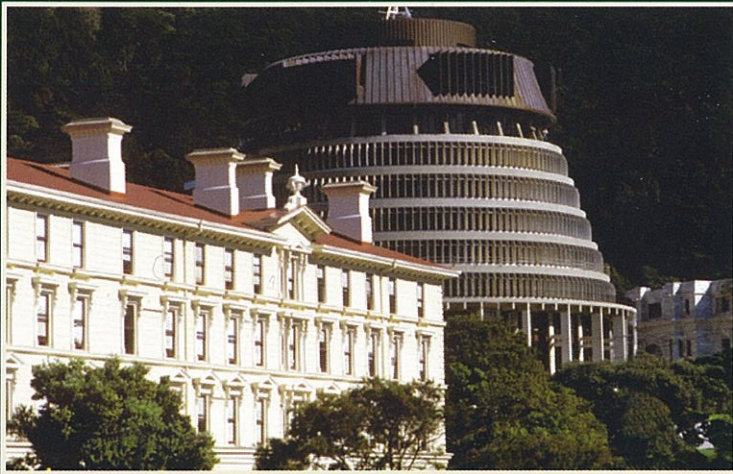


New Zealand Journal of Public and International Law



VOLUME 9 • NUMBER 1 • JUNE 2011

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

The Hon Sir Anthony Mason AC KBE
Stephen Rivers-McCombs
Zuryati Mohamed Yusoff

Joel Colón-Ríos
Cristiano d'Orsi

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



FACULTY OF LAW
Te Kauhanganui Tātai Ture

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2011

The mode of citation of this journal is: (2011) 9 NZJPL (page)

The previous issue of this journal is volume 8 number 2, December 2010

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power <i>The Hon Sir Anthony Mason AC KBE</i>	1
Notes on Democracy and Constitution-Making <i>Joel Colón-Ríos</i>	17
Planning in Wonderland: The RMA, Local Democracy and the Rule of Law <i>Stephen Rivers-McCombs</i>	43
Which Legal Protection for Migrants in Sub-Saharan Africa <i>Cristiano d'Orsi</i>	83
The Malaysian Personal Data Protection Act 2010: A Legislation Note <i>Zuryati Mohamed Yusoff</i>	119

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw and Informat electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the New Zealand Law Style Guide 2010. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

NOTES ON DEMOCRACY AND CONSTITUTION-MAKING

*Joel I Colón-Ríos**

This article explores the relationship between democracy and constitution-making. It begins by advancing the view that constitution-making, given its episodic nature, makes possible the use of certain procedures and mechanisms that cannot be generally used in the context of daily governance, even though they appear to have a strong democratic pedigree. After establishing the general approach to democracy and constitution-making in which the article rests, the author examines the legal and political practices that make the act of creating a new constitution consistent with basic democratic principles. In so doing, it develops a set of criteria that must be met for a constitution-making episode to be considered democratic.

I Introduction

Not all constitutions are born equal, or at least they are not born through the same kind of processes.¹ Some, like the Constitution of the United States of 1787 and the Bolivian Constitution of 2009, are drafted by extraordinary assemblies and then subject to some form of ratification.² These assemblies can be distinguished from those that exist under a provisional government that might operate in a context where the old constitution had been abolished and a new one is not yet in place.

* Lecturer, Faculty of Law, Victoria University of Wellington. I am grateful for Rayner Thwaites' excellent comments and critiques of a previous draft of this paper.

1 This brief discussion on different constitution-making methods partly relies on the excellent analysis by Andrew Arato "Forms of Constitution Making and Theories of Democracy" (1996) 17 *Cardozo L Rev* 191.

2 In the case of the US Constitution, ratification by state legislatures; in the case of the Bolivian Constitution, ratification by referendum. Another important difference between these two assemblies is that, while the Bolivian Constituent Assembly was commissioned by the Bolivian electorate (through a referendum) to write a new constitution, the Philadelphia Convention was only commissioned with the revision of the Articles of Confederation, but decided to adopt an entirely new constitution and create a new federal regime. See Richard S Kay "The Illegality of the Constitution" (1987) 4 *Constitutional Commentary* 57 at 63–64. Perhaps more important is the fact that while the participation in the Philadelphia Convention was limited to a small elite of white and affluent men, the Bolivian constituent assembly, convened more than 200 years later, was mostly composed of delegates from traditionally marginalised groups (especially indigenous groups), which formed a majority of the population.

This type of assembly, like the Weimar National Assembly of 1919, exercises ordinary legislative functions, in addition to being a constitution-making body.³ There is also the possibility of "parliamentary" constitution-making, under which the constitution-making body is not an extraordinary assembly but an ordinary legislature (or a combination of the two houses of the legislature). This model was followed by Spain in 1977, by the Czech and Slovak Republics in 1992, and by South Africa in 1996. A fourth possibility is the creation of a constitution by the executive power, as in the case of Russia's constitutional crisis in 1993.⁴ To these four models of constitution-making one could add the possibility of constitutions written or imposed by external actors. Perhaps the most famous example of this "model" is the case of Japan, whose supreme law was written by American experts and translated into Japanese during the post-war occupation.⁵

If asked which of these types of processes has a greater democratic potential, one would probably agree that the last one (the imposed constitution) is simply anti-democratic, that the "executive model" at the very best could only have a very "weak" claim to a democratic pedigree, and those models in which an elected assembly is the constitution-making body have the greatest democratic potential. It is not clear, however, whether the democratic (or undemocratic) nature of a constitution-making episode depends on how a constitution-making body is elected, how its powers are conceived and how the constitution is ratified. The main objective of this paper is thus to propose a set of criteria that can assist us in characterising a constitution-making episode as democratic.⁶ Focusing on the making of new constitutions makes written constitutions the main

3 As will be seen later, assemblies commissioned with an unlimited constitution-making power (for instance, constituent power), sometimes also engage in the adoption of ordinary laws, even while co-existing with an elected legislature.

4 There is also the possibility of constitution-making as an evolutionary process, which is characteristic of countries with unwritten constitutions such as New Zealand and the United Kingdom. Insofar as both the "evolutionary" and the "parliamentary" models do not generally allow for the direct participation of citizens in the making and re-making of constitutions, they are both subject to similar critiques which will be discussed later. In that respect, and apart from a few incidental comments, this paper is focused on the creation of written constitutions. An additional, clearly anti-democratic model could be represented by constitutions imposed by a military government. Here, the case of the adoption of the Fundamental Rights and Freedoms Decree 2000 in Fiji by a military government is illustrative. For an overview, see NW Barber "State, Necessity and Revolutionary Legality in Fiji" (2001) 117 LQR 408.

5 For a discussion see Jon Elster "Ways of Constitution-Making" in Alex Hadenious (ed) *Democracy's Victory and Crisis* (Cambridge University Press, Cambridge, 1997) 123 at 127 ["Ways of Constitution-Making"]. More generally see Noah Feldman "Imposed Constitutionalism" (2005) 37 Connecticut L Rev 857.

6 This argument should not be understood as suggesting that there cannot be a democracy without a democratically enacted constitution. For example, most people would say that Chile is today a democratic country even though it operates under a constitution that, while amended in important ways, was originally adopted under Augusto Pinochet's regime. That is to say, the paper rests on a distinction between democracy at the level of constitution-making and democracy at the level of daily governance; and it is focused on the necessary conditions for the existence of the former.

object of the paper. While in the context of an unwritten constitution one can identify particular moments of constitutional change (such as when Parliament amends or repeals a constitutional statute or codifies and alters a constitutional convention), the phrase "constitution-making episode" will be used here to refer to the activity of producing a written constitution.

