



Reassessing Public Participation in Constitution-Making Processes*

Reevaluación de la participación
pública en los procesos de elaboración
de la constitución

Reavaliação da participação pública
nos processos de elaboração de
constituição

Amal Sethi**

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** <https://orcid.org/0000-0003-2232-9512>. University of Hamburg, Germany.
amal.sethi@uni-hamburg.de

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Abstract

Scholars have long debated public involvement in constitution-making and will continue to do so. Yet, despite the multitude of opinions, we are no closer to resolving some of the most fundamental questions regarding the role of the public in constitution-making processes than decades ago when these discussions first started. The recent participatory Chilean constitution-making process, the growing wave of authoritarian constitution-making, and the plethora of new empirical evidence present another occasion to revisit this topic. In contrast to earlier literature, this article approaches this topic by addressing both the normative and the sociological dimensions of public participation in constitution-making. It first argues that public participation in constitution-making should only be considered a sociological necessity, not a normative one. Second, using a bottom-up approach, it provides a list of guiding principles to ensure that public participation in constitution-making, when conducted, allows for a net positive for both the constitution and the society it governs.

Keywords

Constitution making; public participation; democracy; referendums; authoritarianism.

Resumen

Los académicos han debatido durante mucho tiempo la participación pública en la elaboración constitucional y seguirán haciéndolo. Sin embargo, a pesar de la diversidad de opiniones, no estamos más cerca de resolver algunas de las preguntas fundamentales sobre el papel del público en los procesos de elaboración constitucional que hace décadas, cuando comenzaron estos debates. El reciente proceso participativo de elaboración de la constitución chilena, la creciente ola de autoritarismo en la redacción constitucional y la plétora de nuevas pruebas empíricas representan otra oportunidad para revisar este tema. En contraste con la literatura anterior, este artículo aborda las dimensiones normativa y sociológica de la participación pública en la elaboración constitucional. En primer lugar, se argumenta que esta solo debe considerarse una necesidad sociológica, no normativa. En segundo lugar, mediante un enfoque ascendente, se enumeran los principios rectores para garantizar que la participación pública en la elaboración constitucional, cuando corresponda, permita un efecto neto positivo tanto para la constitución como para la sociedad que rige.

Palabras clave

Elaboración de la constitución; participación pública; democracia; referéndums; autoritarismo.

Resumo

Há muito tempo os acadêmicos debatem a participação pública na elaboração de constituições e continuarão a fazê-lo. Entretanto, apesar da diversidade de pontos de vista, não estamos mais próximos de resolver algumas das questões fundamentais sobre o papel do público nos processos de elaboração de constituição do que estávamos décadas atrás, quando esses debates começaram. O recente processo participativo de elaboração da constituição chilena, a crescente onda de autoritarismo na elaboração da constituição e a grande quantidade de novas evidências empíricas representam outra oportunidade para revisitar essa questão. Em contraste com a literatura anterior, este artigo aborda as dimensões normativas e sociológicas da participação pública na elaboração constitucional. Em primeiro lugar, argumenta-se que a participação pública deve ser considerada apenas uma necessidade sociológica, e não normativa. Em segundo lugar, usando uma abordagem ascendente, ele enumera princípios orientadores para garantir que a participação pública na elaboração constitucional, quando apropriado, leve a um efeito líquido positivo tanto para a constituição quanto para a sociedade que ela governa.

Palavras-chave

Elaboração de constituição; participação pública; democracia; referendos; autoritarismo.

1. Introduction

In October 2020, nearly 80 percent of Chileans voted to replace their country's Constitution.¹ What followed was a much-hailed participatory constitution-making process.² This process involved the public expansively, at every stage, and through a wide variety of media.³ It could be said that the Chilean constitution-making process represented the 'end of history' for closed-door constitution-making, which had previously dominated for over two hundred years.⁴ Unfortunately, the constitution-making process ended with 62 percent of Chileans rejecting the draft prepared by the constitutional convention.⁵ The rejection of the draft resulted in deep societal polarization and division.⁶ Though it is easy to look back and find faults with the process, up till the very end, the participatory constitution-making process had been applauded as a paradigm of how the public should be involved in constitution-making.⁷ Only towards the end of the process, when a massive 'no' campaign began gaining traction, did people realize that all was not well. The failed (yet initially lauded) Chilean constitution-making process presents us with a highly topical occasion to rethink 'the role of the public'⁸ in constitution-making.

This article is not about Chile. It is rather about why and how the public should be involved in constitution-making in the future. The topic of public participation in constitution-making has already received extensive academic attention. Over the years, several arguments have been made for and against involving the public in constitution-making.⁹ These arguments have resurfaced since the recent wave of authoritarian constitution-making—which has frequently been carried out and legitimated through broad public participation.¹⁰ Today, how-

1 Marcela Prieto and Sergio Verdugo, "Understanding Chile's Constitution-Making Procedure," *International Journal of Constitutional Law*, 19, 1 (2021), p. 1.

2 See Marcela Ríos Tobar, "Chile's Constitutional Convention: A Triumph Of Inclusion," *United Nations Development Programme* (3 June 2021), <<https://www.undp.org/latin-america/blog/chiles-constitutional-convention-triumph-inclusion>>, accessed 18 Sept. 2022.

3 Claudia Heiss, "Political Participation and Constitution-Making: The Case of Chile", *Panoramas*, University of Pittsburg (05 June 2018), <https://www.panoramas.pitt.edu/health-and-society/political-participation-and-constitution-making-case-chile>, accessed 18 Sept. 2022.

4 In 1995, in discussing public participation in constitution-making, James Tully remarked that constitution-making is the single activity in "modern politics that has not been democratized." See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995, p. 28.

5 Catherine Osborn, "How Chile's Constitution Revolution Missed the Mark," *Foreign Policy* (9 Sept. 2022), <<https://foreignpolicy.com/2022/09/09/chile-constitution-referendum-results-reject-boric/>>, accessed 18 Sept. 2022.

6 Cristian Farias, "Chile's Constitutional Moment Is Not Over," *New York Times* (11 Sept. 2022) <<https://www.nytimes.com/2022/09/11/opinion/chile-referendum-constitution-rejection-boric.html>>, accessed 18 Sept. 2022.

7 See, e.g., "Chile Constitutional Process: An Historical Opportunity to Enshrine Human Rights," *OHCHR* (8 June 2022) <<https://www.ohchr.org/en/stories/2022/06/chiles-constitutional-process-historic-opportunity-enshrine-human-rights>>, accessed 18 Sept. 2022.

8 Role of the public, public participation, public involvement, or similar such terminologies, unless specified otherwise, will be used throughout this article as a catchphrase for any public involvement (no matter how small or large) in the constitution-making process of a country.

9 See Sections 2 and 3.

10 See text body accompanying footnote 89-94 and 134-145.

ever, a greater array of empirical evidence puts us in a much better position to assess public participation in constitution-making.¹¹

Beyond this, there is another vital reason to revisit this topic. Most discussions surrounding public participation in constitution-making suffer from two core problems: they (1) conflate the ‘normative’ and ‘sociological’ dimensions of public participation in constitution-making or (2) discuss the normative or sociological dimensions independently, with no or minimal reference to each other. At the outset, a clarification regarding the definitions of normative and sociological dimensions is worth providing. By normative dimensions, I refer to the philosophical and/or moral motivations behind a particular viewpoint. In the context of public participation in constitution-making, this normative dimension refers to the philosophical and/or moral reasoning behind involving the public in constitution-making. This often has a connection to the eventual normative legitimacy of a constitution. On the other hand, by sociological dimensions, I refer to the societal outcomes that can be observed or empirically tested. In the context of public participation, these would mean the societal advantages and/or disadvantages of public participation in constitution-making.

The normative and sociological dimensions of public participation in constitution-making impact each other in small yet significant ways and must therefore be evaluated together to understand the whole picture. In light of this, four possible arguments can be made:¹² (1) public participation in constitution-making should be required for normative and sociological reasons, (2) public participation in constitution-making should be required only for sociological reasons, (3) public participation in constitution-making should be required only for normative reasons, (4) public participation in constitution-making should not be required, either for normative or sociological reasons.

Having agreed on one of these options, we can better answer other ancillary questions regarding public participation in constitution-making.¹³ Choudhry and Tushnet recently highlighted that the dominant view in scholarship and practice is that public participation is desirable on both normative and sociological grounds.¹⁴ Drawing on my previous work, in the context of the constituent power theory,¹⁵ this article will argue that public participation

11 For why such an approach to thinking about democratic theory and facets of it like public participation are vital, generally see David Estlund, *Democratic Authority: A Philosophical Framework*, Princeton, Princeton University Press, 2008. See also Richard Arneson, ‘Democracy is Not Intrinsically Just’, in Keith Dowding et al. (eds.), *Justice and Democracy: Essays for Brian Barry*, Cambridge, Cambridge University Press, 2004, pp. 40-58.

12 There can also be the legal necessity of public participation in constitution-making, i.e., if the existing constitutional norms or rules require it. Nonetheless, this often flows from the normative and sociological necessity and hence is irrelevant to the discussions in this article.

13 See Section 6.

14 Sujit Choudhry and Mark Tushnet, ‘Participatory Constitution-Making: Introduction,’ *International Journal of Constitutional Law* 18, 1 (2020), p. 173.

