
Participatory constitution-making: Introduction

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At least since the late eighteenth century, constitutions have been understood as emanations of the will of “the People,” as the ultimate expression of an inherent popular sovereignty. In the form of theories of constituent power, accounts of constitutional foundations blended notional or conceptual “descriptions” of the People, which anchored the political legitimacy of constitutional orders in the idea of hypothetical consent, with empirical claims that the nation’s actual people were represented in constitution-making processes through elected delegates and thereby were the authors of and gave consent to its fundamental law. As part of the third wave of democratization, there was an important shift in what popular participation consisted of—from indirect participation by elected representatives to direct, popular participation in the constitution-making process. As a matter of constitutional process, this led to the growing practice, and expectation, that major constitutional changes should be ratified through referenda.

As several contributions to this Symposium observe, over the past decades popular participation in constitution-making has come to be regarded as highly desirable for a number of distinct but mutually reinforcing reasons—to confer greater legitimacy on constitutions once adopted, to educate the people in the practice of democratic self-government to better enable them to be citizens and public officials in the constitutional democracy under construction, and to build a shared political identity or at least a *modus vivendi* which is a precondition to the success of new constitutional order in a divided and/or war-torn society where such an identity is absent.¹ To develop a taxonomy of the various forms of public participation, it is helpful to divide the constitution-making process into three stages: agenda-setting, deliberation, and ratification.² The forms of

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¹ ABRAK SAATI, *THE PARTICIPATION MYTH: OUTCOMES OF PARTICIPATORY CONSTITUTION BUILDING PROCESSES ON DEMOCRACY* (2015).

² Cheryl Saunders, *The Processes of Constitutional Transitions in the Face of Territorial Cleavages*, in *POWER AND TERRITORY IN CONSTITUTIONAL TRANSITIONS* (George Anderson & Sujit Choudhry eds., 2019).

popular participation have expanded well beyond ratification through a referendum. Members of the public—directly elected or through their leadership in civil society—may participate in processes to set the agenda for constitutional negotiations, including the adoption of basic principles within which constitutional choice must occur. “Ordinary” citizens, that is, people not identified with existing political groupings, have been brought into constituent assemblies or their equivalent. Indeed, one of the more interesting developments is the replacement of constituent assemblies selected through existing political processes (and so, typically, filled by representatives of major political parties or prominent political figures) with citizen assemblies composed of people chosen at random from the population.

Constitutional commissions have been created alongside, or as an alternative to, constituent assemblies both to diminish the influence of political parties and to create mechanisms for popular consultation and input that go well beyond those that are part of the normal legislative process. Public participation may consist of a public education campaign regarding the need for constitutional reform and a description of the abstract ideals of constitutionalism; solicitation of public input to be fed into the drafting of a legal text; distribution of a “discussion draft” of a constitution to the public generally for public discussion, “consultation,” and submission of suggestions for change (though the record suggests that these processes usually produce no more than modest cosmetic changes in the draft); and even a “crowdsourced” constitution, in which modern social media are used to solicit proposals for constitutional provisions and specific constitutional language from anyone who takes the time to participate.³ At the ratification stage, targeted referenda, allowing voters to express views on discrete components of a new constitutional text, rather than to simply vote yea or nay on the proposed constitution in its entirety—and as opposed to amendments to an existing constitution—have been used (e.g., in Iceland).

These new modes of wider public participation in constitution-making raise important normative and positive questions. The normative case for wider participation relies on a number of distinct goals. And, the choice of goal or goals often has implications for how public participation should be designed, which raises empirical/positive questions. These design choices must be made at each stage of the constitution-making process. Moreover, there may be trade-offs among them—for example, preparing citizens for working the gears of a constitutional democracy might necessitate careful adherence to institutionalized procedures for deliberation and decision and formal legality, whereas demands of popular legitimacy might drive constitutional processes to disregard and overwhelm any constraints that might exist on the exercise of constituent power (as has taken place recently in Venezuela, for example). In addition, the inescapable need within a participatory process for the delegation of some decision-making authority regarding constitutional drafting to a smaller group of individuals—experts, politicians, and/or “ordinary” citizens—means that direct democracy cannot completely supplant representative democracy. So the

³ Even at the limit, someone will have to choose which version of a specific proposal will be inserted into the draft constitution.

choice is not between direct and representative democracy but rather about the role of each in the constitution-making process, and the interrelationship between the two. The extent to which direct public participation should be increased, and how it should be operationalized in the face of the need for delegated authority, is an important and, in our view, as yet underexplored normative question.

