Power to the People(s): Referendums in Deeply Divided Societies

Author : Hoi Kong

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Joanne McEvoy, Letting "The People(s)" Decide: Peace Referendums and Power-Sharing Settlements, 25 **Democratization** 864 (2018).

Referendums have been used to decide divisive constitutional questions in polities around the world. In some cases, the relevant divisions run deeply along ethnic and religious fault-lines and the polities have long histories of conflict. Joanne McEvoy's 2018 article, *Letting 'The People(s)' Decide: Peace Referendums and Power-Sharing Settlements*, makes a significant contribution to the emerging literature on "peace referendums." In what follows, I will highlight this contribution and argue that her text merits close attention from comparative constitutional law scholars.

At the outset of the article, McEvoy identifies her aims and underlines the high stakes involved when referendums are held in societies riven by conflict. She writes:

> This article assesses the use of the referendum to legitimate power-sharing democracy in deeply divided societies. If we lack a full understanding of the dynamics of referendum design in transitions to power-sharing, minority groups may find themselves in a polity they perceive to be both illegitimate and in favour of the majority. Further intracommunal antagonism and the risk of recurring conflict could threaten a fragile political bargain reached by elites. Exploring the value of referendums is therefore important for the stability and legitimacy of peace-building. (P. 865.)

McEvoy situates her text in the extensive literature on power-sharing arrangements.

Authors, including most notably Lijphart, have argued that power-sharing arises when minority groups secure interests that were previously vulnerable in a system that they had regarded as illegitimate. (P. 866.) Elites often play a key role in negotiating these kinds of compromises, and according to McEvoy, this role has drawn scholarly scrutiny since the self-interest of elites may diverge from the interests of the populations whom they purport to represent. (P. 867.) McEvoy further argues that a central role for elites in deciding the shape of political institutions sits uneasily with understandings of legitimacy in the academic writing on state-building and social contract theory. For the former, popular participation assists in "building a sense of political community." (P. 867) [1] And for those writing in the tradition of Locke, the consent of the governed is essential to the continuing legitimacy of political power. (P. 867.) McEvoy notes that the use of referendums to address significant political questions has been widely justified for these reasons. (P. 867.) Yet, she argues, the academic literature has paid insufficient attention to the question of what role groups in deeply divided societies should play in constitutional referendums about power-sharing agreements. (P. 868.)

According to McEvoy, some of the literature on power-sharing suggests that in such a context, a "simple majority threshold risks privileging the majority, thereby excluding the minority community and ultimately failing to legitimate the deal reached by elites." (P. 868.) Other writing suggests that alternatives to a simple majority rule carry their own challenges. Supermajority rules give rise to difficult questions about how to set the threshold in a way that accurately reflects the amount of minority support necessary to legitimate an outcome. (P. 869.) Rules requiring concurrent majorities in the groups that are party to the central social divisions in a polity risk entrenching the relevant markers of identity, exacerbating the divisions, and jeopardizing minorities whose identities are not so entrenched. (P. 869.)

McEvoy examines these claims in light of two case studies. Her first example, the Northern Ireland referendum on the

Good Friday Agreement of 1998 [2], challenges the claim that a simple majority rule will necessarily prejudice the interests of a minority. The referendum eschewed a rule requiring concurrent majorities in the unionist and nationalist communities and opted for a simple majority threshold. According to McEvoy, this threshold was sufficient to legitimize the outcome, in part because the substance of the agreement "sufficiently addressed the groups' self-determination aspirations," (P. 871) and its continuing success hinges on policy-makers' continuing "to foster support for the new constitutional order." (P. 872.)

The second case study involved a 2005 referendum in Iraq [3] ratifying a constitution that included asymmetrical federalism and power-sharing arrangements in federal institutions. (P. 872.) The referendum required a majority of voters across Iraq and the support of two-thirds of voters in three or more governorates. (P. 872.) Because three governorates were located in Kurdistan, McEvoy argues, the Kurdish minority were effectively given a veto power. (P. 873.) McEvoy concludes that because the preferences of the Sunni and Shi'a Arabs were "not fully accommodated in the rushed, imposed constitution-making process of the CPA (Coalition Provisional Authority)," (P. 873) the referendum could not "fully legitimate" the constitution, despite the fact that the qualified majority referendum rules were "arguably appropriate." (P. 874)

In my view, the signal contribution of McEvoy's article lies in the fact that it challenges assumptions about various kinds of rules in constitutional referendums about power-sharing arrangements in deeply divided societies. What lessons might her analysis hold for the field of comparative constitutional law? This question is pertinent because significant comparative work is being done by constitutional law scholars on constitutional change generally, and referendums, in particular. Perhaps understandably, constitutional law professors tend to concentrate their analyses on explicit rules. McEvoy's article suggests that such a focus may lead one to underestimate the role that informal processes can play in determining the success or failure of constitutional reforms. When constitutional law scholars do shift their attention away from the standard positive law sources, they can rely somewhat uncritically on social scientists' work, particularly when a consensus in a field has formed. McEvoy's article suggests that we should be attentive to the specificities of constitutional contexts, particularly when they challenge received academic wisdom.

1. Quoting Joanne Wallis, *Constitution Making During State Building* 315 (2014).
2. For a first-person, participant account of this referendum see, George J Mitchell, Toward Peace in Northern Ireland, 22 **Fordham Int'l LJ** 1136 (1999).
3. For an overview, see Makau Mutua, The Iraq Paradox: Minority and Group Rights in a Viable Constitution, 54 **Buff L Rev** 927 (2006).

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