15 See Amal Sethi, ‘Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining’, *Global Constitutionalism*, (2023 Forthcoming) <<https://www.cambridge.org/core/journals/global>>

in constitution-making should be required only for sociological reasons, not normative ones. If public participation in constitution-making is not something societies need to conduct simply because it is normatively desirable, it allows us to take a step back and approach the topic of public participation in constitution-making using a bottom-up approach.

A bottom-up approach to thinking of public participation in constitution-making will enable scholars and practitioners alike to independently assess what goals public participation can achieve in a given society in a given time and space, the best ways to achieve those goals, and how these goals balance up against the possibilities of any potential downsides. In doing the same, this article lays down seven principles that can help guide public participation in constitution-making when done for sociological reasons. These principles hope to ensure that, when conducted, public participation results in an overall net positive for a society and its people. Beyond those above, these principles also seek to provide directions for constitution-makers on tough (yet not rare) cases where circumstances simply do not allow for meaningful public participation.

The article proceeds as follows. Section 2 reviews the main reasons offered for public involvement in constitution-making. Section 3 reviews countervailing arguments for caution regarding public participation. Due to the word limit constraints of this journal-length article, these two parts only provide broad brush strokes of the arguments for and against public participation in constitution-making. However, they hope to lay down sufficient background context for the discussions in the remainder of the article. Building on the first two parts, Section 4 argues that public participation should not be considered a normative necessity. Section 5 discusses why public participation should, however, be required for sociological reasons and further provides seven guiding principles for public participation in constitution-making processes. Section 6 examines how the guiding principles postulated in Section 5 could work in real-life situations by applying them to four diverse hypothetical scenarios. Section 7 concludes.

2. Why public participation

This section outlines a range of normative and sociological reasons to carry out public participation in constitution-making, starting with normative reasons. Generally, the primary reason to conduct public participation in constitution-making processes is the normative requirement to do so.¹⁶ This is mainly be-

constitutionalism/article/looking-beyond-the-constituent-power-theory-the-theory-of-equitable-elite-bargaining/354DBFEA0F515D7A8A21A2F40F421CA7>, accessed 13 July 2023.

16 Zoran Oklopčic, *Beyond the People: Social Imaginary and Constituent Imagination*, New York, Oxford University Press, 2018, p. 53. See also Roberto Gargella, *Conversation Among Equals*, Cambridge, Cambridge University Press, 2022. See also Brigitte Geissel, *The Future of Self-Governing, Thriving Democracies Democratic Innovations By, With and For the People*, London, Routledge, 2023. For a general theoretical take on public participation's normative

cause modern-day constitutions are seen as documents encapsulating how a nation's people wish to be governed.¹⁷ In fact, based on representative-based theories of political legitimacy,¹⁸ constitutions are only normatively legitimate when they represent the 'will of the people.'¹⁹ Hence, in present times,²⁰ to ensure that a constitution is characteristic of the society and people it governs, scholars, international organizations, and development professionals purport the view that the general populace needs certain opportunities to impact the constitutional content and possibly even give their explicit approval to be governed by the constitution.²¹ Although disagreements certainly exist regarding how expansive public participation ought to be, scholars such as Bonnet, Colón-Ríos, and Saunders have argued (across a range of different factual circumstances) that normative reasons demand that the public should be involved in constitution-making processes in the most expansive ways possible.²²

Beyond these normative reasons, there are sociological reasons for public participation, most importantly, sociological legitimacy. As stated by Harel and Shinar, a constitution having sociological legitimacy means that the people of a country consider their constitution acceptable and are willing to subject themselves to it.²³ If the people generally believe the constitution is unjust, unfair, or does not represent them, it would be hard for politicians to operate.²⁴ This was a core reason for the demands in Chile to replace the Pinochet-era constitution.²⁵

need in democracies, see Christine Lafont, "Deliberation, Participation & Democratic Legitimacy," *Journal of Political Philosophy*, 23 (2014), pp. 40-63. See also John Dryzek, *Deliberative Democracy, and Beyond: Liberals, Critics, Contestations*, Oxford, Oxford University Press, 2004.

- 17 Hans Lindahl, "Constituent Power and the Constitution", in David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations Of Constitutional Law*, Oxford, Oxford University Press, 2016, pp. 141-159.
- 18 A representative-based theory of legitimacy is a theory that justifies the legitimacy of political authority based on the fact that the political authority represents those that it governs. For more on representative-based theories, see Alon Harel and Adam Shinar, "Two Concepts of Constitutional Legitimacy," *Global Constitutionalism*, 12, 1 (2023), pp. 80-105. However, as Harel and Shinar themselves argue, other factors can accord to constitutions their legitimacy, including their content and the beneficial consequences they can have for society.
- 19 The most prominent theory associated with this view is the constituent power theory. For a detailed biography of the constituent power theory, see Lucia Rubinelli, *Constituent Power: A History*, Cambridge, Cambridge University Press, 2020.
- 20 Earlier, it was acceptable for a group of elites, a revolutionary mobilization, or a democratically elected president to channel the people's will. However, modern-day democratic theory does not see this as sufficient and requires public participation to satisfy this condition. See Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.
- 21 For a review of the scholarly literature on this point, see Héctor López Bofill, *Law, Violence and Constituent Power: The Law, Politics, and History of Constitution-Making*, London, Routledge, 2021, pp. 1-18. For a more international organization perspective, see Angela Banks, "Expanding Participation in Constitution Making: Challenges and Opportunities," *William and Mary Law Review*, 49 (2008), pp. 1046-1055.
- 22 See Manon Bonnet, "The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building," in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds.), *The Law And Legitimacy Of Imposed Constitutions*, London, Routledge, 2020, pp. 208-226; Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, London, Routledge, 2012, p. 5; Cheryl Saunders, "International Involvement in Constitution-Making," in David Landau and Hannah Lerner (eds.), *Comparative Constitution Making*, Cheltenham, Edward Elgar Publishing, 2019, pp. 69-89.
- 23 Harel and Shinar, "Two Concepts Of Constitutional Legitimacy," *Global Constitutionalism*, cit. p. 83.
- 24 Kirsti Samuels, "Postwar Constitution Building: Opportunities and Challenges," in Roland Paris and Timothy D. Sisk (eds.), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, New York, Routledge, 2009, p. 179.
- 25 Sergio Verdugo and Marcela Prieto, "The Dual Aversion Of Chile's Constitution-Making Process," *International Journal of Constitutional Law*, 19, 1 (2021), pp. 149-150.

Constitution-making processes that are publicized and openly debated help develop a sense of ownership and guardianship toward the constitution.²⁶ A constitution with sociological legitimacy will make the populace more willing to be subjected to it and encourage them to fight for its enforcement.²⁷ Citizens will protect a constitution to which they are attached by protesting or voting out politicians who violate its norms.²⁸ Elkins and his co-authors suggest that this can make a constitution self-enforcing.²⁹ When constitutions are made behind closed doors with negligible publicity, it is questionable if adequate enforcement pressure can be generated.³⁰

Public involvement in constitution-making has also been argued to have a broad range of other ancillary ‘sociological benefits.’³¹ Six benefits are particularly relevant here. Nonetheless, another issue needs to be discussed before proceeding with them. It could be argued that these sociological benefits could, in themselves, be reasons for normatively requiring public participation in constitution-making. Such arguments could be made by scholars who view legitimacy in utilitarian terms or beneficial consequences terms.³² Nonetheless, as explained in Sections 4 and 5, precisely on utilitarian and beneficial consequence grounds, compulsory public participation for normative reasons should not be advocated. This is because it leads to problems on other fronts.

First, public participation can improve the operation and integrity of the constitution-making process, for example, by preventing criticisms of biased or self-serving behavior by constitution-makers/drafters.³³ Gluck and Brandt highlight how public participation can improve constitution-makers’ accountability by allowing the media, civil society, and the populace to oversee the process and criticize any transgressions from agreed-upon rules.³⁴ In countries

26 Vivian Hart, *Democratic Constitution Making*, Washington DC, United States Institute of Peace, 2003, p. 4; Jusu Ihonvbere, “How To Make An Undemocratic Constitution: The Nigerian Example,” *Third World Quarterly*, 21, 2 (2000), pp. 346-347.

27 Tom Ginsburg, James Blount, and Zachary Elkins, *The Endurance of National Constitutions*, Cambridge, Cambridge University Press, 2009, p. 78.

28 *Idem*.

29 *Idem*.

30 *Idem*.

31 In laying down these reasons, I acknowledge that some of these reasons serve the goals of normative theories as well. However, for the sake of analytical clarity, I classify them under the head of sociological benefits as they provide empirically measurable benefits. For example, theories of deliberative democracy (that often share commonalities with representative theories or are a subpart of such theories) argue that deliberation with the populace is central to legitimacy. These theories see deliberation as enhancing the quality of political outputs. See, e.g., Roberto Gargella, *Conversation among Equals*, Cambridge, cit. See also Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century*, Princeton, Princeton University Press, 2020. However, a benefit such as this is covered by the second benefit mentioned in this section. As discussed later in this article, doing so does not detract from the core point of this article—that public participation should not be seen as a normative necessity as it can result in net negatives. As far as achieving the sociological benefits of public participation is concerned (even if they are the basis for normative reasons), the guiding principles proposed by this article hope to help achieve those sociological benefits.

32 For a review of these reasons as well as what they entail, see Peter Fabienne, “‘Political Legitimacy’ in Edward Zalta”, *The Stanford Encyclopedia of Philosophy*, Stanford (Summer 2017) <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>>., accessed 10 Jun. 2023.