In developing the criteria of a fully democratic constitution-making episode, the paper will defend certain institutions and practices as consistent with democracy, and therefore with the idea of making constitutions democratically. Naturally, establishing such criteria involves the adoption of a particular conception of democracy. This paper will operate under a conception of democracy (which will be developed below) according to which constitution-making should be characterised by a process in which citizens are allowed to take part in the discussion, drafting and ratification of the constitution through highly participatory procedures and take place in a context in which citizens are free to adopt any constitution they want, without finding any substantive limits in established positive law. However, the paper recognises that in some particular contexts a fully democratic constitution-making episode is not an actual possibility, and it is at many times an unreachable ideal. For example, countries sometimes adopt constitutions while under military occupation, and in other cases conflicts between different groups make any prospects of deliberation and debate among the entire citizenry highly unlikely. In that sense, although the paper will frequently refer to past constitution-making episodes in a number of countries (characterised by very different histories and political realities), the purpose of those examples is simply to show the ways in which institutions similar to the ones presented here as an integral part of a democratic constitution-making process have actually been used in the past, not to suggest that they are fully transplantable to any context.

Part II of the paper begins by advancing the view that constitution-making, given its episodic nature, makes possible the use of certain procedures and mechanisms that, even though they appear to have a strong democratic pedigree, are not generally used in the day to day governance of countries that identify themselves as democracies. The paper then suggests that the reason why these mechanisms, although not routinely used by contemporary democracies, appear to be connected in important ways to the democratic ideal is that they facilitate the realisation of democracy's basic components: democratic openness and popular participation. After establishing the general approach to democracy and constitution-making in which this paper operates, Part III examines the specific political practices that make the act of creating a new constitution consistent with democracy's basic components. In particular, the paper argues that a democratic constitution-making episode should be characterised by the following features and practices: a popularly elected constituent assembly, extensive popular participation in all stages of the process (from the discussion of the need of a new constitution to the ratification of the constitutional text), strong popular support for constitutional change, a constitution-making body which is not limited by any form of positive law or subject to external limits, and a constitution-making act that does not result in the abolition of democracy. Part IV offers a brief conclusion.

II *The Basic Components of Democracy*

There is wide disagreement between scholars and politicians about the particular institutions and political practices required by democracy, even though democracy's literal meaning seems to be straightforward. That is to say, democracy means "rule by the people" but it is not clear how the people can actually rule themselves in a contemporary society characterised not only by a large population but also by deep disagreements about fundamental political questions and sometimes by serious tensions between majority preferences and minority rights. Thus, for instance, proponents of liberal democracy qualify the idea of the "rule of the people" by maintaining that certain rights and liberties should take priority over the decisions of the majority.⁷ Participatory democrats, while not necessarily disagreeing with liberal democracy's emphasis on individual freedom, focus on the need of more opportunities for direct citizen participation in the making of political decisions.⁸ Deliberative democrats emphasize instead the importance of institutions that promote the exchange of rational arguments about possible political decisions (institutions that do not necessarily involve opportunities for direct participation and that might not be subject to the same kind of limits recommended by liberal democracy).⁹

Instead of subscribing to one of these conceptions, this paper will identify certain basic components present (in different degrees and emphasis) in these and other democratic theories, and explore what their full realisation in the context of constitution-making would entail. As noted above, in proceeding in this way, the paper will inevitably advance a particular conception of democracy. However, it will be a conception of democracy directed towards the activity of constitution-making, as opposed to the daily functioning of a constitutional regime. The exceptional nature of constitution-making will tend to reduce, to a certain extent, the kinds of disagreements that tend to characterise discussions about democracy. Thus, for example, liberal, deliberative, and participatory democrats might disagree about the scope of the power of legislative majorities, about whether judges should be able to strike down statutes inconsistent with certain constitutional principles, and about whether the use of referendums and other mechanisms of direct democracy are desirable in a contemporary society. However, in the context of constitution-making, most democrats would agree that the people possess an unlimited constitution-making power, and that the

7 See Ronald Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, 1996).

8 See Benjamin R Barber *Strong Democracy Participatory Politics for a New Age* (University of California Press, Berkeley, 1984).

9 Amy Gutmann and Dennis Thompson *Democracy and Disagreement* (The Belknap Press of Harvard University Press, Cambridge, 1996).

process of creating and ratifying a constitution should generally be more participatory than the ordinary activity of law making.¹⁰

The conception of democracy presented here will take that proposition to its natural conclusion and maintain that, in an ideal constitution-making episode, citizens would come together, as political equals, and exercise their unlimited constitution-making power through the most participatory mechanisms possible. These two ideas (unlimited constitution-making power and citizen involvement in the creation of the fundamental laws) can be expressed through the ideals of *democratic openness* and *popular participation*, which I have characterised elsewhere as the basic components of democracy.¹¹ While most democrats would agree that these basic components must play a fundamental role in a democratic constitution-making episode, there are some good reasons to conclude that, in the context of day to day governance, they cannot (or should not) be fully realised. In some cases, they simply cannot be realised for practical reasons. For example, it might be ideal to have a sovereign legislative assembly composed of all the human beings subject to the relevant legal system deliberate on the creation of all laws, but such an institution is simply unthinkable in countries composed of millions, or even hundreds of thousands of persons. In other cases, a particular institution that appears to promote popular participation might be rejected because it is believed to produce bad outcomes.

The typical example would be the citizen initiated referendum. Even though a citizen initiated referendum can in principle be characterised as a highly democratic institution (it gives citizens the power to require the government to trigger a referendum on a particular legal change), one could oppose it for practical reasons. For example, it can be argued that people are generally uninterested in this kind of process, that very low voter turnouts make it difficult to interpret the results, and that referendum questions tend to be vague, especially when the subject matter is complex.¹² Thus, while we may say that the adoption of certain mechanisms might be said to "advance" democracy, to increase the democratic credentials of a particular constitutional regime by augmenting the opportunities for direct citizen involvement in policy making, it may be that in certain situations,

10 Even Ronald Dworkin, a liberal democrat who is always distrustful of popular majorities meddling with the constitutional text, seems to agree: "There seems only one way in which a society that aspires to be a democracy should decide what abstract principles or rights to declare in its constitution. It should do so by popular referendum". Ronald Dworkin "Constitutionalism and Democracy" (1995) 3 *European J of Philosophy* 2 at 10.

11 See Joel Colón-Ríos "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform" (2010) 48 *Osgoode Hall LJ* 199; Joel Colón-Ríos "The End of the Constitutionalism-Democracy Debate" (2009) 28 *Windsor Review of Legal and Social Issues* 25.

12 These are, in fact, some of the critiques put forward in New Zealand against the *Citizen Initiated Referenda Act 1993* (which allows citizens to trigger non-binding referendums through the collection of signatures). See Bridget Fenton and Andrew Geddis "Citizen Initiated Referenda" (2009) *NZLJ* 334. In most countries in which this mechanism is available, like Uruguay, Switzerland, and several states of the United States, the result of the referendum is binding on government.

"advancing" democracy is not necessarily a good idea.¹³ However, as noted earlier, these limits to a fuller realisation of the basic components of democracy at the level of daily governance do not seem to apply in the same way in the context of constitution-making.

Constitution-making represents an exceptional moment in the life of a state, one in which political practices that are not possible on a day to day basis become possible and sometimes acquire a different meaning. Thus, for example, even though it is not possible to have a government by referendum (one in which every single law must be ratified by the electorate before it comes into effect), and even when the very institution of the referendum might be subject to many different types of critiques, most people assume that some sort of direct participation of the people is necessary and desirable in the context of constitution-making.¹⁴ Similarly, while it is almost universally agreed that the main institution of a democracy is an elected legislative assembly, constitution-making might make possible (or desirable) the use of extraordinary assemblies convened specifically for the purpose of making a new constitution. The next two sections will examine in more detail what I have called the basic components of the democratic ideal: the ideal of democratic openness and the ideal of popular participation.

A The Ideal of Democratic Openness

To say that democratic openness is a basic condition of democracy is to say that a democratic society is an open society, that is, one in which even the most fundamental principles are always susceptible of being reformulated or replaced through democratic procedures. Democratic openness welcomes conflict and dissent, and it is incompatible with untouchable abstract principles. To paraphrase Castoriadis, a democratic society is "not a society that has adopted just laws, once and for all, rather is a society where the question of justice remains constantly open".¹⁵ This conception of an open society is directly related to the principle of the "rule by the people" in one fundamental sense. To say that the people rule themselves is to say that they are a "self-governing" people: a group of human beings that come together as political equals and establish the institutions under

13 On this point, see Richard Mulgan "The Meaning of Democracy" in *Democracy and Power in New Zealand: A Study of New Zealand Politics* (Oxford University Press, Melbourne, 1984) at 44.

