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### Unpacking constitutional literacy

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# UNPACKING CONSTITUTIONAL LITERACY

Maartje De Visser & Brian Christopher Jones

## Abstract

*The contemporary crisis in relation to constitutional literacy relates not to the lack of knowledge that citizens possess about fundamental constitutional texts, but to the considerable lack of development in relation to what constitutional literacy itself entails. This article accordingly unpacks the notion of constitutional literacy: its importance, its characteristics, its variable nature, and its potential downsides. Using a comparative lens, the article invites reflection on the role that we expect citizens to play in our democracies, and especially the associated knowledge and skills required for successful state performance. We suggest that constitutional literacy is exceptionally multifaceted and fluid in nature, which serves to make its conceptualisation and measurement challenging endeavours, and certainly more so than the easy invocation of this notion may assume at first blush. In this regard, engaging with the constitutional text, while an integral component of constitutional literacy, is ultimately only one part of the puzzle.*

*Keywords: civic education, constitutional literacy, legal knowledge, political knowledge, text-centrism*

## I. INTRODUCTION

Touting sufficient literacy of civic and political norms among members of the public as essential to a well-functioning state or as a solution to societal ills is a venerable democratic tradition.<sup>1</sup> At the same time, the idea of such literacy has always been challenging because it asks us to confront a difficult normative question: how much should the people know about public affairs? To be sure, contemporary citizens face vastly different knowledge requirements compared to previous generations. Ancient Greek societies operating on more direct methods of democracy undoubtedly valued public knowledge and participation in government, as (male) citizens performed a range of important roles within the state. Whilst the transition to representative democracy meant that a smaller number of people would be performing governmental roles, the idea that the electorate should be engaged and knowledgeable of public affairs has remained. After all, citizens still possessed the power to vote leaders into and out of office, and should accordingly be able to evaluate their performance and what is on offer from potential replacements.

The late mid-to-late 20th and early 21st centuries brought about a different type of democracy focused around further constraining public power—sometimes termed ‘monitory democracy’<sup>2</sup>—often through written constitutions and bills of rights. The number of written constitutions expanded dramatically post-WWII, and nowadays it is commonplace for

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<sup>1</sup> See e.g. MX Delli Carpini and S Keeter, *What Americans Know About Politics and Why It Matters* (Yale University Press, New Haven, 1996) 3-9, 218-67; C Pateman, *Participation and Democratic Theory* (CUP, Cambridge, 1970); CB MacPherson, *The Life and Times of Liberal Democracy* (OUP, Oxford, 1977) chp 5.

<sup>2</sup> J Keane, *The Life and Death of Democracy* (WW Norton & Co, New York, 2009) 585.

countries to possess such documents.<sup>3</sup> As the dawn of constitutional democracy arrived, constitutions and constitutional norms have been added to the list of topics citizens should be familiar with.<sup>4</sup> This is true even in places without a written constitution in place—such as the UK—as the relevance of constitutional literacy has come into focus in recent years.<sup>5</sup> For example, in 2020 the UK government set up an independent review to assess the functioning of the Human Rights Act (HRA) 1998 with a view to identifying possible areas for improvement.<sup>6</sup> Extensive consultations were held to solicit the opinion of parliamentarians, academics, legal experts, public officials, individuals and private organizations. Amongst others, the interveners were united in calling attention to the need to increase the public’s awareness of the rights protected by the UK’s constitution as well as its other features. The report’s very first recommendation stresses that the government should give ‘serious consideration ... to developing an effective programme of civic and constitutional education’.<sup>7</sup> Doing so was thought to be valuable in ensuring public ownership of rights contained in the HRA as well as in countering misperceptions regarding the functioning of the human rights framework. More generally, the idea of enhancing civic or political knowledge has been an ongoing focus for many governments, NGOs, institutions, societies, and individuals around the world.<sup>8</sup>

That individuals ought to have at least basic understanding of the constitution or texts with an equivalent status can be said to be a fundamental attribute of ‘good citizenship’. As noted above, it may also be intuitively linked to ideas of well-functioning democratic systems. Yet, the HRA Review recommendation dovetails with a common view of the situation regarding constitutional literacy around the globe, i.e. that it is either ‘in crisis’,<sup>9</sup> or in need of serious improvement, to ensure that citizens are aware of and able to answer certain questions about their nation’s most fundamental legal text<sup>10</sup> or able to champion the principles and rules enshrined therein in the service of constitutional democracy.<sup>11</sup> One American philosopher has

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<sup>3</sup> Comparative Constitutions Project, ‘Data Visualizations’, available at <<https://comparativeconstitutionsproject.org/>>.

<sup>4</sup> See part 2(B) below, which demonstrates that some written constitutions now even ‘constitutionalise’ the idea of constitutional literacy.

<sup>5</sup> Constitutional literacy has come into play in national referendums on the voting system (2011) and European Union membership (2016), in addition to referendums at the sub-national level (for example the referendum on Scottish independence in 2014).

<sup>6</sup> ‘Independent Human Rights Act Review: Terms of Reference’, available at <<https://www.gov.uk/guidance/independent-human-rights-act-review>>.

<sup>7</sup> Secretary of State for Justice, *The Independent Human Rights Act Review: Full Report* CP 586 (December 2021) 21.

<sup>8</sup> For example, the United States has been a haven for experiments in civic, political, and constitutional education. The Jack Miller Center, CIRCLE, the Center for Civic Education, the American Civics Center, and the Marshall-Brennan Constitutional Literacy Project are just a snippet of the sprawling civic education programmes, centres and institutions found in America. Prominent individuals, such as former US Supreme Court justice Sandra Day O’Connor, have even devoted their lives, or an important part of their lives, to the endeavour of helping make citizens more constitutionally literate. Many civic education or constitutional literacy programs have laudable goals and ambitions. For example, the ABA’s Civil Rights Civics Institute (CRCI) believes that fostering civic education will decrease divisiveness in the United States.

<sup>9</sup> J Silverbrook and Ch Stetson, ‘Constitutional Literacy: Introduction - The Need for a National Constitutional Literacy Campaign’ *Washington Times* (Washington, 8 September 2015); D Davenport, ‘The Civic Education Crisis’ *Hoover Institution* (5 April 2019), available at <<https://www.hoover.org/research/civic-education-crisis>>; BK Whittenbury, ‘The State of Civic Education in America’ (2022) 47 *Human Rights Magazine*.

<sup>10</sup> Studies show that approximately 20-35 per cent of citizens have often never heard of a country’s founding documents: ‘Magna Carta 800th Anniversary Survey’ *Magna Carta* (20 February 2015), available at <<https://magnacarta800th.com/projects/international-poll/>>. See also Chr. Cillizza, ‘Americans know literally nothing about the Constitution’ *CNN* (13 September 2017).

<sup>11</sup> If need be, with the help of knowledge institutions (like universities, the free press of NGOs) as intermediaries to ensure that the people have access to good quality information to perform public scrutiny of the conduct and

called the public's knowledge of government 'abysmal'.<sup>12</sup> But for a state of affairs that has been described as being at crisis levels, there is surprisingly little theoretical research devoted to the notion of constitutional literacy. Much of the literature that is available is focused on the United States,<sup>13</sup> although there are some exceptions to this.<sup>14</sup> But even topics related to constitutional literacy, such as civic education, are not as well-developed as social scientists would arguably have expected in this day and age.<sup>15</sup>

Against this backdrop, the purpose of this article is to critically interrogate the notion of constitutional literacy. Our view is that the most pervasive challenge in relation to such literacy lies in a lack of understanding of the notion itself, more so than with concerns about citizens' lack of knowledge of fundamental constitutional texts. Put differently, there is a need to arrive at a better appreciation of the meaning, importance, and characteristics of constitutional literacy in order to enhance the role that it can, and should, play within our democracies. In this regard, we suggest that constitutional literacy is exceptionally multifaceted and goes beyond the constitutional text to also encompass constitutional norms, unwritten behaviours and actions, and different types of knowledge that undergird or supplement the constitutional text, such as constitutional history. Decisions whether to champion constitutional literacy, and if so, how, may accordingly need to be fashioned with due regard for prevailing political conditions or the ideological preferences of leading state actors. As these will vary across jurisdictions, so too is the approach to constitutional literacy likely to be context-specific.

This article proceeds as follows. Section 2 explores the importance of constitutional literacy, recognising that some justifications in favour of this notion overlap with those supporting civic and political knowledge, but also that other arguments go beyond these. Section 3 offers an overview of the conceptual contours of constitutional literacy, breaking down this notion into the most common and accepted forms it takes – civic, legal, and political knowledge. We advocate a broader understanding that also includes constitutional history and, crucially, the behaviour of constitutional actors. In Section 4, we describe the fluid nature of constitutional literacy, demonstrating how this gives it a heavily contextualised character across audiences, space, and time. Section 5 discusses the challenges attendant on measuring constitutional literacy because of this characteristic. We conclude in Section 6.

## II. THE IMPORTANCE OF CONSTITUTIONAL LITERACY

### *Overlap in importance with civic and political knowledge*

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output of those in, or running for, office, on which V Jackson, 'Knowledge Institutions in Constitutional Democracies: Preliminary Reflections' (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 156.