33 Jason Gluck and Michele Brandt, *Participatory, and Inclusive Constitution Making: Giving a Voice to the Demands of Citizens in the Wake of the Arab Spring*, Washington DC, United States Institute of Peace, 2015, pp. 13, 22.

34 *Ibid.*, p. 13.

emerging from authoritarianism, when constitution-makers adhere to agreed-upon rules, this can demonstrate to the public that the country's new leaders respect democratic and constitutional values.³⁵ In the long term, this can help establish trust in leaders and set important precedents for future governance.³⁶

Second, public participation enables constitution-makers to receive more information about people's wants and needs.³⁷ This can expand the agenda of the constitution-making process by presenting new perspectives.³⁸ At the same time, it can prevent the incorporation of unwanted provisions,³⁹ and even if it does not prevent their adoption, it formally documents public dissatisfaction, promoting future reform efforts.⁴⁰ This benefit can continue beyond the moment of constitutional creation.⁴¹ As participation highlights people's wants and needs, leaders can better determine their priorities, which can then be incorporated into future governance strategies.⁴²

Third, public participation in constitution-making can be an educational exercise in civic engagement and democratic governance. As Wallis argues, this can play a role in 'citizenization,' whereby individuals are educated about their rights and responsibilities as citizens.⁴³ This, in turn, encourages interest in participating in public life.⁴⁴ Ghai and Galli contend that this also helps enhance democratic behavior and attitudes.⁴⁵ In the future, citizens might be encouraged to express grievances through institutions they became familiar with during the constitution-making process rather than resorting to violence.⁴⁶

Fourth, building on the previous point, public participation during constitution-making can help create a constitutional culture by informing the public about the constitution and its operation.⁴⁷ A constitutional culture implies that people care about the constitution and its values and recognize and accept that they are governed by it;⁴⁸ it also indicates that the constitution is taken seriously in political discourse and that officials incorporate a responsive interpretation of the constitution and public views regarding it into the fabric of constitu-

35 *Idem.*

36 *Idem.*

37 *Proceedings, Workshop on Constitution Building Processes*, Boobst Center for Peace and Justice, Princeton University in conjunction with Interpeace and International IDEA, 2007, p. 18.

38 Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution-Making and Reform: Options for the Process*, Geneva, Interpeace, 2011, p. 86.

39 Gluck and Brandt, *Participatory and Inclusive Constitution Making*, cit., p. 13.

40 *Idem.*

41 *Idem.*

42 *Idem.*

43 Wallis, "Constitution Making and State Building," cit. p. 286.

44 *Ibid.*, p. 286.

45 See generally Yash Ghai and Guido Galli, *Constitution-building Processes and Democratization*, Stockholm, International IDEA, 2006.

46 Wallis, "Constitution Making and State Building," cit., p. 286.

47 Devra Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, Ann Arbor, University of Michigan Press, 2008, p. 2.

48 Jason Mazzone, "The Creation of a Constitutional Culture," *Tulsa Law Review*, 40 (2013), p. 672.

tional law.⁴⁹ Scholars consider a constitutional culture critical for the effective operation of constitutional democracies.⁵⁰ While it is almost always lacking in new democracies,⁵¹ there is some evidence that it can be overcome through public participation.⁵²

Fifth, public participation can help foster peace, particularly in conflict-ridden regions.⁵³ This is particularly vital considering that a plurality of constitutions are today being drafted in post-conflict settings.⁵⁴ Analyzing twelve instances of post-conflict constitution-making, Samuels argues that participatory constitution-making allows people to exchange views with former enemies.⁵⁵ This can build trust between previously warring factions.⁵⁶ In best-case scenarios, it can enable people to establish a sense of unity over common values and shared aspirations.⁵⁷ While not making a causal claim, Widner's empirical research on post-conflict constitution-making demonstrates that outbreaks of violence decreased or did not increase in over 78 percent of cases where there was even a minimal level of public involvement.⁵⁸

A final, albeit equally important, reason to involve the public in constitution-making is the constitution's and state's international credibility. Several important international and regional treaties provide a right to participate in a country's public affairs on equal terms.⁵⁹ This right has been interpreted to extend to participation in constitution-making processes.⁶⁰ There have been recent instances where international organizations publicly criticized constitution-making processes, which were considered insufficiently participatory.⁶¹ Thus, involving the public in constitution-making can improve its international credibility and signal to the international community that a particular country respects international law. This is always a desirable characteristic for a country in international relations.

Reasons such as those discussed above have ushered in a new era of widespread public participation in constitution-making. Since the Second World

49 Reva Siegel, "Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA," *California Law Review*, 94 (2006), p. 1325.

50 Mark Tushnet, "The Relation Between Political Constitutionalism and Weak-Form Judicial Review," *German Law Journal*, 14 (2013), pp. 2255-56.

51 David Landau, "A Dynamic Theory of Judicial Role," *Boston College Law Review*, 55 (2014), p. 1512.

52 See text body accompanying footnote 188.

53 See Kirsti Samuels, "Post-Conflict Peace-Building and Constitution-Making," *University of Chicago Journal of International Law*, 6 (2009), pp. 663-682.

54 Andrew Ladley, *Constitution-Building After Conflict: External Support To A Sovereign Process*, Stockholm, International IDEA, 2011. pp. 8-9.

55 Kirsti Samuels, *Constitution Building Processes, And Democratization: A Discussion Of Twelve Case Studies*, Stockholm, International IDEA, 2006. pp. 22-25.

56 *Idem.*

57 *Idem.*

58 Jennifer Widner, "Constitution Writing and Conflict Resolution," *The Round Table*, 94, 381 (2005), p. 511.

59 Hart, *Democratic Constitution Making*, cit., pp. 5-6.

60 *Idem.*

61 See European Commission for Democracy Through Law, *Opinion Number 621/2011 On The New Constitution Of Hungary*, Venice, Venice Commission, 2011.

War, the public has been involved in constitution-making via elections, referendums, consultations, and direct solicitation of views. Such participation has occurred at all stages of constitution-making, from triggering the process to electing members of the drafting body, drafting the constitution, and finally, ratifying the draft. All these elements have become widely-accepted norms in constitution-making, and it is hard to imagine a constitution-making process without any of them.⁶²

3. Public Participation: Why Not

Despite the benefits discussed in the previous section, scholars have highlighted many downsides of the large-scale involvement of the public in constitution-making. Six such reasons for caution are briefly discussed below.

First, there are doubts about the feasibility of meaningful public participation.⁶³ In most societies, whether the general populace possesses the expertise to participate in the constitution-making process is questionable.⁶⁴ This is only aggravated in countries with low literacy rates.⁶⁵ For example, when Afghanistan's constitution-making process began in 2001, it had a baseline literacy rate of 27 percent. These numbers are only lower among the adult population, who are potential beneficiaries of public participation. Considering that the bulk of modern constitution-making is taking place in Global South and/or post-conflict countries, a lack of resources, insecurity, poverty, low voter turnout, and poor infrastructure can also hinder meaningful public participation.⁶⁶ Morrow highlights that in Iraq, due to the security situation, public participation was limited to a few cities (particularly Baghdad) and largely reflected the views of a single ethnic group.⁶⁷ In any case, material inequalities likely mean that groups with more access to resources disproportionately impact the constitution-making process.⁶⁸ At times, public participation allows powerful interest groups to manipulate the process,⁶⁹ particularly affecting minorities and less organized groups.

62 Landemore, *Open Democracy: Reinventing Popular Rule for the 21st Century*, cit., p. 180.

63 For a theoretical consideration of this issue, see George Duke, "Can The People Exercise Constituent Power", *International Journal of Constitutional Law* (2023 Forthcoming) <on file with author>.

64 See, e.g., James Fearon and Daniel Laitin, "Violence and the Social Construction of Ethnic Identity," *International Organizations*, 54 (2000), p. 845; Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, cit., p. 7.

65 Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., p. 342.

66 Alicia Bannon, "Designing a Constitution-Drafting Process: Lessons from Kenya," *Yale Law Journal*, 116 (2007), pp. 1846-1847.

67 Jonathan Morrow, "Deconstituting Mesopotamia: Cutting a Deal on the Regionalization of Iraq," in Laurel Miller and Louis Aucoin (eds.), *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington DC, United States Institute of Peace, 2010, pp. 585-586.

68 See, e.g., Siri Gloppen, *South Africa: The Battle over the Constitution*, London, Routledge, 1997.

69 Erin Houlihan and Sumit Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* Stockholm, International IDEA, 2021, p. 33.

Second, irrespective of the above points, whether the public's views meaningfully influence constitution-making processes is debatable. For example, Iceland's recent constitution-making process was highly participatory.⁷⁰ It included crowdsourcing constitutional content via websites like Facebook, Flickr, Twitter, and YouTube.⁷¹ However, only 10 percent of submissions appeared to impact the draft of the Constitution.⁷² Likewise, South Africa's constitution-making process has been lauded for its high level of public participation conducted through several innovative mechanisms.⁷³

Nevertheless, Hudson's empirical research shows that extensive public participation had a negligible impact on the constitutional text.⁷⁴ Even the most progressive and inclusive provisions were elite-driven rather than a product of public involvement.⁷⁵ Several scholars point out that the reality of constitution-making is that constitutions are generally products of political competition between different power sources at the moment of drafting.⁷⁶ More often than not, public views are brushed under the carpet, or elites window-dress the constitution with aspirational rights provisions to divert criticism—as happened in Iraq,⁷⁷ Rwanda,⁷⁸ and Afghanistan⁷⁹ in the early 2000s. On the contrary, Versteeg's large-N analysis shows how public opinion on topics of key concern diverged from the constitutional content in most countries around the world.⁸⁰ A specific example comes from Kenya, where most Kenyans opposed Islamic courts, but the final draft of the 2010 constitution included them to appease the minority Muslim community.⁸¹ Outcomes like these may also cause public disillusionment with participatory politics.⁸²

Third, public participation can derail the constitution-making process and exacerbate tensions and problems on the ground. To succeed, constitution-

70 Thorvaldur Gylfason, "The Anatomy of Constitution-Making: From Denmark in 1849 to Iceland," in Gabriel Negretto (ed.), *Redrafting Constitutions in Democratic Regimes*, Cambridge, Cambridge University Press, 2020.

