Conclusion

Hopes and limits of deliberative and democratic constitution-making

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In the past, constitutions were commonly written behind closed doors by a selected group of powerful men (all-male panels). In scenarios of democratization, constituents were directly or indirectly elected (e.g., Spain 1978, the United States in 1787). In autocratic systems, they were nominated by the president and worked under his strict supervision (e.g., Chile under Pinochet in 1980). Inclusiveness and citizen participation were not principles to fulfil. Thus, in terms of the sociodemographic features of participants, most processes were rather homogeneous (dominated by men, mainly lawyers, middle-upper class, white). Also, it was not a goal nor an ideal to open the process to any form of direct participation by ordinary citizens, besides some referendums of ratification (Méndez and Wheatley 2013). Thus, from our contemporary normative ideals, we can wonder if all these processes were illegitimate and/or produced illegitimate constitutions? One can be tempted to answer that they were, but it would be unfair to treat all cases equally as it would disregard that many of these experiences had popular support and ended with a legitimate and durable constitution. In any case, as mentioned in the introduction, building on Elster's description of constitution-making ways, we could consider that the eighth wave we are facing nowadays distinguishes from the previous ones by the role given to ordinary citizens (despite, as this edited volume shows, there are many forms for this participation). Thus, it would be unthinkable to conduct a constitutional replacement in a democracy *now* without any form of direct citizen engagement and without some descriptive representation (including women, ethnic groups, etc.), but it would be equally remiss to assume that a participatory and descriptively inclusive process would guarantee a legitimate and durable constitution.

A constitution is expected to represent, embody, and organize the political, economic, and social life of a given community. A constitution founds the political community – when approved by the original constituent power – but at the same time, it needs to be revised and adapted to historical changes and new demands – through derived constituent power. This expresses the constitution's concrete relevance as well as its symbolic value and at the same time the field of disputes that quite commonly surrounds it (Heiss 2022, Negretto 2020). The requirements that the preparation of a constitution must meet in order to respond to its purpose of providing an accepted common ground have been debated at length (Elster 1995).

The role of citizens in its elaboration is nowadays one of the most prominent, and the main topic crossing the chapters included in this volume. Far from being clear, the topic presents many lacunae.

In theory, a constitution represents 'the will of the people'. However, empirical research shows the complexity of evaluating the fulfilment of that in at least two ways. First, there is *nothing* that can translate, reflect, or express that will *without conflict*: 'the people' are a group of individuals and groups with diverse interests, and many of these interests are complementary while many others are in competition. Second, the ways of articulating the expressions of that diversity are also multiple, and their legitimacy is configured in a certain historical moment and in a specific context (see García-Guitián, Chapter 1; Blokker and Gül, Chapter 2; Zlotnik Raz and Almog, Chapter 6; Kies et al., Chapter 7; Ólafsson, Chapter 10).

An abundant body of literature has argued that participatory constitutions have greater legitimacy and are more likely to survive over time (Hart 2003, Einsenstadt et al. 2017, Contiades and Fotiadou 2016). Another incipient body of studies contradicts this assertion, showing that many constitutions that were not elaborated in participatory contexts have managed to be legitimized and survive over time (Partlett 2012), while some of those elaborated participatively have not achieved that goal (Welp and Soto 2020, Negretto 2020, Saati 2017). The experiences of Iceland and Chile, both emblematic and failing in enforcing a new constitution, are probably the cases that most vividly illustrate the complexity of the debate (more on that below, see 'Participation per se does not resolve the legitimacy deficit'). To provide a more nuanced approach, our edited volume focused on covering the dimensions of the debate on a broader sense and articulating two key dimensions: constitution-making and deliberation, considering how actors (elites, parties, social movements, and civil society, among others) and institutions (political systems, electoral rules, etc.) struggle over ideas and power. Our approach based on Easton's systemic approach of legitimacy distinguishes between three types of legitimacy: input (the nature of representation and participation that deliberative democracy allows for), throughput (the shape and form that deliberation takes), and output (public endorsement, political uptake, and policy implementation). (See Introduction.) Accordingly, the reflections presented in what follows focus on the key dimensions emerging from the chapters included in this volume; it does not operate as a definitive conclusion but as a map of debates, because the included works offer different approaches, sometimes even in conflict, to participatory and deliberative constitution-making. I will centre the conversation on the role and understanding of deliberation, inclusiveness, drivers of institutional change, participation, public opinion formation, institutional designs, ICTs, the connections between participation and democracy, and the assessment of success.

