rarely demands such a popular deliberative act for its validity and legitimacy. Against such common understandings, however, a recent discourse has risen to emphasize the relationship between a constitution and popular deliberation.

On a theoretical front, scholars of deliberative democracy have been outspoken in criticizing the problematic concept of aggregative democracy and proclaiming the

---

\* Assistant Professor, College of Law, National Taiwan University; JSD, Yale Law School

<sup>1</sup> Vivien Hart, *Democratic Constitution Making*, Special Report 107, United States Institute of Peace (2003), available at <http://www.usip.org/>(accessed January 14, 2005)

fundamental legitimacy of democratic deliberation.<sup>2</sup> As fundamental as constitutional governance, it must not be established upon force or disingenuous consent but instead upon a rational, reciprocal deliberation process by which all agree.<sup>3</sup> In this way, the thesis of deliberative democracy is more than the theory of legitimacy, and deliberative democrats have begun to engage in intensive dialogues with theory of justice, communitarianism, popular sovereignty, rule of law, or even new institutional economics.<sup>4</sup>

Similarly in practice, various forms of deliberation, in particular public deliberation, have been installed in recent exercises of constitution making or constitutional reforms. For instance, the role of constitutional convention was stressed in the constitution making of European Union. Public consultations were utilized successfully in South Africa's 1997 Constitution.<sup>5</sup> Carefully designed citizen deliberative polling® was tried several times in Australia on amending proposals of constitution acts.<sup>6</sup> Mostly radically, a citizen assembly was formed in British Columbia of Canada to take up deliberative role and make constitutional amendment proposals that were traditionally at the hand of a parliament.<sup>7</sup> As it seems, a so-called "deliberative turn" in modern democracy and constitutionalism has taken hold.<sup>8</sup>

Despite earned acceptance, deliberative democrats still confront serious challenges. Practically, the extent to which citizens were engaged in deliberative process was put into question. The use of public consultation in both South Africa and European Union was seen as rather ceremonial. Many young people showed

---

<sup>2</sup> See e.g. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004).

<sup>3</sup> See e.g. Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97-122 (1998); Anne van Aaken, *Deliberative Institutional Economics, or Does Homo Oeconomicus Argue? A Proposal for Combining New Institutional Economics with Discourse Theory*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* (Anne van Aaken et al eds., 2004).

<sup>4</sup> See generally SEYLA BENHABIB, *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (1996); James Bohman & William Rehg, *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (1997); Jon Elster ed., *DELIBERATIVE DEMOCRACY* (1998); Anne van Aaken et al eds., *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATION DEMOCRACY* 3-32 (2004).

<sup>5</sup> Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 *UNI. ARKANSAS LITTLE ROCK L. REV.* 809 (2001).

<sup>6</sup> James Fishkin, *Deliberative polling®: toward a better informed democracy*, at <http://cdd.stanford.edu/polls/docs/summary/#results>

<sup>7</sup> <http://www.citizensassembly.bc.ca/public>

<sup>8</sup> The term of "deliberative turn" appeared in JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2000).

ignorance about what was going on and the less educated expressed frustrations.<sup>9</sup> In cases where deliberative process was carefully designed to ensure the quality of public engagement, they would have to be limited to only a certain number of citizens. The help from the media or internet in enlarging or disseminating deliberative discourse was rather trivial.<sup>10</sup> The ideal of deliberation day<sup>11</sup> –albeit with the potential in resolving aforementioned technical constraint– remains as utopia. The greatest practical challenge above all is the effectiveness of democratic deliberation regarding its end-result. The questions of effectiveness include whether democratic deliberation has any impacts on its final product –a constitution– and whether a constitution whose birth is through democratic deliberation is more effective in its abidance and successful in its governance.<sup>12</sup>

Theoretical challenges to deliberative democrats are multifold. First, they are criticized as misunderstanding law and politics. Opponents maintain that it is political authority capable of making a founding decision stands at the core of establishing constitutions.<sup>13</sup> Political masses, popular mobilization and in some cases passion were what historically created –even legitimized– any existing polity.<sup>14</sup> Secondly, the thesis of deliberative democracy frustrates the division of labor between political institutions –based upon reasons and representatives– and political will –based upon powers and the people–. Third, by merely highlighting citizens in discursive process, deliberative thesis underestimates the role of social groups and labor unions in a plural polity with socio-economic complex.<sup>15</sup> Last and perhaps strongest is the criticism that citizen deliberation –no matter how carefully designed its process– may

---

<sup>9</sup> For the discussion of South Africa, *see* Christina Murray, *supra* note. For the critics of European Constitution making process, *see* Neil Walker, *Europe's constitutional momentum and the search for political legitimacy*, 3 I-CON INT'L J. CON. L. 211 (2005).

