Constitution-Making Procedure and Legitimacy Maximisation: How Different Constitution-Making Procedures Satisfy Different Conceptions of Legitimacy

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The various meanings of 'legitimacy' – Constitution-making procedure as a tool to achieve the right content of a new constitutional document – The effect of the procedure on the actual social and political context – Trade-offs between the various conceptions of legitimacy – Inherent tensions between transparency and political compromise, and between inclusivity and elite support – Direct democratic involvement aggravating polarisation – When the time is not ripe for constitution-making, recommended substitute strategies – Various procedural options: popular drafting, constituent assemblies, ordinary parliaments, expert bodies, roundtables, referenda – The dangers of (Kelsenian) constitutional revolutions

Introduction

Most countries in the world have a formal constitution (i.e. a legal document or legal documents which have stronger legal normativity than other legal documents and burdensome procedural requirements for its/their amendment or its judicial review). Having a constitution may be seen as a symbolic marker of

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national sovereignty; it can also contain credible commitments and help to coordinate the political process.[1] The discourse on constitution-making is dominated by the search for the best procedural solutions to produce a 'legitimate' (whatever that is supposed to mean) constitution.[2] Procedures are important indeed: they can influence the content of the constitution and directly impact the political context (both in positive and negative ways).

However, we should not ask only *how* a new constitution should be made, but also *whether* and *when* this should be done. Creating new constitutions, no matter how well designed the procedure is and how smart its content is, can under certain social and political circumstances (especially in highly polarised societies) result in more harm than good. In such situations more modest means of democratisation (e.g. amending the old constitution, changing the judicial interpretation of the old constitution, creating new ordinary laws, changing political practice, or a combination of these) are appropriate.

The overly optimistic or even enthusiastic view of constitution-making processes (especially in post-authoritarian situations as a means of democratisation) is to a large extent defined by the success of some of these processes in the past. Many other processes, however, failed – either by producing constitutions that did not prove to be 'legitimate' or by directly triggering unfavourable social and political dynamics. Finding the right procedural steps is sometimes impossible, as sometimes the time is just not ripe for a constitution-making process (no matter how well-meant and smartly designed it may be).[3] Just like sport: it is in general healthy to do some sport, but if you have certain medical conditions then it may not (at least until you get better) be advisable.

Constitutional lawyers usually favour the idea of constitution-making (some of them might even hope to participate in such processes one day) and politicians

[1]D. Landau and H. Lerner, 'Introduction', in D. Landau and H. Lerner (eds.), *Comparative Constitution Making* (Edward Elgar 2019) p. 4.

[2]E.g. C. Bernal, 'How Constitutional Crowdsourcing Can Enhance Legitimacy in Constitution Making', in Landau and Lerner, *supra* n. 1, p. 235; T. Maboudi and G.P. Nadi, 'From Public Participation to Constitutional Legitimacy: Evidence from Tunisia', 75 *Political Research Quarterly* (2021) p. 1; J. Blount, 'Participation in Constitutional Design', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011) p. 38; A. Arato, *Post Sovereign Constitution-Making: Learning and Legitimacy* (Oxford University Press 2016); M. Brandt et al., *Constitution-making and Reform. Options for the Process* (Interpeace 2011); J. Elster, 'The Optimal Design of a Constituent Assembly', in H. Landemore and J. Elster (eds.), *Collective Wisdom – Principles and Mechanisms* (Cambridge University Press 2012) p. 148; J. Blount et al., 'Does the Process of Constitution-Making Matter?', in T. Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press 2012) p. 31.

[3]Or if it is still absolutely unavoidable despite the unfavourable conditions (e.g. because of a total collapse of the former regime), then you should avoid certain steps that would under normal circumstances be advisable (like certain methods of popular participation).

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love to promise their voters a new constitution – as if it were a solution for the complex social, economic, political and cultural challenges a country faces. We should not be blind, however, to the potential futility and even dangers of such processes – not only because these can be instrumentalised by power-hungry politicians,[4] but also, even with the best altruistic intentions, they can be untimely if you want to maximise their 'legitimacy'. Institutional small print (including informal rules and practices) is usually more important anyway for changes in the political culture that are necessary for successful democratisation, than the theatrical grandeur of a constitution-making process.[5]

In the first section of this article, I am going to show various possible meanings of the term 'legitimacy' so that we know what should actually be maximised by the constitution-making process. In the second section I summarise the state-of-the-art concerning the effects of various constitution-making procedures on various conceptions of legitimacy. In the final section, I give an overview of the *combined* effects of various democratic constitution-making procedures concerning various conceptions of legitimacy, with a focus on sequencing and overall timing.

Various Conceptions of Legitimacy

Legitimacy is a very multifaceted concept, containing a series of potential conceptual elements.[6] Moreover, as with many generic concepts of constitutional theory (like democracy, the rule of law etc.), the exact definition will imply certain political views and wishes. Therefore, when we define such a concept, we necessarily also wish for a certain political community – even if constitutional lawyers or political philosophers tend to pretend that they simply describe (or discover) the 'true' content of a concept.[7] Instead of playing this frustrating game of hide-and-seek, I think that it is more useful for the discourse on constitution-

[4]G.L. Negretto, *Making Constitutions: Presidents, Parties and Institutional Choice in Latin America* (Cambridge University Press 2013).

[5]A. Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary', 68 *American Journal of Comparative Law* (2020) p. 760.

[6]According to D.A. Strauss, 'Reply: Legitimacy and Obedience', 118 *Harvard Law Review* (2005) p. 1854 at p. 1854 we should avoid using the term altogether: 'Why not just talk about moral right and wrong, or about legal right and wrong, or about whether a particular law or legal system is generally accepted by a population? Using the term "legitimacy" only adds the potential for confusion; why not dispense with it?' While in theory, this might be a viable option, human language (including constitutional academic discourse) works differently. Once a terminology is established, it usually sticks, and it is more promising to clarify and dissect the terminology, than to aim at abolishing it.

[7]A. Jakab, *European Constitutional Language* (Cambridge University Press 2016) p. 1.

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making procedures to show in an 'if . . . then' manner exactly which constitution-making procedures contribute to which conception of legitimacy.

Legitimacy is usually understood as something good ('a virtue') that political institutions (and the decisions made within them about laws, policies, and candidates for political office) claim to have; something that is, loosely speaking, worthy of support.[8] If we talk about the legitimacy of constitutions, then several conceptions (or a combination thereof) are possible, and fulfilling one of them is quite possible without fulfilling the others.[9] Most of these criteria are not simply a 'yes/no' binary but an issue of degrees or gradients.[10]

The usual twofold distinction between descriptive (sociological) and normative (ethical) legitimacy does not seem sophisticated enough for the purposes of the present analysis, therefore I suggest a threefold terminology differentiating between substantive legitimacy, formal legitimacy and output legitimacy (some of them comprising further sub-categories).[11] As we will see, there can be correlation (and even causality) between the various conceptions of legitimacy, but there can also be cases where they clearly diverge (and, under certain circumstances, trade-offs should also be recognised). There is no hierarchy between the various conceptions of legitimacy (or at least I am hesitant to rank them); all of them are virtues that make a new constitution worthy of our support.

[8]F. Peter, 'Political Legitimacy', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2017), https://plato.stanford.edu/archives/sum2017/entries/legitimacy/, visited 1 July 2025. For legitimacy as 'System-Vertrauen', *see* T. Würtemberger, *Die Legitimität staatlicher Herrschaft. Eine staatsrechtlich-politische Begriffsgeschichte* (Duncker & Humblot 1973) p. 15.

[9]You could also call the various concepts of legitimacy 'dimensions' of legitimacy (*see* e.g. T. Drinóczi, 'Az alkotmány legitimitásáról', *Pázmány Law Working Papers* 2011/37, p. 5; V.A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', 61 *Political Studies* (2013) p. 2; J.G. Oates, 'The Fourth Face of Legitimacy', 43 *Review of International Studies* (2017) p. 199), but in order to emphasise the fact that these do not necessarily follow from each other (and there are even trade-offs), I prefer to talk about 'various conceptions of legitimacy'. Moreover, for the purposes of the present study, I cannot see any analytical advantage in constructing one complex multidimensional legitimacy concept, instead of simply speaking of various conceptions of legitimacy.

[10]R.E. Barnett, 'Constitutional Legitimacy', 103 *Columbia Law Review* (2003) p. 111 at p. 147.

[11]For the purposes of the present study, I also found the threefold terminology of Fallon (moral legitimacy, legal legitimacy, sociological legitimacy) unsatisfactory, as my 'formal legitimacy' includes more than just legality, and my 'output legitimacy' includes more than just social support. In order to avoid confusion, I chose a terminology that is entirely different from that of Fallon. *Cf* R.H. Fallon Jr., 'Legitimacy and the Constitution', 118 *Harvard Law Review* (2005) p. 1787. The threefold terminology of Schmidt (*supra* n. 9) is not suitable for our purposes either, as none of the 'input, output or throughput' categories express the legitimacy stemming from the *text* of the constitution.