This leads to another issue: how does direct popular participation interact with the role of existing political elites? Studies of negotiated transitions from authoritarian to more democratic regimes stress that political elites on their way out, but not yet completely disempowered, must buy into the new constitution. The roundtable processes of Eastern Europe, in Hungary and Poland, are perhaps the best example of this kind of “pacted transition” without much scope for public participation—even in what would now appear to be the relatively minimal form of a ratifying referendum. Indeed, in such a setting, broad and deep popular participation might have made a negotiated and stable constitutional transition impossible. An interesting question is how to approach such transitions in a changed context where public participation of some kind is now presumptive. In Egypt post-2011, for example, there were more referenda (and elections) than in neighboring Tunisia, but the transition was a failure. The lesson of the Egyptian case might be that the rush to popular participation should not come at the expense of elite cooperation. As Jon Elster pointed out many years ago, there are *always* “downstream” constraints on the range of politically achievable constitutional changes.⁴ A principal constraint that advocates of popular participation overlook, in our view, is constitutional implementation—that is, ensuring that public officials translate abstract constitutional language into concrete guarantees, effective and accountable institutions, and constitutionally mandated public policies. After a moment of public participation has passed, and representative democracy takes root, political elites could wield greater institutional authority and determine the success of a new constitutional dispensation. Thus, even if they lack a formal *ex ante* role in a constitutional process, political elites will *de facto* have such a role *ex post* that ordinary citizens do not. As a pragmatic matter alone, it may make sense to design a constitutional process that gives political elites a significant role.

Indeed, as Choudhry and Ginsburg have argued, constitutions should be conceived of as double compacts—as social contracts among the people or peoples of the state about the way in which they wish to organize their common political life, but also pacts among politically powerful actors on how to pursue their own narrow interests within the framework of a common constitutional order.⁵ The first way of looking at a constitution is romantic and noble, whereas the second is often looked down upon by advocates of participatory constitution-making as diminishing the highest aspirations of constitutional democracy. But for constitutions to be stable, they must be rooted in both kinds of agreement simultaneously—among the people as a whole, and among

⁴ Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364 (1995).

⁵ Sujit Choudhry & Tom Ginsburg, *Introduction*, in *CONSTITUTION MAKING* xiv (Sujit Choudhry & Tom Ginsburg eds., 2016).

the politically powerful among them. If one element is present but the other is not, the constitutional order may not take.

Third, if we are interested in increasing public participation in part because doing so will enhance the role of traditionally disadvantaged groups in constitution-making, we should be alert to the collective action problems that are a reason why those groups cannot influence democratic decision-making. These problems may manifest themselves again, perhaps in a different guise, in connection with specific participatory mechanisms. One might think, for example, that the fully crowdsourced constitution, while nominally open to all, might in practice perpetuate the subordinate role of those not (yet) used to full participation—for example, because of unequal access to the Internet and social media. Civil society organizations might play a role here to overcome these barriers to equal participation, but they too face collective action problems. And, the closer the mechanisms of public participation come to resembling the classical elected constituent assembly, the more existing political groupings such as political parties—which have overcome collective action problems—will have advantages over those for whom increased participation might be thought to be normatively desirable. Moreover, the self-description of processes of popular participation as inclusive and particularly alert to the voices of the disadvantaged might operate to deflect criticism from those very communities.

These are only some of the questions raised by recent developments in popular participation in constitution-making. They, and others, are explored in the articles that follow. We summarize those articles, adding brief comments of our own (without attributing those observations to the authors).

Hélène Landemore both describes the recent Icelandic experiment with crowdsourced constitution-drafting and uses that experiment as the basis for reconceptualizing ordinary democracy itself.⁶ She argues that modern technologies enable direct and, importantly, deliberative citizen participation in their own governance. For Landemore, the innovative feature of the Icelandic process was the extensive role of the public in producing the constitutional draft, through crowdsourcing. Moreover, the value of crowdsourcing extended beyond whatever additional legitimacy it conferred on the constitutional draft; that process harnessed the wisdom of crowds and was more likely to produce better substantive outcomes. According to Landemore, the crowdsourced draft was better along important dimensions than alternatives drafted by experts. In particular, she attributes to public participation enhanced protection for constitutional rights in the draft, as well as expanded mechanisms for direct democracy, relative to the existing constitution. And, though the Icelandic process involved constitution-making, Landemore suggests that it could provide a model for ordinary lawmaking as well. In that light, the current failure of the Icelandic process, resulting largely from the refusal of established political elites to buy in to the constitutional draft, might suggest a different lesson from the Icelandic process—that it failed because it did not

⁶ Hélène Landemore, *When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process*, 18(1) INT'L J. CONST. L. 179 (2020).

take elite concerns seriously enough.⁷ The perplexing question this raises is how to frame a mechanism for elite engagement at a moment of popular revulsion to those elites who generated the momentum for the constitutional process in the first place.