<sup>10</sup> Almost everywhere, citizen conferences were only covered by local public televisions and their own established websites whose watching and reading audience was very limited.

<sup>11</sup> BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004).

<sup>12</sup> Stefan Voigt, *The Consequences of Popular Participation in Constitutional Choice – Towards a Comparative Analysis*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* 199- 229 (Anne van Aaken et al eds., 2004).

<sup>13</sup> CARL SCHMITT, GEORGE SCHWAB TRANS., *POLITICAL THEOLOGY: FOUR CHAPTERS OF THE CONCEPT OF SOVEREIGNTY* (1985, 2005).

<sup>14</sup> *Id.* at 30-31.

<sup>15</sup> *See e.g.* IRIS M. YOUNG, *INCLUSION AND DEMOCRACY* (2000).

never deliver what it promises but merely polarizes those with opposing views<sup>16</sup> and even discourages them from participating in politics.<sup>17</sup>

With mounting pressure, deliberative democrats must find new ways to defend their thesis and rejuvenate their position. Some revisions are necessary. This essay does not –certainly cannot– tackle all above challenges. Rather, given the sustained belief in deliberative democracy, it attempts at reconstructing the ways that *citizens* are to be understood in constitutional deliberations. The pre-existing links between citizens and their political/social/economic/cultural/ethnic identities must be formally recognized and reckoned with in deliberative process. In other words, *citizen* deliberation on constitutions should be understood as *citizens of various political/social/economic/cultural/ethnic groups* (hereinafter “social group”) coming and deliberating together in a reciprocal fashion on fundamental constitutional choices. In so doing, neither rationality nor impartiality sought by deliberative democracy would be jeopardized. To the contrary, deliberative process based upon social groups would benefit greatly from the strength and energy of citizens in their respective social groups –rather than overburden each and every isolated citizen at his or her own home. It would also ensure the extent of social mobilization that is necessary to motivate concerned citizens and enlarge public discussion.

In the following essay, I shall first explain why it is better to have citizens of various social groups –instead of isolated citizens– in public deliberation of constitutions. Then I shall argue its institutional advantages and defend potential disadvantages and challenges from classical views of citizen deliberation. Last, I shall hope to advocate a pluralist constitutional regime that is implied in my design and is inevitable in the age of transnational constitutionalism.<sup>18</sup>

## II. Nature & Paradox of Deliberative Democracy

---

<sup>16</sup> Cass Sunstein, *Group Judgments: A Statistical Means, Deliberation and Information Market*, 80 N. Y. U. L. REV. 962 (2005); Cass Sunstein, *Deliberating Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71 (2000).

<sup>17</sup> DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY (2006).

<sup>18</sup> Jiunn-rong Yeh & Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism*, paper draft available at <http://law.bepress.com/expresso/eps/1815>.

## A. Deliberative Democracy v. Representative Democracy

The idea of deliberative democracy affirms the need to justify decisions in any polity.<sup>19</sup> Counting heads or aggregative voting is not considered as a valid or legitimate way of making decisions. Reasons accessible to all must be given in mutually respectful fashion. In this sense, deliberative democracy does not necessarily require any public, popular or citizen deliberation. So long as a deliberative process is undertaken, it is not a concern whether a decision is made by representatives or more popularly by the people. As Gutmann & Thompson make it clear,

*“what makes deliberative democracy democratic is an expansive definition of who is included in the process of deliberation—an inclusive answer to the questions of who has the right (and effective opportunity) to deliberate or choose the deliberators, and to whom do the deliberators owe their justifications.”*<sup>20</sup>

Hence, deliberative democracy is not necessarily popular or direct democracy. In focusing on reasoned decisions, however, a potential link exists between deliberative democracy and popular democracy. For, it remains considerably paranoid for deliberative democrats that representatives, therefore the deliberators, are chosen by mere preferences or even powers while their decisions must be justified by reasons. After all, representatives obtain mandates to make decisions for all. The indirect link between the people and decisions made by representatives suffices neither that the people cannot be deliberators nor that decisions made by representatives need not be justified to the people.

In order to ease this tension, two kinds of solution are offered by deliberative democrats. One way is to add deliberative elements in election process by which the people choose their representatives –future deliberators. For instance, a deliberative polling® was held with the aid of the Center for Deliberative Democracy directed by James Fishkin before a British general election.<sup>21</sup> In Taiwan, an experimental citizen deliberative conference was conducted before the city and county mayor election in 2005.<sup>22</sup> Ackerman & Fishkin advocate for a national day of deliberation before

---

<sup>19</sup> Amy Gutmann & Dennis Thompson, *supra* note, at 3.