14 Consider, for example, the following statement by Geoffrey Palmer and Matthew Palmer on the Citizen Initiated Referenda Act: "The Act should be repealed. It appears to offer a chance for citizens to influence policy but in substance that opportunity is like a mirage in the desert. Referenda should be reserved for those few and important issues of constitution and conscience that should be bound by the people's voice". Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Melbourne, 2004) at 245.

15 Cornelius Castoriadis "Socialism and Autonomous Society" (1980) 91 *Telos* 104. See also Allan C Hutchinson *It's All in the Game: A Non-Foundationalist Account of Law and Adjudication* (Duke University Press, Durham, 2000).

which they live. In the context of constitution-making, this involves two important and related points.

First, for a constitution to be the people's own, its content must be freely determined by today's people, not past generations, however wise or well-intentioned their act of constitution-making was, or whatever the content of the provisions they adopted. This does not mean that every generation must engage in the creation of a new constitution (as Thomas Jefferson and Jean Jacques Rousseau seem to have believed),¹⁶ but that they must be free to do so and that if they do, the content of the new constitution must also be freely determined. In that sense, the idea of pre-commitment (perfectly attuned to the logic of constitutionalism) cannot be brought to an easy reconciliation with democracy.¹⁷ A self-governing people must be able to formulate and reformulate their fundamental commitments democratically. Second, for there to be democratic self-rule, no rule can be taken for granted or be impossible (or virtually impossible) to change.¹⁸ As Claude Lefort has put it, democracy allows "no law that can be fixed, whose articles cannot be contested, whose foundations are not susceptible of being called into question".¹⁹ This openness, of course, is always a "limited" openness, because for a rule to be truly open to change, practices such as criticism and dissent must be possible, and this requires that rights such as the freedom of speech and association are respected.

These limits to democratic openness, however, are the limits of democracy itself. Consider the case of a people that decides to abolish a constitution that provides for institutions that allow for democratic self-rule and to adopt a new one that empowers a sovereign dictator. In this kind of situation, one must distinguish between the procedure by which a decision is taken (for example, a

16 Jefferson thought that at set periods of time (every time a new generation came into place, which occurred every nineteen years according to his interpretation of the European tables of mortality), all laws and institutional arrangements should lapse and periodic constitutional conventions should be convened to decide on the content of the constitutional regime. Thomas Jefferson *Writings* (Merrill Peterson ed) (Library of America, New York, 1984) at 1402. Rousseau had a similar view, proposing periodic assemblies "that should always take the form of ... two propositions that may not be suppressed, which should be voted on separately. The first is: Does it please the Sovereign to preserve the present form of government? The second is: Does it please the people to leave its administration in the hands of those who are actually in charge of it?" Jean Jacques Rousseau *The Social Contract and the Discourses* (Everyman's Library, Germany, 1993) at 269.

17 But see Stephen Holmes "Precommitment and the Paradox of Democracy" in Sanford Levinson (ed) *Responding to Imperfection: Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton, 1995).

18 Alan Keenan *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford University Press, Stanford, 2003) at 10. Although rare, there are some constitutions that make it "illegal" to propose certain constitutional changes. For example, art 239 of the Constitution of Honduras establishes that whoever proposes to alter the rule prohibiting presidential re-election, will immediately be removed from office. This is, of course, the provision that the perpetrators of the 2009 coup used to justify their actions.

19 Claude Lefort "The Image of the Body and Totalitarianism" in Claude Lefort *Political Forms of Modern Society* (Cambridge University Press, Cambridge, 1986) 292 at 303–304.

democratic procedure) and its outcome, or, as Jeremy Waldron has put it, between democratic means and democratic ends.²⁰ Thus, if a political community chooses to establish a dictatorial regime, it does not follow that that regime would be *democratic*, even if it was born out of a democratic process.²¹ These people would not have simply supplanted one set of institutions for another. Such a regime would be in violation of the very idea of democracy: it would preclude the possibility of "rule by the people" and it would supplant it by the rule of one individual.²² While some conceptions of democracy would be less than fully sympathetic with the ideal of democratic openness (for example, liberal democrats would insist that the ideal of democratic openness is limited by certain basic liberties), most democrats would agree that in the context of constitution-making, the people exercise their constituent or sovereign power to decide under which constitution they wish to live.²³

B The Ideal of Popular Participation

That democracy requires popular participation in the production of the fundamental laws is almost axiomatic, and naturally, no democratic theory rejects this ideal in its entirety. Democratic *self*-government not only entails a "community of citizens – the *demos* – [that] proclaims that it is absolutely sovereign" (for example, the ideal of democratic openness); it also involves an affirmation of the "equal sharing of activity and power" of all citizens.²⁴ It would in fact be very difficult to find someone that, claiming to be a democrat, argues that as a matter of principle popular participation in the positing of the fundamental laws should be avoided. The specific form that popular participation should take is what divides democratic theorists. On the one hand, participatory democrats would insist on the creation of mechanisms of direct democracy which, combined with representative institutions, would give ordinary citizens a *decisive* role in the adoption of a new constitutional text.²⁵ On the other hand, theorists of deliberative democracy would see the ideal of popular participation as satisfied when there are wide opportunities for public deliberation by representatives.²⁶

20 Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999) at 255 and 291.

21 The example is Waldron's, *ibid*.

22 As Walter Murphy has expressed, "if citizens destroy their own right to have rights, they destroy their authority to legitimize a political system". Walter Murphy *Constitutional Democracy: Creating and Maintaining a Just Political Order* (John Hopkins University Press, Baltimore, 2007) at 507.

23 For an example of a liberal democrat who does not seem to reject the ideal of democratic openness in the context of constitution-making, see Dworkin "Constitutionalism and Democracy", above n 10.

24 Cornelius Castoriadis "The Greek Polis and the Creation of Democracy" in David Ames (ed) *Castoriadis Reader* (Blackwell Publishers, Oxford, 1997) 267 at 275.

25 See Barber, above n 8.

26 See Gutmann and Thompson, above n 9.

The ideal of popular participation, as conceived in this paper, attempts to combine both conceptions, stressing the need not only for ample opportunities of direct political participation, but also intense deliberation on the content of a constitution. As with all ideals, the full realisation of the ideal of popular participation is not likely in the context of an actual constitutional regime. Perhaps the most salient attempt at its full realisation was the fifth century Athenian assembly, which was open to all male, adult, and free citizens²⁷ and met more than forty times a year.²⁸ The assembly debated and decided on all important issues, such as foreign relations and taxation, and its decisions were implemented by a committee of Magistrates subject to regular elections.²⁹ Each citizen was free to speak his mind, and was paid to attend so that even the poor could take time from work and participate in the affairs of the *polis*.³⁰ These institutions rested on the premise that common people were not only competent to elect their governors, but to deliberate and decide about substantive issues.³¹

While anachronistic, they allow us to see how a full democracy would look like, even if such a regime is not susceptible of being put into practice today. The idea is that democracy is a regime of popular self-government, one in which those who live under a political order can take part, as political equals, on the constitution and re-constitution of such an order. This is how 18th century revolutionaries in Europe and North America understood democracy: as the rule of everyone by

27 These limitations on citizenship are of course unacceptable for today's standards, but one must not forget that until the 20th century women did not have the right to vote in many countries, and that it was only a few decades earlier that slavery was abolished in some of the world's "oldest democracies".

28 Claude Ake "Dangerous Liaisons: The Interface of Globalization and Democracy" in Alex Hadenius (ed) *Democracy's Victory and Crisis* (Cambridge University Press, Cambridge, 1997) 282 at 282.

29 In the year 487, the selection of magistrates changed from election to lottery. Paul Woodruff *First Democracy: The Challenging of an Ancient Idea* (Oxford University Press, Oxford, 2005) at 49.