<sup>12</sup> A Goldman, *Knowledge in a Social World* (OUP, Oxford, 1999) 317.

<sup>13</sup> Two major books on the subject have been published: T Massaro, *Constitutional Literacy: A Core Curriculum for a Multicultural Nation* (Duke University Press, Durham, NC, 1993) and Chr Dreisbach, *Constitutional Literacy – A Twenty-First Century Imperative* (Palgrave, New York, 2016). However, there have also been works in journals and other places throughout the years. A prominent example comes from the *Denver University Law Review*, which devoted a whole issue to public constitutional literacy in 2013 (see M Hart, 'Forward: Public Constitutional Literacy; A Conversation' (2013) 90 *Denver University Law Review* 825). The *American University's Journal of Gender, Social Policy, and the Law* did something similar in 2019, but focusing on the Marshall-Brennan Constitutional Literacy Project (see SJ Wermiel, 'The Marshall-Brennan Constitutional Literacy Project: An Introduction' (2019) 27 *American University Journal of Gender, Social Policy, and the Law* 5).

<sup>14</sup> Ch Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' (2018) 44 *Commonwealth Law Bulletin* 492; A Singh et al, 'Constitutional Literacy in India' (2021) 10 *International Journal of Modern Agriculture* 348.

<sup>15</sup> D Campbell, 'What Social Scientists Have Learned About Civic Education: A Review of the Literature' (2019) 94 *Peabody Journal of Education* 32.

Civic engagement has been described as essential to democracy's survival,<sup>16</sup> and political knowledge is said to be 'one of the most valuable resources that any citizen in a democracy can possess'.<sup>17</sup> There seems to be no getting around the fact that all theories of democracy—whether direct, electoral, or monitory—rely on an informed public, and that adequate civic and political knowledge forms an integral part of that. Amongst others, such knowledge has been said to promote democratic ideals, confidence in key governmental institutions, and a willingness to participate in public life.<sup>18</sup> The idea of constitutional literacy similarly connects to arguments centred around the importance of a citizenry that has the requisite understanding and skills to support the functioning and success of constitutional democracy. This is especially true as regards those constitutional rules and values that shape democratic design as well as performance.<sup>19</sup> Throughout democracy's sustained development the public's capacity for knowledge has been questioned,<sup>20</sup> and anti-democrats have often used a lack of civic or political knowledge amongst the general public to tout alternative forms of government.<sup>21</sup> Widespread constitutional illiteracy could be used similarly, with some advocating that those with a lack of particular constitutional knowledge should not be able to participate in various civic activities, such as voting.<sup>22</sup> Conversely, if the people are able to correctly identify and critically evaluate anti-constitutional claims, they could stand up for democratic ideals and institutions and attenuate the ills that such claims might otherwise give rise to.

Another prominent justification for increased civic, political, and constitutional knowledge is found in popular sovereignty and social contract ideas. It is modern orthodoxy to understand the constitution as emanating from the people, who are the ultimate source of legitimate power, and who have through that document conferred a certain authority to act upon the different branches of government.<sup>23</sup> If there is a widespread ignorance as to what the constitution incorporates, then the claim to democratic legitimacy on the part of the government is correspondingly weakened. When such conditions prevail, the supposed agreement between the governed and the governors could, in a sense, be likened to a one-sided contract as the former do not know what they have actually agreed to. One might object that 'We the People' and social contract theory rest on legal fictions, and that the law generally is replete with such fictions.<sup>24</sup> While that may be true, given their foundational importance, it does not seem quite defensible to accept popular sovereignty or the social contract as fictions pure and simple. In fact, there are strands within the constitutional discourse that treat both as ideals that systems

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<sup>16</sup> C Maiello, F Oser and H Biederman, 'Civic Knowledge, Civic Skills and Civic Engagement' (2003) 2 *European Educational Research Journal* 384; WA Galston, 'Political Knowledge, Political Engagement, and Civic Education' (2001) 4 *Annual Review of Political Science* 217.

<sup>17</sup> M Klienbergh and R Lau, 'The Importance of Political Knowledge for Effective Citizenship: Difference between the Broadcast and Internet Generations' (2019) 83 *Public Opinion Quarterly* 338.

<sup>18</sup> Galston (n 16); Delli Carpini and Keeter (n 1).

<sup>19</sup> See e.g. J Foweraker and T Landman, 'Constitutional Design and Democratic Performance' (2010) 9(2) *Democratization* 43; Z Nwokora, 'Constitutional Design for Dynamic Democracies: A Framework for Analysis' (2022) 20(2) *International Journal of Constitutional Law* 580.

<sup>20</sup> J Keane, *The Shortest History of Democracy* (The Experiment, New York, 2022) 54-8.

<sup>21</sup> *ibid.* It has also been noted that 'Critics of democracy—starting with Plato—have almost always argued that it means rule by the ignorant. Or worse, rule by the charlatans that the ignorant people fall for': D Runciman, *How Democracy Ends* (Profile Books, London, 2018) 179. But see arguments from other scholars about why political ignorance should lead to other outcomes, such as smaller government: I Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (2nd edn, Stanford University Press, Redwood City, CA, 2016).

<sup>22</sup> For example, J Brennan, *Against Democracy* (Princeton University Press, New Jersey, 2016); B Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton University Press, New Jersey, 2008); D Bell, *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton University Press, New Jersey, 2016).

<sup>23</sup> M Tushnet and B Bugarcic, *Power to the People: Constitutionalism in an Age of Populism* (OUP, Oxford, 2021).

<sup>24</sup> E Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (WW Norton & Co, New York, 1988); A Weale, *The Will of the People: A Modern Myth* (Polity, New York, 2018).

ought to strive to realise, with analysis focused on suitable means to give practical effect to the role of the people in the constitutional order.<sup>25</sup> Improving constitutional literacy would be a valuable means to this end. It could further help to address the so-called ‘dead hand’ problem,<sup>26</sup> which queries why democratic majorities today ought to observe the rules and principles agreed on by constitutional framers. Tacit consent, that is to say, the absence of popularly-led efforts for constitutional reform or other ways of communicating disquiet with the status quo, has been pointed to as one possible answer. Some scholars have suggested that this line of thinking is too minimal and artificial; in contrast, if there would be widespread awareness of the constitution’s content, people’s ‘so-called tacit consent would look much more like informed [and hence real] consent’.<sup>27</sup>

While the rationale and implications for constitutional literacy overlap with those relating to civic and political knowledge in some respects, it also goes beyond these in other ways.

### *The importance of constitutional literacy beyond civic and political knowledge*

In an age of constitutional democracy centred around constitutional supremacy, the idea that citizens should be familiar with the supreme law of the land may be inherently valuable. Leading constitutional theorists have advanced this perspective. For instance, Ackerman notes that, ‘[t]o discover the Constitution is to discover an important part of oneself’.<sup>28</sup> Other scholars have acknowledged the connection these documents may have to a people’s collective identity.<sup>29</sup> Improving constitutional knowledge could help actualise the common assumption (or fiction) that one is expected to know the law as a fundamental prerequisite for compliance. In fact, some constitutions even explicitly require members of the polity to abide by and respect the constitution. The 1991 Colombian Constitution states that, ‘It is the duty of citizens and of aliens in Colombia to obey the Constitution and the laws, and to respect and obey the authorities’.<sup>30</sup> Similar provisions can be found in the constitutions of the Dominican

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<sup>25</sup> For example, H Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press, New Jersey, 2020); P Ochoa Espejo, *The Time of Popular Sovereignty – Process and the Democratic State* (Penn State University Press, University Park, Pennsylvania, 2011); L Beckman, K Gover and U Mörkenstam, ‘The Popular Sovereignty of Indigenous Peoples: A Challenge in Multi-people States’ (2021) *Citizenship Studies* 1.

<sup>26</sup> For example, TE Pettys, ‘Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted’ (2008) 86(2) *Washington University Law Review* 313.

<sup>27</sup> P Beck, ‘We (The People) Need an Annotated Pocket Constitution’ *SSRN* (19 June 2019), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3402518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402518)>, 9.

<sup>28</sup> B Ackerman, *We the People, Volume I: Foundations* (Harvard University Press, Harvard MA, 1991) 37. Ackerman also notes that, ‘the narrative we tell ourselves about our Constitution’s roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity’, 36.

<sup>29</sup> J Weiler, ‘On the Power of the Word: Europe’s Constitutional Iconography’ (2005) 3 *International Journal of Constitutional Law* 173, 184 (‘Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community or as a union’).

<sup>30</sup> Columbia Constitution 1991, Title 1.

Republic,<sup>31</sup> Bhutan,<sup>32</sup> Ethiopia,<sup>33</sup> Mozambique,<sup>34</sup> Peru,<sup>35</sup> and Venezuela,<sup>36</sup> amongst others.<sup>37</sup> In some sense, these provisions ‘constitutionalise’ the idea of constitutional literacy, asking citizens to respect or obey the constitution and its contents, which presupposes at least a basic familiarity with this document. Given that empirical evidence shows constitutions have progressively expanded in length and scope, with notably bills of rights becoming longer since the adoption of early modern constitutional texts,<sup>38</sup> these requirements may however be more difficult to meet.