C.1   Deliberation, not a magic bullet but a polysemic concept

In the origins of modern democracies, the legislative body – the Parliament – was designed to represent interests, deliberate and assess different options, and, only

after this, to make the best decisions. The evolution of political parties has eroded this capacity as well as the perception of this capacity, feeding a call to expand citizen participation. Having said that, the meanings of deliberation have been debated for a long time. For elitist theories, Parliaments were exclusively in charge of deliberating, having direct legitimacy provided by the popular election of representatives. Elena García-Guitián (Chapter 1) points out that critical views do not reduce deliberation to Parliament in the same way that there is not a preconceived 'public will' but a process of public opinion formation. In her words:

> The common assumption is that citizens (depicted as a nation, state, people, or citizenry) have not a predefined will that has to be expressed by the representatives, but what can be conceived as the common good should be articulated through public deliberation in institutional (judiciary, executive) and non-institutional (public sphere) settings.

There are also radical theories of democracy that go much further, assuming that deliberation is about self-determination (García-Guitián offers a brief and complete overview of that conception).

The move towards a more radical democracy that self-determination theories support can be traced back to the transition to democracy in Southern Europe and Latin America in the 70s and 80s, and the fall of the Berlin Wall with the consequent expansion of new democracies and new claims to reinvigorate democracy in the 90s. The mechanisms launched to do so have been as diverse as participatory budgeting, local councils, referendums and initiatives, and assemblies chosen by sortition (see Blokker and Gül, Chapter 2; for referendums see Kersting, Chapter 11), as well as the use of ICTs to promote citizen participation (see Kies et al., Chapter 7). In this, there is not only a discussion about who can participate and with what consequences, but also on the type of participation promoted. More recent trends, launched to counteract the legitimacy deficit produced by the 2008 economic crisis in Europe, go beyond the division between those pushing for direct incidence (for whom referendums and initiatives were the prominent mechanism) and others pushing for better quality of decisions (for whom sorted assemblies and other deliberative processes are the best forms), towards a deliberative turn that could combine both (see Blokker and Gül, Chapter 2; Bergmann, Chapter 8).

Far behind the rhetoric of radical democracy and the modest available empirical evidence (i.e., on the reduced capacity of most mechanisms of participation), it is important to understand that while for many deliberation and participation seem to be the solution, it is not so clear what exactly they mean by these terms and how they should be implemented. 'There are many different normative goals: increasing direct citizen participation as a way of self-determination; political education; facilitating self-expression; achieving legitimacy for public decisions; or contributing to the public debate in fairer terms' (see García-Guitián, Chapter 1). There is more agreement on the requirement for inclusiveness.

C.2   Inclusiveness, a necessary but insufficient condition for democracy

The question of who should participate in a constitution-making process directly tackles one of the main deficits of current democracies: the perceived lack of inclusion. Ethnic groups, minorities, women, and children are the main groups identified as under-represented, with different (but also intersectional) characteristics affecting the solutions that can be put on the table. As Mokre and Heiss point out (see Chapter 4),

> it is a question of political contestation and negotiation who counts as a minority and whose rights, therefore, have to be recognized. Also, the importance of "politics of presence" is politically contested as it can be argued that presence (or representation) of a social group is not necessary to represent its rights and interests.

As an example, Zlotnik Raz and Almog (Chapter 6) argue in favour of including children in constitution-making, legislative, and national policy-related deliberative processes. There is an ongoing discussion on the matter, particularly related to the UN Convention on the Rights of the Child (CRC) and the work of the UN Committee on the Rights of the Child (CRC Committee) but also to the growing incidence of youth environmental protests. Children and youth are not a group in the same way that an ethnic minority or women are, given that the condition of children is a transitional one. Nevertheless, there are good arguments to include children and an ongoing discussion on the different alternatives to do so (see Zlotnik Raz and Almog, Chapter 6; also Nishiyama 2017, 2023).