30 Christopher W Blackwell "The Assembly" in A Mahoney and R Scaife (eds) *Dēmos: Classical Athenian Democracy* (The Stoa: A Consortium for Electronic Publication in the Humanities, <www.stoa.org>, 2003). This does not mean, however, that Athenian democracy never had in place procedures that placed different forms of limitations on popular decision-making (even if decisions about all matters took place through democratic processes). Thus, for instance, during the fourth century, a distinction was made between making/revising laws and voting on policy decisions. Proposals made in the Assembly concerning policy decisions (sometimes called 'decrees') had to be consistent with the law (or, put in another way, had to be consistent with the Athenian Constitution). New laws or changes to existing laws could only be framed by a legislative panel chosen by lot (the *Nomothetai*), and then approved by the Assembly. If the Assembly wished to change the laws (for example, the Constitution), it needed to refer any proposals to the *Nomothetai* before being able to vote on them. Woodruff, above n 29, at 33–34.

31 Ellen Meiksins Wood "Democracy: An Idea of Ambiguous Ancestry" in J Peter Euben, John R Wallach and Josiah Ober (eds) *Athenian Political Thought and the Reconstruction of American Democracy* (Cornell University Press, Ithaca, 1994) 59 at 59.

everyone.³² And it is also why democracy's critics opposed it. For modern critics of democracy, popular participation was by its very nature problematic: it involved granting decision-making power to the lower classes of society and that was considered by itself a reason for discomfort.³³ Democracy, as rule by the people, seems to require the adoption of institutions that would result in the direct participation of all citizens in the activity of law-making (fundamental laws included), even if in the context of contemporary societies that is not possible (or, perhaps, not desirable) at the level of daily governance. As I will argue in the next part of the paper, constitution-making provides a more fertile terrain for the realisation of the ideal of popular participation, as well as for opportunities for intense deliberation on the content of the new constitution.

III Democracy and Constitution Making

What does democracy require in the context of constitution-making? The previous part of the paper argued that democracy (at least democracy at the level of the fundamental laws) can be understood as resting on two basic components: popular participation and democratic openness. If a constitution-making episode is to be considered democratic, then it must be consistent with these two basic components. In terms of popular participation, this conception excludes the possibility of "expert" or "elite" constitution-making.³⁴ Citizens must be involved as much as possible in the process of drafting the constitution, through the presentation and discussion of proposals, the selection of delegates to a constitution-making body, and through the ratification of the final constitutional text. A constitution must also be written in a context in which the entire content of the future constitutional text is open to deliberation and debate and in which the constitution-maker is

32 Michael Hardt and Antonio Negri *Multitude: War and Democracy in the Age of Empire* (Penguin Books, New York, 2004) at 240. In the 18th century, democracy was generally understood in its direct, rather than representative, variant. This, of course, raised the stakes exponentially and made democracy even a more unattractive ideal. See Barry Holden *Understanding Liberal Democracy* (Phillip Allan, New York, 1988) at 2.

33 See for example James Madison's famous warning that "[pure] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths", James Madison *The Federalist Papers* (Clinton Rossiter ed) (New American Library, New York, 1961) no 10. Or consider Adam Ferguson's statement that poor majorities, "when admitted to deliberate on matters of state, bring to its councils confusion and tumult, or servility and corruption; and seldom suffer it to repose from ruinous factions, or the effects of resolutions ill formed and ill conducted". Adam Ferguson *An Essay on the History of Civil Society* (Edinburgh University Press Paperbacks, Edinburgh, 1978) at 187.

34 There is an emerging right to popular participation in constitution-making in international law (this "right" is usually derived from the meaning of "democratic participation" (contained in the UN Declaration of Human Rights, Article 21, and the right to "take part in the conduct of public affairs", contained in Article 25 of the United Nations International Covenant on Civil and Political Rights). This is not the place to consider these developments. For a discussion, see Vivien Hart "Democratic Constitution Making" (US Inst of Peace, Special Report No 107, 2003) at 8. See also the essays contained in Gregory Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000).

not constrained by any legal limits or external agents, as the ideal of democratic openness mandates. Moreover, a constitution-maker that respects the ideal of democratic openness will adopt a constitution that respects the institutions that serve as a pre-condition for the existence of democracy, such as basic rights of political participation, as they are necessary for putting into question the future constitutional regime. There are some practices and mechanisms that, when present, might contribute to the realisation of the ideals of popular participation and democratic openness during an episode of constitution-making. The rest of this paper will be devoted to exploring those practices and procedures in more detail. However, there is a basic feature from which these other conditions follow, and when this basic feature is absent, the democratic pedigree of a constitution suffers.

That basic feature is that the official deliberation and drafting of the constitution should be done in an extraordinary (constituent) assembly, as opposed to an ordinary legislature. A constituent assembly is a body convened for the sole objective of drafting a constitution. It is "extraordinary" by virtue of not forming part of the normal institutions of government. Unlike an ordinary legislature, such an assembly is commissioned exclusively for the exercise of constituent power, the unlimited constitution-making power that is said to rest with the people in a democracy. Now, saying that only a constituent assembly should engage in the drafting of a constitution automatically implies a rejection of executive and parliamentary constitution-making (both in the context of written and unwritten constitutions). In terms of the ideal of popular participation, it is easy to see why the executive model would be rejected. Excluding constitutions imposed by an occupying power, presidential constitution-making is probably the least participatory of all methods.³⁵ But it is not clear why an ordinary legislature should not be the preferred body for constitution-making.³⁶ After all, legislators are directly elected, legislatures are structured in such a way that they represent and understand the major interests of the society in which they operate, and its members can be held politically accountable in regular elections.³⁷

35 There is not much to be said in favour of evolutionary constitution-making either, a method based more on tradition and juristic reasoning than on any form of popular politics. Evolutionary constitution-making rests in important ways in the emergence of unwritten constitutional conventions, that, as Elster has expressed, "remain poorly understood" and "are in any case very different from the (mainly) collective deliberations" that are expected in a democratic constitution-making episode. Elster "Ways of Constitution-Making", above n 5. For a discussion in the New Zealand context, see Geoffrey Palmer "The Hazards of Making Constitutions: Some Reflections on Comparative Constitutional Law" (2002) 33 VUWLR 631.

36 All of the constituent assemblies that drafted the new constitutions of Eastern European countries after the fall of the Soviet Union were also ordinary legislatures. For a discussion of the implication of this phenomenon in terms of the content of the constitution that was created, see Jon Elster "Forces and Mechanisms in Constitution Making" (1995) 45 Duke LJ 364 at 380 ["Forces and Mechanisms in the Constitution Making Process"].

37 Ruth Gavison "Legislatures and the Phases and Components of Constitutionalism" in Richard W Bauman and Tsvi Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, Cambridge, 2006) 198 at 206.

Moreover, a constitution created by a legislature can always be submitted for direct approval in a referendum. If the concern is that the legislature was not elected to draft a constitution, there could be a special election granting it that power.³⁸ In addition, like an ordinary legislature, a constituent assembly is composed of individuals called to represent different sectors of the population of a large society (that are not able to come together and deliberate on the adoption of particular laws), not by the entire citizenry deliberating as one body. Not only can a constituent assembly be seen as replicating the legislature, but it might affect the stability of the juridical order, emerging as a sort of parallel power that somehow is closer to the true "will of the people", inevitably taking something away from the legitimacy of the ordinary institutions of government.³⁹ In fact, there are relatively recent historical examples (for example, Colombia 1991, Venezuela 1999, Ecuador 2007) in which a constituent assembly that initially co-existed with a legislature attributed to itself the power of adopting ordinary laws. Why, then, engage in the costly business of convening such an extraordinary body?⁴⁰

There are three main reasons. First, a legislature is part of the basic structure of government and its functions and competences are delimited by the existing fundamental law (either in a previous constitution or a transitional law). In that sense, the legislature is one of the institutions that a constitution-making body might decide to reform (for example, increasing or decreasing its number of seats) or recreate (for example, turning a bicameral legislature into a unicameral one).⁴¹ On the one hand, this means that a legislature should not play a role in deciding its own future or altering the fundamental law that grants its existence. As Elster has put it, "assemblies with this dual role obviously have a conflict of interest: they are being asked to propose a scheme that will, among other things, regulate their own place in the political system".⁴² In terms of democracy's basic components, a legislature is not the proper entity for the realisation of the ideal of democratic

38 An example of this is the first French parliament after 1945, in whose election voters were asked: "Do you want the assembly elected today to be a constituent assembly". Ninety-six percent of the electors voted in the affirmative. See Jon Cowans "French Public Opinion and the Foundation of the Fourth Republic" (1991) 17 *French Historical Studies* 62.

