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An EU Citizens' Assembly on Refugee Law and Policy

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Given the long-standing and all too familiar democratic deficiencies of the EU, which have been exacerbated by the economic and other crises afflicting the EU over the past decade, could Ireland's recent experience with citizens' assemblies yield any relevant lessons for the European Union? I suggest in this Article that it could.

Despite initiatives for democratic reform, parliamentary elections, a powerful European Parliament, democratically elected representatives in the Council of Ministers, a legally enshrined principle of transparency, a strong EU court, and various layers of legal and constitutional rights protection, at the core of the EU's democracy deficit is the fact that it still lacks responsiveness to the preferences of its citizens.[1] True, there is a directly elected parliament, but there are no European political parties. Ultimately, there is no way for citizens to ensure that their vote in European parliament elections translates into any kind of recognizable influence on EU policy making. Further, despite a powerful—and in many ways impressive—European Parliament, there remains a problem of executive dominance in the EU.[2] This executive dominance in turn is exacerbated by the opaqueness of the EU political system and by the technocratic, complex workings of the EU supranational institutions. These institutions are highly inaccessible to citizens and difficult for them to understand or access, making it hard for them to feel a sense of being adequately represented.

The democratic crisis is no longer unique to the European Union, if it ever was. The decline of citizen participation in elections and the growth of public mistrust in, and alienation from, traditional political parties and processes is a more widespread problem today and is certainly not peculiar to the EU. Since the eruption of the Brexit-Trump phenomena in 2016, if not before, increasingly alarming studies have been published on the apparent decline in support for democracy and the waning belief in the value of democracy, particularly on the part of younger people across various democratic states.[3] Democracy is in crisis in many parts of the world, including in those parts that had experienced decades or more of democratic rule, and authoritarianism - with its supposed attractions to those who no longer believe that democratic systems can provide the public goods they seek - is on the rise.[4]

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[1]For an analysis of the issues underlying the EU's lack of political responsiveness, see SIMON HIX, WHAT'S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT (2008).

[2]*See* Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MOD. L. REV. 1 (2014).

[3]Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27 J. DEMOCRACY 3, 5 (2016). *See also* Freedom House, *Democracy in Retreat: Freedom in the World 2019*, https://freedomhouse.org/report/freedom-world/freedom-world-2019.

[4]*See* LARRY DIAMOND & MARC PLATTER, DEMOCRACY IN DECLINE (2015). *See also* DANIEL ZIBLATT & STEVEN LEVITSKY, HOW DEMOCRACIES DIE (2018).

Yet, at the same time, the picture is not all bleak. There is a positive dimension to the growing distrust of conventional political institutions and parties in the sense that there seems to be a simultaneous growth in civic activism and in alternative forms of social and political engagement. Even while people are abandoning elections and traditional party structures, there seems to be a rise in grassroots involvement, youth movements, and other novel participatory initiatives in different countries across Europe, and elsewhere. We see the growth of issue-based activism, and the emergence of groups who might not be interested in the traditionally conceived "political system" but who agitate and advocate for particular issues through grassroots mobilization and other direct means.

Recently, there has also been a growth in the popularity of ideas such as "sortition," which is the principle of randomly selected citizens as decision-makers, that has its roots in Athenian democracy. Last year Emmanuel Macron's *Grand Debat*, which was borne out of the *gilets jaunes* crisis—in spite of being criticized by many as inadequate, temporary, inadequately designed, and superficial—seems to have had some success in getting his presidency back on a firmer footing, providing at least an initial set of responses to some of the *gilets jaunes* demands. Other jurisdictions in the EU—including Belgium's German-speaking community; Madrid, Spain; Finland; Denmark; Austria; and Gdansk, Poland—have established assemblies or deliberative forums of citizens to assist in public deliberation or decision-making on various kinds of municipal, regional, and local projects. In Britain, a citizens' assembly was established to discuss the question of social care, and citizens' assemblies have since been proposed on Brexit, as well as on climate change.

One of the most heralded of the recent experiments in participatory democracy of this kind has been that of Ireland's citizen assemblies. Ireland has had a series of successful experiences with such deliberative mechanisms of constitutional reform. These include the country's Constitutional Convention of 2012[5] and the more recent Citizens' Assembly of 2018.[6] Not only were the Constitutional Convention and the Citizens Assembly nationwide—rather than regional or city-based—initiatives, but importantly, they were tasked with major, difficult, and divisive issues. Further, not only did the government take action on the basis of several of the Convention's and the Assembly's recommendations, but on two of those issues with which the assemblies had been tasked—which had seemed particularly socially contentious or intractable, namely abortion and same sex marriage—a majority of the public voted to implement the recommendations of the Convention and the Assembly in two popular referenda that followed the proposals. Similarly, the recommendations of the Irish Citizens' Assembly on climate change were taken forward by a parliamentary committee and significantly informed the government's subsequent climate action plan.