71 *Ibid.*, p. 222.

72 Alexander Hudson, *The Veil of Public Participation: Citizen and Political Parties in Constitution-Making Processes*, Cambridge, Cambridge University Press, 2021, p. 57.

73 Ebrahim and Miller, "Creating a Birth Certificate of a New South Africa: Constitution Making After Apartheid," cit. pp. 111-157.

74 *Ibid.*, p. 9.

75 Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* cit., p. 31.

76 See, e.g., Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven, Yale University Press, 1984; John Higley and Michael Burton, *Elite Foundations of Liberal Democracy*, Lanham, Rowman & Littlefield, 2006; Guillermo O'donnell, Philippe Schmitter, and Laurence Whitehead (eds.), *Transition from Authoritarian Rule*, Baltimore, Johns Hopkins University Press, 1986.

77 Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., p. 141.

78 *Idem.*

79 See Amal Sethi, "Book review: Afghanistan Legal Education Project, An Introduction to the Constitutional Law of Afghanistan (Stanford Law School, Rule of Law Program, 2nd Edition, 2015)", *Indian Law Review*, 5, 2 (2021), pp. 250-259.

80 Mila Versteeg, "Unpopular Constitutionalism," *Indiana Law Journal*, 89 (2014), pp. 1133-1190.

81 Gluck and Brandt, *Participatory and Inclusive Constitution Making*, cit., p. 16.

82 Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, cit., p. 2.

making ultimately requires compromise among political elites.⁸³ As public participation increases, so does the need for more competing opinions to be reconciled.⁸⁴ This can make it harder for political elites to strike a bargain or, worse, completely derail sensitive negotiations,⁸⁵ leading to deadlocks in already-tense situations.⁸⁶ Over 50 percent of constitution-making processes do not successfully produce a ratified constitution.⁸⁷ Beyond the constitution-making process itself, “spoilers” may use public involvement as an opportunity to polarize and divide the population—especially if the citizens will decide on the approval of the final draft.⁸⁸ Taken to the extreme, this polarization can slide into open conflict—as happened post recent constitution-making processes in Iraq, Somalia, Chad, Timor Leste, Nepal, Congo, Togo, and Bolivia, among other countries. Thus, instead of becoming an occasion to unite the country or reduce violence, the constitution-making process can become the opposite.

Fourth and relatedly, public participation can be used to legitimize undemocratic outcomes. Ordinary citizens often lack the knowledge to understand the consequences of constitutional choices.⁸⁹ This can be weaponized to promote anti-pluralism and authoritarianism.⁹⁰ In recent years, would-be autocrats—notably Orbán in Hungary, Chávez in Venezuela, and Erdoğan in Turkey⁹¹—have used public participation to legitimize unilaterally drafted authoritarian constitutions.⁹² Using misinformation campaigns and pitting people against each other, they often convince the public that certain problematic constitutional choices are in their best interest.⁹³ Curiously, in many instances of authoritarian constitution-making, public participation was more meaningful and had more impact on the constitution than in their democratic counterparts.⁹⁴

Fifth, public participation can make constitution-making processes both time-consuming and expensive. At the bare minimum, meaningful public partici-

83 See, e.g., Gabriel Negretto, “Replacing Constitutions in Democratic Regimes: Elite Cooperation And Citizen Participation,” in Gabriel Negretto (ed.), *Redrafting Constitutions in Democratic Regimes*, cit., pp. 101-128; Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, Umeå, Umeå University Press, 2015.

84 Gluck and Brandt, *Participatory and Inclusive Constitution Making*, cit., p. 15.

85 Jon Elster, “Forces and Mechanisms of the Constitution-Making Process,” *Duke Law Journal*, 45 (1995), pp. 388-89.

86 Cass Sunstein, *Designing Democracy: What Constitutions Do*, Oxford, Oxford University Press, 2001, p. 8.

87 Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., p. 75.

88 See Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* cit., p. 33. See also Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., pp. 2, 255, 302, 324.

89 See Adam Przeworski, “Deliberation and Ideological Domination,” in Jon Elster (ed.), *Deliberative Democracy*, Cambridge, Cambridge University Press, 1998, pp. 140-160.

90 See, e.g., David Landau, “Constitution-Making Gone Wrong,” *Alabama Law Review*, 64, 5 (2013), pp. 923-980; William Partlett, “The Dangers of Popular Constitution-Making,” *Brooklyn Journal of International Law*, 38, 1 (2012), pp. 193-238.

91 Amal Sethi, “The Method and Madness of Authoritarian Constitution Making in Democratic Regimes,” *Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società*, 3, 2 (2021), pp. 13-18.

92 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization And The Subversion Of Liberal Democracy*, Oxford, Oxford University Press, 2021, pp. 116-152.

93 *Idem*.

94 *Idem*.

pation requires civic education campaigns and consultations.⁹⁵ These take considerable time, a fact acknowledged even by ardent supporters of public involvement.⁹⁶ Time-consuming participation processes can prolong transitional rule, entrench the regime overseeing the process, and distract attention from major development issues.⁹⁷ Meaningful public participation is also costly. Unofficial estimates put the cost of the 2005 Kenyan constitution-making public participation campaign at 184 million US dollars (adjusted for inflation in 2005).⁹⁸ In many countries where constitution-making is being carried out today, such costs might be hard to justify for exercises whose benefits are not apparent to the general public.

Sixth, public participation can have negative impacts on the constitutional text.⁹⁹ This can happen in several ways. The involvement of the populace in the constitution-making process may intensify irrationality in constitutional design.¹⁰⁰ To appease the public, constitution-makers might window-dress the constitution with rights.¹⁰¹ Negretto highlights how there is little to no evidence that such rights are effective or safeguard groups requiring protection.¹⁰² In fact, they may favor majoritarian or privileged social groups.¹⁰³ Moreover, as more views must be accommodated into the text, it may develop contradictions and institutional mismatches,¹⁰⁴ potentially rendering the constitutional scheme impractical.¹⁰⁵ Additionally, because a constitutional text that is a product of extensive public participation reflects a mix of often-conflicting ideological perspectives, it may fail to establish fundamental principles and core procedures,¹⁰⁶ instead becoming an unwieldy compilation of detailed substantive rules that would be better served by ordinary legislation or administrative regulations.¹⁰⁷ Rosen argues that all the issues above manifested in the 1988 Brazilian Constitution, which was developed through a strongly participatory process.¹⁰⁸ Furthermore, in societies with authoritarian pasts, apprehension towards government could lead to public participation demanding

95 Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., pp. 91-137.

96 See, e.g., Gluck and Brandt, *Participatory and Inclusive Constitution Making*, cit., pp. 15-16; Vivian Hart, *Democratic Constitution Making*, Washington DC, United States Institute of Peace, 2003, pp. 8-9.

97 Wallis, "Constitution Making and State Building," cit., p. 289.

98 Bannon, "Designing a Constitution-Drafting Process: Lessons from Kenya," cit., p. 1847.

99 Stefan Voigt, "The Consequences of Popular Participation in Constitutional Choice—Towards A Comparative Constitutional Analysis," in Anne van Aaken, Christian List, Christoph Lutge (eds.), *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy*, Aldershot, Ashgate Publishing, 2003, pp. 199-229.

100 Jon Elster, "Forces and Mechanisms of the Constitution-Making Process," cit., pp. 382-84.

101 Bejarano and Segura, "The Difference Power Diffusion Makes," cit., pp. 131-132.

102 Gabriel Negretto, "Replacing Constitutions In Democratic Regimes: Elite Cooperation And Citizen Participation," cit., p. 102.

103 *Idem*.

104 Tom Ginsburg, James Blount, and Zachary Elkins, "Does the Process of Constitution-Making Matter?," *The Annual Review of Law and Social Science*, 5, 1 (2009), p. 215.

105 *Idem*.

106 Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* cit., p. 21.

107 Rosen, "Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988," cit., p. 452.

108 *Idem*.

substantial limitations on state power.¹⁰⁹ This frequently comes at the expense of effective governance.¹¹⁰

4. Why Public Participation Should Not Be A Normative Necessity

The previous two sections outlined the established reasons to involve or not involve the public in the constitution-making processes. Nonetheless, they did not come close to answering questions about why and how the public should participate in constitution-making. This section aims to take a step in that direction. As discussed in the introduction, there are several possible permutations of arguments as to whether public participation in constitution-making should be carried out for normative or sociological reasons. This section will make a brief yet counter-conventional case for public participation not to be a normative necessity. As the next section will show, this line of reasoning can ensure that public participation in constitution-making, when conducted, allows for an overall net positive for society.

