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Beyond Fashion and  
Smokescreens: Citizens'  
Deliberation of Constitutional  
Amendments

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Yanina Welp  
&  
Francisco Soto

Working Paper  
Series

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## **Abstract**

Despite the increasing number of countries that have implemented deliberative processes during constitutional changes, the discussion about the criteria for these processes to be deemed fair and democratic remains open. Thus, first, this paper proposes some conditions related to the features of the mechanism of deliberative participation and the method of processing the resulting contents. Second, it is carried out an empirical analysis focused on deliberative processes of constitutional change that were regulated and/or promoted by governments or public institutions (excluding pure private and/or civil society initiatives) and were opened to citizenship (excluding the ones oriented only to experts or political parties); and were addressed to content production (merely informative or educative were excluded). Our analysis identifies five models of deliberative processes: “symbolic”, “prejudiced”, “participatory overflow”, “constituent opening” and “constituent participation”. The conclusions go beyond the sui generis commitment to implement participatory mechanisms and suggest minimal criteria that deliberative processes should fulfill to be considered democratic.

## **Keywords**

citizen participation, constitutional change, legitimacy, deliberation, political elites

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## Introduction<sup>1</sup>

Several studies in Political Science and Law have analyzed the spectrum of challenges faced by the elaboration and reform of constitutions, with special interest in the conditions that would allow for optimal results: that is, constitutions recognized and legitimated by citizens, and empowered to create and support the appropriate framework for the democratic resolution of social, political, economic and cultural conflicts along time (Elster, 1995; Méndez and Wheatley, 2013; Negretto, 2013). This acquires greater relevance in critical contexts, such as those that characterize processes of decolonization, regime change, transition to democracy and internal pacification. In these cases, the analysis has focused on the legal framework in which new constitutions occur (often non-existent or suspended for decades) and on formal procedures (election of constituents, majorities required for decision making, ratification processes, among others) (Méndez and Wheatley, 2013; Widner, 2008).

In recent decades, the interest in constituent processes has extended to democratic contexts in which a constitutional change is expected to resolve deep crises (Venezuela in 1999, Iceland in 2011, to name two examples). Against the background of the economic crisis and the erosion of traditional party systems, new parties and social movements have defended the incorporation of citizen participation into constituent processes. This is shown by the proliferation of studies on the subject (see among others, Eisenstadt *et al* 2017; Contiades and Fotiadou 2016; Reuchamps and Suiter 2016; Soto and Welp 2017; Castellá 2018). International organizations such as the United Nations (UN), the United Nations Institute for Peace (USIP) or the Institute for Democracy and Electoral Assistance (International IDEA), have taken a position in favor of citizens participation (see Hart, 2003; Ghai, 2006; Gluck and Ballou, 2014).

However, despite this trend towards including ‘the people’ into deliberative process, the evaluation of results has defenders and detractors. For some, it is a guarantee of increased legitimacy and a more inclusive agenda. For others, it is a second order variable (conditioned by the support of the promoter), with limited capacity to influence results *per se*. There are even those who consider it dangerous and undesirable because, they say, it would open the doors to manipulation or misgovernment (Parlett, 2012; Saati, 2015).

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<sup>1</sup> This paper is a translation and updated version of “Más allá de modas y cortinas de humo: la deliberación ciudadana en cambios constitucionales”, authored by Welp, Yanina & Soto, Francisco and published by the *Revista Española de Ciencia Política* 50: 13-41, 2019. <https://recyt.fecyt.es/index.php/recp/article/view/66360>.

In our view, most studies have focused on case analysis, without paying enough attention to the conditions that a constitutional change process with deliberative participation should meet. Thus, in order to contribute not only to the understanding of these processes but also to the discussion of standards, first, we propose two groups of conditions that are determinants of the type of process generated: those referring to the *mechanism of deliberation* (access to information, time given for it, actors included and opening of the debate) and to the *method of processing the contents generated* (if something like a method exists or not, if it has been previously communicated, if it is traceable and if it allows to connect - and how - the contents with the final text). Secondly, with a global approach and to compare procedures in democratic, hybrid and authoritarian systems, we analyze 29 cases in 27 countries, which meet the characteristics defined by our study: having been formally convened, and being oriented to citizen deliberation as well as to the production of content.

We proceed as follows: the next section reviews the findings of previous research, showing the need to deepen the analysis of the mechanisms of deliberation and the procedures for systematizing content. Then the research questions, hypotheses, objectives, case selection and operationalization of variables are presented. Next, the empirical analysis is performed. Finally, conclusions are drawn.

### **Literature review**

The imaginary of modern constitutionalism rests on the founding role of the people expressed in a constitutional agreement (Negretto, 2018). However, direct citizen participation in constituent processes has only gained relevance recently, following the growing number of participatory elaboration of constitutions (Einsestadt et al., 2017; Saati, 2015; Soto and Welp, 2017). Guinsburg *et al.* (2009) point out that constitutions gain weight when they are developed in extraordinary contexts of popular mobilization, which include extra-parliamentary processes of ratification and communication. However, Parlett finds evidence of constitutional systems in post-communist countries in Europe and Asia that have been established and endured without been backed by previous popular mobilizations, while many of those approved with that condition did not necessarily produce better constitutions in terms of limiting the concentration of power in the president (2012: 195-196). These studies share the focus on the analysis of the contexts and the capacity of the constitution to lay the foundations for democratic coexistence.