In the specific case of constitutions, moreover, Stephanopoulos and Versteeg have found that ‘making people more knowledgeable (or at least more inclined to say they are knowledgeable) about their constitution’ has a positive effect on the esteem in which this text is held.<sup>39</sup> It could be theorised that such an attitude of respect may in turn foster what Sternberger has coined as constitutional patriotism.<sup>40</sup> This concept, which Habermas and Müller have developed into a general theory,<sup>41</sup> denotes a form of civic allegiance based on the basic norms and values (as well as, more indirectly, the procedures) found in liberal democratic constitutions rather than a form of belonging centred on potentially divisive attributes like ethnicity, religion or culture. On this approach, constitutional literacy would be instrumental in cultivating the shared political morality that must pervade for constitutional patriotism to succeed. This would hold especially in pluralist societies, which are proliferating around the world. Similarly, there is a growing interest among policymakers and academics in providing people with greater opportunities for direct participation in governance, including constitutional reform projects,<sup>42</sup> for legitimacy-enhancing reasons and to ‘inculcate democratic skills, habits and values’.<sup>43</sup> If we want those outcomes to be realised, citizens should know enough about the relevant constitutional framework in which such participation is to be realised as well as possess a basic understanding of the substance of the issues on which their views are solicited. Such knowledge could also positively impact on expressions of voter preferences

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<sup>31</sup> Dominican Republic Constitution 2015, Title II.

<sup>32</sup> Bhutan Constitution, Art. 8(11).

<sup>33</sup> Ethiopia Constitution 1994, Art. 9.

<sup>34</sup> Mozambique Constitution 2004, Art. 46.

<sup>35</sup> Peru Constitution 1993, Title I.

<sup>36</sup> Venezuela Constitution 1999, Title III.

<sup>37</sup> TG Daly, ‘Designing the Democracy-Defending Citizen’ (2020) 6 *Constitutional Studies* 189, 203 has noted that tendency to codify constitutional literacy provisions seems mainly confined to countries that are not full liberal democracies.

<sup>38</sup> T Ginsburg, ‘Constitutional Specificity, Unwritten Understandings and Constitutional Agreement’ in A Sajó and R Uitz (eds), *The Constitutional Topography: Values and Constitutions* (Eleven Publishing, The Hague, 2010).

<sup>39</sup> N Stephanopoulos and M Versteeg, ‘The Contours of Constitutional Approval’ (2016) 94 *Washington University Law Review* 1.

<sup>40</sup> D Sternberger, *Lebende Verfassung. Studien über Koalition und Opposition* (Verlag Anton Hein, Meisenheim am Glan, 1956); P Molt, ‘Dolf Sternbergers Verfassungspatriotismus’ (2006) 16 *Zeitschrift für Politikwissenschaft* 875; A Datemsch, *Verfassungspatriotismus – eine vergleichende Darstellung der Begriffsbestimmung bei Dolf Sternberger und Jürgen Habermas* (GRIN Publishing, Munich, 2010).

<sup>41</sup> J-W Müller, *Constitutional Patriotism* (Princeton University Press, Princeton New Jersey, 2007); J Habermas, *The Inclusion of the Other* (MIT Press, Cambridge MA, 1998) 105-54; J Habermas, ‘Eine Art Schadensabwicklung’ (1986) nr. 29 *Der Zeit*.

<sup>42</sup> For example, L Bobbio, ‘Designing Effective Public Participation’ (2018) 38 *Policy and Society* 41; T Ginsburg, J Blount and Z Elkins, ‘The Citizen as Founder: Public Participation in Constitutional Approval’ (2008) 81 *Temple Law Review* 361. International actors are similarly committed to involving the people in constitution (re)making processes, amongst others: E Houlihan and S Bisarya, ‘Practical Considerations for Public Participation in Constitution-Building – What, When, How and Why?’ *International IDEA Policy Paper* No. 24, 2021; B Boutros-Ghali, ‘An Agenda for Democratization’ (United Nations, New York, 1996).

<sup>43</sup> J Blount, ‘Participation in Constitutional Design’ in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, Cheltenham 2011) 39.

during elections and referendums in the sense that there would be fewer manifestations of un- or even anti- constitutional proclivities.

The rapid post-WWII growth in constitutional and human rights discourse is another feature that distinguishes constitutional literacy from civic and political knowledge. Citizens are now expected to speak and understand developments in constitutional (e.g., whether certain action was ‘constitutional’ or ‘unconstitutional’)<sup>44</sup> and human rights terms (e.g., whether a certain action was a ‘violation’ or not of particular rights).<sup>45</sup> This implies that citizens should be familiar with the operation and structure of the state as well as with the rights articulated within the constitution. Being aware of what rights are enumerated in a particular fundamental text is important. This is true even if the rights listed in constitutions and bills of rights appear more aspirational than practically feasible.<sup>46</sup> When it comes to the vindication of constitutional rights, citizens will need to know why, when, and how to do so. They will also need to know that rights are often limited, can be curtailed for various reasons, and may need to be balanced in view of respect for other rights. Such an awareness regarding the operation of rights often goes beyond the textual articulation of rights present in written constitutions and bills of rights.

New understandings of what is ‘constitutional’ or ‘unconstitutional’ link to the meaningful exercise of public accountability and how citizens may ‘call out’ behaviour that pushes or exceeds constitutional boundaries. Responding to state actions that affect one’s interests requires knowledge of the operation of the institutions capable of offering redress – from litigation in the courts to complaints to bodies like the Ombudsman or human rights commission to using political avenues to make one’s voice heard. As Theodore Roosevelt starkly put it, there should be an expectation incumbent on citizens ‘to denounce, and, so far as may be, to punish crimes against the public on the part of politicians or officials’.<sup>47</sup> That is, every member of the public can be conceived as a legal-political watchman who must keep the behaviour of officeholders under review. For such popular constitutional guardianship to work a general consensus must be found on the constitutional parameters of governmental power so that transgressions can be properly identified and called out. This argument has acquired strength as realisation has dawned that the conventional institutionalised checks on the political branches – notably judicial review – may not work as well as intended in conditions of democratic and/or constitutional erosion<sup>48</sup> and that the involvement of ‘small-d’ democrats or will be necessary to help sustain constitutional democracies.<sup>49</sup>

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<sup>44</sup> BC Jones, ‘Preliminary Warnings on “Constitutional” Idolatry’ (2016) *Public Law* 74, 78-83. It has been noted that we should be wary of employing the ‘unconstitutional’ label too frequently, as ‘there is a risk that the term “unconstitutional” comes to include everything we subjectively do not like’: J McLean, ‘The unwritten political constitution and its enemies’ (2016) 14 *International Journal of Constitutional Law* 119, 136.

<sup>45</sup> For example, N Gordon and N Berkowitz, ‘Human rights discourse in domestic settings: How does it emerge?’ (2007) 55 *Political Studies* 243.

<sup>46</sup> Although we acknowledge that some recent scholarship has examined the downsides of rights: see e.g. J Greene, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* (Houghton Mifflin Harcourt, Boston MA, 2021); R Thompson Ford, *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* (Farrar, Straus and Giroux, New York, 2012).

<sup>47</sup> Th Roosevelt, The Duties of American Citizenship (26 January 1883), available at <<https://glc.yale.edu/duties-american-citizenship>>.

<sup>48</sup> See generally M Graber, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP, Oxford, 2018); T Ginsburg and A Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, Chicago, 2020); TG Daly, ‘Democratic Decay: Conceptualising an Emerging Research Field’ (2019) 11 *Hague Journal on the Rule of Law* 9; U Belasvusau and A Gliszczyńska-Gabrias (eds), *Constitutionalism under Stress* (OUP, Oxford, 2020).

<sup>49</sup> M Loughlin, ‘The Contemporary Crisis of Constitutional Democracy’ (2019) 39(2) *Oxford Journal of Legal Studies* 435 (arguing that while important, institutional or constitutional solutions alone may not be sufficient to address anti-democratic challenges and concerns). More generally on a role for the people, see Daly (n 37).



### III. MAPPING CONSTITUTIONAL LITERACY

As the above highlights, there are good reasons to be concerned with constitutional literacy amongst the general public. But what exactly does this notion consist of? The adjective ‘constitutional’ naturally evokes an engagement with the big-C text as being at the heart of such literacy, and the prime object of literacy-boosting endeavours. This also suggests a strong legal dimension to the notion of literacy, given the typical characterisation of the constitution as the supreme law of the land. This aligns with how Dreisbach defines it: ‘knowledge of the Constitution sufficient to invoke it properly’.<sup>50</sup> Fombad offers a wider definition, stating that literacy ‘entails the creation of social awareness and knowledge of the constitution, its values and objectives as well as the rights and duties it confers on the citizen to enable them participate fully in a sustained manner in public affairs’.<sup>51</sup> However, his version of literacy remains focused on ‘legal and constitutional frameworks’. We suggest, in contrast, is that constitutional literacy goes beyond requiring an adequate understanding of a definitive legal-constitutional text. Our conceptualisation conceives of such literacy as also intersecting with elements of political and civic knowledge, in line with some of the justifications canvassed earlier, as well as with an awareness of the actions and behaviours of constitutional actors and constitutional history. These different constituent elements of constitutional literacy are elaborated in the sections that follow.