<sup>20</sup> *Id.* at 9-10.

<sup>21</sup> James Fishkin, *supra* note.

<sup>22</sup> The introduction and analysis of the event is provided by Taiwan Think Tank, available at [http://www.taiwanthinktank.org/tt/servlet/OpenBlock?Template=Article&lan=tc&category\\_id=55&article\\_id=519](http://www.taiwanthinktank.org/tt/servlet/OpenBlock?Template=Article&lan=tc&category_id=55&article_id=519)(visited April 1, 2007).

people go to the poll for next elections of Congress and President.<sup>23</sup> The other way is to have citizen deliberations on major policies as supplements for representative deliberative decision making. Public consultation, citizen conferences, citizen juries or deliberative polling<sup>®</sup> exemplifies some of ways in which the rational and legitimate deficit of representative democracy may be rescued by extended deliberations into those who are ultimately bound by public decision making. In this way, deliberative democracy works like participatory democracy – despite the difference being that the latter emphasizes participatory power from the people while the former focuses on supplementary reasons offered by citizens.

In what other more direct ways, then, would deliberative democracy find its popular element? Or whether deliberative democracy has any popular root?

## **B. Deliberative Democracy v. Popular Sovereignty**

Jürgen Habermas, a great thinker of our time, is perhaps the first to link expressively deliberative politics into popular sovereignty.<sup>24</sup> Mindful of Schmittian critique that separates politics from law,<sup>25</sup> Habermas argues for an internal link between law and politics, that is, *discursive politics*.<sup>26</sup> He further defines popular sovereignty as procedure in that popular sovereignty embodied in public discourse would “mediate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives”.<sup>27</sup> To justify popular sovereignty as the fundamental source of legitimacy in modern constitutional states, Habermas relies upon a popular discourse by which a collective judgment is made through a reciprocally reason-giving process. The normative foundation of “We the People” thus comes from the discursive act of the people in forming their own polity but not from their decisive act.

It is in this Habermasian sense that constitutional decisions must be more akin to popular deliberation than normal policy decisions. Modern constitutions, no matter made by parliaments or by direct popular votes, must ground ultimately their

---

<sup>23</sup> BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004)

<sup>24</sup> Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 35-65 (James Bohman & William Rehg eds., 1997)

<sup>25</sup> Carl Schmitt, *supra* note.

<sup>26</sup> JÜRGEN HABERMAS, WILLIAM REHG TRANS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO DISCOURSE THEORY OF LAW AND DEMOCRACY* 133-151 (1998).

<sup>27</sup> Jürgen Habermas, *supra* note [*Popular Sovereignty as Procedure*], at 49.

legitimacy in this popular discursive act in order to resolve the fundamental paradox between human rights, democracy and popular sovereignty.<sup>28</sup>

Another link between public deliberation and constitutions is found in contractual theory of modern constitutional democracies.<sup>29</sup> In contractual terms, modern constitutions are justified by consents. Public deliberation developed by discourse theory rescues such a fundamental contract from being deceitful or hypocritical. Procedural requirements by deliberative democrats are seen as external constraints upon which all parties enter into contract on equal and reciprocal terms. While contractual theorists may maintain that social contract is reached as a result of outcome-oriented utility, procedural utility during contractual process ensure a successful decision making process without which contract cannot be reached.<sup>30</sup>

There also exists a rather practical reason why popular deliberation should be emphasized even in the context of institutions being trusted to decision making. According to him, “*it is because the institutions are designed in such a way that representatives normally do not want to expose themselves to the criticism of their voters.*”<sup>31</sup> Thus it is no surprise that Habermas has labored considerably to advocate citizen deliberation for European constitution making while knowing that it is only to be ratified by separate governments.<sup>32</sup>

Thus, it is fair to conclude that public deliberation –the embodiment of popular sovereignty in both political and normative senses– generates a primary source of legitimacy in constitution making but delivers supplementary legitimacy in ordinary policy making. The latter is supposed to be confined by a rather classical division of labor between representatives and their voters. The remaining issue, however, is how should this “public discursive act” be properly understood, designed or even realized. Is *popular* deliberation necessarily *citizen-based* deliberation? Is it possible for this public deliberation to be *institutionalized* or to have relations with formalized institutions? Should we distinguish public deliberation in constitution making from that in policy context? How exactly should this line be drawn?

### III. Democratic Deliberation & Citizens of Social Groups

---

<sup>28</sup> *Id.* at 48-9.

<sup>29</sup> Anne van Aaken, *supra* note.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> Jürgen Habermas, *supra* note, at 60.