39 This argument is defended in Patrick Fafard and Darrel R Reid *Constituent Assemblies: A Comparative Survey* (Institute of Intergovernmental Relations, Ontario, 1991) at 41.

40 For a general argument about the superiority of constituent assemblies to legislatures as constitution-making bodies, see Jon Elster "Legislatures as Constituent Assemblies" in Richard W Bauman and Tsvi Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, Cambridge, 2006) 181 ["Legislatures as Constituent Assemblies"].

41 Legislatures, of course, have been known to engage in this kind of self-transformation. For example, in 1951 the New Zealand Parliament passed the New Zealand Constitution Amendment (Request and Consent) Act 1947 and the Legislative Council Abolition Act 1950 to abolish its upper house. In 1922, the legislature of Australian State of Queensland also abolished its upper house through The Constitution Act Amendment Act of 1921.

42 Elster "Ways of Constitution-Making", above n 5, at 134.

openness, which involves putting into question even the basic structure of government. On the other hand, if the legislature assumes the role of a constitution-making body, the distinction between ordinary and higher law, (which is preserved by a process of constitutional change that requires special opportunities for popular participation) is blurred. As a result, constitution-making could be seen as merely an extension of the ordinary activities of government and popular interest and participation in the process would arguably decrease. A constituent assembly is less vulnerable to these problems: as a means for the democratic exercise of constituent power (understood as an unlimited constitution-making power)⁴³ it stands above and outside the ordinary institutions of government, including the fundamental laws.

The second reason is connected with that last point. A legislature is a body elected and designed with the purpose of solving the problems a polity faces on a day to day basis (for example, how to spend government funds or whether certain conduct should be decriminalised). As an institution of daily governance, it is the natural operating ground of traditional political parties and different sorts of interest groups that aim at influencing public policy. A constituent assembly, on the contrary, is concerned with the fundamental laws: its function is to look at the ways in which the "rules of the game" should be organised in order to improve the lives of citizens and regulate their relations with the state. For that reason, it might attract and give voice to a whole new universe of participants, particularly groups that may have been historically excluded from the normal institutions of government, such as indigenous groups and other social movements. Over the years, these groups might have lost confidence in the ordinary institutions of government for failing to adequately represent their interests, and might jump at the opportunity of having a say in a process that seeks to revise those very institutions. The idea of a constituent assembly invites the participation of those not traditionally engaged in politics. It makes clear that the country is going through important constitutional transformations: a period of higher law-making different from day to day politics and in which all citizens are called to discuss and decide about the future of the fundamental laws.⁴⁴

Third, a constituent assembly is composed of delegates who, unlike ordinary representatives, are not subject to re-election (since the assembly ceases to exist as soon as the constitution is

43 The most famous formulations of the theory of constituent power are that of Emmanuel Sieyes and Carl Schmitt. Emmanuel Joseph Sieyes *What is the Third Estate?* (Praeger, New York, 1963); Carl Schmitt *Constitutional Theory* (Duke University Press, Durham and London, 2007). For a discussion see Colón-Ríos, above n 11.

44 Despite all the criticisms that have been put forward against the recent processes of constitution-making in Latin America, it is widely recognized that the constituent assemblies had the effect of activating different sectors of society and providing an opportunity for previously marginalized group to have a say (and often a decision making role) about the content of the new constitution. See for example, Renata Segura and Ana María Bejarano "¿Ni una asamblea más sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes" (2004) 11(2) *Constellations* 218.

adopted).⁴⁵ Although this has been used as a criticism of constituent assemblies, in the sense that its members cannot be held accountable for their mistakes, it may be conceived as an advantage from the perspective of democratic openness. Precisely because they do not have to worry about what will happen in the next electoral campaign, they will feel free to propose and support novel measures beneficial to society at large or to put into question long established institutions, even against the opposition of small but powerful sectors of society. As Gavison has expressed: "If the members of the assembly are people who are not directly involved in day-to-day politics, it is likely that their judgment will be less clouded by their own immediate political interests."⁴⁶ With rare exceptions, legislators hope to be elected again, and as such, they are less willing to compromise the interests of those who contribute to their political campaigns. This does not mean that the delegates to a constituent assembly can ignore the opinions and interests of the citizenry or that the process might result in a constitution that a great majority of the population opposes: they know that their decision will have to be ratified by the citizenry at large in a referendum.⁴⁷

A Popular Participation in Constitution-Making

The ideal of popular participation mandates that a constitution is adopted with the participation of those subject to it. It was previously argued that a constituent assembly, in the context of a contemporary society, is a superior mechanism for democratic constitution making, at least when compared with an ordinary legislature. Nevertheless, choosing a constituent assembly as the proper body to engage in the drafting of a new constitution is not enough. Any entity, even one with the potential for increased popular participation, can be designed in such a way as to minimise the involvement of different (or even of particular) groups of a population. There are many forms of popular participation and many ways for citizens to participate in the adoption of a new constitution. However, it is possible to identify some general conditions that most of the time and in most places would result in a constitution-making process that is consistent with the ideal of popular participation. These characteristics can be summarised in the following three general conditions: (1) the constituent assembly should be elected in a way that promotes the participation of all sectors of

45 Nothing prevents a professional politician from being elected to a constituent assembly, and in fact, it is a very common occurrence (for an exception, see Decree 705 of 17 October 2005 issued by the President of Ecuador, which sought to prevent legislators and other governmental officials from being elected to a proposed Constituent Assembly). One option would be to prohibit the members of a constituent assembly from taking part in the next regular election. This rule (the first formulation of which can be attributed to Robespierre during the French Revolution) was in fact adopted by the Colombian National Constituent Assembly of 1991. See the Political Constitution of Colombia (1991), Transitory Provisions, art 2.

46 Gavison, above n 37, at 206.

47 For a defence of the superiority of extraordinary delegates over ordinary representatives in the context of constitution-making, see Dennis C Mueller "On Writing a Constitution" in Ram Mudambi and Pietro Navarra et al (eds) *Rules and Reason: Perspectives on Constitutional Political Economy* (Cambridge University Press, Cambridge, 2001) 9.

society; (2) popular participation should occur in all stages of the process; and (3) constitution-making should only take place in a context of strong popular support for constitutional change. In what follows, I discuss each of these conditions in some detail. In the next section I do the same with the ideal of democratic openness.

1 The constituent assembly should be elected in a way that promotes the participation of all sectors of society

This condition is mainly about the electoral system used to select the members of the assembly, which should promote the inclusion of groups that have been traditionally excluded from democratic governance. Because a constituent assembly should be broadly representative, a system based on the principle of proportional representation is the best option.⁴⁸ In contrast with plurality or first-past-the-post-systems, proportional representation mandates that parties or blocs of like-minded voters win seats in an assembly in proportion to their share of the popular vote.⁴⁹ As John Stuart Mill put it, the idea is that "every or any section [of the electorate is] represented, not disproportionately, but proportionately".⁵⁰ Moreover, the threshold for becoming a delegate should be as low as possible in order to allow the greatest amount of delegates practically feasible and close the distance between the citizenry and the assembly.⁵¹ In addition to the adoption of a system of proportional representation the entire country should be designated a single electoral district.⁵² This is a good way of ensuring that all citizens are properly represented, as individuals and groups with different views about the constitution might be found anywhere in a country.⁵³

Jon Elster's recommendation regarding the use of proportional representation in constituent assemblies rests on similar arguments. For Elster, whatever the alleged advantages of first-past-the-post systems for the creation of ordinary legislatures (for example, that it limits the number of parties represented in the assembly thus increasing the possibility of effective government), a

48 Elster "Legislatures as Constituent Assemblies", above n 40, at 187.

49 Rob Richie and Steven Hill "Proportional Representation" (1996) 26(4) *Social Policy* 25 at 25. See also Juliet Roper, Christina Holtz-Bacha, and Gianpietro Mazzoleni *The Politics of Representation: Election Campaigning and Proportional Representation* (Peter Lang, New York, 2004).