#### *Legal knowledge*

Legal knowledge certainly comes into play when considering constitutional literacy, and there will be a natural inclination to focus on the written constitution in this regard. After all, it is common for this text to be considered the highest form of law within the state, while the constitution may even explicitly declare that it possesses this exalted status.<sup>52</sup> As we know, constitutions devise key state institutions, the structures by which those institutions are governed, who may participate in those institutions, and many other elements. Many constitutional texts moreover cover the rights bestowed on individuals, including what these are and how they are protected (via the courts or through other administrative procedures). As Levinson points out, it is often these aspects of constitutionalism that citizens show the most interest in, as opposed to state structures.<sup>53</sup> This is understandable: aside from self-referential motivations that will be particularly strong for provisions directly addressed to and benefitting them, the length of contemporary constitutions arguably prevents citizens from becoming acquainted with every aspect of these documents.<sup>54</sup>

There are three qualifications that should be borne in mind when thinking about the legal dimension of constitutional literacy as encapsulated in the written constitution. We should firstly remember that constitutions do not, and cannot, exhaustively regulate all facets of the constitutional order. They may be silent regarding aspects that are of keen practical relevance and interest to individuals, like elections or the rules as to citizenship. The corollary is that

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<sup>50</sup> Dreisbach (n 13) 11.

<sup>51</sup> Fombad (n 14) 495.

<sup>52</sup> For example, Canada Constitution Part VII, Ecuador Constitution Title IX, Ghana Constitution Art 1(2); Japan Constitution Chapter X; Malaysia Constitution Art 4; Mexico Constitution Title Seven; South Africa Constitution Chapter 1.

<sup>53</sup> S Levinson, ‘Do Constitutions have a Point?’ in E Paul, F Miller and J Paul (eds), *What Should Constitutions Do?* (CUP, Cambridge 2011) 152.

<sup>54</sup> For instance, the Indian Constitution is over 145,000 words. On this: BC Jones, ‘Perhaps the Only Thing Worthy of Veneration: Brevity’ (*Balkinization*, 12 June 2022), available at <<https://balkin.blogspot.com/2022/06/perhaps-only-thing-worthy-of-veneration.html>>.

other legal categories emerge as also relevant to imbuing the notion of constitutional literacy with meaning. Court decisions interpret the meaning of constitutions and related principles, but they exist outside the formal text,<sup>55</sup> and similarly statutes flesh out, operationalise, or otherwise complement the large-C document. That document, then, is only one facet of the legal knowledge required as a constitutive element of constitutional literacy.<sup>56</sup> We should further not lose sight of the fact that some aspects of written constitutions do not necessarily or entirely have the force of law. Preambles, for example, are part of a written constitution, but usually cannot be relied on in court.<sup>57</sup> Also, conventions that are implicated in the functioning of constitutional rules may always not formally be acknowledged as ‘legal’ in nature, but instead be seen as belonging to the political realm.<sup>58</sup> Finally, larger constitutional principles such as separation of powers or the rule of law may not be explicitly mentioned in a written document, even though they undergird the provisions of that document and indeed the constitutional order more generally. In sum, the constitution as legal text is an obvious point of reference in thinking about constitutional literacy, but it should not be seen as exhaustive of that notion.

### *Political knowledge*

Political knowledge should be viewed as another constitutive element of constitutional literacy. Leaving aside the fact that such knowledge can speak to the same pro-democratic aims that constitutional literacy is amongst others concerned with, an appreciation of the basic institutions and procedures of government is complementary to knowledge about the written constitution as law. One could even say that this kind of political understanding is necessary for citizens to appreciate how constitutions work—or sometimes fail to work—in practice and how contentious socio-political questions with a constitutional dimension are deliberated and resolved, including those that are not explicitly recognised in the constitutional text.

The most widely accepted definition of political knowledge comes from Delli Carpini and Keeter, who take it as referring to ‘factual information stored in long-term memory’.<sup>59</sup> Part of such information derives from the constitution, which encapsulates the political realm to a certain extent. This is notably evident in provisions that establish and regulate the state institutions that operate in this realm, as well as in those that govern the operation of politics or elections. Written constitutions tend to be underinclusive in this regard, however: for instance, they often ignore the idea of political parties,<sup>60</sup> even though these are central to the functioning of government and political life; and neither they do explicitly address the many constitutional conventions that also regulate the functioning of governments and parliaments. More generally, it should be clear that political knowledge extends beyond familiarity with legal rules, be it found in the constitution or related texts. Such knowledge also encompasses an understanding of the political system writ large, its processes, the daily functioning of

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<sup>55</sup> AR Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, New York, 2012).

<sup>56</sup> More generally, we should remember that constitutional knowledge is only one facet of legal knowledge. For example, a typical law degree covers much more than constitutional law, including topics like contract, tort, property, criminal, trusts and estates, ethics, etc.

<sup>57</sup> For example J Frosini, *Constitutional Preambles at a Crossroads between Politics and Law* (Maggioli Editore, Milan, 2012); L Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8 *International Journal of Constitutional Law* 714.

<sup>58</sup> Although they were once thought to be only relevant to the political realm, conventions have been increasingly adjudicated in the courts: F Ahmed, R Albert and A Perry, ‘Judging constitutional conventions’ (2019) 17 *International Journal of Constitutional Law* 787.

<sup>59</sup> Delli Carpini and Keeter (n 1).

<sup>60</sup> TG Daly and BC Jones, ‘Parties versus Democracy: Addressing Today’s Political Party Threats to Democratic Rule’ (2020) 18 *International Journal of Constitutional Law* 509; T Khaitan, ‘Political Parties in Constitutional Theory’ (2020) 73 *Current Legal Problems* 89.

government as well as current issues and events. For example, a prominent 1989 American survey of political knowledge ranged from the constitutional (eg ‘Length of a presidential term’, ‘Describe one first amendment right’), to current affairs (eg ‘Percent unemployed’, ‘Size of federal budget’), to contemporary politics (eg, ‘Name vice president’, ‘Party control of House’) to the international (eg [Who is] Margaret Thatcher, [Who is] Mikhail Gorbachev), to the economic (eg ‘Define the effects of a tariff’, ‘Define recession’), to the historical (eg ‘Did women always have suffrage’, ‘Date of New Deal’).<sup>61</sup> Political knowledge, then, is concerned with fostering comprehension of how the political realm functions, which helps to give shape to and actualise the notion of constitutional literacy beyond the provisions of the written constitution.

### *Civic knowledge*

Thinking back to the justifications set out earlier in support of constitutional literacy, the image of the people that emerges goes beyond a collection of individuals that simply know facts about the particular contents of the constitution and its operation on the political plane. Rather, the expectation, or aspiration, is that people should also be confident and competent to leverage such facts through their behaviour. This is where civic knowledge and education come in. Hargreaves has often been quoted in relation to what civic education means:

Since Aristotle [civic education] has been accepted as an inherently political concept that raises questions about the sort of society we live in, how it came to take its present form, the strengths and weaknesses of current political structures, and how improvements might be made.<sup>62</sup>

Civic knowledge overlaps with and relates to legal and political knowledge, but it forms a distinct part of the constitutional literacy picture. This type of knowledge is concerned with an understanding of how the latter types of knowledge can be activated. Put differently, the civic arena is where citizens make use of their familiarity with the legal and the political to participate in the public square, which explains the emphasis in the civic knowledge literature on skills, engagement, and capacity.<sup>63</sup> These particular civic talents may include ‘the ability to write a letter, attend a meeting and take part in its decisions, plan or chair a meeting, and give a presentation or speech’.<sup>64</sup> In brief, civic knowledge fits with an action-oriented understanding of constitutional literacy that deliberately goes beyond the mere accumulation of knowledge pertaining to the written text and political system.

### *Expanding the picture of constitutional literacy*

Positioning constitutional literacy at the intersection of legal, political, and civic bodies of knowledge appears intuitive and aligned with the justifications discussed in the previous section. However, whilst those elements are important, they are arguably underinclusive, which may potentially have stunted the constitutional literacy project more generally. To breathe more life into constitutional literacy, we should look at this notion in broader terms. One important advantage of doing so is that there will be different ways for individuals to be so

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<sup>61</sup> Delli Carpini and Keeter (n 1) 158-60.

<sup>62</sup> D Hargreaves, ‘The Mosaic of Learning: Schools and Teachers for the Next Century’ (1994) *DEMOS* 32-33.

<sup>63</sup> WA Galston, ‘Civic Knowledge, Civic Education, and Civic Engagement: A Summary of Recent Research’ (2007) 30 *International Journal of Public Administration* 623; Maiello, Oser and Biederman (n 16).

<sup>64</sup> P Levine, ‘Civic Knowledge’ in M Edwards (ed), *The Oxford Handbook of Civil Society* (OUP, Oxford, 2011) 364.

literate beyond the more specialised processes that familiarity with legal texts, methods of adjudication, and relevant court cases imply. As such, a broader reading can help democratise the notion beyond legal and political elites.

