

# Three Fallacies Undermining Participatory Constitution Making

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In recent years, many emerging actors (e.g., new social movements and parties) associate democratic problems with representative institutions. Accordingly, as a solution, they propose to introduce direct citizen participation in constitution and law making. However, three fallacies undermine the potential benefits of citizen participation: (1) attributing a moral and/or epistemic superiority to “the people”; (2) assuming that superiority, expecting to *replace* representation with direct participation; and (3) supposing that the legitimacy deficit will be resolved automatically by introducing inclusive direct participation. This article argues against these three ideas by providing a framework to understand participatory constitution making and briefly examining the cases of Chile and Iceland.

The history of modern constitutionalism is at least partially a history of a myth, one that only recently has been upended. In the past, the myth was shaped by considering constitutions as the result of social pacts, whereas in fact most of them derived from elites’ pacts.<sup>1</sup> Constitutions commonly were written in processes controlled by a few (Ginsburg, Elkins, and Blount 2009). It is not surprising that in terms of the sociodemographic features of participants, most processes were rather homogeneous (i.e., dominated by men, mainly lawyers, middle-upper class, and white). It was neither a goal nor an ideal to open constitutional processes to any form of participation by ordinary citizens, beyond some referenda of ratification after a draft was written (Méndez and Wheatley 2013).

In times of disaffection, the perceived distance between representatives and those represented is identified as a driver of the democratic legitimacy deficit. Accordingly, to close the gap, it has been proposed to introduce direct citizen participation in policy, constitution, and law making, among other proposals (Eisenstadt, LeVan, and Maboudi 2017). However, recent cases of constitution making displayed massive and well-organized processes of participation but failed to resolve the legitimacy deficit. This suggests that the conditions under which legitimacy is built and the role played by institutions and citizen inclusion are not crystal clear. This is because, as I argue, three fallacies undermine the potential benefits of citizen participation: (1) attributing a moral and/or epistemic superiority to “the people,” which operates as a counter face of populism in reducing citizenship to a homogeneous and uncontaminated unit; (2) assuming that superiority, it is expected to replace representation with direct participation

as if they were opposites and not complementary dimensions of democratic functioning; and (3) assuming that the legitimacy deficit will be resolved simply by introducing direct participation, disregarding other central aspects of the legal and democratic systems. This article expands on these ideas by providing an historical overview of constitution making that concludes with the current wave; analyzing the features (and diversity) of participatory constitution-making processes; and, based on the cases of Iceland and Chile, arguing against the fallacies that undermine the potential of participatory constitution making.

## HISTORICAL CONTEXT: ELSTER’S WAVES

According to Elster (1995), there were seven waves of constitution making worldwide until the early 1990s. The first wave came with the new and novel constitutions elaborated by the American and French revolutions in the eighteenth century, which subsequently came to the new Latin American republics. The second wave swept through Europe following the revolutions of 1848. The third wave came after World War I, with newly created states writing their own constitution (e.g., Poland and Czechoslovakia). In the fourth wave, Germany, Italy, and Japan approved constitutions under pressure for democratization from the victorious allied forces that defeated them in World War II. The fifth wave emerged from the breakup of the European colonial empires, beginning in India and Pakistan in the 1940s and gradually through Africa and the Caribbean in the 1960s. The sixth wave is a result of the restoration of democracy in Southern Europe (i.e., Greece, Portugal, and Spain) and Latin America (i.e., Ecuador and Brazil). The seventh wave broke out in Eastern Europe in the 1990s with the introduction of many new constitutions written after the end of the Cold War.

This overview demonstrates that the writing of new constitutions has been observed frequently in exceptional, disruptive contexts such as decolonization, military coups, and regime changes. Most of these constitutions have in common that citizens were not engaged in their elaboration (Brazil in 1988 is one of the few exceptions), and they have no regular means to directly influence them once in force. An exception in both senses is the Swiss constitution, in which citizens can activate a total replacement by signature collection—something that has never happened—and the few cases in which citizens can introduce constitutional amendments.