Ethnic groups present a specific challenge for achieving inclusive democracies. In their study of constitutional deliberation in Bosnia-Herzegovina (BiH) and Romania, Gherghina, Hasic, and Miscoiu (Chapter 5) stress that, 'Democratic decisions are understood as legitimate if and only if those subjected to them have the right, opportunity, and capacity to participate in political decision-making'. They analyse the initiatives promoted in BiH, where international organizations had a prominent role, and those launched in Romania, coordinated by political parties with a particular focus on ethnic groups. The two cases show to different extents that the right may exist on paper, but the opportunity and capacity to participate are rather weak. At the same time, they assess to what extent – or if – legitimacy is understood to be derived from direct participation, then many constitutional processes would qualify as democratic.

With very few exceptions, the distance between the discourse in favour of including participation and the current practices looks quite broad in liberal democracies as well as democracies facing populist threats. Kampka and Oross (Chapter 9) analyse the deliberative component of selecting formal and informal, local and national, experiences of political participation in Hungary and Poland (2010–2020) where deliberation was associated with the political transformation of these post-communist countries.

> However, this ideal has not yet been fully achieved. Populism invokes the people's voice without actually allowing citizens to have a say. A tendency

to arbitrary decisions and centralization are still present in the attitudes of the political elite. The appeal to national pride and emphasis on the state's power is not always accompanied by an appreciation of citizen empowerment, even if such slogans appear in political rhetoric.

Both studies of Eastern European countries raise concerns on the goals of participatory processes on different levels, by populist leaders and or by an instrumental and quite weak form of legitimation.

Taking up the case for female participation, Heiss and Mokre (Chapter 4) follow the definition of gender democracy, a system that envisages a democratic process in which the voices, interests, perspectives, and representatives of women are fully integrated and accountable as equals in a deliberative decision-making process. This is aligned with proceduralist conceptions of democracy. Looking at different processes of female participation in law and constitution-making, they observe how varied forms of participation interact and how some could play against others. As an example, they show how the lobbyism of single-issue organizations can hinder an intersectional approach to discrimination by leading to a hierarchy of discriminations. The contradiction then is noted because, 'While democracy has always been defined as a universal principle of general inclusion, it has also always been exclusionary of people as well as of claims'. Thus, again, this is not only about who participates and how, but also about who decides who is entitled to participate, which is the focus of our next remarks.

C.3 Institutional changes are driven and never take place on a blank slate

Institutional change is shaped by political struggles over ideas and power. This happens generally, and particularly in institutions that organize the power distribution. Contemporary new and old democracies – and even non-democratic regimes – challenged by growing citizen dissatisfaction are experiencing a shift towards the inclusion of institutions of participation (Welp 2022). However, to include deliberation and participation does not necessarily imply effectively opening decision-making processes to new actors, as many chapters in this volume show. Institutional changes never take place on a blank slate and never produce results in a linear fashion. The search for the common good is guided by the perspective from which this common good is viewed and is not exempt from being mobilized by particular interests, and in the same vein can be blocked by these (see Ólafsson, Chapter 10). The struggle for normative views engages with the struggle for power, and both strongly condition the results that can be achieved. In this vein, institutional rules are fundamental and insufficient. The power struggle takes place in a given context that shapes the alternatives to resolve conflicts.

The mechanisms that enact participation and representation are diverse and, far from being opposed, feed off each other. Participation refers to a multiplicity of formats that in no case eliminate mediations (see Blokker and Gül, Chapter 2). Electoral rules with their validation thresholds and requirements for decision-making, the features of leaderships, and even the order of speaking, to mention a few

aspects, have an influence on a deliberation process and its results. This discussion is particularly relevant when analysing referendums (see Kersting, Chapter 11) but has been less prominent for other institutions. Processes with apparently more incidences of decision-making, such as those analysed by Heiss and Mokre (Chapter 4), show that

> political struggles need to penetrate and change institutional structures in order to succeed. For this, they make use of democratic procedures – and, arguably, forms of deliberative democracy are more apt to include different political claims than other democratic procedures due to their relative openness to different actors and their commitment to a substantive understanding of democracy.