One element that should be included in such a broader reading is constitutional history.<sup>65</sup> This is especially to the extent that constitutions and constitutional behaviours are associated with tradition.<sup>66</sup> As Sir Ivor Jennings has noted, constitutional history is the ‘servant of the lawyer and the politician’,<sup>67</sup> and if we desire a constitutionally animated citizenry, the same prescription seems commendable. Being familiar with the founding and development of the constitutional order would allow people to properly situate the contemporary design and functioning of constitutional governments as well as better understand the choices made during the drafting, amending, and interpretation of their constitutions.

In addition, and taking a cue from the notion of literacy as related to language itself, Gee has insisted that literacy should go beyond content-focused definitions and take into account the social milieu in which language is used. As such, acquiring literacy is not limited to learning letters, words and phrases, but also concerned with becoming familiar with the social practice where one would ‘say or write the right thing in the right way while playing the right social role and (appearing) to hold the right values, beliefs and attitudes’.<sup>68</sup> Transplanting this conceptualisation to constitutional literacy, this suggests that we may also wish people to become acquainted with the actual ‘life’ of the constitution as manifested in the actions and behaviour of constitutional actors. Viewing candidates for political office take part in a debate, watching legislators discuss and vote for Bills, hearing judges announce the outcome of their deliberations are all activities that allow citizens to learn and understand the essence of constitutional dynamics.<sup>69</sup> As Barber notes, ‘[I]n a regime that is both democratic and constitutional, the highest task of political leadership is to educate the public from its initial inclinations to what good faith and full deliberation indicate about the public’s true interests’.<sup>70</sup> In this sense, then, literacy would arise from citizen observation of how constitutional actors and the officials that personify them behave in their constitutional role as opposed to citizens merely consulting and consuming written information. Such observation would help put flesh on the bones of the constitutional framework that is the focus of the legal knowledge component mentioned earlier. It may also help demonstrate to people how grand principles, such as checks and balances, judicial independence, or legal-political processes that may otherwise appear indigestible and abstract are given meaning on a daily basis.

Taken together, constitutional literacy may accordingly be said to be more akin to Figure 1 below. This conception shows that there is a strong interconnected quality to the notion. Indeed, we suggest that constitutional literacy interacts with a wide variety of forms of knowledge and should accordingly be seen as a dynamic, multifaceted concept that relies on people being exposed to information from a diverse range of sources. Crucially, the understanding of literacy we advocate deliberately goes beyond familiarity with the written

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<sup>65</sup> F Biagi, J Frosini and J Mazzone (eds), *Comparative Constitutional History – Principles, Developments, Challenges* (Brill, Leiden, 2020); K Tan and NS Bui (eds), *Constitutional Foundings in Southeast Asia* (Bloomsbury, Oxford, 2019).

<sup>66</sup> Think for instance of constitutional provisions that aim to safeguard national cultural traditions, including those of members belonging to indigenous groups or minorities, or an interpretative approach to constitutional provisions that attaches significant weight to the views of the drafters thereof.

<sup>67</sup> Sir I Jennings, *Cabinet Government* (3<sup>rd</sup> edn, CUP, Cambridge, 2009).

<sup>68</sup> JP Gee, ‘Literacy, Discourse, and Linguistics: Introduction’ (1989) 171 *Journal of Education* 5, 6. He refers to literacy as ‘discourse’.

<sup>69</sup> On the role of courts as constitutional role-models, M De Visser, ‘Promoting Constitutional Literacy: What Role for Courts?’ (2022) 23 *German Law Journal* 1121. More critical about the ability of governments to act accordingly: Daly (n 37) 205.

<sup>70</sup> S Barber, *Constitutional Failure* (Kansas University Press, Lawrence, 2014) 59.

constitution, and also beyond a view of those documents as singularly legal texts that are given meaning through supreme or constitutional courts to the exclusion of actors operating within the political domain.<sup>71</sup>

**Figure 1. A More Complete and Dynamic Picture of Constitutional Literacy**



#### **IV. THE VARIABLE AND FLUID NATURE OF CONSTITUTIONAL LITERACY**

The preceding discussion has cast light on the meaning of constitutional literacy. A quintessential attribute of this notion is its open-endedness, which extends from its meaning to the application and realisation of literacy. Indeed, constitutional literacy is not a single standard that applies uniformly across all members of a given polity; nor would that be necessarily desirable. Its presence and significance may further vary along temporal and geographic lines, also within a single jurisdiction.

##### *Literacy's audiences and intermediaries*

*Popular literacy.* When thinking about the audiences of constitutional literacy, it seems self-evident that a distinction should be maintained between legal professionals (judges, lawyers, etc), political office-holders, and civil servants on the one hand, and lay persons on the other hand. Legally trained professionals and political office holders can be expected to be more intimately acquainted with constitutional texts, processes, and practices than other individuals,<sup>72</sup> and can further avail themselves of resources, both financial and human, to augment their

<sup>71</sup> On the role of non-judicial actors in giving meaning to the constitution: M De Visser and J Neo, 'What Would a Pluralist Institutional Approach to Constitutional Interpretation Look Like? Some Methodological Implications' (2022) 20 *International Journal of Constitutional Law* 1884; G Appleby, V MacDonnell and E Synot, 'The Pervasive Constitution: The Constitution Outside the Courts' (2020) 48 *Federal Law Review* 437.

<sup>72</sup> This holds true even if their constitutional knowledge may be lacking, outdated, or otherwise defective as a matter of reality.

constitutional literacy (e.g., aides, external experts, continuing education courses, or further professional training), none of which are readily available to laypersons. Our interest in this article is accordingly with the latter and with what can be called popular constitutional literacy. When it comes to what ordinary individuals should know about constitutional matters, three points should be borne in mind.

First, in thinking about the degree of literacy that lay people ought to possess there are no accepted professional parameters that can guide our thinking about the appropriate standard of literacy in the way that these exist for legal and political elites.<sup>73</sup> Indeed, whilst the latter's professional lives operate within a context that requires regular interaction with aspects of constitutional literacy, the daily lives of most individuals are far removed from this context. On the one hand, it is not always immediately obvious what responsibilities that have a constitutional dimension or underpinning are incumbent on lay individuals.<sup>74</sup> On the other hand, as the approach to democracy has transitioned from being direct to representative in character, the role of individuals in relation to governance has changed.<sup>75</sup> Notwithstanding the deliberative wave of recent decades, most people are not regularly or immediately involved in the law-making, executive, or judicial features of government that could implicate constitutional questions and therefore necessitate a particular level of constitutional literacy.

Secondly, looking more closely at 'the people', we should not lose sight of the fact that this is a vastly heterogeneous category, meaning that it would be overly simplistic to treat this diverse collection of individuals as a single class for the purposes of constitutional literacy. Popular needs and demands for such literacy are likely to vary depending on a range of markers. These include an individual's place within society, including whether they hold the status of citizen or are otherwise entitled to participate in the public square or exercise constitutional guardianship roles,<sup>76</sup> their background and personal identity, their proclivity for political or social engagement, as well as their age. To put it simply, one would neither expect nor require the same degree of literacy of staff working in an NGO dedicated to women's rights as they would of persons belonging to a vulnerable or marginalised community (e.g., refugees, asylum seekers, or citizens without internet access), or even of primary school students. Furthermore, some people will be aware that there are gaps when it comes to their constitutional knowledge and, importantly, exhibit a desire to redress this information deficit by seeking out literacy-boosting information. We can call this the 'curious public': individuals who are self-primed or intrinsically motivated to be interested in constitutional issues and who may accordingly (wish to) exhibit higher than average levels of constitutional literacy. For these individuals, there may be an aspirational quality to the notion. In contrast, other people may not be so inclined, and may exhibit a posture of agnosticism, apathy, or even antagonism towards the constitutional system. Such individuals may be unconcerned about their respective level of constitutional literacy.<sup>77</sup> These various situations pose challenging questions about suitable means to positively affect such an attitude of 'incuriosity' to buttress the effectiveness of literacy-

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<sup>73</sup> We cover 'knowledge' tests targeted at new citizens below but believe that these come with a host of problems when considering them a baseline or minimal form of literacy for both new and birthright citizens alike.

<sup>74</sup> Generally A Miller, 'Toward a Concept of Constitutional Duty' [1968] *The Supreme Court Review* 199.

<sup>75</sup> D Galligan 'The People, the Constitution, and the Idea of Representation' in D Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP, Cambridge, 2013).

<sup>76</sup> On the political rights of non-citizens, see e.g. CM Rodríguez, 'Noncitizen voting and the extraconstitutional construction of the polity' (2010) 8 *International Journal of Constitutional Law* 30; EN Kayran and A-L Nadler, 'Non-citizen voting rights and political participation of citizens: evidence from Switzerland' (2022) 14 *European Political Science Review* 206.