Constitutional replacements have been infrequent in stable democratic settings. Negretto (2021) identified only 25 cases between 1900 and 2015. This low frequency is explained by a narrow definition of what a replacement is (e.g., the Argentinian process of 1994 is considered an amendment, not a replacement). Moreover, a strict definition of a democratic setting was required—that is, to be included in the sample, a

participation or deliberation to understand how it is shaped and how it connects to the decision-making process.

#### FEATURES OF PARTICIPATORY CONSTITUTION-MAKING PROCESSES

Institutions of citizen participation refer to an array of forms that can be complementary. Five dimensions help in under-

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new constitution must have been adopted at least five years after the founding election. This was expected to provide a clear replacement of the institutions of the authoritarian regime, excluding cases such as Spain in 1978. Finally, and particularly relevant for this argument, there is a legal explanation for this low frequency: typically, a constitution in force either does not regulate its replacement (e.g., the 1980s Chilean constitution) or it puts in place obstacles that make change difficult.

After the publication of Elster’s (1995) book, there were prominent new cases that shaped what can be considered an eighth wave. This was based on the expectation of including “direct” citizen participation and being “inclusive” (i.e., 13 of the 25 cases included by Negretto occurred in the 1990s)<sup>2</sup> in which the constitutions approved of the so-called political revolutions in Latin America. These included Venezuela in 1999, Ecuador in 2007, and Bolivia in 2009 and also the Colombian and Ecuadorian constitutions of 1991 and 1998, respectively. Other constitutions that resulted from the “Arab Spring” (e.g., Tunisia) can be included—all of them controversial (Welp and Soto 2019).

For those scholars who explain the growing dissatisfaction with representative democracies due to the perception that politicians are part of the elite pursuing their own interests,<sup>3</sup> the introduction of citizen participation is a solution. Despite having diverse and massive participation, the prominent cases of Iceland and Chile failed to provide legitimacy of the new constitutions or approval and implementation. Furthermore, past experiences demonstrate that there are different forms of engagement. When political parties are rooted in society, informal channels could communicate and legitimate the elite’s decision, which should have been the case of Spain in 1978 (García Guitián 2023). Therefore, it is key to consider that (1) legitimacy is not granted but instead built into the process; and (2) there is a need to surpass a superficial concept of

standing the diversity of participatory institutions: (1) timing: when participation is activated (i.e., before, during, and/or after); (2) subject: who can participate (i.e., self-appointed, sortation of citizens (i.e., participants are sorted by lots in assemblies), invited, and/or elected); (3) place: where it takes place (i.e., virtual platforms, assemblies, and commissions); (4) format: how participation is expressed (i.e., signing to submit proposals, deliberating to produce a draft or on a draft prepared by a convention, and/or voting on issues); and (5) outcomes: with which results (i.e., not specified, consultative, or binding). Ordinary citizens can participate by campaigning in elections to become members of the constituent assembly (as happened in Chile), and they can vote to launch a constitutional amendment (as the law states in Switzerland) and/or to ratify the final draft (as in Spain in 1978). Nonpartisan actors can deliberate to produce proposals (as in Ireland in 2018) or on drafts prepared by a convention (as in Ethiopia in 1991–1995).

Empirical evidence shows that referenda are activated in democratic and nondemocratic settings whereas many processes of deliberation have lacked the basic conditions to be fair. It is not surprising that deliberative processes implemented in nondemocratic contexts tend not to meet the minimum requirements to be considered open and plural; however, it is surprising that this happens in many democratic contexts as well (Welp and Soto 2019). This brief overview demonstrates that it is essential to define standards for fair participatory and/or deliberative democratic processes with some degree of influence. Additional lessons are to be learned from recent processes developed with higher standards and in democratic contexts.