Saati (2015) analyzes constituent processes in post-conflict cases, to conclude that there is not enough evidence on the positive effects of citizen participation. According to the author,

minimal and insignificant experiences have been overvalued, due to their promotion by international organizations, even on occasions in which minimum requirements to guarantee citizen's inclusiveness were not met. Other studies contradict these findings, showing positive effects on increasing legitimacy and electoral participation. (Brandt et al., 2011; Tripp, 2005). Both collections of studies focus on consequences, although Saati (2015) opens the way to reflect on the importance of the time devoted to deliberation, the access to the relevant information and the procedures for processing the content generated.

In Latin America, the “new constitutionalism” has emphasized the participatory nature of the processes observed in the Andean region - especially in the analysis of Venezuela (1999), Ecuador (2007-2008) and Bolivia (2006-2009) (Viciano Pastor and Martínez Dalmau 2011). However, participation has been overrated without paying enough attention to the intrinsic characteristics of these processes and in particular to their (lack of) autonomy from the ruling governments, inclusiveness and transparency of content processing. Another research has analyzed the extent to which pluralism conditions the results of the constituent processes (Bejarano and Segura, 2013, with a particular focus on the Colombian case). The latter provide one of the central elements for our proposal, which refers to the subjects that participate and to the supervision and coordination of the process.

Elster (1995) proposes that different historical waves generate specific conditions for the legitimization of constituent processes. In the same vein, Suiter and Reuchamps (2016) point out that the multiplicity of recent deliberative experiences in Europe could indicate that we are facing a new wave of constitutional turn towards deliberative processes in which the incidence can be observed considering who deliberates, on what (or who defines the agenda) and how much information is available for this deliberation; and then, they observe the extent to which the resulting content is translated into decision-making. We want to build on this point by pointing out the need of differencing between an adequate formulation of the procedure (informed, fair, inclusive, plural, traceable) and its long-term results (among others, its legitimacy). Our work here focuses on the first.

### **Methodology and case selection**

*Which conditions characterize citizen deliberation in processes of constitutional change?*

Leaving aside the results (which could be more conditioned by contextual variables) and focusing on the procedure, we propose that the democratic nature of a deliberative constituent process is conditioned by: 1) the mechanism of participation: in particular the access to the

relevant information, the time given for deliberation, the inclusion of diversity of actors and the plurality of positions. These aspects are key to explain whether an informed, open and plural deliberation occurs, but they are not enough. It is also necessary to consider: 2) the method of processing contents: if it exists or not, if it has been previously defined, if it allows or not to trace results and if it is or not controlled by the government. Because even if participation is plural, it may not have a connection with the constituent process, unless a specific mechanism establishes it. The traceability condition does not presuppose an automatic approval of citizen proposals but their treatment (essential criteria for a process not to be merely symbolic). The public information given before, during and after the process is also fundamental.

The study is exploratory. The coding of requirements would allow us to identify different ‘models’ of citizen deliberation in constitution making. The control of the government over the procedure will be especially taken into account in the second dimension of analysis, under the idea that a broad, inclusive and participatory process could be also controlled, when the contents are filtered by the government on duty. Also, we want to observe to what extent processes conducted in democratic contexts are, as should be expected, clearly democratic when confronted to the ones developed in hybrid or authoritarian regimes. We suggest that when the basic conditions are not fulfilled even participatory process in democratic setting could be just ‘smokescreens’.

### *Criteria for case Selection*

Deliberative participation may occur *before* (prior consultations) or *during* (deliberative processes), or even in both<sup>2</sup>. Another central issue lies in the formats, which can lead to adding preferences (gathering signatures to support a proposal, as a possible mechanism), consulting on specific issues or promoting more or less open deliberative processes. Consultations can be made previously (generating topics) or discussing a draft (Blount, 2011; Negretto, 2018; Soto and Welp, 2017; Castella 2018). Here we are interested in observing content production. Thus, we do not include processes in which only information was offered. Nor do we select cases that only included ratification referendums, received proposals on individual basis or implemented online consultations (as happened in Italy 2013<sup>3</sup>). Collective participation is a necessary condition for

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<sup>2</sup> Referendums tend to occur after, for ratification, but as non-deliberative mechanism are not considered in our study.

<sup>3</sup> In Italy, the 2013 reform attempt (which did not prosper) summoned a group of experts and opened a process of citizen consultation via digital format with the individual survey format.

inclusion in our sample. We selected experiences in which participation was regulated and / or promoted by the government or public institutions, excluding those in which it occurred in parallel, as an act of civil society. A level of openness to citizenship in general was another requirement. For this reason, we exclude experiences in which there were processes described as participatory but that convened only the political parties or commission of experts nominated by the government (such as the round tables in Poland, during 1989, see Poplawska, 2008).

The analyzed time-frame starts from what Elster (1995) identifies as the sixth wave of constitution making, started in 1970, and reaches 2018. The review of data compiled by the Center for Research on Direct Democracy (c2d), USIP and International IDEA led to Identify 29 experiences in 27 countries (Ireland and Zimbabwe conducted two processes each) whose origin is very varied. Due to the interest in analyzing procedures, we include democratic and non-democratic contexts (see Appendix 1).