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Substantive legitimacy based on the text of the constitution

A usual approach is to talk about the legitimacy of a constitution as depending on its text. We expect a constitution to contain values such as democracy, the rule of law (including division of powers), human rights or even justice.[12] These are, however, essentially contested concepts themselves, so their exact content is open to debate. (The content of the text might be improved or worsened by subsequent judicial case law, but that phenomenon is not part of our current enquiry).

This conceptual tradition goes back to Pufendorf, who defined 'potestas legitima' by being bound to substantive natural law principles.[13] Nowadays, substantive legitimacy concepts usually no longer apply the language of natural law; they simply talk more modestly about 'legitimate' as 'just' or as having an 'ethical quality'.[14]

If we apply this approach, then the question is which constitution-making procedure is most likely to produce a text in which these preferred values are explicitly mentioned and/or implicitly promoted in the constitutional text.

A possible objection against this conception of legitimacy could be to refer to sham constitutions which also mention these noble ideas. The text of a constitution does not, in truth, say much about what is actually happening. We may even suspect that the more aspirational the text of a constitution is, the uglier legal reality will be.[15] An overly aspirational text (which implies maximum substantive legitimacy) can be not just a symptom of a legal culture in which legal norms are not taken seriously at all, but it can also strengthen the tradition of viewing the constitution as no more than a political declaration, as the standards set (e.g. concerning social rights) can, in certain cases, be unachievable.

[12]After an autocratic past, importing constitutional provisions from 'real' democracies can also be a proof that the text has substantive legitimacy: *see* M. Hartwig, 'Die Legitimation des Staates durch Verfassungsrezeption in Mittel- und Osteuropa', 59 *Heidelberg Journal of International Law* (1999) p. 919.

[13]S. Pufendorf, *De jure naturae et gentium* (Junghans 1672) § 11. For more details *see* T. Würtemberger, 'Legitimität, Legalität', in O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe* vol. 3 (Klett-Cotta 1982) p. 677 at p. 687. Similarly J. Bodin, *Six livres de la République* (1583) (Librairie générale française 1993) p. 273: 'La Monarchie Royale, ou légitime, est celle où . . . le Monarque (obéisse) aus loix de nature, demeurant le liberté naturelle et propriété des biens aux subiects'.

[14]H. Hoffmann, 'Legalität, Legitimität', in J. Ritter and K. Gründer (eds.), *Historisches Wörterbuch der Philosophie* vol. 5 (Wissenschaftliche Buchgesellschaft 1980) p. 162 at p. 162.

[15]The more 'the rule of law' is mentioned in a constitutional text, the less it is actually adhered to, applied and complied with in practice. *See* T. Ginsburg and M. Versteeg, 'Constitutional Correlates of the Rule of Law', in M. Adams et al. (eds.), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge University Press 2017) p. 506. Latin American countries serve as sadly fitting examples. In a similar fashion, the expansion of constitutional rights in constitutional texts can serve as a 'bribe' for accepting less democratic constitutions (with weaker checks and balances): *see* R. Dixon, 'Constitutional Rights as Bribes', 50 *Connecticut Law Review* (2018) p. 381.

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Formal legitimacy: source, legality, fair procedure

Formal legitimacy concerns: (1) the source of authority; (2) the legality of the procedure; and/or (3) the fairness of the procedure in which the constitution is adopted.[16]

Ad (1) Whereas historically, legitimacy was bound to monarchical rule,[17] in modern constitutional thought the *source* of political legitimacy is the people.[18] Even though this idea is mostly traced back to Rousseau,[19] for the purposes of modern constitutional theory another French social contract theorist, Abbé Sieyès is actually more important. He invented the concept of *pouvoir constituant*, meaning 'the people' as the only legitimate source of the authority of constitutions.[20] If not the people themselves, then at least their representatives (in the parliament or in a constituent assembly) should approve the constitution, so there is a chain of legitimacy leading back to the people.[21]

[16]Legitimacy might also be defined as a combination of these factors; in a negative manner, illegitimacy can be defined as the lack of (one of) them. *See* e.g. 'Je rentre en France appelé par les voeux de la Nation entière pour mettre un terme au Gouvernement illégitime, qui vous a été imposé par la trahison et la force' (Napoleon, 1814, Proclamation in Bastia, quoted by Würtemberger, *supra* n. 13, p. 698).

[17]In constitutional history, 'legitimate' was mostly an adjective of monarchical rule and dynastic claims, sometimes explicitly in contradiction to democratic claims, *see* Hoffmann, *supra* n. 14, p. 162.

[18][s.n.] *Observations générales sur le gouvernement actuel, et sur la proclamation de Napoléon au peuple français, du 1er mars 1815* (Schulze et Dean 1815) p. 6: 'La souveraineté réside dans le people, seule source légitime du pouvoir.' Accepting both sources: 'J'admets deux sortes de légitimité: l'une positive, qui provient d'une election libre, l'autre tacite, quie repose sur l'hérédité; j'ajoute, que l'hérédité est légitime, parceque les habitudes qu'elle fait naître, et les avantages qu'elles procure, la rendent le voeu national': B. Constant, 'Chapitres ajoutés à la quatrième Édition' (1815), in ibid, *Cours de politique constitutionelle* vol. 2 (Guilleaumin 1861) p. 264 at p. 275.

[19]Würtemberger, *supra* n. 13, p. 694: 'Wenn man sich völlig von der *volonté générale* leiten läßt, gelangt man nach Rousseaus Ansicht zu einer legitimen Regierung *gouvernement légitime*), die das Wohl des Volkes sich angelegen läßt.'

[20]The term first appeared during the French Revolution in 1789 (Abbé Sieyès, *Qu'est-ce que le Tiers Etat?;* Ch. V) as the opposite of *pouvoir constitué* (a power constituted by the constitution), i.e. as the counter-concept of all other branches of power. *See* C. Klein, *Théorie et pratique du pouvoir constituant* (Presses Universitaires de France 1996) p. 7 and E. Zweig, *Die Lehre vom Pouvoir Constituant. Ein Beitrag zum Staatsrecht der französischen Revolution* (Mohr Siebeck 1909). The concept (but not the expression) seems to have origins pre-dating the French Revolution: *see* J. Colón-Ríos, 'Five Conceptions of Constituent Power', 130 *Law Quarterly Review* (2014) p. 306 at p. 306-307.

[21]On the chain of legitimacy *see* E.-W. Böckenförde, *Staat – Verfassung – Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991) p. 299; F. Koja, *Allgemeine Staatslehre* (Manz 1993) p. 90. In the French National Assembly in 1789, it was a conscious effort to occupy the term 'legitimate' for the representatives of the people. It was used as a self-definition: 'assemblée légitime des représentants de la [majeur partie de la] nation' (even though the adjective 'légitime' had only been used so far as an epithet of the king): *see* Würtemberger, *supra* n. 13, p. 695 with further references.

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Another sub-version within the strand of formal legitimacy conceptions is to equate it with legality. A constitution is thereby legitimate if it was adopted according to the legal rules which foresee the adoption of a new constitution. This is the original meaning of the word in Roman law, where the 'legitimate' heir was the person who had a legal claim for the legacy if there was no will (testament).[22] Also later, in the 19th century, such uses of 'legitimacy' arose from time to time both in France and Germany.[23]

Even if sometimes legality is considered exactly the counter-concept of legitimacy,[24] and is therefore irrelevant for the legitimacy of a constitution, it is definitely not considered as harmful. The fact that a constitution was made legally does not make it illegitimate – quite the opposite (depending on the definition of legitimacy): an illegal constitution could be considered by some also as illegitimate.[25] I therefore keep it in my cluster of legitimacy definitions, while recognising that this one is even more open to debate than the other ones.

A third sub-version within the strand of formal legitimacy approaches concentrates on the fairness of the procedure. Fairness can especially mean transparency (as opposed to secrecy) and inclusiveness (taking into account the voice of those who are affected). It is primarily not about the moment of consent, but more about the prior process leading up to the decision. Concentrating on the fairness of the procedure as the source of legitimacy is characteristic, for example, of the legitimacy theories of Luhmann[26] and Habermas.[27]

[22] *See* in the *Digesta*: 'legitima hereditas' (heres legitimus) as opposed to the heir by will/testament (Pomponius D.38,16,11; Ulpian D.37,14,11 and D.38,17,1,8).