There are two core reasons for public participation not to be a normative necessity in constitution-making processes (1) the supposed normative necessity for public participation is based on a misplaced notion that a constitution is a product of the collective will of the people of a country or represents the wants of the people and/or (2) public participation can be utilized to legitimize non-democratic outcomes.¹¹¹

Moving to the first reason, contrary to scholarly belief or preferences, constitutions are not a product or reflection of the will of the country's populace. Constitutions are largely a product of various variants of elite contestation that take behind closed doors (balanced¹¹² or unbalanced¹¹³).¹¹⁴ A large number of constitution-making incidents are not even accompanied by what Ackerman calls 'constitutional moments,'¹¹⁵ which see the citizenry in action.¹¹⁶ Moreover, even in those cases when there is a high level of public participation, the afore-said facet regarding elites stays the same. As discussed earlier, in many situations, it is extremely difficult to conduct public participation in a manner that can capture the true 'will of the people.' In other cases, public participation is

109 Gluck and Brandt, *Participatory and Inclusive Constitution Making*, cit., p. 16.

110 *Idem*.

111 In a different context, these arguments have been detailed in length in Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

112 Balanced elite contestation would signify when the contestation is a mutual compromise between different power sources.

113 Unbalanced elite contestation would refer to a situation when a certain group of elites has dominated the constitution-making process at the expense of other groups.

114 Elster, "Forces and Mechanisms of the Constitution-Making Process," cit.

115 See Bruce Ackerman, *We the People I: Foundations*, Cambridge, Harvard University Press, 1991, pp. 1-33.

116 Ginsburg, Blount, and Elkins, "Does the Process of Constitution-Making Matter?," cit., p. 209.

simply a box-ticking exercise wherein public input is brushed aside. All this is complicated by the fact that many constitutions are inflicted on societies against their will by foreign actors, as was the case in Germany, Iraq, Afghanistan, Sudan, East Timor, and Bosnia and Herzegovina, among others.¹¹⁷ Further, in recent years, a global network of constitutional advisors has increasingly played a substantial role in constitution-making processes.¹¹⁸ A trend has also developed in the constitution-making of using universal templates of constitutional design and borrowing outrightly from other constitutions.¹¹⁹

Advocates of public participation for normative reasons might argue that these are genuine issues but can be easily resolved by simply requiring that to satisfy the normative requirement, (1) public participation must be as meaningful and realistic as possible, and (2) constitution drafters should give reasons for not adhering to widely-supported public input. Though this can certainly be done (and for sociological reasons, this article suggests it should be done), it will not change the reality that constitutions are the product of elite contestation at the moment of constitution-making. Such solutions would still result in political elites deciding what to do with the public's views (and how to do it).¹²⁰ To add to it, scholars like Moehler and Miller point out that public opinions on constitutional content are less about the populace's personal viewpoints but more regarding their assessments of the political elites controlling the constitution-making process.¹²¹ This is because citizens (irrespective of the context) find it arduous to assess the constitution and constitution-making process and hence look to political elites for signs.¹²² There is some preliminary evidence of how this played out in the recent Chilean case as well.¹²³

Those who cherish public participation as a normative requirement, despite the concerns raised above, might want to minimize the influence of elites on constitutional content. Instead of removing public involvement as a normative necessity, they might want to find ways to ensure that constitutions are a product of popular will. Among other means, one mechanism to achieve the latter might be to have a technical committee draft a constitution based on public input and then put this draft up for approval in a referendum and/or vote by

117 See, e.g., Noah Feldman, "Imposed Constitutionalism," *Connecticut Law Review*, 37 (2005), pp. 857-889; Phillip Dann and Zaid Al-Ali, "The Internationalized Pouvoir Constituent – Constitution Making Under External Influence In Iraq, Sudan, and East Timor," *Max Planck Yearbook of United Nations Law*, 10 (2006), pp. 423-63.

118 See Landau and Lerner, "Introduction to Comparative Constitution-Making," cit. p. 7.

119 See, e.g., David Law, "Constitutional Archetypes," *Texas Law Review*, 95, 2 (2016), pp. 153-243; David Law and Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism," *California Law Review*, 99 (2011), pp. 1163-1258.

120 Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

121 See, e.g., Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, cit. 7; Christina Murray, "Political Elites, and the People: Kenya's Decade-Long Constitution-Making Process," in Gabriel Negroto (ed-), *Redrafting Constitutions in Democratic Regimes*, cit., p. 191.

122 Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making*, cit. 7

123 Lautaro Cella and Eli Rau, "Chile's New Voting Rules May Have Derailed The New Constitution," *The Washington Post*, September 16, 2022, <<https://www.washingtonpost.com/politics/2022/09/16/chile-constitution-mandatory-voting/>>, accessed 18 Sept. 2022.

political elites.¹²⁴ Ghai has contended that such mechanisms can ensure that a constitution is a balanced reflection of the people's collective will.¹²⁵ However, the question is whether such solutions are even desirable.¹²⁶

As Eisenstadt and Maboudi show with detailed empirical analysis, public participation alone cannot generate constitutions that improve levels of democracy—or, as a matter of fact, even result in the promulgation of new constitutions.¹²⁷ Whether we like it or not, constitutions require elite approval not only for their creation and adoption but also for their post-adoption enforcement.¹²⁸ After the constitution's adoption, those in power must agree to its terms and operate under them in good faith. In fact, Negretto and Sánchez-Talanquer's quantitative analysis demonstrates how levels of public participation in constitution-making are not directly associated with a democratic constitution.¹²⁹ They show how increased democratic outcomes are observed when constitutions are produced as a result of a compromise between different elites.¹³⁰ Such constitutions diffuse governmental power, restrict the said power, and ensure that there are means to make such diffusion and restrictions effective.¹³¹ Counter outcomes are witnessed in constitutions marked by the absence of elite compromises.¹³² Comparable results are noticed concerning almost every aspect of a constitution ranging from judicial review to human rights.¹³³

This points to the second reason to reconsider the normative necessity of public participation in constitution-making: public participation can legitimize undemocratic ends (of different kinds). Constitutional legitimacy is not a yes or no binary but a spectrum.¹³⁴ As mentioned earlier, the reality of constitution-making is that a compromise between diverse political elites is crucial for democratic

124 A variant was done in the failed Kenyan Constitution-Making process of 2005. For an explanation of this process, see Yash Ghai, "Civil Society, Participation And The Making Of Kenya's Constitution," *cit.*, pp. 212-234.

125 *Idem.*

126 Though an oversimplification, the Kenyan constitution-making process mentioned in footnote 124, the draft that a technical committee produced did not receive sufficient elite buy-ins to ensure its promulgation. On this point, see Murray, "Political Elites, and the People: Kenya's Decade-Long Constitution," *cit.*, pp. 212-234.

127 Todd Eisenstadt and Tofiq Maboudi, "Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy," *Comparative Political Studies*, 52, 13-14 (2019), pp. 2135-2170.

128 See generally Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, *cit.*

129 Gabriel Negretto and Mariano Sánchez-Talanquer, "Constitutional Origins and Liberal Democracy: A Global Analysis, 1900-2015," *American Political Science Review*, 115 (2021), p. 522.

130 *Idem.*

131 See *Ibid.*; Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, *cit.*; Gabriel Negretto and Mariano Sánchez-Talanquer, "Constitutional Origins and Liberal Democracy: A Global Analysis, 1900-2015," *American Political Science Review*, 115 (2021), p. 522; Bejarano and Segura, "The Difference Power Diffusion Makes," *cit.*, pp. 131-132; Higley and Burton, *Elite Foundations of Liberal Democracy*, *cit.*

132 *Idem.*

133 Julio Ríos-Figueroa and Andreas Pozas-Loyo, "Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America," *Comparative Politics*, 42 (2010), pp. 293-311; Ran Hirschl, *Towards Juristocracy*, Cambridge, Harvard University Press, 2004; Rosalind Dixon and Tom Ginsburg, "The Forms and Limits of Constitutions as Political Insurance," *International Journal of Constitutional Law*, 15, 4 (2017), pp. 988-1012; Rosalind Dixon and Tom Ginsburg, "The South African Constitutional Court and Socio-Economic Rights as Insurance Swap," *Constitutional Court Review* 4, 1 (2011), pp. 1-29; Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?," *Journal of Law Economic Organization*, 30 (2013), pp. 587-622.

134 Harel and Shinar, "Two Concepts Of Constitutional Legitimacy," *Global Constitutionalism*, *cit.*

outcomes. Any compulsory public participation requirement could unfairly impact this necessity.¹³⁵ Elites from certain groups could use the justification of public participation to increase the normative legitimacy of a constitution at the expense of negotiating with elites from other political groups.¹³⁶ Though primarily associated with authoritarian constitution-making, this has also been the case in many democratic constitution-making incidents (as oxymoronic as that might sound).¹³⁷ Certain elites skip the requirement to negotiate with their political opponents by simply engaging in highly participatory constitution-making and/or seeking approval from the populace in its place.¹³⁸

To address quandaries such as these, a variety of scholars (albeit in different contexts), such as Bernal, Roznai, and Stacey, among others, have argued that for constitutions to be legitimate, they should contain values associated with the core of constitutionalism, liberalism, and the rule of law.¹³⁹ This can undoubtedly be regarded as a normative requirement for modern-day constitutions but will not stop the legitimizing of undemocratic constitutions.¹⁴⁰ Let us take the case of authoritarian constitution-making. In most cases of modern authoritarian constitution-making, the ensuing constitutions seemingly contain principles associated with the aforesaid values.¹⁴¹ Authoritarian constitutions almost always provide for courts with the power of judicial review, human rights provisions (perhaps even more than their democratic counterparts), and a pledge to operate the society in accordance with the rule of law.¹⁴² Further aspects that are problematic might be such that they are perfectly acceptable in other contexts.¹⁴³ Scheppele, among several others, has described how it is only in the margins and intricate workings of their particular systems that their problematic nature is noticeable.¹⁴⁴ If we take constitutions that do not serve authoritarian purposes (or at least do not intend to), these problems are even

135 Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

136 *Idem*.