<sup>32</sup> Jürgen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, 1 EUR. L. J. 303 (1995).

## A. Problematic Deliberation among Citizens of Strangers

In the beginning of this essay, I have mentioned a recent trend in incorporating public deliberation into constitutional process. Public consultations in European Union and South Africa, deliberative polling® in Australia and citizen assembly in Canada were mostly cited practices. Intriguingly however, in all these cases, “*the public*” called on for deliberation included only “*citizens*”. Citizens scattered and isolated at their own homes were invited to submit their proposals or comments on constitutional drafts and at times called up to ask whether they would like to spend one day or two –or even several weekends– to join in a randomly selected group for deliberation.

Having received sufficient information prepared and articulated by experts and engaged in reciprocal reason-giving conversations, some citizens have completed with better understandings of debated issues and consequentially change their minds.<sup>33</sup> Their confidence and interests in engaging in public debates and civil activities are once again reestablished, and a genuine sense of citizenship is felt.<sup>34</sup>

Others may not. According to recent studies done by political and social psychologists, having exposed to opposing views may have a silencing effect on those who are initially uncertain about their own views or do not feel strongly about them. Worse yet, it is discovered that some people, having realized the fact that others hold very strongly views against their own, may begin feeling not very enthusiastic to discuss them in fear of social confrontation or undermining harmonious relationships. Certain distancing effects or even retreating from political conversations and active political participations appears at times as a result of being exposed to opposing views.<sup>35</sup> In addition, Cass Sunstein has contended that group polarization and information cascade as detrimental to deliberative process.<sup>36</sup> In some cases, deliberating groups end up in a more extreme position in line with their tendencies before deliberation. It is because people receive and process better views or facts they are originally oriented at. The phenomenon of information cascade points to the fact that people tend to agree with the view agreed or expressed most often, and that

---

<sup>33</sup> Fishkin, *supra* note.

<sup>34</sup> Bruce Ackerman & James Fishkin, *supra* note.

<sup>35</sup> Diana C. Mutz, *supra* note, at 89-124.

<sup>36</sup> Cass Sunstein, *Group Judgments*.

common knowledge exercises greater influences upon deliberating groups than individuals deliberating privately.<sup>37</sup>

The seemingly conflicting findings of citizen deliberation practices, in my view, are not surprising at all. Both positive and negative findings point to a diverse nature of individual citizens. It is only common that some of us are more inclined to stand up speaking for their own minds in public while others are more likely to be very conscious of others, have doubts of their own and easy to make compromises. In this modern society of strangers,<sup>38</sup> politeness and even distancing are becoming general attitudes –or even virtues– in public, business or even rather intimate settings. Immersed in such a modern complex, it is only easy for us to feel isolated, unsupportive, confused and insecure about our own selves and others. Only very few –perhaps those *public* citizens– are exceptions.<sup>39</sup> Even if we are very much inspired and at times feel obliged in the sense of *our common good*,<sup>40</sup> we do not always pay attention to public issues due to various conditions and life struggles. Nor are we all capable of thinking through important issues and making our points clear to our friends and colleagues. As a consequence, we rely heavily upon politicians and techno-bureaucrats while at the same times distrusting them strongly.

This modern (or perhaps already post-modern) syndrome of self-conflicting and retreating public is precisely what triggers the recent rise of deliberative democratic theory that aims at re-bounding citizens together. What deliberative democrats fail to recognize, however, is that simply calling on individual citizens for deliberation is not a panacea. The mostly popular method employed by recent deliberative practices is to call on citizens scattered at their own homes on the basis of residence, age, income and gender and assemble them as a deliberating group with sufficient information aided by experts.<sup>41</sup> So long as this group is supposedly mirrored as the larger society, some passive or negative attitudes towards discussing strangers are not easily transformed in any magical fashion. The sampled variables of age, residence, income, gender and in some cases race do not represent any categorical differences (or sameness) of opinion attitudes in deliberating citizens.<sup>42</sup> Neither are they genuine

---

<sup>37</sup> *Id.* at 999-1006.

<sup>38</sup> LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* (1999).

<sup>39</sup> Bruce Ackerman distinguishes “public citizen” from “private citizen” and defines most of us as private citizens who would be coming together in a unprecedented mobilization at extraordinary constitutional moments. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)

<sup>40</sup> Gutmann & Thompson, *supra* note, at 26-29.

<sup>41</sup> James Fishkin, *supra* note.

<sup>42</sup> It is emphasized not to presuppose sampled citizens’ attitudes.

standards by which a reflected community can be drawn.<sup>43</sup> Is our community really composed of citizens according to these selected variables? In what particular sense we are certain these variables are valid pertaining to assembling a deliberative group for any public policy making? If chosen variables are defended by a common modern social scientific method,<sup>44</sup> perhaps it inevitably exposes the arbitrariness embedded in its collaborators, libertarian or classical liberal understandings, which have already been criticized and revised further.