#### *Operationalization of variables and data collection*

We focused on the institutional design of the mechanism of deliberation and the procedure for processing the content generated. In addition to the design, we analyze the practices (how they occurred and if the results were published). We analyzed primary sources (when language and availability allowed), and secondary sources for each of the cases. Dimensions and indicators were defined as follows:

First, the information offer: civic training stage records if the process was accompanied by an educational stage and/or dissemination of information (coded as Planned or Improvised). In the case of an affirmative answer we assess if this was adequate (sufficient/insufficient), or only based on the vision of the government (biased). Second, for time, the guiding question was whether there was sufficient time to conduct a discussion. Coded as Improvised (not fixed) or, if planned, as sufficient/insufficient. It is a subjective criterion, for which we proceed considering that one day cannot channel a constitutional debate in the territory, and we based our evaluation on reports from civil society organizations and scholars. Third, for the actors convened, we observed if according to the call, the process was aimed at a few actors (restricted) or was open (inclusive). Then we observed how it worked according to reports. Cases of sortition are considered inclusive if the categories created are representative of the population. Fourth, for plural discussion, we record if the agenda is closed and predefined or if is open. In cases where citizen participation is given by lot, plurality is defined by the call (plural or not) of experts and key actors.

The characteristics of the mechanism for processing the content generated is measured as follows. For the method we check if it exists or not (Yes/No), defined as the criteria for preparing the systematization documents. For the observation we check whether the method was previously communicated (Yes/No). For traceability we analyze when the contents are published (even when there is no explicit method of aggregation of preferences) and if it is possible to track their incorporation or at least their discussion during the constituent. This is not possible when citizens do not have access to documentation (Yes / No). For incidence we consider that traceability is a condition to identify if the content produced had incidence or not. If there is not a report of main agreements, then it is not possible to observe whether the constitutional discussion incorporated issues arising from the citizen's deliberation. Different methods can guarantee that the contents of the participatory process are necessarily discussed by the constituent body (for example, citizen proposals backed by a certain number of signatures; or compulsory discussion of the suggestions) or on the opposite could be optional and discretionary. We codify as "Yes" when the mechanism forces the discussion of the contents generated in the Congress or Constituent Assembly. The incidence is "mandatory" when it leads to discussion and "optional" when the specific discussion is at the discretion of the constituents.

Finally, for the connection with the constituent process: here we observe if there is control of the government or there is independence in producing contents. There are many options, including the "smoke screen" option if in the end a few actors of doubtful legitimacy decide what enters and what does not (an example of this would be the most recent Cuban process, of 2018). Coded as independent (not controlled by the government) or prejudiced (under government control).

### **Analysis**

The analysis led to the identification of five types of participatory constituent processes determined by the characteristics of the mechanisms of participation and the procedure of content processing, as detailed in Table 1.

**Table 1: Classification of citizens deliberation in constituent process (1970-2018)**

<b>Mechanism of participation</b>	<b>Procedure for content aggregation</b>	<b>Type</b>	<b>Cases (29)</b>
The conditions for inclusion and pluralism in participation do not exist.	There is no method previously informed to the participants, nor traceability or identifiable incidence.	Symbolic (5)	Rwanda (2000-2003), East Timor (2001), Iraq (2005), Afghanistan (2011) y Morocco (2011)
The conditions of temporality and inclusiveness are met, but not the ones for pluralism. The information is biased.	The participatory stage is planned but there is no previously informed processing method. The government controls the process.	Prejudiced (5)	Cuba (1976 y 2018), Uganda (1995), Ethiopia (1992-1994) and Zimbabwe (1999-2000)
There are conditions of temporality, inclusiveness and relative pluralism	Low or null planification of the process	Participatory overflow (3)	Venezuela (1999), Ecuador (2008), Bolivia (2006-2009)
There are conditions of temporality, inclusiveness and pluralism and access to information.	There is a method and a final synthesis document, but no formal procedures that require treatment.	Constituent opening (12)	Colombia (1991), Nicaragua (1986), Guatemala (1994-1999), South Africa (1994), Eritrea (1994), Albania (1997), Thailand (1997), Kenya (2008), Dominican Republic (2007), Zimbabwe (2008-2013), Tunisia (2011), Chile 2017
There are conditions of temporality, inclusiveness and pluralism and access to information.	There is method, organism, traceability and incidence.	Constituent participation (4)	Brazil (1988), Island (2011), Ireland (2012 y 2016)

Source: Own elaboration

### *Symbolic deliberative processes*

The "symbolic" deliberative processes are observed in critical contexts. Although it can be planned, the mechanism of aggregating the content generated is deficient and do not allow to

connect the outcomes of deliberation with the constituent body. Participation is promoted as a way to legitimize a political process (for example, the resolution of armed conflicts) rather than to incorporate content into the constitutional agenda. The processes that took place in Rwanda (2000-2003), East Timor (2001), Iraq (2005), Afghanistan (2011) and Morocco (2011) are included here. The first four included an educational phase and a public consultation phase. They generated different levels of participation, but do not stand out for being massive or plural, even, some deliberately excluded certain groups. They were mainly promoted by international organizations with the aim of legitimizing the new post-war political regime (Banks, 2007).

The most recent case, in Morocco, appears as a flagrant example of manipulation of the participation associated with the most recent citizen demand to participate in the definition of public affairs, but does not meet the slightest criteria to be considered a fair process. In Afghanistan, a secretary appointed by the United Nations was externally responsible for overseeing and accompanying the process, which was due within 18 months. A commission appointed by President Hamid Karzai drew up a draft, practically behind closed doors, which was then submitted to the citizens for consideration. The participatory process, with scarce resources and in a devastated country, lasted a month. The content processing was not transparent and the process was not inclusive. The final stage was left to the president and his cabinet (Brandt, 2005).

In Rwanda, the deliberative constitutional process took place after a brutal civil war. It was launched between 2000 and 2003, there were public events and information programs on radio and television. Two years were dedicated to civic education. A draft of the constitution was distributed throughout the country and there were two months dedicated to public consultation. This did not include all sectors and the meetings rather gave space to internal disputes, which were resolved from above, there were no methods of systematization of the content generated (Brandt et al., 2011; Saati, 2015).