[23] S. de Sismondi, *Examen de la constitution française* (Treuttel et Würtz 1815) p. 87: 'La légitimité est seulement la preuve que donne un Gouvernement, qu'il a été établi conformément aux lois qui existaient immédiatement avant lui'; J. von Held, *Grundzüge des allgemeinen Staatsrechts oder Institutionen des öffentlichen Rechts* (Brockhaus 1868) p. 216: 'Juristisch hat also die Legitimität nichts mit dem Inhalt des Gesetzes zu tun und ist insofern identisch mit Legalität'.

[24] *See* e.g. C. Schmitt, *Legalität und Legitimität* (Duncker & Humblot 1932) using the concept of 'legitimacy' as a counter-concept of 'legality' (i.e. justifying illegality). *See also* A. Gamper, *Staat und Verfassung*, 5th edn. (Facultas 2021) p. 274 juxtaposing legality (i.e. conformity with positive laws) and legitimacy (i.e. conformity with natural law and justice). Similarly, defining 'legitimacy' specifically as *extra*-legal: *see* B. Schöbener and M. Knauff, *Allgemeine Staatslehre,* 4th edn. (Beck 2019) p. 117.

[25] Here, I leave open the question of whether this *necessarily* implies that following the law is a *prima facie* moral obligation and how far this could depend on the moral quality of the content of the law.

[26] N. Luhmann, *Legitimation durch Verfahren* (Luchterhand 1969) p. 30: 'bei hoher Komplexität und Variablität des Sozialsystems der Gesellschaft … die Legitimation politischer Macht nicht mehr einer naturartig vorgestellten Moral überlassen', but 'im politischen System selbst erarbeitet werden'.

[27] J. Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973) p. 43: 'da letzte Gründe theoretisch nicht mehr plausibel gemacht werden können, erhalten die formalen Bedingungen der Rechtfertigung selbst legitimierende Kraft'.

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Unfortunately, there seems to be a trade-off between the fairness of the procedure, on the one hand, and the quality of the text or (under certain circumstances) possibly even the social output of the constitution, on the other hand. As Klein and Sajó put it:

> At the Philadelphia Convention, great and successful efforts were taken to ensure secrecy of the debates; although the opposite model was found imperative in 1789 in Paris. The drafts and debates of the National Constituent Assembly were published daily and commented on in endless pamphlets within hours. The debates were open and it seems that it was very fashionable at the time to be seen during the deliberations. Threats from the gallery and the street and the immediate reactions of public opinion played a remarkable role. The imperfections of the work in committees and the noise in the general debate that lost arguments contributed to inefficiency.[28]

Output legitimacy (social result): just and free society, economic growth, stability and support

Output legitimacy of a constitution is all about the social consequences, the social result of the document.[29] Did our society become a more just (free, equal etc.) place because of the constitution? Does the constitution ensure economic growth?[30] Does it guarantee stability and support by the main political actors, the officials (justices, policemen etc.) and by *the* people?[31] Sometimes this approach is referred to as descriptive legitimacy, but it is probably better not to call it 'descriptive',[32] as by referring to these social facts (such as support) as legitimating factors, we are

[28]C. Klein and A. Sajó, 'Constitution-making: Process and Substance', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 419 at p. 436. For a similar argument (i.e. the negative effect of transparency on the output as it hampers genuine negotiation and favours theatrical intransigence), *see* J. Elster, 'Forces and Mechanisms in the Constitution-Making Process', 45 *Duke Law Journal* (1995) p. 364.

[29]R.D. Cooter, *The Strategic Constitution* (Princeton University Press 2000).

[30]T. Persson and G. Tabellini, *The Economic Effects of Constitutions* (MIT Press 2003); S.A. Koob et al., *Human Rights and Economic Growth* (Danish Institute of Human Rights 2017); R. Rigobon and D. Rodrik, 'Rule of Law, Democracy, Openness, and Income. Estimating Interrelationships', *National Bureau of Economic Research (NBER) Working Paper* No. 10750 (2004).

[31]The question of *why* the support is given by certain social groups is a different one. According to Max Weber, the source of (support) legitimacy can be tradition, charisma or legality: M. Weber, 'Die drei reinen Typen der legitimen Herrschaft', 187 *Preußische Jahrbücher* (1922) p. 1. For legitimacy as popular support *see*, e.g., S.M. Lipset, 'Some Social Requisites of Democracy: Economic Development and Political Legitimacy', 53 *The American Political Science Review* (1959) p. 69.

[32]T. Würtemberger, 'Legalität, Legitimität', in *Staatslexikon der Görres-Gesellschaft*, 7th edn. (Herder 1987) vol. 3, p. 874.

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actually implying normative ideas.[33] By referring, for example, to social support as 'legitimacy', we are implying that social support is desirable (because it is democratic etc.).

The constitution-making process should not be seen simply as a means to achieving a good text: *the process itself can have transformative power* on the future of the polity that can be even more consequential than the actual constitutional text.[34] Instinctively, we would think that certain procedural steps lead to a constitutional document, and then this document has social consequences (indirect social output of the constitution-making procedure). There are signs, however, that there is a direct social output of the process and that this might be even more important. All these mechanisms exist, but their relative strength is far from obvious (we are going to return to these questions in the second part of the present article).

Lawyers are familiar with a similar phenomenon concerning trials by juries: a jury's main virtue is in the procedure and *not* in the outcome. As a matter of fact, a jury is a notoriously bad decision-maker (also concerning facts),[35] but it helps citizens (not only jury members) to feel that they 'own' the legal system. It therefore can contribute to *more* popular support for the legal system,[36] at the price of having *less* good court judgments. Also in the case of constitution-making processes, we have to entertain the idea that a certain procedural step might have a certain effect on the new constitutional document, but at the same time it might have an opposite effect on the social and political context of the constitution. If we do have two causal chains (as shown in Figure 1), then even a failed constitution-making process can have positive effects: one could potentially argue, for example, that the over-inclusive deliberative Icelandic process (2010–2013) contributed to

[33]D. Beetham, *Legitimation of Power* (Globe Pequot 1990); T. Győrfi, 'Comments on András Körösényi's "Legitimacy of the Constitution in Hungary 1985–2005"', in A. Jakab et al. (eds.), *The Transformation of the Hungarian Legal Order 1985–2005. Transition to the Rule of Law and Accession to the European Union* (Kluwer 2007) p. 562.

[34]V. Hart, 'Constitution-making and the Transformation of Conflict', 26 *Peace & Change* (2001) p. 153.

[35]J. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1949) p. 194: 'The jury, then, are hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do. It follows that the use of fact verdicts, while it may slightly reduce the evils of the jury system, cannot eliminate them. The jury makes the orderly administration of justice virtually impossible.'

[36]Higher levels of popular support for the legal system lead to higher levels of law-abidance: *see* T.R. Tyler, *Why People Obey the Law* (Princeton University Press 2006).

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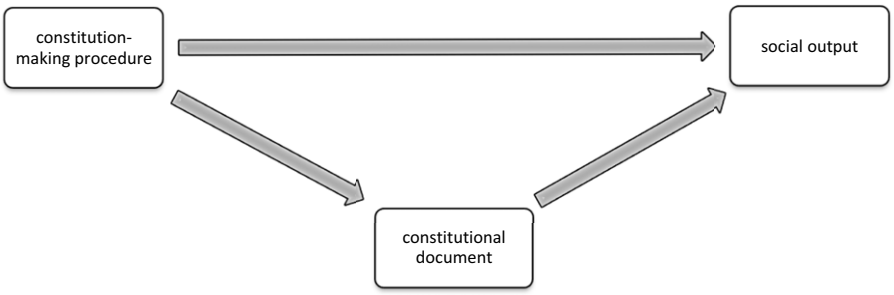


Figure 1. Direct and indirect social output of constitution-making procedures

the failure of the actual adoption of a new constitution, but *at the same time* it also improved the Icelandic democratic culture.[37]

The various social outputs are themselves (and more so than any other above-mentioned factors of substantive or formal legitimacy) of a more-or-less nature and are not binary: it is not obvious what percentage of the population has to support the constitution at a certain time in order to be able to say that it enjoys popular support. It is also unclear what the actual (psychological or sociological) content of such support is: most ordinary citizens do not know the actual content of their own constitution (or at least not in detail). Do we measure support with approval rates (and, psychologically, how intense should this approval be?) or rather by how far the legal system based on the constitution is followed in practice?[38] How do we define 'the' people, and can the meaning of this term change over time (e.g. through the extension of voting rights)?[39] Is it not the constitution itself which defines 'the' people of the political community?

If it is about the support of political actors and officials, do they need to internalise the constitution or simply obey it? Also, in this approach, legitimate constitutions can become illegitimate over time or, conversely, illegitimate constitutions can step-by-step gain legitimacy.

[37]On the arguments for and against various methods of deliberation *see* the excellent M. Reuchamps and Y. Welp (eds.), *Deliberative Constitution-Making. Opportunities and Challenges* (Routledge 2024).