None of this is to suggest that the Irish assemblies were without their problems or flaws. Much has been written about their shortcomings and limitations: These include the apparent lack of randomness in the selection of citizens, the lack of transparency of rules and procedures, the inadequate time for deliberation, the inability to take all submissions into account, the difficulty for certain types of citizen to participate, and more. There is also the more substantive critique advanced by some that citizens' assemblies should not be replacing the functions of the representative institutions of government. Nevertheless, despite the criticisms, the significant success of Ireland's experiments in citizen consultation and decision-making appear to have become the envy of deliberative democrats the world over. What is less clear, however, is whether Ireland's experience could be replicated elsewhere, and more particularly, whether it offers any lessons for tackling the democratic deficiencies of the EU.

There are some reasons to doubt the transferability of Ireland's success to the EU context. In the first place, Ireland is a relatively small country with a fairly cohesive society, even though the

[5]Citizens Information, *Irish Constitution: Convention on the Constitution* (Feb. 27, 2019), https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitutional_convention.html.

[6]The Citizens' Assembly, *Welcome to the Citizens' Assembly* (2018), https://www.citizensassembly.ie/en/.

issues in question were difficult or divisive. Transposing the experience of a citizens' assembly to the vastly larger, vastly more diverse EU stage, would likely require a drastically different design and purpose. Second, Ireland's assemblies may have enjoyed success, but there have been other careful and well-designed citizens' assemblies that did not seem to yield the same success. A major example is that of two Canadian provinces – British Columbia and Ontario - which held citizens' assemblies on electoral reform, but their recommendations were subsequently defeated in popular referenda. Hence it might be argued that Ireland's experience was a lucky exception, attributable to features unique to a small and relatively homogenous society, and to a rare political consensus on certain issues following a period of economic and political crisis. Third, what has drawn such extensive acclaim, in fact, is the few successes of the Irish experiment. But the Citizens' Assembly and Constitutional Convention also made recommendations on other topics and issues on which the government chose either not to act, or to postpone action. There were also issues on which the public disagreed with the recommendation made, as in the case of the proposal to lower the age of eligibility for the Presidency, which was defeated by popular vote in a referendum.

Nonetheless, none of these points provides a definitive or knockdown argument against the potential transferability of elements of the Irish experience to the European Union. In the first place, smaller scale assemblies—or rather, assemblies for smaller polities—may have been the main successes so far, but we do not have much evidence of larger experiments failing. In other words, it is not necessarily the case that a citizens' assembly experiment could not be run on a larger scale. Voluntary or citizen-led initiatives have actually been attempted already in the EU, as in the case of the four-country project run by a group of NGOs in Hungary, Italy, Romania, and Germany, who reported on their experience in late 2018.[7] Further, proposals as to how a set of trans-European local, national, regional, and EU level citizens' assemblies might work together have been made by Richard Youngs and others. So, it is an experiment yet to be tried, without any necessary evidence available that it is likely to fail on grounds of size or scale.

Second, as far as the apparent failure of other citizens' assemblies and the question whether Ireland may just be an outlier is concerned, it is important first to look more closely at the alleged or apparent failures of other experiments. Those most often pointed to are the citizens' assemblies which took place in British Columbia and Ontario on electoral reform. Despite the care taken with their design, organization, and operation, the recommendations of the assemblies were eventually rejected by the public in the referenda that followed. A closer study of the Canadian experience, however, suggests that these initiatives were not in fact the failure that some would suggest. First, insofar as the aim of the assemblies was to generate and restore some citizen trust in the political system—which appears to have been part of the reason for their establishment—the assemblies seem to have been quite a success. And even beyond the value to those actively participating in the assembly, there can be a process of public education, wider participation—through submissions and following the proceedings of the assembly—and trust-building that follows. Second, one of the main reasons for the failure of the referenda to adopt the recommendations of the assemblies was that the government decided to set a high threshold of 60% approval for the referendums. These thresholds were almost reached, (with a 58% vote in Ontario), thus demonstrating significant support for the change. At the same time, however, it seems that the original impetus for the reform—a series of anomalous and perverse election results following from the first past the post system—was no longer a public concern at the time of the referendum, which came only some years after the citizens' assembly.