Following the independence of Indonesia, East Timor set about developing a new constitution, which should be given under the supervision of an external secretariat and within 90 days. The consultation prior to the draft was given in a week, without enough information or time for the civic education stage. The document was discussed for five months, but people could only comment on the text published in Portuguese, a language that barely 10 percent of the population knew. There were no independent bodies to process information derived from participation (Brandt et al., 2011; Brandt, 2005).

In postwar Iraq, a Transitional Law regulated the procedure to elaborate the new constitution, in nine months. The draft was drafted by Iraqi elites, under the supervision of the United States government, who encouraged citizen consultation. The Extension Unit was created, responsible for convening meetings throughout the country. Participation was scarce and exclusionary (the Kurdish and Sunni Arab regions did not participate). According to the Extension Unit, there were 126,000 presentations that were received by the Drafting Committee but no mechanism was established to treat contents (see Benomar, 2004) and, accordingly, there is no traceability.

In Morocco, inspired by the “Arab Spring”, the Youth Movement February 20 (M20F) called for the opening of the regime. Different associations of activists and leftist parties but even Islamist parties supported the claims. A National Support Committee was formed that brought together more than 100 civil society organizations. Then King Mohamed VI began a reform process calling for participation. The M20F refused to participate but other groups did, including labour unions and political parties. A Special Commission for Constitutional Reform appointed by the King took charge of receiving suggestions. About two hundred documents were collected and approximately one hundred meetings were held between the Constitutional Commission and the representatives of civil society organizations. In parallel, the intimidation multiplied. There is no record that these demands have been met. The new constitution was ratified in a highly questioned referendum (Maghraoui, 2011).

#### *Prejudiced deliberative process*

In the cases included here an intensive and planned participation is observed. The goal is not, as in the previous group, to give a varnish of legitimacy outward but to mobilize the bases in a process controlled by the government. Content is generated and may be introduced in the debate and in the constitutional text but the procedure is not specified, so it is considered discretionally by legislators or constituents (or directly the Party) to incorporate it into the final text. The cases included in this group -Cuba (1976 and 2018), Uganda (1988), Ethiopia (1992-1994) and Zimbabwe (1999-2000)- share the trait of being oriented to mobilize the like-minded.

In Cuba, in 1974, the government and the Communist Party appointed a Drafting Commission made up of twenty members responsible for drafting a constitution<sup>4</sup>. During 1975 there was a public discussion in which 216,000 people proposed more than twelve thousand modifications (Zaldívar Abad, 2016: 25-6). The draft was discussed by members and followers of the Party, grassroots committees and governing bodies of the Young Communist Union, the trade union sections, the Committees for the Defense of the Revolution and, among others, the Revolutionary Armed Forces. The participatory process would have resulted in the modification of 60 articles (Guanche, 2013), but the discussions were not made public. The First Congress of the Communist Party of Cuba approved the text, finally submitted to a referendum.

In Table 1, the Cuban process is classified as restricted by being controlled by citizens and organizations strongly linked to the party. Although the official documents indicate a significant number of modifications derived from the process there is no report or information available to trace what and how was changed as a result of the participatory process. Thus, we classify it as “without incidence”. In 2018, a similar process took place, which lasted for twelve weeks. According to official data, more than seven million Cubans (64% of the population) gathered to discuss a constitutional proposal prepared by a commission appointed by the National Assembly. Although this suggests massive participation, the opposition is prohibited and persecuted. There were 133,681 meetings and about ten thousand proposals were generated. The National Processing Team analyzed the interventions as they were received, and without predefined criteria. Then, the documentation generated was passed to the Analysis Group, composed of eight members of the Editorial Committee and twenty-two experts from various branches of Law (handpicked). This group drafted the text that was approved by the National Assembly and ratified in a referendum on February 24, 2019. All this documentation, unlike the 1975 process, has been available. For these reasons we rate the process as having incidence, although controlled. Thus, it is a sort of intraparty or intragroup process of participation, far from an open and free one.

In Uganda, the National Resistance Movement government initiated the constitutional replacement by appointing a 21-member Commission to prepare a draft. Then, 86 two-day seminars were organized in the 34 districts of the country and an entire year was devoted to constitutional education, in the 870 municipalities (translated into all the languages of the

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<sup>4</sup> The Cuban experience was inspired by the elaboration of the Soviet Constitution in 1936 and the Czech in 1960, where the Communist Party had a notable participation and the project was subject to popular discussion (Guzmán Hernández, 2015).

country). In the consultation stage Mohler (2006) registers more than 25,000 suggestions. The political parties were not authorized to participate. Finally, a constituent assembly with a majority of its elected members directly at the polls (214 of 284) drafted and approved the text (Tripp, 2010; Waliggo, 2001).

In Ethiopia the constitutional elaboration took place during the transition process (1991-1995), after the seizure of power by the Democratic and Revolutionary Front of the Ethiopian People and the Oromo Liberation Front. A Commission appointed by Parliament prepared the constitutional draft and launched an educational and participatory process. It was held during 1992 and 1993, open to all parties and citizens (Wodajo, 2001). But the political elite was divided and finally dominated by the armed groups that overthrew the revolutionary government, giving a turn in a process that could have been of opening (it is observed in table 1 how the participatory process gathers positive characteristics while the phase of systematization turns in the opposite direction).