One of the most prominent discussions on institutional change and deliberation comes from the opportunities and challenges posited by sorted citizen assemblies. This type of assembly seems to represent the ideals of deliberation (while potentially offering the best conditions for informed reasoning) and inclusiveness (allowing the production of descriptive representation through sortition). However, they also attract criticism (see Vrydagh et al. 2023). Stone (Chapter 3) focuses on the specific challenge faced by so-called 'lottocracy' (the idea of promoting sorted assemblies as a replacement for elected legislative bodies) by stressing that deliberative systems theorists have treated the democratic function as a single-dimensional operation embodied by the value of inclusion, but leaving aside a fundamental function that refers to popular sovereignty. Interestingly, not only for this specific conversation but for the whole debate about participatory systems, there is not much discussion on the mechanisms employed to engage people in the decision-making or how to further advance people's participation.

C.4   Participation per se does not resolve the legitimacy deficit

The legitimacy deficit cannot be resolved just by 'injecting participation', because participation and representation go hand in hand. If one is absent or very deficient, the final result will be bad. It is worth recalling that in contemporary democracies the most widespread method of participation is electoral, and decreasing turnout could be also problematic for new forms of participation (an equivalent problem coming from the difficulties of getting participants in sorted assemblies has been observed in recent processes, see Vrydagh et al. 2023). 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 a good quality of representation – parties and social leaderships that have support. Many conditions are required for a participatory process to be fair and meaningful.

The complex relation between participation and representation is illustrated in this volume by the case of Romania (see Gherghina et al., Chapter 5). In 2013, the Romanian Parliament voted to set up the Constitutional Forum as an autonomous

and consultative structure whose aim was to organize debates and consultations with society members regarding the revision of the constitution. Complementary to this, they also set up a Parliamentary Committee whose task was to discuss the proposals coming from the Forum. The Forum coordination team asked for a minimum of six months to deliver a report, and the Parliamentary Committee decided to grant them only two and half months. According to the authors, 'the main consequence of this precipitation was insufficient time to prepare some of the public debates and to draft a coherent and consistent final report'. Thus, the specific conditions under which the participatory and deliberative processes are conducted matter. But not only that, the authors also find that in Romania, ethnic groups chose to not participate or participated to a minor extent because they prefer to be represented by their leaders.

Iceland and Chile's attempts at constitutional replacement illustrate the ideas developed here. Both processes derived from popular mobilization that, each with its distinctions, has in common the rejection of the traditional parties. The participatory elaboration of a new constitution was an axis of the claims that, in both cases, arose from highly innovative processes; in Iceland with the election of a citizen assembly, in Chile with the election of a Convention made up of representatives of parties and citizens, with a majority of independents and new parties. Both processes were successful in producing a draft but failed to get it approved. In Iceland, the Parliament rejected it (see Chapters 8 and 10, by Bergmann and Ólafsson respectively). In Chile, the constitution was rejected in a referendum on 4 September 2022 (61.9% against and 38.1% in favour, with a participation rate of 85% in a first compulsory vote). If the Icelandic experience shows the relevance of articulating participatory processes with representative institutions, the Chilean experience shows that the construction of legitimacy does not automatically derive from the participatory elaboration of laws. Deliberation occupies a prominent place in this debate, because it is expected to produce the best decisions and those having greatest support. However, again, the question arises of the conditions that a deliberative process must meet to be considered democratic and legitimate as well as succeed in reaching the expected outcome in constitutional terms. This connects with our next topic, how to understand and capture 'the will of the people'.