Some deliberative democrats defend this particular chosen method with the inspiration from jury system in the common law tradition.<sup>45</sup> But common law jury was initially developed from a group of witnessing neighbors –who are thus familiar with local customs to stand in better position for judgment.<sup>46</sup> It was due to particular historical conditions that juries became a group of strangers. Serious challenges to jury system have been enormous and some of them bear similar relevance to criticism of citizen deliberations.<sup>47</sup> Must deliberating citizens be chosen this way? Certainly not.

## **B. Deliberations among Citizens of Social Groups**

### *1. Public Sphere with Citizens of Social Groups*

Let us reexamine the picture of deliberative politics –laid down by Jürgen Habermas– that extends to normative justifications for polity. According to him,

*“[w]ith some institutional imagination, ...one can think of how existing parliamentary bodies might be supplemented by institutions that would allow affected clients and the legal public sphere to exert a*

---

<sup>43</sup> It should be also noted that sampled citizens participate voluntarily and thus certain distortions in actual assembled groups are inevitable.

<sup>44</sup> James Fishkin, *supra* note.

<sup>45</sup> ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004) (inspired by both deliberative democracy and citizen juries, arguing for a compulsory service provided by citizens for deliberation in a so-called popular branch.)

<sup>46</sup> Ellen E. Sward, *A history of civil trial in the United States*, 51 U. KAN. L. REV. 347, 347-363 (2003); Note (H. Marlow Green), *Common law, property rights and the environment: A comparative analysis of historical developments in the United States and England and a model for the future*, 30 CORNELL INT’L L. J. 541, 542-544 (1997).

<sup>47</sup> Cass Sunstein, *supra* note [*Group Judgments*].

*stronger pressure for legitimation on the executive and judicial branches.*”<sup>48</sup>

In giving a bit further details on what he means by public spheres in addition to the already institutionalized mechanisms of will and opinion formations, he notes:

*“It would be realized to the extent that opinion-forming associations developed, catalyzed the growth of autonomous public spheres, and in virtue of the natural visibility such associations enjoy, changed the spectrum of values, issues and reasons. It would both innovatively unleash and critically filter the elements of discourse that have been channeled by the mass media, unions, associations, and parties, according to the dictates of power. ... [T]he emergence, reproduction, and influence of such a network of associations remains dependent on a liberal-egalitarian political culture sensitive to problems affecting society as a whole...”*<sup>49</sup>

It is clear that Habermas views deliberative politics that complements for legitimacy of existing representative institutions in a much more complex way. The deliberating citizenry includes at least media, unions and voluntary associations, and perhaps more importantly, the complicated networks and their respective functions are to be determined not by one-dimensional theoretical articulation but by contingent political cultures. The more liberal, egalitarian a political culture is, the more likely these various networks reason and collaborate with one another towards the common good and the less conflict of interests would be generated.

Although Habermas has not been explicit on how exactly these networks of various interests in public sphere would (or should) work together,<sup>50</sup> he nevertheless insists any potential conflicts in interests must be resolved from the use of *public reasons* and from the standpoint of *impartiality*.<sup>51</sup> Despite this rather abstract solution, however, it is clear that the deliberating public envisaged by Habermas is not a random assemble of individual citizens isolated at their own homes but a complex network of civic associations –already engaged in public sphere– whose members are citizens with the common good as well as special interests/concerns/attitudes in mind.

---

<sup>48</sup> Jürgen Habermas, *supra* note [Popular Sovereignty as Procedure], at 56-7.

<sup>49</sup> *Id.* at 60.

<sup>50</sup> JORGE M. VALADEZ, DELIBERATIVE DEMOCRACY, POLITICAL LEGITIMACY, AND SELF-DETERMINATION IN MULTICULTURAL SOCIETIES 61-2 (2001). *See also* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY (1996).

<sup>51</sup> Jorge M. Valadez, *id.* at 62.

In my view, it is only very common for individual citizens to engage themselves in public discussions through mediated associations or forums. We understand things and issues through our particular frameworks and references,<sup>52</sup> which have been formed over time as a combined complex result of our experiences, education, identities, interests and even passions. We are more likely to be concerned with, think through and even speak up for issues that are possibly understood in our referring or perceptive frameworks. We are more confident and willing to talk about matters and issues when we are more aware of them or have certain degree of previous knowledge about them. The various extents of references, perceptions or previous knowledge are related to our respective living experiences, interests, cultural influences and political/economic/social/cultural identities.<sup>53</sup> Consequently, it is only common that we participate in public spheres by way of our own chosen associations, clubs or groups. More importantly, the likelihood and effectiveness of our participation in public discourse increase significantly when we are talking with confident voice and collaborative –thin or thick– perceptions. Knowing at least our views are shared makes us more likely to speak up and exchange with other different views.