After the independence of the British Crown (1980), Zimbabwe was governed by the National African Union of Zimbabwe. In 1997, the National Constituent Assembly (ACN) was created, bringing together more than one hundred civil society organizations, students, workers, churches and citizens individually to promote constitutional replacement. Between 1999 and 2000 there was a participatory process that was planned and accompanied by the ACN, which deployed 600 facilitators in the territory and implemented education programs on constituent processes. The government accompanied the initiative (partly due to the social pressure generated) with 500 commissioners who held meetings, whose main support material was a questionnaire of 400 questions and answers on the central themes of the debate. Despite that, the constitution was rejected in referendum. The process was heavily controlled (Saati, 2015).

### *Participatory overflow*

The analysis of the methodology, transparency and inclusiveness of deliberative processes has led us to a finding that contradicts or at least complements the assessment of cases such as Venezuela (1999) Ecuador (2008) and Bolivia (2006-2009). These have been highlighted as experiences that involved citizens and social movements in the process, and this was indeed so. However, there was little or no planning of the participatory stage and there were no methodologies for information processing, so these processes do not meet the requirements to be considered fair.

In Venezuela, the constitutional process was carried out shortly after the arrival of the V Republic Movement, led by Hugo Chávez. During the campaign there were numerous forums and debate meetings open to the public, including the various political parties and social movements. The first three months of the constituent were characterized by the broad participation of social movements and civil society organizations. However, this participation was not planned, while the decision-making process was quick and controlled by the government. The participation was plural, but not its results, as there were no procedures to systematize the participation or publication of documents that allow traceability (Massüger and Welp, 2013).

Like Chavez in Venezuela, Rafael Correa (Country Alliance) in Ecuador had campaigned promising the convening of a constituent assembly and activated a referendum to unlock the process once the government reached in 2007. The election of assembly members gave Correa a considerable victory and its allies (80 of the 130 seats). A Social Participation Unit (UPS) was created, composed of three people. But the participation overflowed the process, with the opening of the constituent Headquarters in Montecristi (240 KM from Quito), where approximately 170,000 visits were recorded, that were channeled through the definition of work tables. Workshops and discussion groups with experts were also organized (see Ortíz Lemos, 2013; Centro Carter, 2008). The lack of resources and methods, on the one hand, and on the other, the tight control of President Correa would have even limited pluralism within the assembly (for details see Welp, 2018).

In Bolivia, the Movement to Socialism (MAS), led by Evo Morales, triumphed in the 2005 elections and initiated constitutional change. The participation was organized without planning but with a plural approach through territorial meetings, which led the assembly members of different groups to participate in public debates in all regions of the country (Lazarte, 2008; from the source Jeria, 2010). However, the information and dialogue prevailed over the generation of content and the contents that were generated could only be transferred to the debate if the will of the assembly members operated as a transmission belt.

#### *Constituent opening*

Colombia (1991), Nicaragua (1986), Guatemala (1994-1999), South Africa (1994), Eritrea (1994), Albania (1997), Thailand (1997), Dominican Republic (2007), Kenya (2008), Zimbabwe (2008-2013), Tunisia (2011) and Chile (2017) were conducted with guarantees, plurality and sufficient information. They differ from those of “controlled participation” in that they are inclusive and plural, and from those classified as “participatory overflow,” in that they came up with a plan

aimed at channeling the demands and suggestions given by civil society. The cases included in this type give rise to an autonomous deliberation in a plural framework and the systematization processes allow to trace and connect the citizen debates with the constituents. That is, the systematization allows to know whether there were debates on the issues, but the methods implemented did not allow to guarantee that the debates took place.

In Colombia, in 1991 the newly elected government of César Gaviria (1990-1994) continued the process initiated by its predecessor in response to the citizen's claim to replace the constitution (Welp, 2018). The participatory process was an initiative of the Executive Branch, which convened working tables and preparatory commissions to discuss the reform and the agenda devised by the government. Between September 16 and November 15, 1990 (before the constituent elections), 1580 work tables were run throughout the country that resulted in the submission of more than one hundred thousand proposals (Jiménez Martín 2006). The preparatory commissions prepared the synthesis documents that were then sent to the constituent (Bejarano and Segura, 2013).

In Nicaragua, the Sandinista Popular Revolution put an end to the dictatorship of the Somoza family (1934-1979), settling in power in July 1979. After the electoral victory of Daniel Ortega in 1984, the constitutional process was launched. A special commission (not elected), composed of representatives of seven political parties, elaborated the constitutional proposal. 750,000 copies were published and between May and June 1986, councils were organized throughout the country. More than 70 councils were activated in which contributions were received from all social groups. About 100,000 citizens participated, of which 2,500 made suggestions in the councils and 1800 delivered them in writing. The Constitutional Commission was responsible for receiving the result of the Constitutional Open Councils and the opinions and suggestions of citizens. After the systematization, several changes were recommended that were subsequently submitted for discussion and approval by the plenary of the legislative body (National Assembly, 1987).

Guatemala can be described as a participatory opening process frustrated in achieving its objectives. In 1994 an agreement between the government and the Guatemalan National Revolutionary Union (URNG) reopened the peace negotiations, with the mediation of the UN and witness countries. The Civil Society Assembly (ASC), consisting of 84 delegates representing 47 organizations, was launched and thematic commissions were created to formulate proposals on priority issues, which were then discussed in plenary sessions by delegates of all participating groups. These documents were shared in other meetings with various political and social actors,

including organizations representing women, businessmen, indigenous people, peasants, the Church, human rights NGOs and displaced persons that resulted in an agreement signed by the Government and finally submitted (and rejected ) in a referendum in which only 17 percent of citizens participated (Delgado and Brett, 2005; Alvarez, 2004).