137 Gabriel Negretto describes how even in democratic constitution-making bodies, power is frequently wielded in partisan ways on behalf of some rather than all of the people of a polity. See Gabriel Negretto, "Democratic Constitution-Making Bodies: The Perils Of A Partisan Convention," *International Journal of Constitutional Law*, 16 (2016), pp. 254-279.

138 Sethi, "The Method and Madness of Authoritarian Constitution Making in Democratic Regimes," cit., pp. 13-18.

139 See Richard Stacey, "Popular Sovereignty and Revolutionary Constitution-Making," in David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations Of Constitutional Law*, Oxford, Oxford University Press, 2016, pp. 162-178; Yaniv Roznai, "The Boundaries Of Constituent Authority," *Connecticut Law Review*, 52 (2021), pp. 1405-1406; Carlos Bernal, "Constitution-Making (without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution," in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds.), *Constitutional Change and Transformation in Latin America*, Oxford, Hart, 2019, pp. 21-49. Though it must be stated that Stacey and Roznai's proposals have been in the context of the constituent power theory, whereas Bernal's outside it.

140 Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

141 For example, a perusal of three of the most famous and newly drafted (or substantially redrafted) authoritarian constitutions in Hungary (2012), Venezuela (1999), and Turkey (1982 with Amendments through 2017) all contain elements that comply with these requirements on the face of it.

142 Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review*, 86, 2 (2018), p. 555.

143 Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

144 *Idem*.

harder to spot. In such cases, constitutions might be *prima facie* democratic, but they exclude important views and interests. This often hurts those most in need of constitutional protections.¹⁴⁵

5. Public Participation — Doing It For Sociological Reasons

After considering some reasons for caution regarding involving the public in constitution-making processes, the last section made a case against public participation as a normative requirement. However, it was certainly not an absolute case against public participation in constitution-making. In fact, by removing the normative necessity of public participation, we are not forced to conduct it simply because it is a default. This allows us to take a step back and assess what goals public participation can achieve in a given society in a given time and space, what the best ways to achieve those goals are, and how these goals balance up against the possibilities of potential downsides. Along the way, we are also able to answer many other ancillary questions regarding public participation in constitution-making.

Public participation in constitution-making has sociological benefits.¹⁴⁶ At a minimum, it helps give a constitution the social and international legitimacy it needs to function. Beyond this vital benefit, it has other more modest ones too. It can expand the constitution-making agenda and introduce new issues—especially those more relevant to the populace than envisioned by elites. It can also promote citizenization and the development of a constitutional culture. It can even arguably improve the transparency of the process and the accountability of constitution-makers. However, do the drawbacks of public participation outweigh these benefits? As shown in the remainder of this article, aside from those discussed in the previous part, most other reasons for skepticism towards public involvement can be overcome or mitigated through careful design of the constitution-making process rather than blanket bans on public participation.¹⁴⁷ Further, in those cases where the costs of public involvement outweigh its risks in ways that cannot be reconciled, constitution-makers can still utilize strategies to ensure that, at the bare minimum, a constitution can obtain a degree of sociological legitimacy and international credibility.¹⁴⁸

Before we proceed to discussions regarding public participation, it is important to address a point raised in Section 2. As stated, it could be argued by

145 Gabriel Negretto, "Democratic Constitution-Making Bodies: The Perils Of A Partisan Convention," *International Journal of Constitutional Law*, 16 (2016), pp. 254-279.

146 Due to the limited scope of this article, it does not consider the reasons grounded in deliberative democracy for conducting public participation in constitution-making. However, the guiding principles provided in this section could also help address the concerns of those who see public participation as a vital component of deliberative democracy (at least to some extent).

147 See generally Section 5.

148 See Section 6, Scenario 4.

those who view beneficial consequences or utilitarian reasons as a source of normative legitimacy—that sociological benefits could, in themselves, be reasons for the normative necessity of public participation in constitution-making. Though such an argument can be made (and is not *per se* wrong), it would fall into the trap of allowing participation to legitimize constitutions that serve undemocratic ends, as outlined in the previous part. This feedback loop can only be avoided by removing the normative necessity of public participation in constitution-making.

Consequently, three questions arise regarding public participation for sociological reasons. First, at what stages of the process should it take place (i.e., the start of the process, middle drafting stage, and/or ratification stage)? Second, how involved should the public be at each stage, and relatedly, what form should public participation take at a given stage—consultative, deliberative, or decision-making?¹⁴⁹ Third, how should any potential costs of public involvement in constitution-making be balanced against the benefits, both at a given stage and in the process as a whole?

One potential answer is Elster's 'hourglass' model, where the public is involved at the start and end of the process.¹⁵⁰ Per Elster, the optimal role of the public should include participation via public hearings at the upstream stage and some form of ratification possible at the downstream stage.¹⁵¹ This helps provide checks on the drafters at both ends.¹⁵² The actual writing and deliberation (the neck of the hourglass) should be shielded from the public to avoid problems associated with public participation, like derailing sensitive elite negotiations or providing opportunities to polarize the public.¹⁵³ Spain's 1978 constitution-making process is an example that comes close to Elster's model.¹⁵⁴ In the Spanish case, members of an elected drafting body first conveyed a multi-partisan seven-member panel to hammer out a preliminary constitutional text.¹⁵⁵ Before internal approval, this introductory text was debated and

149 See Anna Dziedzic, "Consultation, Deliberation, and Decision-Making: Direct Public Participation in Constitution-Building," *Constitutional Insights*, 4 (2020), pp. 3-5. Anna Dziedzic breaks down public participation in constitution-making into three primary forms. They are (1) Consultation: This is a one-way form of public participation in which the people provide information to decision-makers. The goal of consultation is to obtain information and feedback from members of the public. (2) Deliberation: This is a two-way form of direct public participation where members of the public work together with experts and decision-makers to identify and prioritize constitutional reform issues and develop solutions. Deliberation aims to explore issues in-depth and develop a mutually agreed position between elites and the populace. (3) Decision-making: This is a form of public participation, often conducted through referendums, which is direct and places decision-making in the hands of the public.

150 Jon Elster, "Forces and Mechanisms of the Constitution-Making Process," *Duke Law Journal*, 45 (1995), pp. 395-396.

151 *Idem*.

152 *Idem*.

153 *Idem*.

154 *Ibid.*, pp. 387-389.

155 See Andrea Bonime-Blanc, *Spain's Transition To Democracy: The Politics Of Constitution-Making*, New York, Routledge, 1987.

amended within the larger drafting body.¹⁵⁶ The populace then approved the constitution's final draft in a referendum.¹⁵⁷

Another model that tries to balance the costs and benefits of public participation is Arato's two-stage post-sovereign conception of constitution-making.¹⁵⁸ This model was inspired by the South African constitution-making process carried out over five years from 1991 to 1996.¹⁵⁹ In this model, the first stage requires various political and social groups, such as civil society organizations, to mutually agree on an interim constitution in a series of private roundtable talks.¹⁶⁰ In the second stage, a permanent constitution is drafted in a highly participatory manner by an elected parliament doubling as a drafting body.¹⁶¹ The ensuing constitution is subject to the principles agreed to in the interim draft, and a constitutional court certifies compatibility with the principles.¹⁶² This certification by a constitutional court ensures that the process does not lead to undesirable results.¹⁶³

Both these models are templates that have worked well in the particular circumstances of Spain and South Africa, at least to the extent that they both produced constitutions that have endured. Nonetheless, neither of these models can be used as universal templates. There might be context-specific reasons to involve or not involve the public at a particular stage. For example, considering how ubiquitous they have become, it might be challenging to dispense altogether with referendums during ratification (though sometimes it might be prudent to do so).¹⁶⁴ Though it would be optimal to start the constitution-making process with an elite bargain,¹⁶⁵ in cases where all political elites are not on board, the process might need to be initiated by the public.¹⁶⁶

Similarly, public participation in the middle stages might help resolve deadlocks in countries with weak or divided political parties.¹⁶⁷ Moreover, it might only be possible to determine whether this is necessary once the process has started.¹⁶⁸ Likewise, in other situations where existing elites lack legitimacy, opening up the middle stages to public participation (or at least public scrutiny) might help avoid allegations of bias and ensure transparency.¹⁶⁹ On the

156 *Idem.*

157 *Idem.*

158 See Andrew Arato, *Post Sovereign Constitutional Making: Learning And Legitimacy*, Oxford, Oxford University Press, 2016.

159 *Ibid.*, p. 107.

160 *Ibid.*, pp. 108-157.

161 *Idem.*

162 *Idem.*

163 *Idem.*

164 See Section 6, Scenarios 1 and 3.

165 See text body accompanying footnotes 126-133.

166 See Section 6, Scenario 3.

167 See Section 6, Scenarios 2 and 3.

168 See Section 6, Scenario 2.

169 See Section 6, Scenario 2.

other hand, there might be infrastructural, resource, or time constraints (such as the lack of an independent court for certification or security to carry out public participation) that can limit the hourglass and two-stage models' applicability in particular contexts.¹⁷⁰ The solution to that certainly cannot be not to draft a constitution—particularly if the country does not have one.