50 John Stuart Mill *Utilitarianism, On Liberty and Considerations on Representative Government* (HB Acton ed) (Everyman's Library, London, 1988) at 278.

51 Asgeir S Eriksen "Liberal Constitution-Making" (2005) Arbeidsnotat no 2 at 16 <<http://www.hio.no/>>. See also Elster "Legislatures as Constituent Assemblies", above n 40, at 187 and Mueller, above n 47, at 18. To have an idea of what counts as a practically feasible number of delegates, one of the largest assemblies has been the Indian Constituent Assembly, which was composed of 389 members. Fafard and Reid, above n 39, at 18. The Kenyan National Constitutional Conference was even larger, and consisted of 629 delegates.

52 Mueller, above n 47, at 18.

53 *Ibid.*

constituent assembly should follow the proportional system in order to enjoy the legitimacy of a body with a broader basis.⁵⁴ Successful episodes of constitution-making, such as that of Colombia in 1991, used a system of proportional representation in a single nation-wide district. As Segura and Bejarano have argued, this kind of electoral system allowed traditionally excluded groups, such as new social movements and indigenous peoples to gain representation in the assembly.⁵⁵ To guarantee that all sectors of society will have a voice in the assembly, in some countries it might be necessary to reserve seats for groups that, independently of their size, are so marginalised that their prospects of successfully competing in an electoral process are weak or non-existent.⁵⁶

2 *Popular participation should occur in all stages of the process*

A second condition is that the attempt to increase popular participation is present in all the stages of the process, including the early stages. As suggested earlier, there are, generally speaking, four stages in a democratic constitution-making process: (a) the discussion of the need for a new constitution; (b) the elections of the members of the constituent assembly; (c) the drafting of the new constitution; and (d) its ratification.⁵⁷ In each of these four stages the methods and institutions used might facilitate or make more difficult the involvement of ordinary citizens. There are many ways of making each of these stages participatory; this discussion will be limited to examine some ways of facilitating popular participation in the different stages of a constitution-making process and provide some examples. The first stage refers to the ways in which the constitution-making process is the result (or not) of strong support for constitutional change. That is, whether it is a process initiated from above or from below. The mechanisms that might increase popular participation at this early stage, which are directly related to the method used for the convocation of the assembly, will be discussed in the next sub-section.

Regarding the second stage, it was argued above that the election of the delegates to a constituent assembly should be based on the principle of proportional representation and that the entire territory should be the constituency. This implies that the constitution-making body should be composed of members that are directly elected by the people, instead of appointed by the government officials. The appointment of the members of a constituent assembly by officials

54 Elster "Legislatures as Constituent Assemblies", above n 40, at 186–187.

55 Segura and Bejarano, above n 44, at 229.

56 This is the example of Venezuela (1999), where it was decided that the President had the right to appoint three delegates as representatives of indigenous communities. Segura and Bejarano, above n 44, at 230.

57 Fafard and Reid, above n 39, at 7, identify the following four stages for constitutional change generally: "(1) the pre-negotiation period of public discussion and the formulation of proposals; (2) the negotiation of agreed basic principles and a framework to be embodied in the new constitution or constitutional amendment; (3) the negotiation of the legal text for the proposed new constitution or constitutional amendment; and (4) the ratification of the new constitution or constitutional amendment."

increases the distance between the delegates and ordinary citizens, and it is in the interest of the democrat to decrease that distance.⁵⁸ The third stage refers to the actual drafting of the constitution. Historically speaking, popular participation in the stage of drafting the constitution has been notoriously absent.⁵⁹ The drafting of a constitution has been the exclusive domain of jurists and other experts in the technique of governing. The intervention of the citizenry, if any, occurs only at the second and fourth stage: the election of the members of the assembly and the ratification of the constitution in a referendum.

More recently, and particularly in developing countries, this historical trend has changed, if only apparently. For instance, in Kenya, a Review Commission was created with the mandate of visiting different parts of the country to collect the citizens' views regarding the proposal prepared by a small group of experts to be later revised and approved in a National Constitutional Conference.⁶⁰ In South Africa hundreds of workshops were held all over the country, where members of the Constituent Assembly met with citizens encouraging their involvement in the constitutional process. There was also an intensive media campaign accompanying every stage of constitutional negotiation and a website through which people could ask questions and make submissions. Around two million submissions were made by the public.⁶¹ And in Ecuador's most recent episode of constitution-making, a "blog" was created through which citizens could electronically submit questions and proposals directly to the delegates of a constituent assembly.

However, the real effect that popular consultation had in the final draft constitutions of Kenya and South Africa is unclear. For example, in the case of Kenya, the draft constitution approved by the National Constitutional Conference (which arguably reflected the views expressed by citizens) was subsequently altered in important ways by Parliament. And there is no clear evidence indicating the actual weight given by the members of the South African Constituent Assembly to the proposals gathered the country.⁶² In the case of Ecuador, it is not clear how effective the use of the internet to

58 Elster "Ways of Constitution-Making", above n 5, at 125. This type of indirect selection of the members of a constitution-making is not uncommon at all, it was for example the method used by the Philadelphia Convention and the German Parliamentary Council of 1948 (the members of these assemblies were appointed by state legislatures). Fafard and Reid, above n 39, at 19.

59 See for example the cases studied in Patrick Monahan, Lynda Covello and Jonathan Batty *Constituent Assemblies: The Canadian Debate in Comparative and Historical Context* (Centre for Public Law and Public Policy, North York, 1992) at 42. See also Alex Frame "Lawyers and the Making of Constitutions: Making Constitutions in the South Pacific: Architects and Excavators" (2002) 33 VUWLR 699.

60 Alicia L Bannon, "Designing a Constitution-Drafting Process: Lessons from Kenya" (2007) 116 Yale LJ 1824 at 1833. In 2005, Kenyans rejected the draft constitution by 57 per cent in a referendum.

61 Simone Chambers "Democracy, Popular Sovereignty, and Constitutional Legitimacy" (2004) 11 Constellations 153 at 162.

62 On the limits of popular participation in the South African constitution-making process, see Heinz Klug "Participating in the Design: Constitution-Making in South Africa" (2006) 3 Review of Constitutional Studies 18.

promote citizen involvement in the process of drafting a new constitution is, particularly when it might not be accessible to most of the population. Nevertheless, this does not mean that this type of initiative cannot be successfully implemented. One way could be by complementing such consultative commissions and initiatives with a mechanism (such as a popular petition process triggered by the collection of signatures) that would allow groups of citizens to present proposals which the constitution-making body is required to consider and discuss.

A related and contested point is whether the deliberations of a constitution-making body should be public. For instance, it has been argued that secrecy "tends to improve the quality of whatever discussion does take place because it allows framers to change their minds when persuaded of the truth of an opponent's view".⁶³ According to this argument, if discussions are public the vanity of the framers might keep them from changing their mind later, even when after deliberating they become persuaded by the force of the arguments of their political opponents. Though powerful, when weighted against democracy, this defence of secrecy must give way to the realisation of the ideals of popular participation and democratic openness. If deliberations on the content of the constitutional text are fully public, the spirit of debate and discussion might spill over to the population at large, thus extending popular interest and increasing proposals from citizens and social movements. Of course, like in any assembly, there would be private negotiations among its members, but the citizenry should be aware of the positions of their delegates and the reasons for those positions.

The last stage of a constitution-making process is the ratification of the new constitution. There are many ways of accomplishing this task; the easiest one is ratification by the majority of the members of the constituent assembly or ratification by Parliament.⁶⁴ The advantage of this method is that it comes accompanied by a high probability of success: it makes it almost certain that a new constitution will be adopted. From a democratic perspective, the obvious alternative is ratification in referendum. Referenda have a bad reputation: from Hitler to Napoleon, they have been used as a way of legitimating authoritarianism and dictatorship.⁶⁵ Popular referenda can also be manipulated

63 Elster "Forces and Mechanisms in the Constitution-Making Process", above n 36, at 388. Elster maintains that a constitution-making process should involve both secret (committee discussions) and public sessions (plenary assembly discussions). For Elster, with total secrecy "partisan interests and logrolling come to the forefront", and full publicity "encourages grandstanding and rhetorical overbidding". Elster, above n 36, at 395.

