

## *Critical Debates*

# *Democratization Through Constitutional Change*

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Mike Albertus and Victor Menaldo, *Authoritarianism and the Elite Origins of Democracies*. Cambridge: Cambridge University Press, 2016. Figures, tables, notes, bibliography, index, 312 pp.; hardcover \$99.99, paperback \$29.99, ebook \$24.00.

Todd Eisenstadt, Carl LeVan, and Tofiq Maboudi, *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions*. Cambridge: Cambridge University Press, 2017. Figures, tables, appendix, notes, bibliography, index, 200 pp.; hardcover \$110, paperback \$32.99, ebook \$26.

Comparative political studies have traditionally paid relatively little attention to the impact that constitutional change might have on the inauguration or consolidation of a democratic regime. This has recently changed. The two books reviewed in this article are excellent examples of a new research agenda in comparative politics that attempts to trace some aspects of democratization back to whether, when, and how new constitutions were adopted in the creation or transformation of a democratic regime. This review will critically discuss their contributions to the fields of comparative democratization and constitutional politics and assess the conceptual and empirical challenges that remain to be addressed in the study of constitutional change and democratization.

## **THE TIMING OF CONSTITUTION MAKING AND THE NATURE OF DEMOCRACY**

In *Authoritarianism and the Elite Origins of Democracies*, Mike Albertus and Victor Menaldo (A&M) propose that not all democracies are created equal; some are popular and others elite-biased. Popular democracies promote policy outcomes closer to the preferences of the median voter and electoral majorities and are, for this reason, relatively egalitarian in terms of income distribution, taxation, and social safety nets. Elite-biased democracies, by contrast, favor outcomes closer to the preferences of privileged

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minorities, thus leading to more unequal societies. According to the authors, democracy adopts one or the other of these two forms depending on whether its constitution was crafted by (or under the influence of) authoritarian or democratic elites.

The operationalization of these concepts is straightforward: a constitution has a democratic origin if it was promulgated in a year of free and fair elections; otherwise, its genealogy is authoritarian. Based on these concepts and measurements, A&M provide a detailed empirical analysis of a database containing 122 democratic transitions that took place between 1800 and 2008 around the world. For the coding of transition and democratic years, the authors rely on a dichotomous measurement of democracy based on Boix et al. (2013) and Cheibub et al. (2010). The analysis of these data includes a series of longitudinal statistical analyses and two in-depth studies of the cases of Sweden and Chile.

Several important findings emerge from this study. First, at inauguration, most democracies in the world operated under a constitution inherited from their authoritarian predecessors. Second, due to the influence of outgoing authoritarian rulers over their design, autocratic constitutions tend to incorporate a wide variety of majority-restraining institutions. Third, in terms of their effects, elite-biased democracies tend to exclude larger sectors of the population from participation in governance and lead to fiscal and macroeconomic outcomes associated with smaller governments, less social spending, and less progressive taxation than popular ones. Fourth, after the political influence of former autocrats declines, elite-biased democracies adopt constitutional changes that transform them into more majoritarian and egalitarian regimes over time.

A&M's work makes various contributions to the comparative democratization literature, the most important of which is perhaps to show that one of the main reasons why privileged elites are willing to risk a transition to democracy is that this regime may protect their interests as well as—or sometimes better than—a dictatorship. A&M also place constitutional change as a key determinant of the nature of democracy because constitutional texts can and often are used to lock in specific policies and perpetuate the interests of those who had more influence over their writing. These merits notwithstanding, the book raises some questions about who are the actors with more influence over constitution making across various political conditions and how that influence translates into a particular type of constitutional design.

A&M presuppose that constitution writing is an elite-driven affair, so that the difference between constitutions that give birth to elite-biased democracies and those that create popular ones is simply whether they have been drafted under the influence of nonrepresentative or representative elites (28). This is a reasonable assumption, supported by various traditions of empirical research in comparative politics. More debatable, however, is their premise that the origins of constitutions can be derived simply from the coding of regime types during the year a new constitution was enacted.

In A&M's database, both Peru in 1980 and Turkey in 1983 are coded as years of transition to an elite-biased democracy because the new democracy was regulated by a constitution enacted in an authoritarian year. However, the origins of these

constitutions differ sharply. Peru's 1979 Constitution was drafted, negotiated, and voted on by a popularly elected constituent assembly in which no party was able to control a majority of seats. By contrast, Turkey's 1982 Constitution was made by a constituent body unilaterally appointed and controlled by a de facto military government. Intuitively, it does not seem that the influence of outgoing authoritarian elites could be the same in both cases.