## *2. Concept of Social Groups: Thick or Thin? Static or Fluid?*

Talking based upon some particular –thin or thick– shared perceptions or positions helps us as ordinary citizens begin effectively participating in public discourse and reason with others. It is in this way I advocate for deliberations by citizens of social groups.

Similar advocacy has been done by previous theorists such as Iris Young, Jorge M. Valadez and Michael R. James among others.<sup>54</sup> For example, in advocating for a more inclusive democracy for socially marginalized groups, Iris M. Young combines communitarian ideals with deliberative democracy. She argues:

*“Inclusion ought not to mean simply the formal and abstract equality of all members of the polity as citizens. It means explicitly acknowledging social differentiations and divisions and encouraging differently situated groups to give voice to their needs, interests, and perspectives on the society in ways that meet conditions of reasonableness and publicity.”<sup>55</sup>*

---

<sup>52</sup> Anne van Aaken, *supra* note, at 10-12.

<sup>53</sup> Jorge M. Valadez, *supra* note, at 58-67.

<sup>54</sup> Iris M. Young, *supra* note; Jorge M. Valadez, *supra* note; MICHAEL R. JAMES, *DELIBERATIVE DEMOCRACY AND THE PLURAL POLITY* (2004).

<sup>55</sup> Iris M. Young, *supra* note, at 119.

By inviting citizens of differently situated social differences to join in public discourse, Iris Young makes it clear that public sphere is not composed by homogenous citizens but rather by diverse citizens of various social positions. Political legitimacy is ultimately sustained with such enriched public sphere of multiple voices trying to seek further political cooperation in ways that are open, civilian and reciprocal.<sup>56</sup>

Communitarian scholars often hold a rather thick and static concept of social groups/identities that are deemed as capable of determining substantive values and providing world views of group members. But communitarian/deliberative democrats such as Iris Young or Michael R. James exhibit a rather thin or even fluid concept of group identities. Young argues that “*social difference is not identity*”<sup>57</sup>, and that any thick conception of social group as identity must “*confront the fact that many people may deny that group positioning is significant for their identity*”<sup>58</sup>. Instead, “*social group differentiation in relational rather than substantial terms*”<sup>59</sup>, and these social differences must be seen as political resources –rather than difficulties– upon which citizens of various social differences may enrich public sphere and seek cooperative efforts.

Similarly, distinguishing four models (instrumental/agent, interpretive/agent, instrumental/structure, and interpretive/structure) of identity construction, Michael James is conscious of fluidity in identity.<sup>60</sup> Recognizing such complex fluidity in identity construction, he argues for a kind of deliberative politic that include all relevant *group perspectives*.<sup>61</sup> The inclusion of group perspectives in public discourse may require some degree of group-based representation but the two are not the same and it may be achieved through more informal or indirect ways.<sup>62</sup>

I agree with Young and James insofar as they understand social groups/differences as a thin concept. It is clear that not all women “identify” themselves with the women group that has a particular view of gender and related

---

<sup>56</sup> *Id.* at 108-12.

<sup>57</sup> *Id.* at 87.

<sup>58</sup> *Id.* at 88.

<sup>59</sup> *Id.* at 89.

<sup>60</sup> Michael James, *supra* note, at 17-22.

<sup>61</sup> *Id.* at 49.

<sup>62</sup> *Id.* Michael James focuses here on the design of parliamentary or electoral rules. Since these are not the focus of this essay, I shall omit them.

cultural perceptions. But it is certainly not a problem to have this particular view held by this women group – insofar as it does not claim to represent all women– to be presented and taken reciprocally seriously at the discussion table. Most importantly, this view is not necessarily expressed even if we randomly sample a group of citizens half of which are women to participate in deliberation. It is either because those randomly selected women do not hold this view or –perhaps most likely– because the few who hold this view feel not strong enough to express it in public before strangers for social or political psychological or personal reasons I have discussed earlier.

Thus, I regard social groups or differently situated social positions as mediated concept that strengthens citizens’ capacity in understanding and deliberating matters and issues with which they are concerned to various degrees. To make my point clear, I do not argue for deliberative politics of social groups for communitarian democracy or the pursuit of social cohesion. Rather, deliberating citizens based upon social groups exhibit greater strength –not politically (due to the constraint of reciprocity) but cognitively–<sup>63</sup> in conducting public discourse compared to individually isolated citizens. At the discussion table, citizens of particular social groups may express “representative” views of particular social groups but may not. They do not “represent” their respective social groups nor are they required to play such roles. Their membership in their respective social groups must be taken as facilitating medium for their gained strength in talking and formed perspective in understanding. At the discussion table, they must abide by rational and reciprocal rules required by principles of deliberative democracy.