[38]In the context of court legitimacy, we differentiate along these lines between 'specific legitimacy' (approval rates) and 'diffuse legitimacy' (*de facto* acceptance): *see* J.L. Gibson and M.J. Nelson, 'The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto', 10 *Annual Review of Law and Social Science* (2014) p. 201 at p. 202-203.

[39]Klein and Sajó, *supra* n. 28, p. 424.

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Sometimes, this support legitimacy can grow also despite severe deficiencies in the formal legitimacy. The German *Grundgesetz* of 1949, which may well be the most influential and (at least in Europe) the most often copied constitution,[40] has a dubious pedigree. Here, the military pressure of foreign countries (viz the occupying Western allied forces) can be proven (i.e. both 'source' and 'legality' are questionable).[41] The frameworks for constitution-making (also in terms of substance) were determined by the occupying forces, and even the final draft had to be approved by them. Once the final version had been drafted, US generals 'persuaded' the *Länder* (notably Bavaria which seemed to have had enough of 'Northern Protestant rule' and planned to opt for a more Catholic vision) that were unwilling to accept the *Grundgesetz*. Initially, the *Grundgesetz* was not held in high esteem by (West) German citizens, either. Yet it soon became the symbol of post-war economic prosperity and of the new regime (promoting democratic values) in general which then led to the currently high support legitimacy of the German Constitution.[42]

And finally, the border between long-standing traditional legality, on the one hand, and the support by officials and political actors resulting in stability, on the other hand, can be blurred, so it might be unclear which conception of legitimacy we are talking about.[43]

[40]For more details on this question *see* D.S. Law and M. Versteeg, 'The Declining Influence of the United States Constitution', 87 *New York University Law Review* (2012) p. 762.

[41]C. Schmid, *Erinnerungen* (Scherz 1979) p. 370; C. Thornhill, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press 2011) p. 335-337; C. Winterhoff, *Verfassung – Verfassunggebung – Verfassungsänderung* (Mohr Siebeck 2007) p. 1-2 *(Geburtsmakeltheorie)* with further references. The Japanese Constitution of 1947 was not merely influenced by the occupying (American) forces, but virtually drafted by American lawyers in its entirety, and forced on the country by military threat: *see* F. Schauer, 'On the migration of constitutional ideas', 37 *Connecticut Law Review* (2005) p. 907 at p. 908, with further references. Still, no one today would doubt its legitimacy, as it meets expectations in terms of the rule of law, democracy and symbolic community. Symbolic suitability means that those drafting the constitution tried not to offend the traditions and national sentiments of the defeated country (e.g. the institution of the Emperor was not abolished). This way, the constitution did not become the constitution of humiliation, and could not be used as a negative symbol, because despite its total victory, the occupying American power aimed at a compromise. Another factor that strengthened the legitimacy of the constitution was that Japan became one of the most successful powers of the world economy under this constitution.

[42]More generally, on the question how imposed constitutions can grow (in our terminology: output) legitimacy, *see* R. Albert et al. (eds.), *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

[43]F. Guizot, *Histoire de la civilisation en Europe*, 6th edn. (Didier 1856) p. 68: 'La légitimité politique est un droit fondé sur l'ancienneté, sur la durée'.

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How to create magic? Various procedural options in constitution-making and their consequences for various conceptions of legitimacy of new constitutions

Legitimacy has also been compared to magic: it is a magical characteristic of documents or political institutions which makes them worthy of being followed.[44] If this is so, then what are the steps of the successful spell? How can a designer of a constitution-making process become Gandalf, or at least Harry Potter?

There are authors according to whom the procedural steps of a constitution-making process are just symptoms of a certain pre-existing political culture, and that political culture (i.e. not the constitution-making process itself) causes a constitution to fail or to succeed – therefore the process is just a predictor, not the cause of the success.[45] I also think that the procedural steps of a constitution-making do not determine, on their own, whether a constitution will be successful or not.[46] Nevertheless, I believe that certain procedural solutions (or 'rituals') are indeed helpful for certain conceptions of legitimacy,[47] and political culture offers a frame within which it does matter which procedural solution we choose. In the following, I am presenting some usual constitution-making procedural steps through the lenses of legitimacy-creation.[48]

Before we venture into the questions of how, we should also consider whether or when constitution-making is appropriate. For the output legitimacy, certain political contexts of a potential constitution-making are a mission impossible. In highly polarised societies, the mere fact that a new constitution is being made can aggravate polarisation.[49] In such cases, constitutional amendments (and

[44]F.-R. de Chateaubriand, 'Compiègne' (Avril 1814), in *Oeuvres de Chateaubriand*, vol. 15 (Boulanger et Legrand 1828) p. 35 at p. 37: 'Plus de factions, plus de partis! tous pour Louis XVIII! Telle est en France la force du souverain légitime, cette magie attachée au nom du roi.'

[45]K. Pócza, 'Kontorverse Verfassunggebung mit einer Kompromisslösung am Ende? Text und Kontext des ungarischen Grundgesetzes', in E. Bos and K. Pócza (eds.), *Verfassunggebung in konsolidierten Demokratien. Neubeginn oder Verfall eines politischen Systems?* (Nomos 2014) p. 211.

[46]A. Jakab, 'On the Legitimacy of a New Constitution – Remarks on the Occasion of the New Hungarian Basic Law of 2011', in M.A. Jovanović and Đ. Pavićević (eds.), *Crisis and Quality of Democracy in Eastern Europe* (Eleven 2012) p. 61.

[47]I do not want to deny that the effects of certain procedural steps are only probabilistic, i.e. 'constitutional luck' also plays a role: *see* K.L. Scheppele, 'A Constitution between Past and Future', 49 *William and Mary Law Review* (2008) p. 1377 at p. 1387.

[48]For an overview of various procedural steps of constitution-making processes for practitioners *see* Brandt et al., *supra* n. 2.

[49]By polarisation I mean the growing political intolerance and the declining basic trust that lead actors to view their adversaries more and more as 'enemies of democracy': *see* A. Schedler, 'Rethinking Political Polarization', 138 *Political Science Quarterly* (2023) p. 335. This phenomenon not only fosters a toxic atmosphere and diminishes rational discourse among citizens but also undermines the very structures of democratic accountability. The reasons for growing political

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reinterpretation of the existing text) are better suited: adopting a new constitution is a symbolic act (a national ritual), and if the polarisation is strong already then such an act will most likely just result in even more polarisation. (Popular participation will usually not lead to national consensus, see below.) In such cases, the idea of constitution-making needs to be abandoned or at least postponed. Once the polarisation situation has improved (it will take time, but there are constitutional methods to help this, e.g. proportionate electoral system, negative voting, preferential voting etc.). The thread can be picked up again, but in the meantime self-restraint is advised. Sometimes keeping the old constitution is bad, but adopting a new constitution would be even worse. Fresh wounds would be created in one half of the country – no matter which text version is adopted and no matter how smart the process design is, the 'other' half will hate this symbolic act. Amending and re-interpreting existing constitutional texts could solve a lot of problems, in a less symbolic and less emotional way. It is better to incrementally improve the situation than to aim for a theatrical and cathartic victory which ends up as a painful failure with long-lasting damage. If for some reason (total collapse, chaos, war or civil war) it is not possible to keep the old constitution in a highly polarised society, adopting first an interim constitution (or something similar, such as a formal agreement between key actors about the subsequent constitution-making process) can be helpful to build trust, to lower the stakes and to guarantee core interests of the polarised actors.[50]

Representative bodies: parliamentary procedures versus constituent assemblies

There are two main institutional solutions when choosing the body which deliberates the new constitution: ordinary parliaments and specifically convened constituent assemblies. Constituent assemblies have two main functions:

polarisation in several countries around the world are largely cultural, i.e. cultural changes amongst ordinary citizens create opportunity structures for political entrepreneurs (which can then be exacerbated further by economic or technological factors): *see*, for more details and a literature overview, A. Jakab, 'Cultural Enabling Factors of the Erosion of Liberal Democracy – and What Follows from Them for the Restoration Process', *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2024-27, p. 2-3, available at https://ssrn.com/abstract=5021057, visited 1 July 2025 Polarisation creates an environment where transgressions against the principles of liberal democracy become justifiable, leaving such democracies vulnerable to erosion: *see* J. McCoy et al., 'Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities', 62 *American Behavioral Scientist* (2018) p. 16. Polarisation does not necessarily lead to the erosion of democracy and the rule of law (there are polarised countries that are not experiencing erosion), and erosion is also possible without polarisation, but polarisation makes the erosion of democracy considerably *more likely*. Therefore, in our terminology, it tends to lower the output legitimacy of a new constitution.