Third, one of the major substantive arguments heard against citizens' assemblies—namely that they are usurping what should be the proper function of elected representative governments and parliaments—is not apt to be invoked against their use in the EU. The EU does not have the kind of generally accepted, legitimate, representative, and democratic system of government that (democratic) states have. Hence the argument based on democratic usurpation has much less force in

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[7]Citizens Assembly for Europe, *What We Want to Achieve* (2019), https://www.citizensassemblies.eu/en.

the EU context. More generally, the argument assumes that representative democracy is being usurped by these directly participatory assemblies and methods, whereas the challenge and the promise of mini-publics or deliberative assemblies, as Alberto Alemanno has argued, is precisely the combination of different types and forms of democratic involvement—representative democracy on the one hand, and participatory forms, deliberative or direct, on the other.[8]

Fourth, the fact that only certain recommendations from the Irish Constitutional Convention and Citizens' Assembly were successfully taken up and adopted—either voted upon by referendum or absorbed into the government's program—is less an argument against the likely transferability of lessons from Ireland to the EU, and more something from which lessons might be learned. Indeed, there is as much to be learned from the failures of certain dimensions of citizens' deliberative forums as there is from their successes.

What was it, then, about certain issues dealt with by the Irish assemblies that led to their eventual successful adoption? In Ireland's case, the three issues which saw a successful outcome in terms of the proposals being adopted or taken up as policy were abortion, same sex marriage, and climate change. Two of these were followed by referenda which approved the proposals, and one was implemented in part by a government action plan.

The reason for assigning these issues to the Irish Assembly appears to have been what some have critically called "passing the buck" or punting the issue when political actors were unwilling or unable to act—in some cases, such as reproductive rights, for decades—on socially contentious issues. And of course, while this may be seen from one perspective as an abdication of political responsibility, from another perspective, this may be exactly the point at a citizens' assembly can become most useful—when an issue is socially divisive, and there appears to be deadlock, both politically and socially. Under these circumstances, a deliberative forum in which the issues can be mulled and discussed in a more considered and in-depth way and in which citizens randomly selected —rather than "partisan" political actors who have party agendas and reelection considerations in mind—are put in the driving seat, seems to be a potentially useful and legitimate way of breaking the deadlock.

Apart from socially divisive issues on which political gridlock has been reached, a second reason for those in power to hand over consideration of an issue to a citizens' forum is when there has been a perceived governmental failure and considerable public anger surrounds an issue. This seems to have been the case for the Irish Citizens' Assembly in relation to climate change. The economic crisis and the subsequent bailout in Ireland gave rise to significant public concern and loss of faith in political institutions. The Citizens' Assembly was initially called for and proposed by a number of academics and activists as a way in which the government could begin to rebuild public trust, as well as gaining useful input into the policy process.

On all three of the issues on which the Irish Citizens' Assembly was most successful, it could be said that political actors and leaders were looking for some kind of legitimacy, guidance, or input from citizens on issues on which they felt pressure to act but had failed to do so for various reasons. In the case of abortion, much of the pressure in recent years had come from international human rights bodies and external censure as well as from internal social mobilization. The same was true—albeit to a somewhat less immediately pressing extent—regarding the subject of gay marriage. In contrast, the issue of climate change has become, quite literally, the burning issue of our time, and Ireland has notably been lagging in Europe and indeed in global terms when it comes to tackling this complex set of challenges. Other issues left aside by the government following the assembly's recommendations, which were either postponed or rejected, seem to have been considered less urgent or less contentious. There was also less public and external pressure to take action, and there was no obvious political or social gridlock.

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[8]Alberto Alemanno, *Beyond Consultations: Reimagining EU Participatory Politics*, CARNEGIE EUROPE: RESHAPING EUROPEAN DEMOCRACY (Dec. 5, 2018), https://carnegieeurope.eu/2018/12/05/beyond-consultations-reimagining-eu-particpatory-politics-pub-77873.

Hence two significant scope conditions might arguably be identified and extracted from the Irish experience with citizens' assemblies: (1) political gridlock on a contentious or divisive issue; and (2) a sense of crisis or urgency which has led to public frustration or anger with the political establishment.