As Daly noted, "It appears sensible to recognize that participation should be pursued only where it does not lead to greater conflict in the process of constitutional transformation or threaten the entire project, can be adequately inclusive (and not only partially inclusive or based on 'cherry-picking' of participants)...."¹⁷¹ The question of how to involve the public in constitution-making certainly does not have a one-size-fits-all answer. Even in specific circumstances, many decisions regarding public participation will be highly subjective. Therefore, instead of a particular fixed model, this article recommends the following seven guiding principles on public participation in constitution-making to answer the three questions raised at the start of this part.

Principle 1: There should be a presumption that the public should be involved at every stage of the constitution-making process.

Principle 2: The degree and sequencing of public participation in the process should be such that it is the most optimal way of achieving the goal(s) of involving the public without redundancy or exclusion while minimizing potential negative implications.

Principle 3: If the public is excluded from any stage or is included in a limited way, it should be only for necessary reasons and should be proportionate to these reasons for exclusion.

Principle 4: Constitution-makers should, as far as is prudent, try to record and communicate to the public through the best available means their reasons for involving, limiting the involvement of, or not involving the public.

Principle 5: The degree and sequencing of public involvement do not need to be decided before the start of the constitution-making process (though they most certainly can be). This decision should depend on the realities on the ground in a given society.

Principle 6: If the degree and sequencing of public involvement are decided "along the way," as allowed by Principle 5, the decision to take this approach should nonetheless be clearly laid down at the start of the constitution-making process.

¹⁷⁰ See Section 6, Scenario 4.

¹⁷¹ Tom Daly, "Introduction to Section III: 'Constitution-making and Constitutional Change,'" in Richard Albert and Yaniv Roznai (eds.), *Constitutionalism Under Extreme Conditions - Law, Emergency, Exception*, Cham, Springer, 2020, p. 319.

Principle 7: If, in light of Principle 3, it is impossible to conduct public participation at any stage of a constitution-making process, constitution-makers still have the onus to ensure that the lack of public participation is offset in other ways—whatever they may be in a given circumstance.

These seven principles could capture how to involve the public in constitution-making while allowing us to take into account reasons for concern.

It starts with the assumption that the public needs to be involved at all stages. Rather than advocating a particular mode, sequence, and degree of involvement at a given stage, it requires thinking about how the goals of public involvement can best be achieved without redundancy and negative implications. This ensures that public participation, when conducted, is meaningful and not a box-ticking exercise. It also accords constitution-makers the flexibility to gauge the ground-level realities at every stage and decide questions around public involvement accordingly.

Additionally, it allows divergence from this baseline standard in a manner compliant with international law. Under international law, bar certain non-derogable rights, reasonable restrictions can be imposed on rights for a necessary reason and in a proportionate and legal manner.¹⁷² This can ensure that even when public participation is not conducted at a particular stage or is done in a limited way, backlash from the international community is mitigated.

Moreover, by requiring constitution-makers to try to record and communicate to the public their reasons for involving or not involving the public, these principles can promote transparency and manage public expectations. This can prevent a scenario where the public feels ignored or let down, which can happen when they have unrealistic expectations of the process.¹⁷³

Lastly, these principles acknowledge the reality that sometimes it is impossible to conduct public participation even for its sociological benefits. Nonetheless, Principle 7 tries to limit the net negatives of those cases. Constitution-makers cannot simply get away with stating that involving the public in a particular constitution-making process is impossible. They still have the burden to offset the costs of not involving the public in other ways. As to how this can happen, Scenario 4 in the next section can provide some guidance.

172 See Oliver de Schutter, *International Human Rights Law*, Cambridge, Cambridge University Press, 2010, pp. 288-367. It should be noted that international human rights also contain the requirement of legality, which requires that any derogation from human rights should take place only in accordance with national law. This is based on the reasoning that human rights rules should be clear and accessible. Considering that in many cases of constitution-making, national law might not be in place, Principle 6 is what tries to satisfy the condition of legality.

173 Dinesha Samararatne, *Direct Public Participation in Constitution-Making*, Melbourne, Constitution Transformation Network, 2018, p. 1.

Public participation in practice¹⁷⁴

The previous section laid down seven principles to guide public involvement in constitution-making processes. Let us consider four brief scenarios where these principles could be applied to a hypothetical country, 'Atlantis,' to understand how they might work in practice.¹⁷⁵ At the start, it must be acknowledged that these scenarios reduce things to rather simplistic terms. In real-world scenarios, the realities are far more complex and would require more consideration than this section provides. Nevertheless, this section aims to give the reader a rough idea of how the principles would apply to actual constitution-making instances.

Scenario 1: Atlantis is a peaceful advanced Western democracy. It lacks any significant societal tensions. Atlantis also has high levels of literacy and a thriving constitutional culture. However, the political elites of Atlantis are heavily distrusted. They are also and divided. This has resulted in a fractured political process. The populace of Atlantis is demanding a new constitution to reform the dysfunctional politics in the country, which they believe is a result of its 200-year-old Constitution. This demand is quite clear, and recent polls have shown numbers as high as 98 percent of the people wanting a new constitution. Existing political elites have realized that they have no option but to undertake the drafting of a new constitution. Considering the demand for a new constitution is clear, a referendum to approve the formation of a drafting body might be redundant. The constitution-making process can start immediately with the election of members to a drafting body.

Nevertheless, starting from a down-to-top level by pre-drafting consultation by means such as the Internet¹⁷⁶ and countrywide town hall meetings¹⁷⁷ might be required to gauge the public's precise demands and aspirations. Additionally, considering Atlantis has a high literacy rate and thriving constitutional culture,¹⁷⁸ pre-drafting deliberations via citizen assemblies, deliberative poll-

174 The design of every aspect of the constitution-making process (such as the drafting assembly or referendum) has different ramifications on the quality of public participation. Nonetheless, due to this paper's limited scope, I shall omit this topic from this section. That is indeed a shortcoming of this section's analysis, which might deserve attention on another occasion.

175 A caveat must be made regarding these scenarios. All these scenarios operate on the assumption that the existing constitution contains no revision or total reform clause, i.e., clauses in a constitution that lay down how a new constitution should be drafted. It is a separate question of whether such clauses are valid. Nonetheless, this assumption should not seriously cast doubt on the scenarios provided in this section for two reasons: 1) very few constitutions contain such clauses—it is an exception rather than a norm and 2) even in cases where they exist, they simply lay down the broad contours to initiate the process or agree upon the rules (such as approval by X percent of the legislature). This would not impact the analysis in this part.

176 For the use of the internet in constitution-making processes, see Bernal, "How Constitutional Crowdsourcing Can Enhance Legitimacy In Constitution-Making," cit. pp. 235-258.

177 Townhalls are open public gatherings where officials hear the voices and concerns of the constituents. Today they are even held online, especially in the age of the pandemic.

178 In advanced countries, such devices are successful because people tend to trust their fellow citizens if they have been educated and have deliberated on a subject. See Mark Warren and John Gastil, "Can Deliberative Minipublics Address the Cognitive Challenges of Democratic Citizenship?," *The Journal of Politics*, 77, 2 (2015), pp. 562-574.

ing, or focus groups could also be conducted to identify and prioritize constitutional reform issues and develop solutions.¹⁷⁹ Further, involving the public during the middle stages might be necessary to address political elites' lack of credibility and resolve deadlocks that can arise when weak parties dominate the process. This could take the form of reporting on the progress of the drafting body to strengthen the credibility of the process. Moreover, if any deadlocks between the weak and divided parties arise, they could be resolved via non-binding referendums, which can act as tiebreakers.¹⁸⁰ The internet and town hall meetings could again be used as a consultative mechanism post the creation of the first draft to ensure that an undesirable draft is not put to a referendum. Last, the final constitution can be approved via a referendum. Since Atlantis lacks significant societal divisions or tensions, this is likely a safe bet that does not result in polarization or violence. In light of the absence of challenging circumstances and the need for transparency and managing public expectations, the sequence and goals of public participation can be decided upon before the start of the process.

Scenario 2: Atlantis is a parliamentary democracy in the Global South with deep divisions on all fronts, income inequality, and moderate literacy levels. It had a colonial past until the late 1940s. However, in the post-colonial era, Atlantis never drafted a constitution and operated under an unwritten constitution. Today two major political factions representing the left and right dominate the political space in Atlantis. Currently, the left has a majority in the parliament. Though a large share of politicians in Atlantis is well respected, Atlantis lacks a constitutional culture, and politics is heavily captured by interest groups. For the last few years, the left has been demanding a written constitution that entrenches human rights. The right is against this proposal. Now that the left is in power, they want to draft a new constitution. Considering the deep divisions in Atlantis, a referendum seeking approval for drafting a new constitution should be conducted. A high threshold for the referendum to succeed should be set to ensure that the decision to draft a new constitution is unanimous.¹⁸¹ If the referendum passes, the existing parliament could sketch out the rules governing the constitution-making process. For example, the constitution-making process could start with the election of members to a drafting body. After the drafting body is elected, but before it begins drafting the constitution,

179 Citizen assemblies, deliberative polling, and focused groups are both means of consultations wherein randomly selected representative groups of citizens are educated on constitutional issues, post which they are made to deliberate on constitutional issues or provide recommendations. See, e.g., Anna Dziedzic, "Consultation, Deliberation, and Decision-Making: Direct Public Participation in Constitution-Building," *cit.*, pp. 3-5; Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* *cit.*, pp. 27-29.