This dilemma provides a helpful bridge to Gabriel Negretto's article, which combines an aggregate analysis of twenty-five constitutional revision processes with case studies to illuminate the relation between popular participation and elite buy-in.⁸ Putting to one side the issues that arise in connection with transitions from non-democratic regimes to democratic ones, Negretto focuses on constitutional changes within nations with reasonably well-functioning though imperfect democratic institutions. Negretto argues that popular participation will push for expanded notions of rights and participatory democracy with relatively less concern for how the institutions of government will implement the constitution. By contrast, political elites, concerned in part with preserving their ability to compete about control over those institutions, will push for effective constraints on executive power but demonstrate little concern for expanded rights or direct democracy. Informed by the Latin American experience of executive-led, participatory constitutional processes that have resulted in the expansion of executive power and rights but have weakened legislative and judicial checks on executive power, Negretto suggests that popular participation fails in achieving its own goal of better rights protection. A combination of popular participation in constitution-making with substantial participation by existing political elites yields constitutional changes that expand the domain of citizenship in part *through* imposing effective constraints on executive power. One question left open by Negretto's analysis is: *why* do imperfect democracies engage in constitution-making rather than, for example, constitutional tinkering by means of successive amendments? Perhaps the conditions underlying the push for substantial constitutional change *already* include both popular and elite dissatisfaction; if so, that effective revisions result from cooperation between political elites and the wider public might not be so surprising.⁹

Offering a synoptic view of global developments, Ruth Rubio-Marín burrows into constitution-drafting bodies, examining in detail the increase, perhaps modest in some instances but generally significant, of the actual presence of women in those bodies.¹⁰ She directs attention as well to the role of women in civil society organizations, influencing the work of the constitution-making bodies without necessarily being incorporated within them, especially by working closely with women who are

⁷ It is worth noting that the very process of drafting a new constitution through the open processes Landemore describes might have subtle long-term effects; if so, the immediate failure to adopt the new constitution could seem relatively unimportant in retrospect. Indeed, one can possibly imagine that the process may set in motion a longer one that could indeed produce a new constitution at some later point.

⁸ Gabriel Negretto, *Constitution Making and Liberal Democracy: The Role of Citizens and Representative Elites*, 18(1) INT'L J. CONST. L. 206 (2020). We refrain from giving the now-conventional label "large-N" to the first portion of Negretto's article, because of some concern that twenty-five cases, while sufficient to support statistical tests, are not really a "large" N.

⁹ To overstate, the conditions for constitutional revision mean that both political elites and the wider public have *already* agreed that substantial changes are needed, which eases the task of bargaining over details.

¹⁰ Ruth Rubio-Marín, *Women and Participatory Constitutionalism*, 18(1) INT'L J. CONST. L. 233 (2020).

members of those bodies. The participatory turn in constitution-making, according to Rubio-Marín, coincides with the participatory turn in feminist political mobilization. The latter is rooted in the conclusion that abstract guarantees of rights are by themselves insufficient to address gendered disadvantage; they must also be accompanied by power for women in the institutions which frame rights, implement them, and enforce them. Rubio-Marín describes how traditions of exclusion simultaneously reassert themselves and come under pressure as the norm that women should be incorporated within constitution-making bodies spreads. Here she emphasizes the distinction between descriptive and substantive representation. This might be a partial response to the concern that participatory constitution-making might replicate patterns of social disadvantage while invoking the rhetoric of substantive equality: the gap between self-description and political reality provides the political resources for disadvantaged groups to hold participatory processes to their own ideals.

Abrak Saati draws upon and extends her prior work on the effects of popular participation in constitution-making, providing a skeptical counterpoint to the seeming consensus on the proposition that not only is such participation valuable in itself but it contributes to the legitimacy and stability of the constitutions that result.¹¹ Like Negretto, but focusing on constitution-making in post-conflict or transitional settings, Saati analyzes the interaction between public participation and elite negotiation. Examining two constitution-making processes in Fiji, Saati concludes that popular participation was mostly symbolic—descriptive rather than substantive, to adapt terms from the discussion of women’s participation in representative bodies—and that elite negotiations had far greater influence on the constitutions as drafted. The contrast between Saati’s rather downbeat assessment of the interaction between popular participation and elite bargaining and Negretto’s more optimistic assessment suggests that a possible distinction between post-authoritarian processes (Saati’s focus, given the role of military coups in Fiji) and processes within imperfect democracies (Negretto’s) may usefully inform subsequent scholarship on popular participation in constitution-making, as scholars deal with other dimensions of interest.

Details matter, especially perhaps in connection with apparently emerging norms or prescriptions of “best practices.” Popular participation in constitution-making at the level of drafting may be such a norm or best practice. As the articles in this Symposium suggest, popular participation comes in many forms and has many and varying effects, depending on circumstances. Modern technology might do more than merely enable wider public participation; it might also provoke a reconsideration and lead to a redefinition of what we think is fundamentally valuable about democratic self-governance. Yet despite the indispensable role for public participation, there is a need to think carefully about how to combine with it more traditional mechanisms of elite cooperation in order to ensure that participatory constitution-making delivers on its own promises.

¹¹ Abrak Saati, *Participatory Constitution-Building in Fiji: A Comparison of the 1993–1997 and the 2012–2013 Processes*, 18(1) INT’L J. CONST. L. 260 (2020).