<sup>77</sup> A Campbell, 'The Passive Citizen' (1962) 6 *Acta Sociologica* 9. Such an attitude may be more prevalent among birthright citizens than naturalized citizens who may not be able to affect incuriosity, as they may be required to take tests that assess aspects of constitutional knowledge.

cultivating initiatives by state entities or other providers.<sup>78</sup> For present purposes, though, our point is that it would be misguided to assume a ‘one-size-fits-all’ approach in relation to the personal dimension of constitutional literacy. Rather, we should think of this notion as a spectrum, with a series of diverse audiences each with their own predisposition, motivations, and preferences to learn or do more about the various types of knowledge identified as pertinent to such literacy, and this to varying degrees. This means, in other words, that we should be cautious in assuming that there exists a single nation-wide standard that is met by all those living within its territory.

Finally, and building on the previous points, we recognise that many states do put forward minimum levels for state ‘knowledge’ that is required of new citizens. These often come in the form of citizenship tests, which must be passed before citizenship is granted or before the naturalisation process proceeds further.<sup>79</sup> At first blush, such tests could perhaps be seen as markers of what a society considers as minimally constitutionally literate. The content of these tests however often covers, if not focuses on, elements that do not squarely fall within the understanding of literacy as advocated above: think of practical knowledge regarding daily living (e.g., how to apply for benefits), widespread moral values (e.g., towards things like sexuality or gender roles), and prominent cultural information (e.g., famous musicians, artists, or athletes). Elements more closely related to our understanding, such as constitutional history, may be contentious. Indeed, there can be significant differences in the iterations of the tests from one government to another, including what constitutional aspects are emphasised throughout.<sup>80</sup> The way the tests are used also varies significantly among countries.<sup>81</sup> Although citizenship tests can thus be important in articulating shared values and connecting to constitutional identity, and get new citizens ‘up to speed’ on not just state structures but a wide range of cultural and practical information—similar to what citizens already living in these countries would encounter during schooling and in their daily lives—looking at them as minimal gauges for constitutional literacy is problematic for a variety of reasons, and especially when considering the picture of literacy that we present above.

*Intermediaries.* Let us next consider how popular constitutional literacy can be operationalized, that is to say, how lay individuals would partake of information regarding the various components of knowledge and behaviours that are constitutive of constitutional literacy. In this regard, there are intermediaries at work, who help to explain legal texts, political norms, or public actions to ordinary citizens so that the latter can perform the roles outlined in Section 2 above. Such intermediaries may also act as interpreters of such constitutional materials and conduct. Those intermediaries include actors working within state institutions. Sometimes, their efforts are legally or constitutionally mandated; at other times they are engaged in by way of extension of public functions. Examples include civil servants involved in delivering

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<sup>78</sup> Word constraints prevent us from further developing ways to address this concern. We can note, however, that a significant portion of literacy-boosting initiatives may need to be targeted at the youth, in line with the psychological argument that younger minds are more susceptible to new ideas, which holds out the prospect of inculcating pro-constitutional mindsets from an early age that would hopefully be sustained through adulthood (especially if there would be continuous exposure to literacy-boosting information and activities for adults as well).

<sup>79</sup> SB Elias, ‘Testing Citizenship’ (2016) 96 *Boston University Law Review* 2093.

<sup>80</sup> Elias (n 79). See the examples discussed in the article, such as the UK (pp 2121-27), the Netherlands (pp 2127-34), Germany (pp 2134-41), and France (pp 2142-48), each of which changed the content and focus of their citizenship knowledge tests at various points.

<sup>81</sup> Elias (n 79) 2155-58. For example, they can be used as hurdles to exclude or hinder further naturalization within a given state, or as ‘rewards’ for new citizens in terms of achieving certain levels of integration.

government-sponsored civic education programmes,<sup>82</sup> judges creating brochures explaining to citizens what purpose constitutional adjudication serves in a democracy, and members of parliament engaging with constituents regarding the latter's constitutionally-derived entitlements vis-à-vis the state. Other intermediaries can make a valuable contribution to conveying facets of constitutional literacy as well, and though public-facing, operate more in the private sphere. Political parties have traditionally been particularly effective in this regard, by helping to orient and influence citizens' responsibilities as voters or more generally as public participants in political processes. To this end they have an interest in conveying information about laws and regulations pertaining to political campaigns and electoral processes. They also do so through articulating different approaches to realise the principles, objectives, and values articulated or implied in the constitution.<sup>83</sup> Moreover, notably in parliamentary systems, opposition parties are specifically responsible for role-modelling constitutional notions of checks and balances, accountability, and responsible government (e.g. through the idea of the 'loyal opposition'<sup>84</sup>). Civil society can also be a constructive intermediary, mainly by leveraging its role in overseeing how public officials use their competences, but also by providing citizens with an arena to hone and apply their legal, political, and civic knowledge. Finally, the media play an increasingly significant role in communicating the constitution and associated knowledge through reporting on the behaviour of constitutional actors, including other intermediaries. This is also true for the new types of media present in our societies, such as blogs, vlogs, microblogs, social networking, and other types of communications.

In keeping the people abreast about important constitutional issues, these intermediaries not only augment popular constitutional literacy, but may also provide necessary correctives at times. For example, in March 2021 several UK business owners decided to defy Covid-19 restrictions by putting statements in their shop windows invoking clause 61 of Magna Carta, which they claimed provided a right to dissent to laws if they felt they were being governed unjustly.<sup>85</sup> In fact, clause 61 was repealed in 1216, just one year after the original Magna Carta was sealed. In the end, the upheavals regarding whether Magna Carta could protect business owners against further coronavirus restrictions were short lived, with the media, together with the police, helping to quell misconceptions regarding the rights protected under the UK constitutional framework. Taken together, we should accordingly recognise the valuable role that intermediaries, which tend to be non-constitutional experts, play in the constitutional literacy project. As conduits of information, they may help highlight the salience of such literacy and undertake to improve the various types of knowledge associated with it. At the same time, we should realise that if their own understanding and practice of all things constitutional is deficient or characterised by disinterest, constitutional literacy may conversely be suppressed.

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<sup>82</sup> Such programmes are constitutionally mandated in, amongst others, the Constitution of Cape Verde, Art 73; the draft Chile Constitution, chapter III; the Fiji Constitution, Art 31(4); or the Venezuela Constitution, Title III.

<sup>83</sup> This happens irrespective of the form of government that a country subscribes to. For an example in the US presidential system, consider the pledge by the Democratic Party to 'fight to pass a Constitutional amendment that will go beyond merely overturning Citizens United [a US Supreme Court decision holding that the First Amendment right to free speech means that the government cannot restrict 'independent political spending' from corporations and other groups] and related decisions like Buckley v. Valeo by eliminating all private financing from federal elections', available at < <https://democrats.org/where-we-stand/party-platform/restoring-and-strengthening-our-democracy/>>.

<sup>84</sup> For a discussion of the application of the idea of the loyal opposition in the context of a presidential system, using the US as the main example, see G Anastaplo, 'Loyal Opposition in a Modern Democracy' (2003) 35 *Loyola University of Chicago Law Journal* 1009.

<sup>85</sup> A Colman, 'Covid lockdown: Why Magna Carta won't exempt you from the rules' *BBC News* (London, 6 March 2021), available at <<https://www.bbc.co.uk/news/56295261>>.



Constitutional literacy is contingent on other aspects too. In particular, the quantum and focus of such literacy will vary spatially as well as temporally. This is perhaps seen most dramatically during or in the immediate aftermath of moments of constitutional change. If popular participation in the adoption of the new text is envisaged,<sup>86</sup> the occasion of formal change tends to result in the increased dissemination of constitutional information. It may also trigger interest in the constitutional status quo ante to better appreciate the nature and significance of the envisaged change. Literacy further acquires prominence in transitional settings or in other situations where the constitution has been drastically overhauled. In such cases, prior governance practices and ideologies may be at odds with the normative precepts associated with a country's new constitution, while this text may also introduce novel power-sharing mechanisms. A classic example is South Africa's confrontational post-Apartheid constitution that sought to deliberately reshape the country's social and political institutions in line with a new set of basic values, alongside the establishment of a range of new democracy-protecting bodies, such as the constitutional court or human rights commission.<sup>87</sup> Likewise, several states in the Asia-Pacific region have long privileged elders, nobility, or traditional chiefs in decision-making, in a manner that did not comport with the equal (in the libertarian) sense of participation in expressing the collective will as provided for in their constitutions following extensive reform efforts.<sup>88</sup> Under such conditions, literacy becomes important to instruct citizens and others on the fresh commitments enshrined in the constitution and associated behavioural expectations at a particular moment in time. But these literacy-enhancing efforts are not easy, as the South African case demonstrates.<sup>89</sup>

In addition, times of crisis may place constitutional literacy in sharp relief. This has been seen, for example, in societal debates regarding the decision not to invoke emergency powers during the Covid pandemic<sup>90</sup> and the permissibility of curbs on basic fundamental rights, from free movement to the exercise of religious beliefs. Thus, in the Netherlands for instance, the government's attempt to restrict such rights through decentralised emergency regulations led to a growing awareness of the constitution's relevance in providing the appropriate legal basis and conditions for rights limitations.<sup>91</sup> High-profile political developments or scandals may generate similar focal points, such as the removal from office of Korean president Park in 2017 which awakened many ordinary citizens both to the rules on

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<sup>86</sup> This is rapidly becoming the default position. From an abundant literature, see e.g. Elkins, Ginsburg and Blount (n 42), V Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in L Miller and L Aucoin (eds), *Framing the State in Times of Transition* (US Institute of Peace Press, New York, 2010).