[50]M. Prieto and S. Verdugo, 'How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions', 13 *Hague Journal on the Rule of Law* (2021) p. 265.

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originally, they were a substitute for referenda at a time when referenda were difficult to organise logistically;[51] nowadays, they are established if the usual (mostly parliamentary) adoption does not suffice (e.g. the parliament still belongs to the *ancien régime*, or a radical personal separation seems to be appropriate). In constitutional history, we have seen both failures (like the Österreich-Konvent[52] or the Convention on the Future of Europe)[53] and successes (USA) of constituent assemblies. The fact that a constituent assembly is in place does not say anything about its fairness (outliers are possible) or its legality.[54] Widely constituted constituent assemblies (like the above-mentioned Österreich-Konvent and the Convention on the Future of Europe) tend to have deadlocks and/or pack the text with favourite topics (which would normally be more suitable for ordinary laws).

A possible advantage of a constituent assembly as opposed to an ordinary parliament could be that it is not biased towards the interests of the parliament. There is no systematic research, however, which would prove this (and there are signs of exactly the opposite in empirical research).[55] A special risk bound to this institutional solution is that the election of a new constituent assembly, especially in a polarised society and under turbulent circumstances, could easily lead to a body in which a large part of the traditional elite is not represented. This can result in substantial efforts from this excluded elite to undermine the new constitution. This was a major concern in the case of the (eventually failed) 2021-2022 Chilean constitution-making process, where the traditional right-wing elite had only very low-level representation in the 2021 Constitutional Convention.[56]

[51]Klein and Sajó, *supra* n. 28, p. 429.

[52]C. Konrath, 'Austria after the Convention', in A. Benz and F. Knüpling (eds.), *Changing Federal Constitutions* (Verlag Barbara Budrich 2012) p. 333.

[53]F. Marchi, *The Convention on the Future of Europe* (Peter Lang 2015).

[54]On this diversity *see* J. Elster et al. (eds.), *Constituent Assemblies* (Cambridge University Press 2018). Too much transparency makes bargaining difficult: Elster, *supra* n. 2. Arato calls constituent assemblies that can decide alone without any legal constraints 'sovereign', as opposed to 'postsovereign' constitution-making where 'the constituent power is not embodied in a single organ or instance with the plenitude of power, and second, that all organs participating in constitutional politics are brought under legal rules': *see* A. Arato, *Constitution Making under Occupation. The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009) p. vii. A recent example is the failed 2021–2022 Chilean constitution-making process: *see* S. Verdugo and M. Prieto, 'The Dual Aversion of Chile's Constitution-making Process', 19 *International Journal of Constitutional Law* (2021) p. 149.

[55]Blount et al., *supra* n. 2, p. 44–45 (criticising Elster). There is actually a slight (not entirely conclusive) tendency for the opposite (ibid., p. 48), thus constituent assemblies tend to give more powers to legislators than constitution-making legislators to themselves.

[56]D. Landau, 'The New Chilean Constitutional Project in Comparative Perspective', *I.CONnect Blog*, 16 July 2022, at https://www.iconnectblog.com/the-new-chilean-constitutional-project-in-comparative-perspective/, visited 1 July 2025.

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Moreover, assembly members who are more likely to be elected on non-partisan tickets are not necessarily impartial: they have a tendency to focus on single issues (such as rights of certain minorities, environmental problems, or the status of their own religious communities and churches) and they are on average more likely to represent radical positions than party politicians. Compromises are necessary for any new constitution. However, if delegates only care about isolated single issues, in a radical manner, then it is difficult achieve these necessary compromises (especially in the various thematic committees where the respective fundamentalist positions can be even more concentrated).[57] In this way, non-partisan romanticism by the designers of constituent assemblies (such as it happened in Chile, where assembly delegates were excluded from future legislative positions) can easily backfire.[58]

There are various approaches towards the ideal composition of constituent assemblies: (1) they can be ordinarily elected representative bodies, just like parliaments (especially if the authority of the latter is questionable, e.g. because of former issues in the electoral process); (2) they can be representative bodies into which various social (ethnic, religious, professional) groups and/or state organs delegate members. The question is, of course, how we determine which groups and organs qualify for inclusion. Also, because of the lack of direct electoral input, a referendum is normally also expected at the end of the process. Additionally, of course, a combination of elected and delegated membership is also possible.

It is often claimed that if members of the constitution-making body are excluded from future political offices ('veil of ignorance' not in a perfect Rawlsian sense, but at least as an exclusion of perpetuating current political offices), then they might consider public interest more, be more cooperative rather competitive,[59] resulting in a better text.[60] Postponing the date on which the new constitution comes into force (e.g. after the next general elections) can have

[57]G. Larrain et al., 'How Not to Write a Constitution: Lessons from Chile', 194 *Public Choice* (2023) p. 233 at p. 241 and 243.

[58]Ibid., p. 241: 'as delegates were not going to be parliamentarians later on, they were essentially playing a non-repeated game. This did impede their willingness to compromise ("you get something now if you do me a favor in the next round" was excluded). On the other hand, knowing that they will not become legislators later on may also imply a preference to bind future legislators as closely as possible. This may be one explanation for the length of the draft, which would have been one of the longest constitutions in the world.'

[59]Negretto, *supra* n. 4.

[60]*See*, e.g., J. Widner, 'Constitution Writing in Post-Conflict Settings: An Overview', 49 *William and Mary Law Review* (2008) p. 1513 at p. 1517. According to A.L. Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya', 116 *The Yale Law Journal* (2007) p. 1824 at p. 1866, the inclusion of foreign experts (academics, civil servants) in the drafting process can also have such an effect.

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similar veiling effect.[61] If the negotiations in the constitution-making body are too transparent (e.g. where even committee meetings are open to the public, televised or streamed), then finding compromises (which implies changing one's formerly stated position) might be more difficult.[62]

As to the majority rules and veto rules within the deliberating body, Ginsburg, Elkins and Blount note that as:

> the veto power of minorities increases, one might expect the adoption of more minoritarian institutions, such as judicial review ..., bicameralism, and, assuming that relevant cleavages are geographically concentrated, federalism. Supermajoritarian processes might produce supermajoritarian rules and institutional configurations, to the extent that a rule-making body will produce others in its likeness.[63]

Below in Table 1, I show the variability of the use of deliberative representative bodies in constitution-making procedures. There is no mainstream solution, no overwhelming majority for any of the solutions. The only clear tendency seems to be that if no representative organ is involved (i.e. constitution-making by the executive branch), then at least a referendum is necessary in order to also give it some source legitimacy.

Direct popular involvement

There are two major ways of direct popular involvement: (a) referenda (i.e. decisions at various stages of the process, most typically at the final ratification); (b) citizens' fora and consultations (i.e. including citizens in the drafting process).[64] Even though there is a general consensus that popular involvement is *somehow* recommended (it can even be framed as the right to participate in public affairs),[65]

[61]Bannon, *supra* n. 60, p. 1868.

[62]J. Elster, 'Arguing and Bargaining in Two Constituent Assemblies', 2 *The University of Pennsylvania Journal of Constitutional Law* (2000) p. 345 at p. 410-413.

[63]Blount et al., *supra* n. 2, p. 53.

[64]X. Contiades and A. Fotiadou (eds.), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2016); F. Méndez and J. Wheatley (eds.), *Patterns of Constitutional Design. The Role of Citizens and Elites in Constitution-Making* (Ashgate 2013).

[65]V. Hart, 'Constitution Making and the Right to Take Part in a Public Affairs', in L.E. Miller (ed.), *Framing the State in Times of Transition Case Studies in Constitution Making* (US Institute of Peace 2010) p. 20, referring to various international human rights instruments. These instruments, however, are vague and the exact form of participation is not determined by them: *see* A. Saati, 'Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?', in G. Shaffer et al. (eds.), *Constitution-Making and Transnational Legal Order* (Cambridge University Press 2019) p. 283 at p. 292.