C.5 The will of the people is shaped, not reflected, and is not epistemically superior

The expected superiority of the people has been fed both by a philosophical tradition that has its roots in Rousseau (the assembly of free and equal participants as the ideal democratic model) and reaches Hanna Pitkin (representation as the available option for putting democracy into action because of the impossibility of implementing direct participation; in other words, representation as 'the second best'). In recent times, the so-called crisis of democracy has given space to new voices that have identified the origin of all problems in representative institutions. The *leitmotiv* lies in rejecting political parties, perceived as machines that in the search to achieve and keep power prioritize their electoral strategies over the search for the common good. In doing

so, they cannot find the best solutions to the problems arising in their environments. It is clear that political parties have a notable responsibility for such a perception; however, accepting it does not imply validating alternative fallacies such as considering the people to have an epistemic superiority or supposing that just by injecting participation, the legitimacy deficit will be resolved.

The fact that the parties are not working well does not lead to identifying the people's epistemic superiority, although neither does this claim lead to rejection of the need for popular sovereignty. Nothing allows us to attribute to non-partisan leaders or those from social movements the idea of 'being the people', acting as spokespersons for the general will and accordingly transcending pettiness for the benefit of the whole. This is because 'the people' is not an entelechy but a diverse collection of individuals living in a community, grouped according to agendas in dispute; and those who act as their representatives cannot get rid of their conditioning factors (ethnic, gender, class, etc.). Far from being a problem, this is good given that in greater descriptive representation lays the foundation for greater inclusion (on that, see Chapter 5). Stone (Chapter 3) goes further in this discussion to show that epistemic democrats have no problems designing deliberative systems with a critical focus on their epistemic potential, but other democratic theorists fear that the focus on epistemic considerations necessitates the sidelining of democracy. As already mentioned, and part of a broader debate, there are challenges coming from the side of authorization and accountability.

Public opinion is shaped and context matters. Ólafsson (Chapter 10) deals with the issue by analysing the case of decolonialism and constitution-making in Iceland, Greenland, and the Faroe Islands. His main argument is that the decolonial agenda undermines deliberation: 'Once national identity is at stake and the values and priorities that characterize the nation or culture come to the foreground, deliberation on a future political community tends to be seen as a less important issue'. One of the arguments in favour of changing the Icelandic constitution is, however, that the constitution inherited from the past colonial period with minor changes needs to be understandable to ordinary people and not a complicated legal text needing expert interpretation to be properly read and appreciated. But again, this does not necessarily create space for a deliberative process engaging the public. Something similar happens in Greenland where, according to Ólafsson,

> the political parties that campaign for independence may not be under pressure to submit to a real deliberative process because their supporters emphasize the independence drive and the general goal of separation, not only political but also cultural, from Denmark – rather than looking critically at the individual issues actually covered by the constitution.

It is in this sense that the author argues that the decolonial argument creates a pseudo-consensus emerging from an apparently incontestable claim. Interestingly enough, a similar path emerges under populist leaderships, wherein it seems to be clear what the will of the people means and who purports to be entitled to incarnate it in an uncontested way (Welp 2022).

C.6 The central relevance of institutional designs

Institutional designs have an impact on how a process of participation is conducted and the outcomes achieved. If, for example, citizen initiatives are under consideration, it is relevant to define the number of signatures required, if there are certain topics excluded from the discussion, or a set time given to collect signatures. There are multiple examples and systematic studies showing the extent to which design affects performance. In a study of 29 citizen deliberation cases in constitution-making processes, we found that the characteristics of the mechanism of participation (the extent to which complete information was provided, there was enough time for a reasoned debate, and the degree of openness and plurality of the process) and the method of content processing (if it existed, had been previously communicated, derived from reports that allow traceability, and establishes a link with the constituent process itself) were highly relevant for the deliberation to be deemed fair and democratic (Welp and Soto 2020). The combination of results attributed to the two dimensions identified allowed the classification of five types: (i) 'symbolic' deliberative processes (neither the participatory mechanism nor the systematization procedure meets the minimum requirements); (ii) 'prejudiced' (the mechanism manages to attract a significant number of actors, is planned and has time to be developed, but the processing is deficient, being controlled by the government, with different levels of lack of transparency; exemplified by the case of Cuba in 1976 – no transparency at all – and 2018 – when documents are available); (iii) 'participatory overflow' (when deliberation is relatively plural and inclusive but there is little planning and even fewer methods of processing the generated content); and, finally, (iv) 'constituent openness' and (v) 'constituent participation', both of which have plural and inclusive participation and clear outcomes, but only the latter has this in direct connection with the formal constitution-making body (see Welp and Soto 2020).