<sup>87</sup> K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146; H Botha, A van der Walt and J van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press, Johannesburg, 2003).

<sup>88</sup> See M De Visser and E Perham, 'Contextualising Participatory Constitution-Making: Insights from the Small State Experience' (2022) 20 *International Journal of Constitutional Law* 1216.

<sup>89</sup> See BC Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (Edward Elgar, Cheltenham, 2020) 45; D Bilchitz et al., 'Assessing the Performance of the South African Constitution' International IDEA (20 May 2016), available at <<https://www.idea.int/publications/catalogue/assessing-performance-south-african-constitution>>.

<sup>90</sup> For general discussion, T Ginsburg and M Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498; J Grogan, 'States of Emergency: Analysing Global Use of Emergency Powers in Response to Covid-19' (2020) 4 *European Journal of Law Reform* 338.

<sup>91</sup> M Julicher, 'Following the constitution in times of corona: A path to redeeming constitutional idolatry in the Netherlands?' (*IACL Blog*, 19 January 2021), available at <<https://blog-iacl-aidc.org/2021-posts/2021/1/19/following-the-constitution-in-times-of-corona-a-path-to-redeeming-constitutional-idolatry-in-the-netherlands-t6hky>>.

impeachment as well as to the existence of the country's constitutional court and its role in enforcing constitutional law.<sup>92</sup>

Next, interpretations by courts or political institutions of constitutional provisions may overrule or drastically adjust the meaning previously ascribed thereto, often in response to extra-legal developments. Think for instance of the 'separate but equal doctrine' initially accepted in *Plessy v Ferguson*<sup>93</sup> as a legitimate reading of the Fourteenth Amendment to the US Constitution that was famously rejected in *Brown v Board of Education*,<sup>94</sup> or the recent decision in *Dobbs*,<sup>95</sup> which reversed an earlier Supreme Court ruling, *Roe v Wade*, that provided stronger protections for abortion.<sup>96</sup> The same type of changes can be observed in the Japanese Cabinet Legislation Bureau accepting that Article 9 of the Constitution, the so-called peace clause, no longer prevents participation in collective self-defence missions in response to rising global security threats.<sup>97</sup> In the immediate aftermath of such evolved understandings there is an obvious need to update constitutional understandings. In an optimistic scenario, the presence of such instances could moreover become a catalyst for citizens to become more interested in procuring or acting on constitutional knowledge.

Finally, there can be intra-jurisdictional variation in literacy standards. Differences may obtain on account of the country's size but may also be influenced by aspects such as separatist tendencies in certain parts thereof. Those living in such regions and agitating in favour of self-determination may be more well-versed in existing and alternative vertical separation of powers arrangements than their compatriots in other areas. The situation in the UK seems especially instructive here, as citizens in devolved entities—such as Scotland, Wales and Northern Ireland—may be more aware of the powers (or limitations) under these arrangements than citizens in England, who do not have a devolved legislature. Conversely, they may also have a distinct view of constitutional operation, in that they may emphasise or pay attention to certain features of the constitution but downplay or ignore others. Again, Scotland seems like a good example here, as the main tenet of the UK constitution—parliamentary sovereignty—is not as readily accepted in Scotland.<sup>98</sup>

Constitutional literacy, then, is heavily context-dependent.<sup>99</sup> Like constitutional meaning, it may fluctuate over time and across space. This reality cautions against easy statements about the choice of what would constitute appropriate mechanisms for its realisation or the extent to which it should be present within the population at large.

## V. MEASURING CONSTITUTIONAL LITERACY

A corollary of the fluid nature of constitutional literacy is that there are difficulties and ambiguities in assessing its empirical manifestations. An important complication is that there can be such a dizzying array of situations in which individuals leverage constitutional

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<sup>92</sup> See e.g. H-S Lim, 'A Closer Look at the Korean Constitutional Court's Ruling on Park Geun-hye's Impeachment' *Yale Journal of International Law* (Online Supplement) 18 May 2017; M Hee and Y Seongyi, 'The Role of Social Media and Emotion in South Korea's Presidential Impeachment Process' (2019) 55 *Issues and Studies – Institute of International Relations* 195.

<sup>93</sup> *Plessy v Ferguson*, 163 U.S. 537 (1896).

<sup>94</sup> *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>95</sup> *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. \_\_\_\_ (2022).

<sup>96</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>97</sup> 'New legislation bureau head eager to discuss collective self-defense' *Japan Times* (Tokyo, 20 August 2013).

<sup>98</sup> The principle has even been questioned in the Scottish courts. For example, in 1953 Lord President Cooper asserted, 'The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law' (*MacCormick v Lord Advocate*, 1953 SC 396).

<sup>99</sup> For example, T Ginsburg, 'Constitutional Knowledge' (2018) *Know: A Journal on the Formation of Knowledge* 15, 25.

knowledge in the real world that a full translation thereof in quantitative or qualitative terms does not seem quite possible. Thus, any data collection effort is likely to be underinclusive and provide only a partial picture of the state of constitutional literacy. Take for example the relatively straightforward exercise of using surveys to measure people's awareness of the existence of the formal constitution or its most pertinent features, such as the number of branches of government or the identification of those rights that are explicitly protected. This is undoubtedly a common approach: news reports that claim to speak to the level of constitutional literacy often refer to surveys that have been designed along those lines.<sup>100</sup> To be sure, such surveys can tell us something about certain aspects of constitutional literacy in a given jurisdiction, but these may not be the best or most useful indicators of the knowledge that individuals truly possess. Constitutional literacy is a sprawling notion, which should extend beyond a textual understanding of the formal constitution. Knowledge regarding the larger principles that speak to the identity of the constitutional order, or relating to the public role of individuals as citizens, including their sentiments to the constitution, the state, the form of government, or other aspects of constitutionalism, are not easily or reliably captured in surveys.<sup>101</sup> Additionally, a lack of textual constitutional knowledge does not mean that citizens do not hold their own values about justice, fairness, truth, politics, and a number of other important elements that relate to the way constitutional democracies operate.

A possible alternative approach is to look to the actual usages of the constitution by members of the public as evidencing their understanding of constitutional matters. Here one could think of the performance of constitutional rights or obligations by individuals in the public square, such as participating in demonstrations, the number of associations dedicated to politics or constitutional issues, or voting in countries where this is not compulsory. Data along these lines would again offer an incomplete proxy for the true amount of constitutional literacy that prevails in society, however. It may also be unclear whether interest should lie primarily or only in uncovering the frequency with which the constitution is used or also the substantive quality of that usage, which would focus attention on the elusive issue of what would constitute a 'worthy' display of constitutional literacy.

Additionally, the degree to which citizens pay attention to or 'watch' constitutional actors may be difficult to determine, especially in an era where people have access to a variety of media outlets. Other aspects included in our definition of constitutional literacy, such as constitutional history, could play out in books, television shows, movies, plays and other forms of entertainment.<sup>102</sup> But these markers are, at least to our knowledge, not used when it comes to assessing constitutional literacy. Finally, accumulating and accessing data regarding the actual invocation of constitutional knowledge is much more complicated than merely surveying a small segment of the public on particular aspects of the constitution.

But let us assume for the moment that there is workable data – even if flawed in some respects – that provides an indication of societal levels of constitutional literacy. At that point, literacy advocates will likely also need a yardstick that speaks to what would be a satisfactory, if not an optimal, level of literacy within the jurisdiction. This would enable a determination of the need for and scope, if any, of remedial action to increase literacy levels.<sup>103</sup> How could such a baseline to be established? We might look to the past for an assessment of the kind of adequate or even high degrees of literacy that have been achieved in society before. Times of significant constitutional (re)making would be a natural candidate for such a baseline, as citizens would be expected to be engaged with constitutional questions during such times, which

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<sup>100</sup> See e.g. Cillizza (n 10).

<sup>101</sup> We leave aside here questions regarding the representativeness of the population sample surveyed.

<sup>102</sup> For example, the hit Broadway production 'Hamilton' seems to be a perfect illustration in this regard.

<sup>103</sup> In a less optimistic scenario, an 'established' deficiency in constitutional literacy might even be relied on by some to argue that people should not be entrusted with a significant role in government.

could occur either when formal adoption or amendment processes are initiated or during what Ackerman has referred to as ‘constitutional moments’, those rare occasions outside of normal politics during which national debates regarding higher-order constitutional issues become of acute interest to citizens.<sup>104</sup> But these ‘moments’ are often focused around a major issue or two, rather than critique of the constitution as a whole. Leaving aside the question of measurement,<sup>105</sup> the past may not however necessarily be the most suitable marker for achieving future literacy levels. After all, the content of constitutional literacy varies over time, in part on account of formal and informal constitutional change, and any standard ought to be duly cognizant of that fact. An alternative approach would be to attempt to fashion an idealised benchmark that abstracts from real world levels of constitutional understanding. But there are serious concerns here, one being that the literacy benchmark can be set at an unrealistically high level that would produce unmanageable expectations as to what citizens ought to be familiar with. Another complexity would be the plurality of audiences and their attributes, which could make formulating a single national standard an extremely difficult exercise.