In South Africa, after the end of the 'apartheid' and with the new government of Nelson Mandela (African National Council, CNA), the Convention for a Democratic South Africa (CODESA), a body composed of 19 members representing the various South African ethnic groups, was responsible for leading the constitutional development process. More than 95,000 people participated, presenting proposals in workshops and meetings. There were 13,443 written presentations - from a few handwritten lines to printed reports of more than 100 pages - about 10 percent were from organizations, less than 1 percent from political parties, and the vast majority from individuals (Klug, 1996). Once the draft was prepared, copies were distributed throughout the country attracting more than 250,000 new presentations. A secretariat received the proposals and compiled them (Klug, 1996). These agreements were submitted to a referendum exclusively for the white population, being approved by 60 percent of the votes (Barnes and de Klerk, 2002).

In Eritrea, the government promoted a constitutional process after the independence of Ethiopia in 1991. In 1993 a Commission responsible before the National Assembly was created to coordinate the process, under government control. The 50 members of the Commission included women (21 out of the total), the country's nine ethnic groups and various social sectors, business groups, etc. (Selassie, 2010). The participatory process had an educational and an advisory stage that provided the basis for drafting the text, and a third stage in which the document that the Commission finally sent to the National Assembly was discussed. For two years public meetings were held in 157 places in the country in which 110 thousand citizens participated while another 11 thousand participated in 16 places from abroad. There were no predefined methods of presenting the contents. The reports presented suggest that the Commission took into account the recommendations (Selassie, 2010).

In Albania, after years of tensions between the government and the opposition, and with NATO occupying parts of the territory, in 1997 the Socialist Party initiated the constitutional replacement. Parliament regulated the process, which included citizen consultation, for nine months and preceded by a stage of civic education coordinated by an Administrative Center with government support and the participation of a wide range of non-governmental organizations. The process was open, however, the Democratic Party (displaced from power in the 1997

elections) did not participate. There were more than a dozen forums and symposia to identify important issues for the population and listeners from the general public were included. All information was recorded and transcribed in detailed summaries that also included the recommendations. In August 1998, the second phase of the revision of the draft prepared with the first was opened. Hundreds of proposals were considered and more than 50 changes introduced, affecting 45 of the 183 articles. Approximately 25 percent of the document was modified based on the suggestions received. The Commission completed the process by approving the final text that was ratified in a referendum on September 30, 1998 (Carlson, 2010).

In Thailand, after triumphing in the 1996 elections, the New Aspiration Party convened the Assembly responsible for drafting the new constitution. Once the Assembly members were elected, they set out to travel through the provinces and together with civic groups organized public meetings during February and March 1997. Then, they prepared a first draft of the Constitution that was disseminated in the media and resulted in to a second round of consultations.

A committee was formed, having the responsibility of gathering and systematizing recommendations that were the basis of a review by the Assembly (this is one of the clear differences between this procedure and the Bolivian, for example, where also the assembly members organized territorial meetings but there was neither systematization nor second round of consultations) (Klein, 1998). There were two instances responsible for information processing: the Democratic Development Committee (CDD) responsible for registering the first proposals and the public opinion committee of the CDA. The CDA processed the contents with the support of public opinion committees and academics. The Drafting Committee (CDA) prepared a draft in May and with it traveled throughout the country to collect opinions at public hearings. The final document was approved by the National Assembly on September 27, 1997 (Munger, 2007; Uwano and Birns, 1998).

The one in Kenya is another process of constitutional openness, although ultimately frustrated in its objective of approving the new constitution. The demand for a constitutional replacement came from civil society, which in 1997 achieved the enactment of the Constitutional Review Law. In 2001, the Review Commission was created, responsible for carrying out civic education and preparing citizens for participation in the Constitutional Advisory Forums. The Constitutional Commission was composed of 27 people nominated by a Parliamentary Committee appointed by the President. There were hundreds of public hearings, all comments were entered into a database and sorted by name, subject, location and other criteria. The

National Constitutional Conference met from the end of April 2003 until March 2004, composed of 629 delegates, including the commissioners, deputies and representatives of each district and political party, as well as religious organizations, professionals and other civil organizations only entitled to voice. This instance should adopt the draft constitution by "consensus" and with a two-thirds majority for the amendments. Modifications to the draft were included in Parliament and the constitution was drafted which was rejected with 57 percent of the votes in referendum (Andreassen and Tostensen, 2006; Bannon, 2007)

In the Dominican Republic, the process arises from an initiative promoted by President Lionel Fernández in October 2006, to form a Commission in charge of preparing the draft reform of the Constitution prior to a participatory process. The process in question was entrusted to a commission of thirteen jurists (decree No. 323/2006), which prepared a document with 77 questions and designed a methodology of popular consultation accompanied by open councils. The implementation was carried out by a team of facilitators who had to articulate a participatory process at the municipal level and systematize the results generated. The conclusions were presented at a National meeting (February 2007), based on a report of recommendations (April 2007) that were weighted by an elected Review Assembly (2009) that finally approved the final constitutional text (DIAPE, 2007).

The second process in Zimbabwe, in 2008, articulated a broad political agreement that allowed to establish the basis for constitutional change. The government initiative had 1400 facilitators (30 percent of parties; 70 percent of general recruitment), which held thematic meetings of citizen debates, enabling a web platform to receive contributions and consultations. The inputs generated were systematized and some of the proposals were taken into consideration in the final text (for example, issues related to childhood, youth, gender and same-sex marriage) (Magaya 2015). The text was submitted to a referendum and this time it was supported by 95 percent of the population (Sachikonye, 2017).