A similar contrast can be observed if we look at the modality of adoption of democratic constitutions. Both the 1966 Constitution of the Dominican Republic and Sweden's 1974 Constitution count as texts of democratic origins because they were enacted during a year of free and fair elections. However, whereas the Dominican constitution was drafted under the exclusive influence of the incumbent government party's majority, the Swedish constitution was approved by a reform coalition that included the government and main opposition parties. If the environment where constitutions are made matters at all, it would seem that these two legal documents should show important differences in terms of their origins and potential effects.

As regards constitutional choice, A&M argue that apart from including provisions such as explicit immunity for crimes committed by former authoritarian rulers, bans on leftist parties, or electoral rules designed to favor parties associated with the authoritarian regime, autocratic constitutions also incorporate institutions associated with a consensual or power-sharing design, such as bicameralism, federalism, proportional electoral rules, or supermajority constitutional amendment rules (85–89). The problem with this argument, however, is that very similar institutions may also be part of a liberal-democratic constitution designed to protect disadvantaged minorities or to provide the political opposition with institutional safeguards during democratic competition. One possible way to discriminate between different types of majority-restraining institutions is by analyzing the relative weight of specific provisions designed to protect former authoritarian rulers and their allies.

From this perspective, for instance, it may not be bicameralism per se that signals the elite bias of an autocratic constitution but the existence of a second chamber with veto power over decisions of the lower chamber and selection rules that over-represent conservative forces. It is also plausible to think that reformers' degree of influence has an impact on the specific set of institutions selected, so that the elite bias of a constitution should be strong only when the actual influence of authoritarian rulers over its design was also strong.

## MODALITIES OF CONSTITUTION MAKING AND LEVELS OF DEMOCRATIZATION

In *Constituents Before Assembly*, Eisenstadt, LeVan, and Maboudi (ELM) attempt to find a link between constitution making and democratization, not by looking at the time when constitutions are adopted but by analyzing the specific features of the process from which new constitutions emerge. They distinguish between “bottom-up” or popular constitution making, in which citizens genuinely and actively participate at various stages during the process, and “top-down” or imposed constitutions,

which are based on elite bargains and pacts and tend to exclude or manipulate citizen participation.

ELM disaggregate the constitution-making process into convening, debating, and ratifying stages, each of which they code as imposed, mixed, or popular, depending on whether the degree of influence citizens and civil society have over them is low, medium, or high. Based on this distinction, ELM argue for, and show evidence in support of, the proposal that high levels of citizen and civil society participation, particularly at the early convening stage, improve postpromulgation levels of democratization. Unlike A&M's work, this proposition is meant to apply not only to transitions to democracy and established democratic regimes, but also to autocracies.

Compared to A&M's book, *Constituents Before Assembly* is a more empirical, hypothesis-testing kind of work. Although it contains a literature review on the topic, it does not develop an independent theoretical framework to differentiate various modalities of constitution making, discuss their effects on democratization, and derive observable implications of the theory. It also offers little discussion about the actual microlevel mechanisms that might link aggregate constitution-making process variables with political outcomes. The book is anchored in the statistical analysis presented in chapter 2, which uses an original database on the adoption of new constitutions in 190 countries between 1974 and 2014. This analysis shows that public participation throughout the constitution-making process in general, and during the convening stage in particular, has a positive impact on levels of democracy, measured at multiple intervals of the Polity IV and Unified Democracy Score scales after promulgation. It also provides support for the proposal that it is the genealogy and not the formal design of constitutions that matters for democracy. The statistical work is complemented by paired comparisons of confirming and disconfirming case studies of top-down and bottom-up constitution-making processes.

As regards the impact of the type of constitution-making process on democracy, ELM interpret the results of their quantitative analysis as a demonstration of the "systematic benefits of direct citizen involvement" during constitutional change and as providing "empirical support for emerging international norms of participatory governance and for participatory models of democracy" (51–53). Several problems are involved, however, in this interpretation. The most important is the way this work conceptualizes and operationalizes the role that ordinary citizens and political elites play in constitution making.

ELM do not make a proper distinction between direct and indirect means of citizen involvement, and they use the generic term *public participation*, without further qualification, to refer indistinctly to representative channels of citizen influence or to mechanisms of direct democracy. This distinction is crucial, however, if one wants to analyze the democratizing effects that elite-led constitution-making processes have in comparison to popular ones, in which direct citizen input is supposed to matter more. To be sure, one can think of a "citizen" constituent assembly, made up of representatives who do not belong to the political elite. Yet in the vast majority of cases, constitution makers are either rank-and-file party members who

follow orders from the leaders of the organization or individuals who themselves occupy a position of authority in the party. From this perspective, even if delegates to a constituent assembly are selected in a free and fair election, it makes more sense to consider them as part of the political elite than to identify their decisions as those that ordinary citizens would make themselves.