### *3. Voluntary Nature of Social Groups & Civic Organizations*

As already emphasized, deliberating citizens of social groups are not representatives of their respective groups. Neither these groups are “identity groups” –thickly defined. Hence, in deliberation by citizens of social groups, these groups must be of *voluntary* nature. There are perfectly reasons for an aborigine not to identify him/herself as aboriginal and for some women choose not to join women groups. The medium of social groups/positions is to strengthen deliberating citizens in their capacity of participating in public discussion and to complement as much as possible –but inevitably limited– perspectives by which cognitive understandings and opinions may be formed.

Since social groups must be understood as a thin concept and of voluntary nature, they are of no difference from other voluntary civil organizations such as

---

<sup>63</sup> Jorge M. Valadez, *supra* note, at 58.

environmental groups, labor unions or even professional associations. Hence, members of social groups as well as other civil organizations shall enjoy equal opportunity in joining public deliberation. It is perfectly up to one's decision for one's various *political/social/economic/cultural/ethnic/civic/professional affiliations* mainly based upon which one participates in public discourse. There are perfectly good reasons for a young/female/Asian/animal loving lawyer to spend most of her energy and time in an animal-lover club, with which she has learned and formed mostly her perspectives on public issues. This point may be made similarly to the concept of “*seriality*” by Sartre and Iris Young.<sup>64</sup>

### **C. Defense against Critics**

A number of worries or criticisms run against deliberations by citizens of social groups. First and foremost, it is worried that deliberations by citizens of social groups may turn a reason-giving discourse into a bargaining one. As discussed earlier, when engaged in deliberation, citizens of social groups must abide by rational and reciprocal rule. They must try to make their points and persuade others by referring to mutually acceptable reasons rather than naked preference or tangible interests.<sup>65</sup> Since they are not delegates of their social groups, they need not bargain with one another to maximize their interests. The membership or affiliation of any social groups of their own chosen merely opens the door for their participating in deliberation but not binds them from taking any particular opinions. Even randomly sampled citizens may have strongly hidden preferences or interests. What really matters is the strict enforcement of open, reciprocal, reason-giving discussions. There is no need to worry that deliberation by citizens of social groups would be less rational than citizens of random picks.

The second concern is on the issue of accountability in that the accountability of deliberating person of social groups is put into question. But I must emphasize again that citizens of social groups join in deliberation not as representative of their groups but merely on their own as *citizens*. Thus, they are accountable to no one just as randomly sampled citizens are.

Third, relative strengths or unequal resources of various social groups are of some critical concerns. Michael James, in urging group-based plural deliberation, has

---

<sup>64</sup> Iris M. Young, *supra* note, at 100-01.

<sup>65</sup> Gutmann & Thompson, *supra* note; Anne van Aaken, *supra* note,

signaled a warning on unequal positions of groups that may undermine public deliberation on an equal footing.<sup>66</sup> But the model advocated in this essay is not a plural deliberation on a basis of groups. Citizens of social groups are supposed to participate in discussions as citizens. Their membership in any groups or organizations is merely a mediated concept that strengthens their capacity in joining the discussion. They are supposed to talk with the common good, to which they can only understand through their cognitive perspectives contingently influenced by their various *political/social/economic/cultural/ethnic/civic/professional affiliations*. In this sense, relative strengths or unequal positions of social groups should not be of concerns here. Even if they are, they are perhaps already immersed into relative strengths and unequal weights of *social perspectives*, which are precisely sought to be redressed by reciprocal, rational and reason-giving discourses.

The fourth is a real serious challenge that some groups or their members may not wish to join in citizen deliberations. Jorge Valadez divides ethno-cultural minorities into three kinds: accommodationist, autonomist and secessionist. The willingness to join in democratic deliberations of any given polity, according to him, is strongest with accommodationist, less strong in autonomist while with nearly no incentive for secessionist due to structural conditions and moral incommensurability.<sup>67</sup> In calling on citizens of social groups for public deliberation, it is possible that some are not willing to join. If this creates a democratic deficit in public deliberation, it would equally undermine the validity and legitimacy in the model of randomly sampled citizens.