64 The use of majority rule in the context of constitution-making bodies, in addition to respecting the idea of equality, performs an essential political role. That is, it guarantees that a constitution will be produced. See Ulrich Preuss "The Exercise of Constituent Power in Central and Eastern Europe" in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007) 211.

65 Margaret Canovan *The People* (Polity Press, Cambridge, 2005) at 108. For a comparative and historical study of the referendum, see Markku Suksi *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff Publishers, Dordrecht, 1993).

by the media and strong executives, they can send mixed messages when the turnout is low, and they do not involve the degree of deliberation that can take place in representative assemblies.⁶⁶ Referendums are risky business, especially to those that have invested high levels of energy and political capital in producing a constitution to which political elites can agree. Historically, there are plenty of cases in which "high quality" constitutions or constitutional amendments have been rejected by the electorate.⁶⁷

On the balance, however, referendums seem to be worth the risk. They are the method through which the citizenry controls the work of the delegates elected to draft a constitution, the mode in which the people decides that the constitution is "theirs". Of course, a referendum imposed from the top down with no public discussion is not a particularly democratic exercise. As Emmanuel Sieyès argued more than two hundred years ago, the exercise of popular sovereignty does not take place when people form their opinions at home and simply bring them to the voting booth: deliberation is essential.⁶⁸ But in a constitution-making process that comes accompanied with a high degree of popular support and discussion, a positive referendum result can only add democratic legitimacy to a new constitution. However, as Canovan has argued, perhaps the added legitimacy "is due not so much to the referendum procedure as to the popular mobilisation that has taken form around it".⁶⁹ Referenda are thus a central, but flawed, component of any democratic constitution-making process.

3 Constitution-making should take place in a context of strong popular support for constitutional change

Even if, in the context of constitution-making, a legislature is inferior to a constituent assembly from the perspectives of popular participation and democratic openness, state officials must have a

66 There is some empirical evidence that contradicts the common argument that referendums are easily manipulated by strong executives. For example, David Altman has demonstrated that in Latin America, referendums convened by the executive have around a 50 per cent success rate. See David Altman "Democracia Directa en el Continente Americano: ¿Autolegitimación Gubernamental o Censura Ciudadana?" (2005) 12 *Política y Gobierno* 203.

67 This was, for example, the case of Canada in the Charlottetown accord in 1992. For a discussion, see Matthew Mendelsohn "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33 *Canadian J of Political Science* 245.

68 Elster "Forces and Mechanisms in Constitution-Making", above n 36, at 387. John Dewey expressed this view clearly when he wrote: "Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule ... The means by which a majority comes to be a majority is the most important thing: antecedent debates, modification of views to meet the opinions of minorities ... The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion". John Dewey *The Public and its Problems* (Swallow Press, Chicago, 1954) at 207.

69 Canovan, above n 65, at 113–114.

role in all constitution-making episodes: no constituent assembly can convene itself.⁷⁰ The Philadelphia Convention of 1787, for instance, was convened by the Continental Congress, and the French Constituent Assembly of 1789 was convened by the King.⁷¹ Even "popular initiatives" for the adoption of a new constitution (discussed below) emerge from a constituted power (as they are authorised by the constitutional text) and the convocation of the assembly depends on the action of governmental bodies. There is no other option but for the constituent assembly to be called into action in this way. As Rousseau puts it, "the command to assemble should itself proceed from the law".⁷² But that should be the only role of the ordinary institutions of government: to legally activate the process of constitution-making and establish the rules that will apply for the election of the delegates to the constituent assembly.

Regardless of the specific form of convocation (legislative act, executive action, collection of signatures), a constituent assembly should only be convened during times of heightened political support for constitutional change, that is, as a result of pressure "from below" and not in situations in which the need for change is not shared by large majorities of the population. In the absence of a "political moment" (to use Sheldon Wolin's term),⁷³ political elites – particularly a strong executive – could be able to manipulate any type of constitution-making process, adopting a new constitution with the votes of its followers but without giving voice to other sectors and groups. There are structural, official, and informal mechanisms that might help guarantee that constitution-making takes place in a context of increased popular support, and each of them does not exclude the other two. Structural mechanisms are provisions contained in the constitutional text that allow citizens to trigger the convocation of a constituent assembly. This kind of provision is now present in several new Latin American constitutions and requires the collection of a number of signatures (usually less than 20 per cent of the registered voters) before the mandate for a constituent assembly is

70 The only exception would be a group of individuals in the state of nature that decides to create a government. Constitution-making as an exercise of constituent power, however, usually presupposes that the state of nature has been superseded. See Schmitt, above n 43, at 112.

71 Elster "Forces and Mechanisms in Constitution-Making Process", above n 36, at 373.

72 Jean Jacques Rousseau *The Social Contract and the Discourses* (Everyman's Library, Germany, 1993) at 259.

73 Sheldon Wolin, "Fugitive Democracy" in Seyla Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, Princeton, 1996) 31.

activated.⁷⁴ As mechanisms that tend to facilitate constitutional change "from below", these popular initiatives have the advantage of mobilising different sectors of society (by forming alliances among different movements, for example) and directly involving them in the very early stages of discussing the need of a novel constitution.

By official mechanisms, I refer to governmental attempts of increasing public interest in the necessity of a new constitution. These attempts might take the form of public consultations and workshops throughout different parts of a country like the ones used in the case of Kenya and South Africa but before the convocation of the constitution-making body and the election of its members. Informal mechanisms are those used by civil society and political parties (for example, public manifestations, protests, civil disobedience) to put pressure on the government to initiate a constitution-making process. An example of this occurred in Zimbabwe in 1999 when, pressured by an umbrella organisation formed by opposition parties and other groups, the government of Robert Mugabe reluctantly agreed to establish a commission to draft a constitution. The result, however, was a process manipulated by the President's party and the popular rejection (54 to 46 per cent) of the draft constitution in a referendum that took place in February 2000.⁷⁵

C Democratic Openness and Constitution-Making

In the context of constitution-making, democratic openness refers to a situation in which the constitution-maker finds itself as an unconstrained, sovereign legislator; the author of a constitutional text that does not come accompanied by any default set of principles already sedimented into it.⁷⁶ There are at least two types of limits that a constitution-making body might confront. On the one hand, there might be internal limits imposed by the political culture of a given

74 See for example art 408 of the Constitution of Bolivia: "The total reform of the Constitution, or those modifications that affect its fundamental principles, its recognized rights, duties, and guarantees, or the supremacy of the constitution and the process of constitutional reform, will take place through a sovereign Constituent Assembly, activated by popular will through a referendum. The referendum will be triggered by popular initiative, by the signatures of at least twenty percent of the electorate; by the Plurinational Legislative Assembly; or by the President of the State. The Constituent Assembly will auto-regulate itself in all matters. The entering into force of the reform will require popular ratification through referendum". See also the Constitution of Venezuela, art 348, and the Constitution of Ecuador, art 444.

75 Hart, above n 34, at 9. Interestingly, there are also historical examples in which an amendment process that did not result from public pressure but from a concern among political elites that a major revision to the constitution was a good idea, has been rejected by the electorate. A good example is that of Australia, in which, mainly as a result of the lack of public enthusiasm with constitutional change, 13 of 16 amendments were rejected in five constitutional referenda held from the 1970s to the late 1980s. See Cheryl Saunders, "Changing the Constitution: The Three Referendum Amendments of 1977" (1977) 51 *Australian L Journal* 508; Cheryl Saunders "Australian Constitutional Convention" (1982) 13 *Melbourne University L Review* 628.

76 See Jürgen Habermas "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*" (1995) 92 *The J of Philosophy* 109 at 128.

society that prevents it from drafting a certain type of constitution without confronting a negative vote in a referendum, or (in the absence of a referendum) broad opposition from the majority of the population. On the other hand, there are external limits that might take the form of an occupying power or of international obligations. Only this second type of limit is problematic from the perspective of democratic openness. Internal limits of the kind described above are self-imposed and, in the context of a democratic political culture, they are the only guarantee that a constitution-making act will not result in the abolition of democracy. Taking this distinction into consideration, there are three general conditions for democratic openness: (1) the constituent assembly cannot be legally limited by any form of positive law; (2) the constituent assembly must not be subject to external limits; and (3) the constitution-making act should not result in the abolition of democracy. These general conditions are discussed separately below.