#### ICELAND AND CHILE IN FOCUS

Chile (2020–2022) and Iceland (2009–2013) were selected for this study because they both illustrate different dimensions of

the consequences of overestimating the potentialities of including citizen participation. In Iceland, a main obstacle to succeed in approving a new constitution resulted from the lack of connection between the participatory process and the formal institutions (Bergmann 2023). In Chile, the debate is ongoing and there are competing arguments: media manipulation from the right (Piscopo and Siavelis 2022); “a set of identitarian outlooks that has for too long masqueraded as radical politics” (Rojas 2023); and weaknesses of parties and/or ideological representation (Larraín, Negretto, and Voigt 2023), among others. My focus is on how main promoters of direct citizens’ participatory processes trusted in obtaining a more legitimate constitutions, neglecting or underestimating the complexities of building such legitimacy on a daily and an institutional basis.

In Iceland, the attempt to replace the constitution stemmed from social protests over the 2008 financial crisis and the consequent economic collapse. Massive numbers of demonstrators flooded the streets and the politicians became very unpopular. New parties replaced traditional parties. The collapse of the government in 2009 and the call for new elections facilitated what would be a temporary replacement (Olafsson 2016). In 2010, a left-wing coalition came to power and addressed the demand to promote a constitutional replacement. In November, the National Forum began to function with the participation of 950 citizens chosen by lottery. The National Forum was mandated to prepare a proposal that later would be discussed by a parliamentary committee consisting of seven members nominated by the political parties; from there, it would go to Parliament. The draft then was submitted to a commission divided into party blocs, producing a debate that limited the legitimacy of the process. The next step was to convene a constituent assembly consisting of 25 elected representatives. Barely a year after the great mobilization of 2009, only 37% of registered voters went to the polls. The election presented irregularities that led the Supreme Court to invalidate it in January 2011. This decision was highly controversial, which benefited the Parliament main actor’s position, opposed to the replacement. The Parliament nominated the assembly members and, in April 2011, the constituent body began to function, deciding to open up to the citizenry for a “crowd-sourced” constitution. The constitution was approved and submitted for a referendum on October 20, 2012, with a low voter participation rate of 48%. Six questions were approved: in addition to asking about the constitution, specific aspects were consulted, including the ownership of natural resources and the introduction of direct-democracy mechanisms. However, the constitution was rejected by the traditional parties, which had regained their position in Parliament (Gylfason 2014; Olafsson 2016).

On October 13, 2015, President Michelle Bachelet (2006–2010 and 2014–2018) of Chile announced a schedule to change the existing constitution dating from Pinochet’s era despite several amendments (Heiss 2022). The process that was initiated with a participatory experience of “citizen dialogues” did not end with a constitutional replacement as expected. Demands for constitutional change reemerged in October 2019. The increase in public-transportation fares was followed

by waves of protest. Despite the repression, the mobilization did not end, which forced the government to open a dialogue with the opposition parties that set the scenario for constitutional replacement. The agreement included a referendum as a first step to decide whether to change the constitution as well as the appropriate body to conduct the process. In October 2020, more than 78% of Chilean voters approved rewriting the national constitution and—in a second referendum question—opted for a directly elected Constitutional Convention equally composed of women and men (unique in the world) that guaranteed an appropriate representation of indigenous councilors. In mid-May 2021, Chileans elected 155 representatives from more than 1,300 candidates from parties, social movements, and independent candidacies. Despite the low turnout (42.5%), the election reaffirmed Chileans’ commitment to overcome the status quo. Political-party candidates on both the right and the left received so few votes that neither traditional right- nor left-wing forces were able to veto proposals on their own in a convention dominated by independent citizen candidates. The process also was open to other forms of participation. However, on September 4, 2022, the proposed new constitution was defeated: 61.9% against and 38.1% in favor, with a participation rate of 85% in the first mandatory vote.