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Table 1. **Adoption by Representative Bodies in Constitution-Making Procedures**[66]

	Special constitutional assembly		Ordinary parliament		No representative body (instead: highest executive organ)
	Direct democratic legitimacy	Indirect democratic legitimacy	Democratic legitimacy (newly elected)	No democratic legitimacy (old Parliament)	
Without referendum	Austria 1920, Portugal 1976, Norway 1814, Bulgaria 1991		Slovenia 1991, Croatia 1991, Macedonia 1991, Montenegro 2007, Ukraine 1996, Czech Republic 1992, Slovakia 1992, Latvia 1993 [the old Constitution of 1922 revived]	Serbia 1990, Hungary 1989	
With referendum	Romania 1991, Estonia 1992		Lithuania 1992, Albania 1998		France 1958, Russia 1993
Further participants in the procedure		USA 1788 (separate conventions in the member states) German *Grundgesetz* 1949 (drafted by a convention the members of which were delegated by the parliaments of the *Länder* + ratification by the parliaments of the *Länder* + approved by the occupying forces)			

[66]Following B. Wieser, *Vergleichendes Verfassungsrecht*, 2nd edn. (Verlag Österreich 2020) p. 87-97. Years indicate the last step of the procedure that was necessary for the constitution to become effective.

empirical evidence concerning its effects is mixed at best.[67] It seems that popular involvement on its own (without accompanying consensus-building among rival elites) will most likely not result in a high quality subsequent democracy.[68]

(a) Referenda (decisions at various stages of the process): Constitutions are often considered to be made at least rhetorically by 'we, the people' (source legitimacy),[69] the expression of which in a procedural sense is usually (and historically more and more) a referendum.[70] Referenda tend to contribute to support legitimacy, even though the exact political circumstances (political polarisation), the time and the financial tools given for the campaign, the behaviour of the elites (who tend to be gatekeepers of referenda), the approval threshold, and the structure of the question (one single question of yes or no *vs* decision about a series of options) can all make a difference.[71] Referenda (at least in democracies) tend to contribute to the durability of constitutions, i.e. to the stability of the regime.[72] Procedures ending in referenda tend to create texts which contain more fundamental rights, as drafters anticipate the supposed wishes of the electorate, the fulfilment of which can make success at the polls more likely.[73]

It seems to be a contemporary tendency that constitution-making processes become more and more inclusive and apply direct means of public participation in different moments of the procedure, such as an 'entry referendum' about whether or not to change the current constitution, and an 'exit referendum' to

[67]The most well-known sceptical empirical analysis is probably D.C. Moehler, *Distrusting Democrats. Outcomes of Participatory Constitution Making* (University of Michigan Press 2008). Interviews conducted with citizens who participated in the Ugandan constitution-making process (which was not perceived as entirely fair) showed no additional support for the constitution when compared with a control group (but it had positive effects on democratic attitudes). Interviews were, however, conducted *several years* after the event, and the negative experience of subsequent Ugandan democracy might have influenced them. The lack of democratic attitudes (i.e. hybrid regime traditions, polarised public) make the generalisation of Moehler's findings difficult, *see* the book review by R. Doorenspleet in 7 *Perspectives on Politics* (2009) p. 212–214.

[68]G.L. Negretto, 'New Constitutions in Democratic Regimes', in G.L. Negretto (ed.), *Redrafting Constitutions in Democratic Regimes. Theoretical and Comparative Perspectives* (Cambridge University Press 2020) p. 1.

[69]F.I. Michelman, 'Constitutional Authorship by the People', 74 *Notre Dame Law Review* (1999) p. 1605; G. Negretto, 'Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites', 18 *International Journal of Constitutional Law* (2020) p. 206 at p. 208–209. For a denial of the idea of a unified popular sovereign, and therefore rejection of the importance of direct popular involvement, *see* Arato, *supra* n. 2, who argues for gradualism and consensus-building roundtable negotiations.

[70]S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) p. 12.

[71]Blount, *supra* n. 2, p. 49.

[72]Blount et al., *supra* n. 2, p. 52–53.

[73]Elster, *supra* n. 28, p. 364.

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approve the final text of the constitution (ratification). Referenda can also be used to solve deadlocks in the deliberating body during the drafting, i.e. concerning specific questions.

As to the likelihood of resulting the referendum in a yes vote, Zachary Elkins and Alexander Hudson note that:

> leaders maximize their chances of success when the constitutional change takes the form of a new constitutional text. If amendments are the chosen path, more amendments are better than fewer, and special referenda are better than those that co-occur with other elections. However, from the perspective of the citizen who wishes to exercise a veto on potentially anti-democratic constitutional change, the reverse is true.[74]

While referenda are good for the 'source legitimacy' of a new constitution, they can have detrimental effects on the 'output legitimacy' as they can drive the public discourse towards polarisation. If the public discourse is already anti-intellectual, overly emotional (hateful), polarised, captured by the state or extreme ideologies, binary choices at referenda are most likely going to make things even worse. Referenda are not the right institutional tools for solving disagreements constructively and for achieving compromise. They are also much more susceptible to being abused by would-be authoritarians than other forms of direct popular involvement.[75]

(b) Citizens' fora, consultations: inclusiveness in drafting: Popular constitution drafting processes (constitutional crowddrafting)[76] and various consultation

[74]Z. Elkins and A. Hudson, 'The Constitutional Referendum in Historical Perspective', in Landau and Lerner (eds.), *supra* n. 1, p. 142 at p. 163.

[75]Y. Welp and F. Tuesta Soldevilla, *El diablo está en los detalles: Referéndum y poder político en América Latina* (Fondo Editorial de la Pontificia Universidad Católica del Perú 2020).

[76]C. Bernal, 'How Constitutional Crowdsourcing Can Enhance Legitimacy in Constitution Making', in Landau and Lerner (eds.), *supra* n. 1, p. 235 at p. 240. As to the variety of procedural options, *see* e.g. ibid., p. 255: 'The crowd can perform at least four specific online tasks: voting on the content of draft provisions, deliberating on the reasons for and against adopting those provisions, giving feedback to the drafting body on specific proposals or preferences, and making open suggestions concerning existing or new proposals. Regarding the process, there should be mechanisms for the drafting body to timely respond to the voting, deliberation, feedback, and suggestions by the crowd. The response should be substantial. Furthermore, the draft constitution should evolve and successively mirror the crowd's input. From the outset, the initiator should clearly state the requirements and avenues for participation, and the timeframe and conditions for the dialogue. The initiator should provide the crowd with basic constitutional knowledge that qualifies anyone to participate m the crowdsourcing exercise. At the end of the dialogue, the initiator should collate, analyze, and systematize the crowd's input, and explain how the drafting body responded to it, and its ultimate relevance for the draft constitution.'

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mechanisms have become popular in recent years.[77] The most well-known example is the Icelandic one (2010-2013) where: first, 950 randomly selected individuals (an age-, gender- and geography-balanced, one-day long 'National Forum', divided into small discussion groups moderated by trained discussion leaders) established 'the principal viewpoints and points of emphasis of the public concerning the organization of the country's government and its constitution';[78] second, a directly elected (but for procedural reasons, later appointed) constituent assembly of 25 non-professional politicians had to prepare a text (in an iterative process in which the Constitutional Council collected online comments, redrafted, then collected comments again, and so on, several times); and third, a non-binding referendum had to approve the text.[79] Participation at the referendum was unusually low by Icelandic standards (47%), even though two thirds of those who voted were in favour of the text. The Icelandic parliament, however, never voted on the final text (shown by the low referendum participation and also by the 2013 electoral success of those parties which opposed the process), so as of today, there is no new Icelandic Constitution.[80]

Such processes have the taste of anti-elitist (or even populist) distrust towards political parties and professional politicians (professional politicians thus tend to distrust these processes; they even could try to prevent their adoption), and it is questionable whether this is a good purpose[81] and also whether such an effort can be successful.[82] As Mark Tushnet put it:

[77]On the Irish case where randomly selected citizens were mixed with elected politicians and had to propose amendments *see* D.M. Farrell et al., 'The Effects of Mixed Membership in a Deliberative Forum: The Irish Constitutional Convention of 2012–2014', 68 *Political Studies* (2020) p. 54; S. Suteu, 'Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland', 38 *Boston College International and Comparative Law Review* (2015) p. 251; O. Doyle and R. Walsh, 'Constitutional Amendment and Public Will Formation: Deliberative Mini-publics as a Tool for Consensus Democracy', 20 *International Journal of Constitutional Law* (2022) p. 398.

[78]H. Landemore, 'When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process', 18 *International Journal of Constitutional Law* (2020) p. 179 at p. 183.

[79]Landemore, *supra* n. 78, p. 183.

[80]Landemore, *supra* n. 78, p. 184.

[81]NGOs which are supposed to take over this role are by most democracy definitions non-democratic (non-representative, unaccountable). NGOs are important as part of the social infrastructure of a democratic society, but they are themselves non-democratic.

[82]K. Samuels, 'Post-Conflict Peace-Building and Constitution-Making', 6 *Chicago Journal of International Law* (2006) p. 663 at p. 681: 'In relation to constitution-making process, the more participatory and inclusive processes were seen to broaden the constitutional agenda and avoid the process degenerating into a mere division of spoils between powerful players. At the same time, such constitutions tended to threaten the established power structures. The key dilemma is therefore how to ensure both that the powerful players participate and are committed to the process, and yet also ensure that the process fosters political dialogue and empowers the people.'