In Tunisia, the project for a new Constitution was prepared between August 2012 and June 2013. The first draft was submitted to citizens for consideration and was disseminated through a public campaign for two months, which proved insufficient to attract the population. The main instance of participation was the open deliberative dialogues held in the 24 local governments. With the support of the United Nations Development Program, other participatory bodies were promoted. Different documents speak of approximately 7,000 participants, including 300 members of civil society associations and 320 representatives of the academic world (it is far from being massive when compared to other cases analyzed here). The

meetings were held with members of the Constitutional Committees, which took place every Sunday for approximately six weeks. They were between 50 and 500 participants, with free attendance but a compulsory registration was kept (Pickard, 2013). According to the information collected up to February 2013, more than 10,000 amendments to the text had been collected by the assembly members. The proposals were then reviewed by the constitutional committee (Zemni, 2015; Brandt, 2015).

In Chile, the participation process arises as a commitment of President Michelle Bachelet (2014-2018). Participation was not carried out on a draft, but on three topics of constitutional conversation: values and principles; rights, duties and responsibilities; and institutions of the State. The consultation process was carried out under two modalities: a digital form that was answered individually and in-person collective deliberation. The collective debate stage was implemented, in turn, in three phases: local, provincial and regional. The first was called Local Self-convened Meetings (ELA) and was the one that registered the highest participation with 106,412 participants followed by the individual consultation with 90,804 responses. While in the provincial and regional councils 12,852 and 8,621 people participated (a total of more than two hundred thousand participants). The process was accompanied by a Council of Observers and another Council of Systematizers, who presented their respective reports in January 2017. In March 2018, upon the end of her government, President Bachelet sent a new constitution project referring to the participatory process. This project has not been put into discussion in the Parliament. Hence, it is not yet possible to speak of incidence or link with the constituent (Soto and Welp, 2017).

### *Constituent participation*

In the group that we describe as “constituent participation” the contents generated by citizen participation are not by default or automatically incorporated into the constitutional text, but the mechanism by which a theme will be discussed is established with certainty, something that we consider fundamental for a process to be fair. The four experiences included here - Brazil 1988, Iceland 2011 and Ireland in 2012 and 2016 - differ from the ones classified as of ‘constituent opening’ in that the method implemented allows a better combination of deliberative processes with instances that guarantee citizenship or that the demands will be taken into account meeting certain requirements or, as a minimum, that will be discussed (effective agenda capacity, as in the case of Brazil).

The Brazilian experience happened during the transition to democracy in 1988. Mechanisms were designed to channel participation: first, citizen suggestions were accepted (equivalent to a petition), 72,719 were accepted and registered in a Computer Support System to the Constituent (SAIC) driven by 122 associations, which gathered about twelve million signatures. Of these, 83 (a low number in proportion), gathered the formal prerequisites to be presented at the Congress, becoming an antecedent of the popular initiative; second, some 400 citizen meetings were promoted at the local level that generated around 2,400 suggestions; and third, once the first draft of the constitutional text was presented, associations with legal registration could make new suggestions when they could support them with 30,000 signatures (Rauschenbach, 2011). The final decisions were left to parliament, but the mechanism guaranteed the arrival of certain issues and forced them to discuss them.

In Iceland, within the framework of a deep economic and political crisis and with the opening of the electoral arena to new parties, assemblies were organized during 2009 with the participation of citizens elected by lottery. In the 2010 elections, a leftist coalition came to power and promoted constitutional replacement. Again, the process combined different stages and forms of participation. First a National Forum was convened in which 950 raffled citizens participated. A parliamentary committee composed of seven members nominated by the political parties was then organized to discuss the report presented by the Forum. In April 2011, the Constitutional Council began to function, deciding to open itself to citizenship (crowd-sourced constitution). Social networks and other traditional media were made available to citizens to submit their proposals. In a process open to the eyes of citizens, the council was advancing through deliberation and voting. The constitution was approved and submitted to a referendum on October 20, 2012 (Gylfason, 2013; Bergmann, 2016).

Finally, the Irish experience is one of reform (not replacement), but our interest in the design of participatory mechanisms encourages us to include it. In the first experience launched in 2012, the proposal for democratic innovation came from academics and activists. Once the government supported the initiative, the topics that could be debated in the Convention were identified and a mechanism was designed to choose by people by sortition representing the population in terms of gender, age, territory and economic income. The Convention incorporated 66 percent of its members by lottery while the other 33 percent were nominated by political parties. The topics included issues such as reducing the presidential term to five years, lowering the voting age to 17 years, reforming the electoral system, same-sex marriage or promoting the participation of women in politics, among others. In a process with a clear

methodology, participation of facilitators and training mechanisms of the participants, recommendations were produced that the government undertook to consider and / or submit to a referendum (Farell et al., 2017; Suiter et al., 2016). In 2016, the mechanism implemented to discuss the regulation related to voluntary termination of pregnancy was similar (raffled assembly and referendum) but this time there were no political representatives. Universities played a leading role in guaranteeing the quality of the process: complete information (among others, arguments of all positions). The opinion of the Assembly would have influenced public opinion, being approved by referendum, on May 25, 2018.