Bergmann (Chapter 8) shows that institutional designs also play a role explaining the different outcomes of the Icelandic and Irish processes of constitution-making. He points out three main differences: in Iceland, the constitutional body was directly elected, in Ireland, randomly selected; the ambition of the Icelandic experience was big, a general change, in Ireland, it focused on concrete points; the Iceland deliberative Forum was purely composed by citizens, whereas Ireland mixed citizens and civil servants.

> The Icelandic and Irish cases each have their strengths and weaknesses. The strength of the Icelandic process lies in its grand design of using many different instances of public debate; a randomly selected forum, specialist committee, nationally elected assembly, and a general referendum. Here the very variety of means is helpful for future designs of such processes. Citizen panels can, thus, be either randomly selected or elected. However, some sort of random selection is favourable. The main lesson from Ireland, however, indicates that involving politicians in the process can help to secure output legitimacy (Bergmann, Chapter 8).

C.7   It is about politics: The potential and limits of ICTs

Let us also consider the promises and pitfalls of digital media use for improving democracies. Even if the world remains far from the utopian vision of digitally connected participatory democracies, assessing where we are and the prevailing direction of change is not clear, as technological change proceeds rapidly and with multiple and often unpredictable effects. There was a time of great expectations for the role of ICTs to promote democracy, and a time in which it became quite clear that the effects were more about 'preaching to the converted' (Norris 2003). The rise of social media later had a powerful double effect, changing the prior trend. On one hand, right-wing extremists pushing disinformation and 'fake news' have found fertile ground for fomenting their views. On the other hand, social movements focused on addressing climate change and advancing racial and gender equality have also been able to amplify their voices and engage new activists through social media, as the experiences of Fridays for Future or Black Lives Matter demonstrate. If we move to the study of more institutionalized actions aiming to include participation in law and constitution-making, the panorama is less clear.

Kies et al. (Chapter 7) propose a typology of the online hybridization of consultation processes that helps us to understand the extent to which the online parts of the processes affect inclusiveness and the outputs of the reforms. Their departure point is that digital tools are broadly used to inform and interact with the general public, and could be essential in involving lay citizens in constitutional reform processes. They review five constitutional consultation cases (Iceland, Estonia, Latvia, Luxembourg, and the German region North-Rhine-Westphalia) to explore their inclusiveness (defined as the ICT's contribution to involving the general public in the constitutional reform processes) and effectiveness (understood as the inputs made by online participants affecting the agenda-setting and constitutional amendments). Their findings dismiss the expectations. In the authors' words:

> We saw that bottom-up initiatives are taken over by the government or Parliament. In these cases, the government tries to dominate the agenda setting. Regarding the topics open for discussion, in some cases citizens were free to discuss any constitution-related topic (such as in Luxembourg and Iceland), while for other cases, the scope of discussion was limited to certain topics (Estonia and WBR).

Their analysis shows important deficits in the design and implementation of digital participation that undermine the potential for ICTs to foster a revitalization of democracy. The main reason for this happening is much more related to the factors driving institutional change and struggles for the meaning of deliberation than to the potential or limits of ICTs as tools.

C.9   Participation is not democratic by default

The erosion of democracy and the increasing appeal of hybrid and autocratic leaders to 'the will of the people' calls attention to the connection between participation and democracy. There was an overly optimistic view of what participation