The ambiguity of the term *participation* is visible in the coding rules. According to ELM, the convening stage (the most important process variable in their analysis) is coded as “popular” when there is “systematic civil society input or strong transparency or specially elected drafters freely and fairly elected” (30). Although it is not clear when civil society input is systematic or how strong transparency is measured, these indicators supposedly refer to instances of direct citizen involvement before decisions are made about the content of the new constitution. By contrast, measuring when a constituent assembly is elected in a free and fair electoral contest is relatively straightforward, yet it only implies that the constitution was crafted by representative elites, not that these elites had limited or no control over the process. Several constitutions enacted between 1974 and 2014, such as those of Sweden (1974), Finland (2000), Bulgaria (1991), and the Czech Republic (1993), were drafted by constituent assemblies specially elected in free and fair elections, but the process did not include any instance of direct citizen involvement either before, during, or after the new text was deliberated, negotiated, and voted on by members of the assembly.

A related problem is how to differentiate among various degrees of elite control. ELM use the generic term *elite bargaining and pacting* as an inferior form of participation (compared to public deliberation) that frequently coincides with top-down or imposed constitutions. Although they discuss the classic works on transitions to democracy that emphasize the central role of negotiations during these processes, they depart from the meaning that elite bargains and pacts have had in these and other general studies on democratization. According to ELM, “pacted constitutions may be imposed by a general, a president or a small group . . . or may result from a more plural group of elites” (85). This concept equates, in a rather counterintuitive way, constitutions made by nonrepresentative elites in a highly centralized process, such as the 1980 Chilean Constitution, with constitutions adopted by means of an inclusive and consensual agreement among a plurality of representative elites, such as the 1978 Spanish Constitution.

The cases of Venezuela and Gambia, included in chapter 4, which are supposed to confirm the hypothesis that elite processes have a negative effect on democratization, illustrate the indiscriminate use of the notion of elite control and imposition. Whereas Venezuela’s 1999 Constitution was drafted by a freely and fairly elected constituent assembly and the process followed instances of direct citizen involvement in virtually all its stages, Gambia’s 1997 Constitution was imposed by a military dictatorship. According to Polity IV, whereas Venezuela was democratic until 2006, Gambia had an authoritarian regime before, during, and after the adoption of the new constitution. Although one can criticize how Hugo Chávez and his supporters in Venezuela activated the process, used their majority in the assembly to

exclude the opposition, and manipulated citizen participation for self-serving purposes, it is hard to see how these two episodes could be considered similar cases of “authoritarian consolidation via top-down decree imposition” (101).

A similar ambiguity is apparent in the coding of the cases of Colombia (1991) and Ecuador (2008) as episodes of popular constitution making, analyzed in chapter 5 as cases that confirm and disconfirm, respectively, the positive effects of public participation on democracy. Although in both cases the constitution was adopted by a popularly elected constituent assembly and included several instances of direct citizen involvement, the Colombian constitution was negotiated and voted on by a plurality of political forces. By contrast, in Ecuador (as in Venezuela), the new constitution was made by the incumbent president and his coalition, excluding any opposition group.

In contrast to A&M, ELM propose that formal design does not have a consequential effect on democratization. They support this proposition by running statistical tests comparing the democratic impact of the content of constitutions with the democratic quality of their origins. The analysis is not conclusive, however, because it is based on a very limited sample of formal provisions, such as whether the head of state has decree power, whether the constitution places any restriction on the right to vote, and whether the constitution has provisions for a human rights commission. Moreover, there is no attempt to trace constitutional choice back to the modality of constitution making, so it is uncertain whether some forms of constitutional design are endogenous to the particular features of the process.

## THE NEW RESEARCH AGENDA ON CONSTITUTIONAL ORIGINS AND DEMOCRACY

These two works fill a lacuna in the literature on constitutional politics and make an important contribution to the comparative analysis of constitutional change and democratization. At the same time, they suggest what aspects of this research agenda need to be strengthened. Three issues stand out: the type and degree of elite control under different political conditions, the impact of various forms of direct citizen involvement, and the potential link between the modality of constitution making, formal institutions, and democracy.

Even if constitutions are made by political elites, a detailed analysis of the politics of constitution making shows that the influence of authoritarian and democratic elites is subject to variation. Both nonrepresentative and representative political elites can have an influence that is more inclusive or less inclusive of a plurality of political interests. In addition, constitutional origins vary in terms of the indirect and direct involvement that citizens may have in the process. However, in order to understand these variations and measure their independent or interactive impact, we need a separate analysis of representative channels and mechanisms of direct democracy in constitution making.

Furthermore, although the impact of formal constitutional design on democratization is unclear, different constitutional origins are likely to lead to different types

of constitutional choice. Future progress in this area will strongly depend on the development of an integrated theoretical framework for understanding the relationship between constitution making, formal constitutional choice, and the actual political effects of the origins and content of constitutions across regime types.

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