It has been argued that the problem in Iceland was based on both the prioritization of consensus and the design of the process, which left power in the control of the traditional institutions (Olafsson 2016). In other words, the National Forum that produced the draft constitution operated on a consensus basis, independently of parties. It produced poor results because there was a disconnect with the institutional framework—which partly explains the subsequent failure with traditional parties rejecting the text—whereas the search for consensus from the point of view of “ordinary citizens” produced a vague text susceptible to various interpretations. In Chile, the procedures were clearly established and agreed to; however, this process also was frustrated due to its defeat in the referendum. Of course, is not possible to isolate a single explanation; however, I do consider that the anti-partisan discourse behind both conventions led to an underestimation about the need to work not only on participatory mechanisms but also on building representation channels and connecting the process with formal and informal institutions. This led to an expectation of legitimacy simply because of the participation of independents or ordinary citizens as “the people.” To summarize, in both cases, the more “citizen-driven” nature of the process was not sufficient to reach more legitimacy due to several factors. These include the legal framework in which the process was installed (i.e., Iceland) and the limits of new forms of representation (i.e., civil-society organizations and new parties) to build legitimacy.

#### LESSONS LEARNED

The two cases analyzed in this study suggest that there are fallacies damaging the processes of democratic renewal expected by the promotion of citizen participation. These fallacies have been fueled by the predominance of the idea of self-determination of “the people” and the suspicion that

limitations to exercise that will be imposed by the institutionalization of representation and the rule of law (García Guitián 2023). This led to the idealization of direct participation, which is rooted in Jean-Jacques Rousseau (i.e., the assembly of free and equal citizens as the ideal democratic model) and Hanna Pitkin (i.e., representation as the only available option of putting democracy into action because of the impossibility of implementing direct participation; in other words, representation as “the second best”), and which gave place to the three fallacies.

First, there is no people’s epistemic superiority. Nothing allows us to attribute to nonpartisan leaders or those from social movements “being the people,” acting as spokespersons of the general will and, accordingly, transcending pettiness for the benefit of the whole. A feminist or an environmental activist has a specific agenda and a party also should have a programmatic agenda. “The people” do not comprise an entelechy, and those who act as their representatives should behave according to their conditioning factors (e.g., ethnic, gender, and class). Far from being a problem, this is beneficial given that in greater descriptive representation is the foundation for greater inclusion as a necessary but not sufficient condition. Democracy is a method to organize the plurality of interest with some limits framed by the rule of law.

Second, the mechanisms that put participation and representation into action are diverse and, far from opposed, feed off on another. Participation refers to a multiplicity of formats that in no case eliminate mediation. Members of Parliament participate and represent their electorate in the same way in which a civil-society leader is expected to speak to some extent in the name of civil society. Electoral rules with their validation thresholds and requirements for decision making, the features of leadership, and even the order of speaking—to name only a few aspects—have an influence on a deliberation process and its results.

Third, the legitimacy deficit is not resolved by injecting participation because participation and representation go hand in hand. If either one is absent or severely deficient, the result will be poor. In contemporary democracies, the most widespread method of participation is in elections. Strengthening democracy requires a good design of institutional channels so that citizens can make their voices heard—for example, with popular initiatives that can be activated by collecting signatures—and high-quality representation through parties and social leaders who are recognized and valued.

The reflections in this article were inspired by the defeat of the proposed Chilean constitution, but they are not intended to point out that the overwhelming rejection can be explained by an abstract and unequivocal reason such as “the crisis of representation.” However, this article does seek to draw attention to three fallacies that lead to an underestimation of the weight and complexity of the construction of legitimacy in contemporary democratic systems.

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#### CONFLICTS OF INTEREST

The author declares that there are no ethical issues or conflicts of interest in this research. ■

#### NOTES

1. As with most transitions to democracy, the pacts that conducted the system to democracy ironically were driven by nondemocratic means (O’Donnell, Schmitter, and Whitehead 1986).
2. These cases are Finland 2000, Switzerland 1999, Hungary 2011, Poland 1997, Ukraine 1996, Thailand 1997, Nepal 2015, Bolivia 2009, Colombia 1991, Ecuador 1998 and 2008, Venezuela 1999, and Dominican Republic 2010.
3. For example, in Latin America, *Latinobarómetro* indicated in 2017 that an overwhelming 73% believe that governments rule for a few powerful groups and their own benefit. See [www.latinobarometro.org/latNewsShowLatest.jsp](http://www.latinobarometro.org/latNewsShowLatest.jsp).

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