1 The constitution-making body cannot be limited by any form of positive law

A basic tenet of modern constitutionalism is that governmental power is by its very nature limited by law: it owes its existence to the fundamental law, and must operate according to it. Under this conception, a political community that wishes to alter its constitution must constitute itself as a body whose primary purpose is to exercise the constituent power, the unlimited constitution-making power of the people. This is the primary rationale behind the convocation of a constituent assembly, not that of bypassing a legislature that is no longer trusted by the citizenry. The distinction between the constituent and the constituted powers has an important implication in terms of the nature and faculties of a constituent assembly: unlike the legislative, executive, and judicial organs of the state, a constituent assembly cannot be limited by any form of positive law, the existing constitution included. This is precisely why it has the potential of satisfying the ideal of democratic openness.

The idea that the members of a constituent assembly must be able to "work freely and also be able to reform the institutions as they do see fit",⁷⁷ not only belongs to the terrain of theory but has also been recognised in actual political practice. For instance, in a 1999 decision, the Venezuelan Supreme Court of Justice expressed that the limits established in the constitution regarding the Congress' power to amend the constitutional text, did not apply to the people acting through a constituent assembly.⁷⁸ The "sovereign" nature of a constituent assembly not only means that it is not bound by the constitution it intends to replace (since its very purpose is to create a new

⁷⁷ Eriksen, "Liberal Constitution-Making", above n 51, at 15.

⁷⁸ The Court decided that the limits to constitutional reform established in the constitutional text only applied to Congress, not to the people acting through a constituent assembly. Fallo Núm 17 of the Supreme Court of Justice of Venezuela, 19 January 1999.

constitution) but also that it must create its own rules of operation.⁷⁹ As mentioned before, in the exercise of their sovereign powers, some constituent assemblies have gone down the dangerous road of attributing to themselves the (provisional) power of ordinary law making.

2 *The constitution-making body should not be subject to external limits*

One of the basic implications of the ideal of democratic openness is that a constitution-maker should not be subject to external limits. The most clear-cut example of an external limit is the presence of an occupying power. This type of limit does not have to take the extreme form of a country drafting and imposing a constitution on another, as it famously occurred in Japan when General MacArthur instructed his legal advisors to draft a new democratic constitution for the country. "It apparently did not occur to MacArthur", writes Kyoko Inoue, "or to many other Americans, that there was a contradiction in imposing democracy on another nation, or that many Japanese might not select democracy, as understood in the United States, if given a free choice".⁸⁰ But the case of Japan is more the exception than the rule. As Noah Feldman has pointed out, nowadays "the wholesale imposition of an entire constitutional order is rare".⁸¹

What is not rare, he adds, are constitutions "drafted and adopted in the shadow of the gun".⁸² Feldman has in mind the recent cases of Yugoslavia, Afghanistan, and Iraq, where interim or permanent constitutions have been drafted under de facto or de jure occupation.⁸³ For Feldman, "[e]ach of these cases has seen substantial local participation in the constitutional process; but each has also seen substantial intervention and pressure imposed from the outside to produce constitutional outcomes preferred by international actors".⁸⁴ Granted, a constitution-making episode cannot occur in isolation, and there are innumerable types of outside forces (e.g. an international organisation or an economically well-off country that a constitution-maker might decide to please) that might indirectly affect the content of the new constitution. Even in those cases, the fact that it is possible (or should be possible) to evaluate and choose to accept or reject the relevant external influence, might be enough to make the constitution-making episode consistent with the ideal of

79 For instance, the text that authorized the convocation of the constituent assembly in Venezuela read in part: "Once the ANC is installed, it must dictate its own operating statutes". Quoted in Michael Coppedge "Venezuela: Popular Sovereignty versus Liberal Democracy" in Jorge I Domínguez and Michael Shifter (ed) *Constructing Democratic Governance in Latin America* (John Hopkins University Press, Baltimore, 2003) 165 at 412, note 47.

80 Kyoko Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of its Making* (University of Chicago Press, Chicago, 1991) at 74.

81 Feldman, above n 5, at 858.

82 Ibid.

83 Ibid.

84 Ibid, at 859.

democratic openness. This is not the case, however, with a constitution written under military occupation.

Democratic openness requires that a constitution be produced by those that will become subject to it, and that they write it freely. This does not mean, for example, that a constituent assembly should pay no attention to the international obligations assumed by the ordinary government, such as human right treaties or international trade agreements.⁸⁵ Of course, nothing prevents a constituent assembly from adopting a constitutional provision inconsistent with an obligation previously assumed by the government (even when such a course of action might have important political consequences). For example, a constituent assembly might include in the new constitution a clause that prohibits the privatisation of the water sector, even when the government had previously assumed the obligation of privatising the water sector in exchange for economic assistance.⁸⁶

3 The constitution-making act should not result in the abolition of democracy

If a constituent assembly must be legally unconstrained, it inevitably involves the risk of undemocratic outcomes. In other words, a constituent assembly might draft a constitution that abolishes democracy and a population might ratify it in a referendum. The abolition of democracy takes place when the institutions (whatever specific form they take) that make any kind of democratic change possible, particularly basic rights of political participation (for example freedom of association, freedom of speech, the right to vote) are not respected by the newly created constitutional regime. These institutions not only make possible the very existence of democracy, but are a necessary precondition for the realisation of the ideal of democratic openness: without them, it would be very difficult for a citizenry to put into question the established constitutional regime and decide to engage in an act of constitution-making.

Nevertheless, this basic condition of democratic openness must always give way to the other two: if a people, in the exercise of their sovereignty, decide to abolish democracy, it would be against the very idea of democracy to prevent them from doing so. As Benjamin Barber has stated: "In a democracy, living popular will always trumps. It operates under constraints, to be sure, but these constraints are themselves conditional: the product of a will to self-regulation by a prudent

85 In this respect, it is interesting to note that the act authorizing the Venezuelan constituent assembly of 1999 established that the only limits of the constitution-making body would be "the valued and principles of our republican history, as well as the fulfilment of international treaties, accords, and commitments validly signed by the Republic; the progressive character of the fundamental rights of man and democratic guarantees; within the most absolute respect for the commitments assumed". Quoted in Coppedge, above n 79.

86 A similar situation occurred in Uruguay in 2004, although the amendment was not introduced by way of a constituent assembly, but through a popular initiative to amend the constitution. See generally, Altman, above n 66.

popular sovereign".⁸⁷ One can only hope that the members of a constituent assembly (together with a people living through a democratic moment) would not be interested in abolishing the rights and institutions that allowed them to engage in an act of democratic constitution-making in the first place. Fortunately, democrats have good reasons to cling to that hope: although there are some examples in history in which a constitution that protects the basic rights of political participation has been imposed in a non-democratic manner, there are no examples in which a democratic constitution-making process has led to the adoption of an autocratic constitution.⁸⁸

IV Conclusion

This paper developed a set of general criteria that would be met by a "fully" democratic constitution-making episode. These criteria follow from what the paper identified as the two basic components of democracy: the ideals of democratic openness and popular participation. In terms of popular participation, the paper argued that: the constitution-making body should be an extraordinary constituent assembly; that its members should be selected in a way that allows for the participation of all sectors of society; that popular participation should occur in all stages of the process; and that constitution-making should take place in a context of strong popular support for constitutional change. In terms of democratic openness, the paper argued that: the constitution-making body cannot be limited by any form of positive law; that it must not be subject to formal external limits; and that the constitution-making act should not result in the abolition of democracy. While it would be unlikely that an actual constitution-making episode would take place, from beginning to end, through the most democratic procedures possible, the criteria presented provide us with some tools to assess the ways in which the activity of creating a new constitution might come closer to (or farther away from) democracy.

87 Benjamin Barber *A Passion for Democracy* (Princeton University Press, Princeton, 1998) at 27.

88 Elster "Ways of Constitution-Making", above n 5.