could produce, while the constraints under which participatory institutions were developed were underestimated. This explains why they were not able to minimize the ongoing worldwide democratic erosion. It is worth considering that even if constitutions are pillars of democracy, a constitution could also play a role in promoting or consolidating authoritarianism, and that authoritarian or hybrid regimes could also be interested in launching some forms of citizen participation. Just as an example, it is quite clear that in Hungary, Viktor Orban has undermined the independence of the judiciary and challenged political and human rights – such as elections, the right to asylum, and the right to assembly – while promoting legal changes including mechanisms of citizen participation. Referendums seem to be a common practice in hybrid and authoritarian regimes. A presidential system was introduced in Turkey by Recep Tayyip Erdoğan through a controversial referendum in 2017, ending a debate about liberal constitution-making of the previous decades. Why, if Orban and Erdoğan seem to govern without restrictions, would they be interested in changing the rules? Dictators also need information and want to control present and future options. It is rare for dictators to step down, but when they do accept, it is because they have a feasible alternative. So, constitutions are expected to provide future solutions for the members of the regime as well as some form of domestic and international legitimacy. They need to perform in front of potential domestic opponents (sometimes also within the regime) as well as in front of international pressure.

Referendums are not only implemented in democracies but also in autocracies; for example, modern autocracies implement deliberative instruments, as shown by Russia (Kersting, Chapter 11). Here, direct democracy is often used as a symbolic vote in favour of the incumbent authoritarian ruler (see Kampka and Oross, Chapter 9; Kersting, Chapter 11). Authoritarian leaders also need and want this symbolic additional base of legitimacy. In some cases, they have to use 'pork barrel' strategies and additional electoral gifts to secure the support of political clientelist networks and voters.

> In fact, we can see that deliberative participation and outreach programmes became part of these modern authoritarian regimes. In these cases, it is obvious that modern authoritarian regimes try to control the process of dialogue. This deliberation is often either in a very local parochial new clientelist network or strongly influenced by an atmosphere of intimidation of the political opposition (Kersting, Chapter 11).

C.10 What does success mean?

Let us discuss, finally, the notion of success. The results of the Chilean constitution-making process at the end of 2022 illustrate the many dimensions on the table (for an overview of the background, see the introduction and Mockre and Heiss chapter). Let me focus on two explanations for the overwhelming rejection of the draft constitution in the plebiscite in Chile on 4 September 2022. One maintains that the constitutional proposal was defeated because it was bad, i.e., a long and disjointed list of good wishes, too ambitious, incoherent; in short, unfeasible. The

other explanation affirms that the Convention lacked legitimacy, primarily because the vote as a method of selection inhibits ordinary citizens and catapults partisan actors and the most radical to the fore. Further, there was low participation: it would not be really representative. These ideas come from almost opposite backgrounds – one more attached to the status quo, the other characterized by expectations of radical transformation of democracy. Curiously, they converge in pursuing the displacement of models of direct citizen authorization by supposedly neutral procedures; one claims to be technical, the other epistemically superior. Both start from false assumptions.

For those for whom the constitution itself was bad, the solution is for the experts to take the reins with an elected assembly that would accept their guidance. However, any institutional decision has pros and cons. A majoritarian electoral system values governability. A proportional model values representativeness. Over-representing the vote in rural areas can be seen as something unfair from the centre but, from the peripheries, it is a way of not being ignored given their irrelevant electoral weight. There are no technical solutions but good (not perfect) institutional designs that must be endorsed by the majority. The black hole of the proposal is: who decides which experts sit at the table?

Those who allege that the Convention lacked legitimacy suggest an assembly made up of people selected by lottery following sociodemographic criteria (age, gender, educational levels, territorial, etc.). This would achieve descriptive representation in that it would be a mirror of society. These people would draft the constitution without interference from political-partisan interests, in ideal conditions for informed debate, with time and access to fundamental information provided by the experts coordinated by a moderator. However, this proposal is based on a mistake. That an assembly is descriptively representative does not make it legitimate in the eyes of the citizenry. The Convention was legal and legitimate, but it did not manage to maintain its legitimacy and keep public support. Nothing can guarantee that an assembly chosen by sortition will have legitimacy for the sole fact of being descriptively representative. It might work, or it might not. On the other hand, organizing a participatory process from a laboratory would be undemocratic if there is no citizen demand or authorization to do so.