## Conclusions

The review of previous studies showed that despite the rise of deliberative constituent processes there are gaps in the definition of the minimum criteria that these processes should meet to be considered democratic. We then proposed conditions to classify the deliberative stage of constituent processes referred to: a) the characteristics of the mechanism (information, time, degree of openness and plurality) and b) the method of content processing (if it exists, has been previously communicated, derives in reports that allow traceability and establish a link with the constituent process itself). For the empirical analysis, we selected experiences in which participation was regulated and / or formally promoted, had a level of openness to citizenship (excluding those who convened only experts or political parties) and were oriented to generate content in a period that goes from 1970 to 2018.

At a national level and with a global approach, we identified 29 cases in 27 countries that met the indicated requirements. The combination of results attributed to the two dimensions identified allowed the classification of “symbolic” deliberative processes (neither the participatory mechanism nor the systematization procedure meets the minimum requirements); “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 ); of “participatory overflow” (when they are relatively plural and inclusive but there is little planning and even fewer methods of processing the generated content); of “constituent openness” and “constituent participation”.

The opening and constituent processes share all the conditions but do differ in the incidence. While the first ones show transparency in the publication of the systematization of

results and in some cases specify the methods used to generate these reports, they do not establish mandatory treatment of contents. This does not lead to deny that they may have an impact, but said treatment depends on the political will, as it happened in South Africa, for example. On the other hand, processes qualified as “constituent participation” do establish mechanisms of compulsory treatment (which does not necessarily lead to the introduction of the proposals and suggestions, as happened in Brazil 1988).

Although our research confirms that deliberative processes implemented in non-democratic contexts tend to not meet the minimum requirements to be considered open and plural, it also shows that processes implemented in democratic contexts are deficient (Ecuador as an outstanding example). The conclusions suggest that it is essential to define standards for fair deliberative processes and invites us to discuss the most appropriate mechanisms for this (sorted assemblies combined with referendums and / or deliberation processes that allow the generation of initiatives backed by signatures as two possible examples). At the same time, the data collected will allow to go in depth in the analysis of the results of deliberative participation.

At the level of policy design, these findings invite promoters of deliberative participation in general to take into account the minimum criteria that a process of these characteristics requires to prevent them from continuing to feed the spiral of disenchantment. The main theoretical implication invites to consider that a participatory process must comply with minimum parameters that allow distinguishing between a mere symbolic or instrumentalized exercise and a fair, competitive and democratic procedure.

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## Appendix 1: Characteristics of citizens deliberative processes in constitution making contexts (1970-2018)

Case	Mechanism of participation				Procedure to present the contents generated				
	Information/ Civic education stage	Time for deliberation	Participants	Agenda	Method	Previously informed	Traceability (Published)	Incidence	Connection constituent body
Cuba 1976	Planned / Biased	Planned / Sufficient	Restricted	Partial	No	--	No	No	Prejudiced
Nicaragua 1986	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Guatemala 1994-1996	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Brazil 1988	Improvised	Planned / Sufficient	Inclusive	Plural	Yes	Yes	Yes	Yes, optional and mandatory	Independent
Uganda 1995	Planned / Biased	Planned / Sufficient	(Inclusive)	(Plural)	No	--	Yes	No	Prejudiced
Colombia 1991	Improvised	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
South Africa 1996	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	Yes	No	Yes	Yes, optional	Independent
Eritrea 1994	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Ethiopia 1994	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	No	No	Prejudiced
Albania 1997	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Thailand 1997	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Venezuela 1999	Improvised	Improvised	Inclusive	Plural	No	--	No	No	n/a
Zimbabwe 1999-2000	Planned / Biased	Planned / Sufficient	Restricted	Partial	No	--	No	No	Prejudiced
Zimbabwe 2008-2013	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Rwanda 2000	Planned / Adequate	Planned / Sufficient	Restricted	Partial	No	--	Yes	No	Prejudiced
East Timor 2001	Planned / Adequate	Planned/Insuff.	Restricted	Partial	No	--	Yes	No	Prejudiced
Kenya 2002-2008	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Iraq 2005	Planned / Adequate	Planned/Insuff.	Restricted	Partial	No	--	No	No	Prejudiced

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Ecuador 2007	Improvised	Planned/Insuff.	Inclusive	Plural	No	--	n/d	n/a	n/a
Dominican Rep. 2007	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	No	--	Yes	Yes, optional	Independent
Bolivia 2006-2009	Improvised	Improvised	Inclusive	Plural	No	--	No	No	N/a
Tunisia 2011	Improvised	Planned/Insuff.	Restricted	Plural	No	--	Yes	Yes, optional	Independent
Island 2011	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	Yes	Yes	Yes	Yes, optional	Independent
Afghanistan 2011	Planned/ Inadequate	Planned/Insuff.	Restricted	Partial	No	--	No	No	Prejudiced
Irland 2012	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	Yes	Yes	Yes	Yes, optional	Independent
Irland 2016	Planned / Adequate	Planned / Sufficient	Inclusive	Plural	Yes	Yes	Yes	Yes, optional	Independent
Morocco 2011	Improvised	Planned/Insuff.	Restricted	Partial	No	--	Yes	No	Prejudiced
Chile 2017	Planif. / Adecuada	Planned / Sufficient	Inclusive	Plural	Yes	No	Yes	(No)	n/a
Cuba 2018	Planned / Biased	Planned / Sufficient	(Restricted)	(Biased)	No	--	Yes	Si	Prejudiced

Source: Own elaboration from primary and secondary sources for each case. In brackets are cases that admit more controversy, such as Cuba 2018, where the records speak of a massive participation and a debate considerably more plural than the desired by the government. Considering the lack of basic liberties, we choose to qualify it as partial while the prohibition of political parties and persecution of opponents leads to it being qualified as restricted.

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