More importantly, by inviting citizens of social groups for deliberation, a sense of recognition in particular social perspectives held by social groups is formally made and even linked to a new way citizenship is understood. As Iris Young articulates finely, the recognition of social perspectives held by members of social groups creates:

*“democratic publicity by acknowledging that they are together and that they must work together to try to solve collective problems. Creation and sustenance of publicity in this sense, ...involves the willingness on the Part of participants to make claims and proposals in ways that aim to achieve understandings by others with different interests, experiences, and situations, and to try to persuade them of the justice of their claims.”*<sup>68</sup>

---

<sup>66</sup> Michael James, *supra* note, at 96-7.

<sup>67</sup> Jorge M. Valadez, *supra* note, at 45-67.

<sup>68</sup> Iris M. Young, *supra* note, at 112.

No deliberative democrats—even those who are more inclined in communitarian ideals— would coerce or demand any social groups to join for democratic deliberation. What they can do—facing secessionist struggles—is only to recognize as broadly as possible in the concept of citizenship and provide as democratic as possible with the platform for a wider array of groups and their members to join with a fair conversation.

#### **D. Constitutional Deliberation v. Policy Deliberation**

The model of deliberation by citizens of social groups advanced in this essay is designed for constitutional deliberation. I remain cautioned in applying this model to policy deliberation for several reasons.

First—and perhaps the most important—is role differentiation in constitutional deliberation and policy one. The role of citizen deliberation is forming and legitimating any existing polity at the level of constitutional politics while at the level of legislative politics it has rather supplementary functions. A settled division of deliberative labors between government and citizenry is rather presupposed in a legitimized constitutional order. In this way, policy deliberation is subject to representative institutions whereas constitutional deliberation is still reserved for citizens.

Secondly, it is more likely that constitutional choices—either presented at constitution making or constitutional revisions—are separate from much more immediate and entrenched interests or preferences. Thus, it is more feasible to ask citizens of social groups not to be influenced by their more immediate tangible interest and to abide by deliberative rules.

Last but not the least is that constitutional decisions often require more profound reflections upon citizens on their basic needs, morals and attitudes for collective lives. Diverse social perspectives brought by citizens of social groups at the discussion table are beneficial for such profound reflections. On the contrarily, these diverse social perspective may divert too much in a rather detailed context of policy making.

The distinction between constitutional and policy deliberations seem to be echoed in practices. In Taiwan, a study on a deliberative forum of civil groups regarding the reform proposal of national health insurance system finds that civil groups with institutional involvements or entrenched interests in the existing system were—to a significantly greater extent— less likely to be affected by deliberations. On

the contrary, civic groups without previous institutional involvements were much more likely to have positive attitudes towards deliberations.<sup>69</sup>

Group-based civic deliberation for constitutional reforms, however, seemed to yield better results. In 2005, responding to a renewed call for substantial constitutional reforms, the 21<sup>st</sup> Century Constitutional Reform Alliance was formed to serve as a deliberating forum for various social groups and civil organization to come up with a reform proposal.<sup>70</sup> Deliberating individuals were members –not necessarily their chosen delegates or representatives– of collaborated groups and organizations. Determined to deliver a concrete reform proposal, deliberations were held at least twice a week and individuals of various social groups were deliberating with various constitutional choices including whether to have special representation for women and aborigines or to recognize a right to die. In one particular issue concerning a special gender proportion in the parliament, it was reported to have extraordinary debates between individuals from women organization and gay group. Divergent social perspectives were understood and reasoned solutions found. Months later, a first-ever constitutional reform proposal by civic groups in Taiwan was born.

#### **IV. Conclusion**

Evidently from Canada, Australia to Taiwan, a recent global trend that focuses on citizen deliberation has emerged. It is not yet clear, however, whether this trend of citizen deliberation on constitutions would be a success. Against a now prevailing model of citizen deliberation, this paper argues for an alternative: constitutional deliberations by citizens of social groups. This new alternative would undermine neither rationality nor impartiality sought by deliberative democracy. To the contrary, deliberative process based upon social groups would benefit greatly from the strength and energy of citizens in their respective social groups –rather than overburden each and every isolated citizen at his or her own home. It would also ensure the extent of social mobilization that is necessary to motivate concerned citizens and enlarge public discussion. Besides theoretical and practical reasons, constitutional deliberation by citizens of social groups offers a rather fluid and pluralist picture of constitutional regime that is inevitable in the age of transnational constitutionalism.

---

<sup>69</sup> Chung-yeh Deng & Chia-ling Wu, *Civic Groups Forum: Implications to Public Participation in New Democracy*, 1 TAIWAN FOUNDATIONS FOR DEMOCRACY 35 (2004). (Chinese article w. English abstract)

<sup>70</sup> The introduction of this forum and its results are available at <http://www.21cra.org.tw/>