The constitutional proposal was rejected due to a multiplicity of factors that will continue to be analysed, but we already know that there are not 17 million constitutionalists in Chile, nor in the history of the formation of public opinion has there been a people's will that emerged in abstract, from isolated individuals. With good or bad methods, some campaigns were more effective than others. In addition, it is false to say that the problem was the absence of technical knowledge. The transparency with which the Convention worked saw a multiplicity of people invited to provide information and arguments about electoral systems, decentralization, and mechanisms of direct democracy, among many others. The Chilean academy was involved, as were many scholars from abroad. Last, to think that 'the experts' possess the truth and have no ideology is simply nonsense or manipulation. In a few words, success can be assessed in terms of the participatory process, the legitimacy reached and the results achieved, and evaluations could differ from one to the other.

C.10.1   *Final words*

In general and with few exceptions, the institutions of participation engaged for constitution-making have been mostly limited in their effects on democracy, and in many cases, controlled by political incumbents in ways that reduce the impact or autonomy of participants. In cases of more radical citizen participation, success was limited – at least in approving a constitution (Iceland and Chile). The counter example is Ireland, where a good combination of sorted assemblies with referendums and interaction of representatives offers more room for inspiration. Positive, democracy-enhancing effects are more likely under certain formal conditions, mostly related to their institutional design, and informal conditions, such as political actors' behaviour and acceptance of rules, among others. Digital participation shows a similar path but with an even more reduced impact and more weaknesses in their institutional design and implementation. Revolutionizing democracy by including citizens in decision-making processes has been one of the great hopes since the 1990s. More than 30 years later, the focus in much of the democratic world is on impeding democratic backsliding. There is a need for better participatory institutions, not simply more, because just 'more' can serve to weaken, distract, or diffuse social demands.

References

Contiades, Xenophon and Fotiadou, Alkmene (2016). *Participatory Constitutional Change: The People as Amenders of the Constitution.* Nueva York: Routledge.

Einsenstadt, Todd, LeVan, Carl and Maboudi, Tofigh (2017). *Constituents before Assembly*. Cambridge: Cambridge University Press.

Elster, John (1995). Forces and Mechanisms in the Constitution-Making Process. *Duke Law Review*, 45(2), 364–396.

Hart, Vivien (2003). *Democratic Constitution Making*, USIP, Disponible en la web: https://www.usip.org/publications/2003/07/democratic-constitution-making.

Heiss, Claudia (2022). What Can a Constitution Do? Seeking to Deepen Democracy through Constitution-Making in Latin America. *LASA Forum*, 53(3), 10–15.

Méndez, F. and Wheatley, J. (Eds.) (2013). *Constitution-Making and Popular Participation*, London: Ashgate.

Negretto, G. (2020). New Constitutions in Democratic Regimes. In Negretto, G. (Ed.), *Redrafting Constitutions in Democratic Regimes* (pp. 1–30). Cambridge: Cambridge University Press.

Nishiyama K. (2017). Deliberators, Not Future Citizens: Children in Democracy. *Journal of Public Deliberation*, 13(1), Art. 1. https://doi.org/10.16997/jdd.267

Nishiyama, K. (2023). Deliberation in citizens' assemblies with children. In Reuchmaps, M., Vrydagh, J., and Welp, Y. (Eds.), *De Gruyter Handbook of Citizens' Assemblies*. Berlin, Boston, MA: De Gruyter.

Partlett, William (2012). The Dangers of Popular Constitution-Making. *Brooklyn Journal of International Law* 193, 193–238. Disponible en: https://ssrn.com/abstract=1924958

Saati, A. (2017). Constitution-Building Bodies and the Sequencing of Public Participation: A Comparison of Seven Empirical Cases. *Journal of Politics and Law*, 10(3), 13–25 https://doi.org/10.5539/jpl.v10n3p13

Reuchmaps, M., Vrydagh, J. and Welp, Y. (Eds.) (2023). *De Gruyter Handbook of Citizens'*
Assemblies. Berlin, Boston: De Gruyter.

Welp, Yanina and Soto, Francisco (2020). Beyond Fashion and Smokescreens: Citizens'
Deliberation of Constitutional Amendments. *ConstDelib Working Paper Series*, no. 7.

Welp, Yanina (2022). *The Will of the People. Populism and citizens participation in Latin*
America. Berlin: De Gruyter.