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> Existing political groupings and parties will almost certainly affect how crowd-sourcing and similar mechanisms of direct public participation in drafting actually operate. For example, parties may prompt their members to submit identical proposals, thereby multiplying the apparent public support for the proposals.[83]

The result of such an inclusive process has a mixed effect on the quality of the text output.[84] On the one hand, fundamental rights tend to have wider scope and include some rarely-emphasised aspects; direct democratic mechanisms are also usually more influential. On the other hand, inconsistencies can also be expected: various provisions might contradict, interact or could simply be badly written (as tested in constitutional history). The logistics of avoiding such pitfalls is unclear, to put it mildly.[85] It is not always clear whether such instruments serve the inclusion of popular ideas, or whether they just provide the illusion of actual popular influence (digesting the large amount of citizens' submissions can be also an insurmountable logistical challenge). One way to take popular influence more seriously, institutionally, is to require the drafters to give reasons why particular popular suggestions were accepted or rejected, instead of just cherry-picking some of them.[86] Experience shows that the actual influence of popular involvement on the text is, in general, limited, and if political parties are strong, then very, very limited.[87] If the political and legal culture of the citizens is less liberal democratic, such processes can even make the text less friendly towards principles of liberal democracy (and/or prone to abuse by charismatic politicians).[88]

Inclusive processes are supposed to create popular support for the new constitution.[89] As to the actual quality of democracy after the constitution-making process, popular involvement in the drafting does seem to have a positive effect[90] (as opposed to ratification referenda, which have no significant influence

[83]M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 2nd edn. (Edward Elgar 2018) p. 20.

[84]Landemore, *supra* n. 78, p. 190–197.

[85]Philosophically nice, but practically difficult: *see* Blount, *supra* n. 2, p. 40.

[86]Bannon, *supra* n. 60, p. 1862.

[87]A. Hudson, *The Veil of Participation. Citizens and Political Parties in Constitution-Making Processes* (Cambridge University Press 2021).

[88]W. Partlett, 'The Dangers of Popular Constitution-making', 38 *Brooklyn Journal of International Law* (2012) p. 193 at p. 234; Landemore, *supra* n. 78, p. 200. For more scepticism (esp. concerning quality of democracy after participatory constitution-making) *see* A. Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (Statsvetenskapliga institutionen, Umeå universitet 2015). According to Saati, it is elite cooperation that is decisive for the subsequent quality of democracy, not popular participation.

[89]J.M. Carey, 'Does It Matter How a Constitution Is Created?', in Z.D. Barany and R.G Moser (eds.), *Is Democracy Exportable?* (Cambridge University Press 2009) p. 155 at p. 156–157.

[90]T.A. Eisenstadt et al., *Constituents before Assembly Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge University Press 2017).

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on the quality of subsequent democracy),[91] most likely because participants gain ownership[92] and are also educated through the participation process.[93] The most important practical advantage of popular drafting is information dissemination and education of citizens.[94] This makes popular support later on much more likely.

The risk is, however, that if the fora are badly designed (e.g. they are homogenous, even though society is heterogeneous), then this can contribute enormoudly to political polarisation. Homogenous discussion groups do not simply reconfirm their own opinion, but normally even become more extreme through the discussion process.[95] In highly polarised societies, just like in the case of referenda, the risk of further polarisation is especially high through popular participation.[96]

Drafting by expert bodies (constitutional lawyers)

Expert bodies (domestic, foreign or international, such as the Venice Commission) consisting of constitutional lawyers tend to contribute positively to the quality of the text (and therefore to the substantive legitimacy).[97] Well-crafted legal texts also tend to enjoy some support from legal professions (such as judges). Such texts also tend to contribute to foreseeability in a legal system, and legal certainty is helpful for economic development.

In many cases, however, their work is not very transparent, and they can also seem suspicious from a perspective of source legitimacy. Moreover, legal experts 'tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus' amongst political actors.[98] This can be detrimental to stability and the ongoing support of political actors.

[91]T.A. Eisenstadt et al., 'When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making, 1974–2011', 109 *American Political Science Review* (2015) p. 592.

[92]V. Hart, *Democratic Constitution Making* (U.S. Institute of Peace 2003).

[93]Maboudi and Nadi, *supra* n. 2.

[94]Bannon, *supra* n. 60, p. 1861. On popular drafting as a form of dialogue between the elite and the people, serving both information gathering and information dissemination, *see* Blount, *supra* n. 2, p. 46.

[95]C. Sunstein, 'The Law of Group Polarization', 10 *Journal of Political Philosophy* (2002) p. 175 at p. 176–177 on 'enclave deliberation'.

[96]Blount, *supra* n. 2, p. 44; Saati, *supra* n. 66, p. 306.

[97]*See* M. de Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform', 63 *American Journal of Comparative Law* (2015) p. 963 at p. 1003 and 1005, criticising the lack of representativeness and the lack of clear procedural rules of the Venice Commission.

[98]J. Elster, 'Forces and Mechanisms in the Constitution-Making Process', 45 *Duke Law Journal* (1995) p. 364 at p. 395.

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Drafting by extra-legal political negotiating bodies (unelected roundtables)

Unelected roundtables can be used for effective elite bargains, if the ordinary representation (Parliament) lacks representation, and even the rules of a new election are open to debate. In such cases, transitions (including transitional constitutions) can be negotiated by the relevant (but extra-parliamentary) political actors. Such negotiations are sometimes (partly) secretive. The formal approval can either be given by the parliament of the *ancien régime* or by referendum (for a combination, see Hungary in 1989, with a partial referendum on four constitutionally relevant political questions on the transition). Elite cooperation can be fostered by such methods; this seems to be important for the stability of democratic regimes,[99] and it also improves the quality of democracies.[100]

As Andrew Arato has explained it:

> While formally relying on the inherited amendment rule and legal continuity, materially this method uses a new institution, the round table, where old regime actors formally negotiate with oppositional forces concerning interim constitutional rules under which a new constitution can be made. The weakness of this method is that it can reduce the process to mere bargaining among élites, producing a strong legitimacy problem. But this weakness is often a strength. Much more conscious of the need to generate legitimacy than reformers or revolutionaries, the protagonists of the round table can and often do mobilize inclusion, consensual decision-making, public openness, strict legality and a new democratic election producing the final drafting body as sources of democratic legitimacy.[101]

It has been empirically confirmed that the most likely improvement of the subsequent democracy can be achieved by well-designed methods for including various interests (whether in the form of roundtable or not, consisting of not only political parties, but interest groups, labour unions, human rights activists etc.), and public participation is less important: 'smoke-filled rooms which include relevant socially anchored interests are more relevant to enhancing democracy than thousands of Facebook "likes" and social media commentary'.[102] Moreover, direct participation usually influences more the actual text of the constitution

[99]B. Weingast, 'The Political Foundations of Democracy and the Rule of Law', 91 *American Political Science Review* (1997) p. 245.

[100]Negretto, *supra* n. 69, p. 224.

[101]A. Arato, 'Democratic Legitimacy and Forms of Constitutional Change', 24 *Constellations* (2017) p. 447 at p. 448.

[102]T.A. Eisenstadt and T. Maboudi, 'Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy', 52 *Comparative Political Studies* (2019) p. 2135 at p. 2141.

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than non-elected inclusion.[103] When compared with representative solutions, however, non-elected (or not representatively elected) inclusion seems to risk amplifying, entrenching and overvaluing unrepresentative minority voices.[104]

The question of constitutional revolutions

The term 'legitimacy' is sometimes used in a revolutionary sense (i.e. as a concept that helps to contest the bases of the legal system), but sometimes it is exactly a counter-concept of revolutions.[105] In any case, it is not harmful to adopt a constitution legally – in certain cases it can simply be irrelevant whether the constitution was adopted legally or not (if the old regime collapsed).

The fact of a legal revolution (i.e. illegal replacement) itself does not legitimise: it is the substantive content or the source (the people) that was brought about by the revolution to which legitimacy claims of revolutionary constitutions refer. Illegality itself is a risk for support legitimacy (especially in the eyes of those who considered the former constitution legitimate), and it is of course in clear contradiction to legitimacy as legality. Revolutions can also have an economic price (especially because they can be used in the future as precedents, and therefore can endanger legal certainty).

Conclusion and overview: combined effects, sequencing and overall timing

The success of a constitution-making process (measured on the various conceptions of legitimacy) depends on a number of contextual elements (like elite cooperation, political and legal culture, revolutionary events preceding the

[103]T. Maboudi, 'Participation, Inclusion, and the Democratic Content of Constitutions', 55 *Comparative International Development* (2020) p. 48. All this also implies that, at the end of the day, the text of the newly adopted constitution only has limited influence on the actual nature and quality of subsequent democracy.

[104]D.L. Horowitz, *Constitutional Processes and Democratic Commitment* (Yale University Press 2021). On the recently failed Chilean constitution-making process as a concrete example of the unfortunate consequences of the over-emphasis on inclusiveness, *see* C. Heiss and J. Suárez-Cao, 'Constitution-Making in the 21st Century: Lessons from the Chilean Process', 57 *Political Science & Politics* (2024) p. 1 at p. 3.