180 In Iceland (2012) and Luxembourg (2015), non-binding referendums were used to assess the public views on certain issues to resolve deadlocks. See Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* *cit.*, p. 25.

181 For a detailed analysis of why high thresholds in referendums would be desirable, see Matt Qvortrup and Leah Trueblood, "The Case For Supermajority Requirements In Referendums," *International Journal of Constitutional Law*, 21, 1 (2023), pp. 187-204.

participation in the form of deliberative polling, focus groups, and citizen assemblies can be conducted, taking into account the power of interest groups and the lack of equal access to resources in Atlantis. Given moderate literacy levels, deliberation can be assisted by making independent experts available to answer questions as they arise.¹⁸² At the same time, the public might be excluded from the middle and end stages. In the middle stage, it might be prudent to do so to facilitate sensitive negotiations and a bargain between the left and the right. At the end stage, if the decision regarding the constitution's approval is in the hands of the public's hands, misinformation campaigns could be used to derail the final product in the present internet age.¹⁸³

On the other hand, the certification process via a constitutional court could be borrowed from Arato's post-sovereign model to ensure that the constitution was not unilaterally written. Given the ground realities in Atlantis, decisions on whether to involve the public and, if so, to what degree could be decided upon before a particular stage based on how the process has unfolded so far. This facet of the process could be provided for in the rules that lay down the constitution-making processes.

Scenario 3: Atlantis is a middle-income autocracy governed by an autocratic president for the past four decades. Atlantis has high literacy rates, and 93 percent of the population belongs to the same race and religion. Minorities with distinct cultural practices have struggled under Atlantis's autocratic rule. Recently, massive protests broke out, and the president and their close allies were forced to flee the country. Leaders of the protest, the marginal opposition, and civil society want to draft a new constitution to help reset the country. There seems to be little public opposition, as the public also looks forward to a new Atlantis. In such a case, a referendum to seek approval to draft a new constitution might not be necessary, as all power brokers agree that the next step for Atlantis is a new constitution. However, an elected drafting body and a referendum to approve the final constitution would be non-negotiable. Both elements have become standard practices in constitution-making¹⁸⁴, and there should be highly compelling reasons to avoid either — such as significant redundancy (Scenario 1) and or extreme risk of derailment of the process (Scenario 2). In fact, elections to the drafting body and referendums can help acquaint a large portion of the populace with democratic practices for the first time. Both consultative and deliberative public participation can take place pre-drafting and pre-ratification. There might also be a good reason to involve the public during the middle stages through means such as small committees carrying out consultation with members of the public, surveys, and town hall meetings.

182 This was a device utilized in Mongolia (2017) with great success. See Amarzaya Naran, "Insights for Design of Direct Public Participation: Mongolia as a Case Study," Melbourne Forum on Constitution Building, International IDEA, and Constitution Transformation Network, 2019, p. 5.

183 See text body accompanying footnote 88.

184 Ginsburg, Blount, and Elkins, "Does the Process of Constitution-Making Matter?," cit., pp. 204-210.

All of these might help establish the democratic bona fides of the new leaders in Atlantis, both in the eyes of the local populace and the international community. To ensure an inclusive participation process that acknowledges the views of the minority population, an independent institution could be entrusted with overseeing and administering the public participation process.¹⁸⁵ This institution could take into account the cultural practices of Atlantis's minority groups, which may hinder or facilitate inclusive participation.¹⁸⁶ The institution could provide a final report to the drafting body on what it believes are the populace's balanced views on a new constitution. Moreover, to increase the transparency of the process and allow monitoring by the public, civil society, and the media, the broad contours of the entire public participation process could be decided in advance.

Scenario 4: Atlantis has one of the world's highest poverty and lowest literacy rates. It has four distinct ethnic groups, all of whom have their own languages. These ethnic groups have been embroiled in a civil war for several decades. All institutions of governance are destroyed or non-existent. Leaders of the four ethnic groups have agreed to come to the table for a series of peace talks to be conducted over a three-year period. The initial goal of the peace talks is to settle on an interim constitution and transitional government to start the state-building and peace process. The peace talks' end goal is to promulgate a mutually acceptable permanent constitution that provides the framework for the first democratic election in Atlantis. This entire process is supported by various international actors and organizations that have agreed to play a mediatory role. In such a scenario, the ending of a decades-long conflict can take priority over any form of public participation. Considering Atlantis has absolutely no capacity at this stage to carry out an inclusive public participation process, doing so would not be meaningful. Trying to put in place a participatory constitution-making process (even with the help of international donors and international constitutional advisors) could make it hard to reach a consensus, may frustrate necessary elite negotiations, and may provide ammunition for "spoilers" to deny the legitimacy of a text whose content is generally approved by most groups. This could hinder the entire peace process.

Moreover, Atlantis may not have the time to undertake a meaningful participatory process. Prolonging transitional rule could only complicate things. Arguably, the best option for Atlantis at this stage is to reach an initial resolution between the four ethnic groups. Following that, a constitution written with the assistance of constitutional advisors could be agreed upon between different groups. Nonetheless, this constitution might lack social legitimacy (even

185 For the advantages of using such independent institutions, see Ghai, "Civil Society, Participation And The Making Of Kenya's Constitution," *cit.*, pp. 212-235.

186 On why this matters, see Houlihan and Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* *cit.*, pp. 48-49.

though it might have some international legitimacy). Therefore, in the days to come, elites in Atlantis might benefit from accessible and multi-language civic education campaigns that inform the public of the constitution and its contents—at least those relevant to citizens in Atlantis. These campaigns could use television, radio, and print materials in forms like booklets and comic books.¹⁸⁷ There is some evidence dating back to the creation of the American Constitution in 1789 (which was otherwise a flawed and exclusionary constitution-making process) that such campaigns can also help create a constitutional culture and the process of citizenization¹⁸⁸—though obviously not to the same extent as widespread public participation in constitution-making.

These four scenarios obviously do not exhaustively illustrate how sociological reasons can help determine how to carry out public participation. Nevertheless, they help give a broad idea of what type of sociological considerations can be taken into account, not only in deciding whether to involve the public at a particular stage but also in deciding how the public should be involved.

Conclusion

Public participation in constitution-making is favored for both normative and sociological reasons. Though the sociological reasons have undeniable merits, the normative reasons are based on a romanticized assumption that “the people” of a country are the authors of its constitution (or, at the bare minimum, constitutions reflect the people’s will). The reality of constitution-making is that constitutions are the product of political contestation at the moment of their drafting. This reality is unlikely to change, and whether we should try to change it is questionable. Furthermore, insisting on public participation as a normative necessity only provides tools to legitimize undemocratic constitutions.

If we look beyond the normative necessity of public participation, we do not need to worry about conducting public participation ‘just because.’ We are better positioned to assess what goals public participation can achieve in a given society in particular circumstances, the best ways to achieve those goals, and how these goals balance against the possibilities of any potential downsides. This article precisely tries to do this by providing a list of seven guiding principles. As the article argues, these seven principles can capture how to involve the public in constitution-making aptly and simultaneously, allowing us to balance any reasons for concerns. At the same time, these principles also hope to provide directions for constitution-makers on tough (yet not rare) cases where circumstances do not allow for meaningful public participation.

187 All these are commonly used modes in countries with low literacy rates. For more information on the best usage of these modes, see Brandt, Cottrell, Ghai, and Regan, *Constitution-Making and Reform: Options for the Process*, cit., pp. 97-99.

188 See Mazzone, “The Creation of a Constitutional Culture,” cit., pp. 671-672.

This article is only a preliminary step toward examining public participation in constitution-making through a new lens. If the approach presented by this article is worth pursuing, further scholarship is needed. Scholars might need to think of ways that do not rely on the public to legitimize constitutions normatively—ways that are reconcilable with the realities of constitution-making and not highly susceptible to being used to legitimize non-democratic ends.¹⁸⁹ Furthermore, with new empirical developments in comparative constitutional studies emerging almost every day, scholars could further refine or expand the guiding principles suggested by this article. They could also study the best ways to apply these principles to real-world contemporary constitution-making processes and consider their applicability to hypothetical future situations. Another topic that requires refinement and further research is how to best design individual components of a constitution-making process (such as drafting bodies and referendum questions) to ensure meaningful public involvement. Lastly, empiricists must continue studying this topic and developing better methodologies and case studies. This would allow comparative theorists to develop further insights into this very important topic.

It is my hope that this article provides a springboard for better and more realistic discussions on public participation in constitution-making.

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189 For why it might be prudent to think beyond such an approach to the legitimacy of constitutions, see David Dyzenhaus, "Constitutionalism in an Old Key: Legality and Constituent Power," *Global Constitutionalism*, 1, 2 (2012), pp. 229-60. For different ways to think about the normative legitimacy of a constitution, see Sergio Verdugo, "Is it Time to Abandon the Constituent Power Theory?," *International Journal of Constitutional Law*, 21, 1 (2023), pp. 14-79. See also Bernal, "How Constitutional Crowdsourcing Can Enhance Legitimacy In Constitution-Making," cit., pp. 246-249. For different criteria for measuring normative legitimacy, see Harel and Shinar, "Two Concepts of Constitutional Legitimacy," cit. See also Sethi, "Looking Beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining," cit.

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