Lastly, attempts to measure constitutional literacy will need to contend with the contested nature of this notion. As is well known, different views exist – including among the constitutional actors whose behaviours may be observed to arrive at a greater degree of constitutional literacy – regarding what constitutes a ‘correct’ understanding of constitutional issues or the method to take in studying these.<sup>106</sup> For example, even judges, as the typical authoritative interpreters of the written constitution, may proffer multiple readings of the proper meaning to be ascribed to this text (which may also implicate different approaches to the process of constitutional interpretation).<sup>107</sup> Beyond the courts, different public institutions and their officials perform different roles within the legal order and ‘this makes it likely that they will view the constitution from different viewpoints’,<sup>108</sup> which in turn will likely influence their conduct in giving effect to the constitution. Such divergences are conducive to the occurrence of constitutional dialogues, both among state institutions as well as within society.<sup>109</sup> At the same time, they also serve to complicate assessments of constitutional literacy. This is because any form of literacy measurement will not only be preoccupied with whether and to what extent people possess knowledge about the constitution and its operation, but also with the identification of the accuracy of that knowledge. In other words, those seeking to assess levels of constitutional literacy are typically interested in uncovering the degree to which people ‘correctly’ understand constitutional matters, as opposed to having inaccurate information or relying on mistaken beliefs. However, when there is no consensus about the ‘right’ reading of the constitutional text or the ‘right’ type of constitutional behaviours – which is not an uncommon occurrence – the consequence is that such determinations become very challenging indeed.

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<sup>104</sup> Ackerman (n 28) 263.

<sup>105</sup> For an attempt to measure a past constitutional moment, see D Young, ‘How do you measure a constitutional moment? Using algorithmic topic modelling to evaluate Bruce Ackerman’s theory of constitutional change’ (2013) 122 *Yale Law Journal* 1990.

<sup>106</sup> Some suggest that familiarity with such diverse views is part and parcel of a high level of constitutional literacy, so Dreisbach (n 13). Apart from making it incredibly taxing for people to achieve such a level of literacy, attempts to do so may also have the effect of turning them off the notion in their entirety, as it could be perceived as too convoluted.

<sup>107</sup> See for example P Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) 60 *Boston University Law Review* 204; A Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 *Cincinnati Law Review* 849.

<sup>108</sup> D Feldman, ‘Factors affecting the choice of techniques of constitutional interpretation’ in F Mélin-Soucramanien (ed) *L’interprétation constitutionnelle* (Daloz, Paris, 2005) 120.

<sup>109</sup> For example, G Sigalet, G Webber and R Dixon (eds), *Constitutional Dialogue – Rights, Democracy, Institutions* (CUP, Cambridge 2019); S Sanders, ‘Dignity and Social Meaning: *Obergefell*, *Windsor*, and *Lawrence* as Constitutional Dialogue’ (2018) 87 *Fordham Law Review* 2069.

## VI. CONCLUSION

Significant concerns abound about the state of constitutional literacy around the world, but generic alarmist statements are of little help to the literacy project. It seems more valuable, in contrast, to reflect on the meaning and characteristics of this notion to see whether it is understood, and operationalized, in a realistic and constructive manner. In this regard, the idea that constitutional literacy is in crisis because citizens are not well-versed in highly legalistic texts (e.g., the constitution, legislation that operationalises the constitution, or major court cases) appears tenuous in that it places an almost impossibly high burden on lay individuals regarding the knowledge required of them. In our view, constitutional literacy should go beyond overly legalistic indicators, and take a wider view of how such individuals may become constitutionally literate. Thus, a more complete and dynamic understanding of literacy should conceive of this notion as developing not merely from consultation of (a small sub-set of) written texts, but also as an observed form of knowledge or act of doing. Indeed, textual constitutional literacy may be only a small part of good citizenship. Citizens have finite resources to spend on literacy efforts, and using those to develop other forms of constitutional engagement may better serve their states, societies, or local communities.<sup>110</sup> While some citizens may choose to put their energies into learning more about the written constitution or constitutional history, others may partake in civic engagement activities, and yet others may invest time and energy in improving their political knowledge and observing political leaders. All these citizens should be considered constitutionally literate, but each in different styles. As such, this article lays the foundation for thinking about constitutional literacy in different light, where a break from the text-centric approach may further enhance the role that this notion plays within our democracies. Moving beyond text-driven knowledge matters because, as Crick has noted, ‘The old routines of learning about “the constitution” in a non-discussive, unproblematic, and therefore dead boring manner (often called Civics) are now generally recognised as at least useless, at worst counter-productive to encouraging democratic spirit’.<sup>111</sup>

At the same time, we do not pretend that the view of constitutional literacy presented here encapsulates the full extent of what this complicated concept may entail or require. As such, further theoretical and empirical research will be necessary to address at least three interrelated questions. The first is how a clearer conceptualisation of constitutional literacy can help the practice and effectiveness of literacy-boosting initiatives for the benefit of participation in, and the defence, of a constitutional order. Such initiatives may be deployed by state institutions, but non-state actors (including knowledge institutions like universities, the free press, or NGOs) may have an important role in this regard as well,<sup>112</sup> suggesting that we should be concerned to ensure that they are properly equipped to discharge this role. Regardless of who is the author of the literacy-boosting initiative, they will need to move beyond a focus on acquainting citizens with an entrenched ‘master text’ through top-down brochures or public campaigns. They may instead wish to think about leveraging the emerging literature on legal design, which advocates the adoption of a human-centred approach and suggests the use of technology and visual aids to present information a manner that is comprehensible for people

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<sup>110</sup> However, we do not go as far as some, who have suggested that citizens should completely ignore politics and focus on things that really matter, such as local community projects and other forms of virtue. See C Freiman, *Why It's OK to Ignore Politics* (Routledge, Abingdon, 2021). In our view, to suggest that one can ignore politics and then act politically is also a troubled notion. If individuals are completely unaware of political issues and problems, then it will be difficult to decide where to put their efforts.

<sup>111</sup> B Crick, *Democracy: A Very Short Introduction* (OUP, Oxford, 2002) 115.

<sup>112</sup> On such institutions, see Jackson (n 11).

and catered to their needs and capabilities.<sup>113</sup> It may further be worthwhile to identify and celebrate individuals or state institutions that are positive role-models of constitutional literacy and related virtues. Constitutional history, meanwhile, could perhaps profitably be disseminated through the arts. Second, we need to think carefully about how constitutional literacy can be better captured in terms of its measurement to enable us to make reasonable claims about the state of such literacy in a given country at a given point in time and chart a desirable way forward. Going beyond randomised surveys about constitutional architecture or the naming of apex judges would seem a suitable way forward. This includes recognising that literacy may consist of observational or even participatory learning. If so, we need to think carefully about the types of observation to include, and the manner in which these can be appropriately accounted for. As for the recent turn to make more use of participatory mechanisms, there is an unfolding debate about whether, and how much, such mechanisms improve constitutional-legal literacy that needs to be pursued more fully.<sup>114</sup> Third, future research may also need to reckon with the possible downsides of constitutional literacy, such as increased constitutional idolatry,<sup>115</sup> a potential reckoning with problematic or unfortunate aspects of a state's constitutional history,<sup>116</sup> or a disparity between constitutional text and constitutional practice.<sup>117</sup> From a practical perspective, these downsides may potentially affect the way that future constitutions are written or brought into effect.

In sum, we hope that our theorising about the qualities of constitutional literacy will help expand the range of methods, perspectives, and tools employed by those seeking to engage with or advance such literacy. Ultimately, if the future of our democracies depends on constitutionally literate citizens, then we should have a more sophisticated understanding of what this notion consists of, as deriving from both textual and non-textual sources.

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<sup>113</sup> See e.g. S de Souza, 'Communicating the Law: Thinking through Design, Visuals and Presentation of Legal Content' in S de Souza and M Spohr (eds), *Technology, Innovation and Access to Justice* (Edinburgh University Press, Edinburgh, 2021); S Chung and J Kim, 'Systematic Literature Review of Legal Design: Concepts, Processes, and Methods' (2022) *The Design Journal*.

<sup>114</sup> Citizens' assemblies and other participatory mechanisms can allow the ordinary individuals involved therein to "learn by doing" what the functioning of constitutional democracy entails and requires, while providing other segments of the public with yet another actor whose behaviour can be observed for constitutional learning. When the topics for deliberation have a constitutional flavour, such modalities of what Landemore (n 25) has called 'open democracy' can further enable citizens to (better) discern how fundamental rights and institutional structures are expounded upon and concretised for application.

<sup>115</sup> Jones (n 87).

<sup>116</sup> This is playing out in America at the moment, as the views of the 'Founders' have come under increased scrutiny (see, e.g., 'The 1619 Project' *The New York Times* (New York, 14 August 2019)). However, it may also come about because of the way that certain constitutions have been written (e.g., by outsiders or for other states), or potentially because of the lack of a national referendum on the final text.

<sup>117</sup> It has been noted that they are 'definitely not blueprints': G Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar, Cheltenham, 2018) 14-5.