[105]*See* with further references Würtemberger, *supra* n. 13, p. 709 in fn. 150. I am using the concept of constitutional revolution in a Kelsenian sense (ie breaking legal continuity): *see* e.g. H. Dreier, 'Revolution und Recht', 100 *Zeitschrift für öffentliches Recht* (2014) p. 805; A. Jakab (ed.), *Methoden und theoretische Grundfragen des österreichischen Verfassungsrechts. Eine Einführung für Fortgeschrittene* (Verlag Österreich and Nomos 2021) p. 62-70. For a wider sense of the concept (as paradigm change, transformation or substantial reorientation) *see* G.J. Jacobsohn and Y. Roznai, *Constitutional Revolution* (Yale University Press 2020).

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constitution-making),[106] and also on how these interact with each other and the very precise details of the procedural rules. Because of the high variability, it does not seem possible to give any more detailed guidance without knowing which concrete country and which period we are dealing with. We should, however, definitely avoid any oversimplication of the precise recipe of concrete procedural steps that would necessarily result in a constitution achieving 'legitimacy'. We need to accept the sad fact that by opting for a certain procedure in order to enhance one conception of legitimacy, we often pay the price in another conception of legitimacy of the new constitution.[107]

Our conclusion as to the relationship between various types of legitimacy and different procedures is therefore a conditional one ('if . . . then'): if you want this type of legitimacy, then you should use this constitution-making procedure; and if you want that type of legitimacy, then you should use that constitution-making procedure. In Table 2, we summarise the findings of the present article concerning the effect of various procedural steps on various conceptions of legitimacy.

As already mentioned above, there seems to be a negative correlation between substantive legitimacy and output legitimacy of constitutions. It is not a causal relationship, but overly aspirational constitutional texts seem to be symptoms of legal cultures with low constitutional normativity. Moreover, such texts can also strengthen the tradition of viewing the constitution as just a political declaration, as realistically their standards (e.g. concerning social rights) are unachievable.

References to the *pouvoir constituant* (source legitimacy) might be used/abused as justifications for illegality (i.e. violating formal legitimacy as legality) and can in practice end up in constitutions of authoritarian regimes (i.e. violating output legitimacy as free, just etc. society).[108] Further, as also mentioned above, there seems to be a negative causal relationship between a very high degree of

[106]Therefore, even for the same conception of legitimacy, different procedures can be beneficial: *see* M. Dani et al. (eds.), *The Legitimacy of European Constitutional Orders. A Comparative Inquiry* (Edward Elgar 2023); B. Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union', 45 *British Journal of Political Science* (2015) p. 705.

[107]Moreover, it is not simply that in many cases we are only dealing with probabilities concerning the relationship between procedural steps and conceptions of legitimacy – but even these probabilities are very much context-dependent; universalistic knowledge is therefore necessarily limited in this area. We can usually tell what is likely to fail, but we cannot tell what exactly leads to success. With the necessary modesty, all we can offer is some educated generic guesses and the identification of factors that should carefully be considered locally.

[108]M. van Asseldonk, 'Who, the People? Rethinking Constituent Power as Praxis', 48 *Philosophy and Social Criticism* (2022) p. 361. This criticism only applies to the *pouvoir constituant originaire* (which is conceptually illimitable and therefore necessarily revolutionary), as opposed to the legally regulated competence to adopt a new constitution (*pouvoir constituant dérivé*). On the conceptual difference *see* G. Vedel, 'Souveraineté et supraconstitutionnalité', 67 *Pouvoirs* (1993) p. 79 at p. 90.

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Table 2. The effect of procedural steps on various conceptions of legitimacy

Conception of legitimacy →		Formal legitimacy			Output legitimacy (social result)				
							Stability and support by ...		
Procedural step ↓	Substantive legitimacy (text and case law)	Source	Legality	Fairness (transparency, inclusiveness)	Free, just, etc. society	Wealth, GDP	Political actors	Oficials (judges, police, etc.)	*The* people
Parliamentary approval	0	0 or + (if democratically elected, indirect)	0 or + (tend to be legal)	+ (usual guarantees of parliamentary procedures)	0	0	+ (if represented)	0	+
Constituent assemblies	0	+ (indirect)	0 or – (tend to be illegal)	+ (ranging from 0 to ++)	0	0	0 or + (if represented, depending on ofice continuity)	0	+
Referenda	+ (more rights, direct democracy)	++ (direct)	0	+ (as inclusiveness)	- or 0 (risk of polarisation)	0	+ (dificult to contest)	0	++ (ownership)
Popular Drafting	+ (dependent on political culture: more rights, direct democracy) *and* - (inconsistency)	+	0	++	- or 0 or + (risk of polarisation, but potential of ownership)	0	+ (dificult to contest after the adoption) *and/ or* – (substitute for elite inclusion)	0	++ (educative, ownership)
Drafting: Expert Bodies	++ (professionalism)	–	0	- (elitist and secretive)	0	+	- (resisting ambiguity)	0 or +	0
Roundtable Drafting	0	–	0	- (elitist and secretive)	+ (elite cooperation)	0	++ (elite cooperation)	0	0
Legal Continuity	0	0	++	0	0	+	+	++	0 or +

transparency, on the one hand, and the quality of the text and the social output, on the other. Such trade-offs should be taken into account and weighed thoroughly when designing constitution-making procedures. Ideally, with the combination (and the right sequencing) of various steps, the advantages could be combined to a limited extent, but we have to accept that there is no perfect procedure.

In any case, the design of a constitution-making process requires very thorough consideration and goodwill. Probabilities are very much context-dependent and it is impossible to identify one single (fit-all) procedure with precisely detailed steps. If we want to do well on as many conceptions of legitimacy as possible, then we can only give some very generic tentative advice about the ideal procedural steps, their sequencing and the overall timing of the procedure:

(1) It seems that at the beginning of the process, some kind of combination of expert drafting and roundtable discussion is useful (if there is no elite cooperation in this matter, then the hopes for high quality subsequent democracy are low, no matter what procedural tricks are applied).
(2) The proposed draft can then be adjusted via popular involvement (electronic and in person discussion fora).
(3) Generally, keeping the whole process legal is more beneficial than attempting a revolution in a legal (Kelsenian) sense.
(4) The involvement of the ordinary parliament or a special constituent assembly should be considered as of only secondary importance; on their own they do not provide any special benefits (and public debates risk running into theatrical grandstanding).[109] Reasons for their involvement could be to ensure the legality of the process (ordinary parliaments) and to guarantee inclusivity, to insert brakes to avoid high-jacking and non-consensual texts (constituent assemblies).
(5) As an additional final ritualistic step, a referendum usually seems appropriate. However, a referendum on its own cannot heal on its own preceding procedural deficiencies of a constitution-making process.
(6) In highly polarised societies, forms of direct popular involvement tend to aggravate conflicts if the new constitution is rejected by a sizeable minority.[110] The democratic constitution-making procedure itself (independently from the actual content of the new constitution) can therefore trigger social and political dynamics which doom the new constitution to fail in certain aspects of 'legitimacy'. In such societies, constitution-making should possibly be

[109]Elster, *supra* n. 2, p. 164-166.

[110]Constitution-making is not an effective peacemaking (conciliatory) measure after civil conflict either: *see* H. Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage', 33 *University of Pennsylvania Journal of International Law* (2011) p. 239 at p. 242: 'undertaking a multi-stage constitutional process that establishes an interim constitution may be able to overcome the practical problems of merging constitutional and peacemaking goals. The drafting of a permanent constitution, however, must wait for more peaceful, secure, and stable times.'

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postponed until the fever of polarisation has cooled.[111] In the meantime, more modest solutions (e.g. amending the old constitution, changing the judicial interpretation of the old constitution, creating new ordinary laws, changing the political practice, or a combination thereof) should be applied.[112]

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[111]My argument is different from that of Friedrich Carl von Savigny who, in his *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer 1814), argued that the German codification of private law should be postponed. His influential work was an important reason why there was no German civil code (similar to the French *Code civil* of 1804) in the 19th century, up until the adoption of the *Bürgerliches Gesetzbuch* (1896). Savigny argued mainly that legal doctrine should develop before codification, whereas I am referring here to the necessary development of the political context (esp. polarisation) before constitution-making.

[112]The border between constitution-making and constitutional amendment can also be blurred in practice, as fundamental changes to the constitution can also be achieved via amendment (and even symbolic steps, like referenda, can be attached to amendment procedures). The above advice for highly polarised societies is therefore to be understood as a desirable tendency towards minimalism, i.e. towards solutions that are as far from adopting a new constitution as possible.

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