How might these insights translate to the EU context? As an initial matter, it seems that at least one of the broad scope conditions for the establishment of a potentially successful citizens' assembly that I have identified—the existence of public distrust of, and dissatisfaction with the governing institutions of the EU—is present, albeit as an ongoing phenomenon which has grown in intensity, rather than a recent or context-specific phenomenon. Further, the second possible scope condition which I have suggested can be derived from the Irish example is the identification of a divisive current issue when political stalemate has been reached. In particular, it may be the case that when the divisive issue is a specific and delimited one rather than a broader issue—such as the wider democratic legitimacy of the EU system and the broad set of grievances which were the subject of Macron's *Grand Debat*—some traction and progress is more likely to be achieved.

What kind of issue then might be suitable for assigning to a trans-European citizens' assembly for the EU? My suggestion at this point is no doubt likely to appear counterintuitive—in terms of its suitability for reasoned citizen deliberation and consensus-building—given its deep social divisiveness and politically gridlocked nature. I suggest that the question of refugee policy reform is one issue that meets these criteria at the EU level. The EU's member states have been deadlocked on this issue for some years. Member states have been unable to agree on how to reform the current and problematic EU system. In addition, general issues of movement, integration, and treatment of refugees are highly contested as a social and political matter. Why not then experiment and give some of these questions to a randomly selected transnational assembly of citizens to debate together and think over with a view to coming up with a series of proposals? What is there to be lost by setting up such an initiative? The fear of a populist illiberal outcome? The assumption that assemblies will not necessarily be progressive? These are certainly fears not to be discounted, but I would argue that they are also insufficient to stand in the way of such an experiment. The risks of setting up such a trans-EU citizens' assembly are not so high, and the potential payoff is strong.

Yet, to date, the EU has been deeply reluctant to cede any kind of institutional power to civil society or to release any element of control of the main institutions—the Commission and the Council—despite the commitments to participatory democracy in the Lisbon Treaty. As a result, there is reason to doubt the current willingness of EU institutions and member state governments. For consultations at the EU level, any involvement of civil society and other non-institutional actors has almost always been carefully choreographed, managed, and controlled by the Commission and directed towards goals and policies already specified from above.

Given this general resistance of EU leadership and member state governments to date towards deliberative citizen input, my proposal for an experiment in the EU with a citizens' assembly on a divisive and gridlocked issue may be destined to fall on deaf ears. If that is the case, one further possibility would be for EU citizens themselves to establish such an assembly. Some embryonic or pilot versions of this proposal have indeed already been undertaken, as in the case of the *WeMoveEU* project, which was conducted across four member states.[9] Nevertheless, it seems clear that it is easy for such citizen-led initiatives to be ignored by the political establishment unless they find a way to assert themselves, to gain a higher profile, to catch the imagination of the media and others, or to gain public traction in other ways. The recent proposal by opposition MPs and civil society groups in the UK to establish an assembly on Brexit is an example of such a prominent, but not formally government sanctioned, initiative which could have gained prominence—and might still, even after UK exit from the EU—especially if chaired by a prominent public figure

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[9]*See note 7 above.*

such as the Archbishop of Canterbury, who made such a public offer.[10] If a citizen-led assembly were to be established across multiple EU states, with backing from major civic groups, the involvement of prominent public figures, and done explicitly as a response to dysfunction, gridlock, or urgent public policy—such as refugee policy or climate change—then it could very well attract significant media and public attention, even if it is not formally mandated by the EU. This option would at least allow the assembly to operate as a critique of the institutional deadlock, even if not as an official input into policy.

On the one hand, a willingness to undertake these kinds of citizen-focused reforms necessarily entails some risk given the growth of popular opposition to the EU in recent years, as evidenced in how EU political leaders have come to fear the use of devices such as popular referenda. On the other hand, the development of direct, deliberative, and grassroots forms of engagement seems ever more crucial to build real democratic support for the EU and to facilitate some element of genuine participation on the part of the governed. Citizen initiatives—whether popular or deliberative—are not alternatives, but supplements and correctives, to the existing elements of representative democracy within the EU. Let us try a citizens' assembly on refugee policy in the EU.

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[10]*See* Matthew Weaver, *Archbishop of Canterbury Says He May Chair Brexit Citizens' Forum*, THE GUARDIAN (Aug. 27, 2019), https://www.theguardian.com/politics/2019/aug/27/archbishop-of-canterbury-says-he-may-chair-brexit-citizens-forum. Calls for such a Brexit citizens' assembly are still forthcoming. *See* Rowena Mason, *UK Campaigners Call For Citizens' Assembly to Repair Democracy*, THE GUARDIAN (Nov. 4, 2019), https://www.theguardian.com/politics/2019/nov/04/uk-campaigners-call-for-citizens-assembly-to-repair-democracy.