

## Direct Public Participation in Constitution-Making

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***The growing momentum for public participation in constitution-making is supported by normative arguments, but clarity is required in understanding the purpose, modalities and outcomes of public participation in constitution-making.***

Transparency is accorded a very high value in the contemporary world of constitution-making by many including citizens, policy-makers and scholars of constitutional law. In the context of constitution-making, 'transparency' is equated with inclusion in the drafting process. Consequently, almost every contemporary attempt at constitution-making and/or reform has included a platform for public participation and consultation among the public.

This Policy Brief examines the practice of public consultation in constitution-making from a critical point of view. The growing momentum for public participation in constitution-making is supported by normative arguments, which can broadly be categorised under the headings of democracy and 'the rights-based approach'. However, clarity is required in understanding the purpose, modalities and outcomes of public participation in constitution-making. Moreover, demonstrating the positive impact of public participation through tangible outcomes has been difficult. A robust and critical debate on this practice therefore is overdue.

### The Debate

As it has evolved today, democracy demands that the public are consulted and involved in decisions that relate to constitutional reform. Keeping the public 'informed' is no longer considered to be adequate. The, now well known, instrumental arguments in defence of public participation in constitution-making

can be grouped together in two lines of argument. One is that public participation generates political legitimacy for the constitution-making process as well for the substance of that constitution. Another is that it encourages inclusion in debates and decision-making on constitutional governance.

The counter-arguments to public participation are as follows. Firstly, public participation in constitution-making can generate expectations that may not be fulfilled in the drafting and/or the implementation of a constitution. Secondly, the act of participating in the process itself can polarize a society and be a cause of political instability. Thirdly, unfulfilled expectations and polarization of society can aggravate levels of political dissatisfaction resulting in disenchantment with the entire process.

Sceptics of public participation in constitution-making therefore argue in favour of a process driven primarily by political elites and experts. In such a process the public participate indirectly to elect representatives who participate in the process and/or by way of referenda.

Such sceptics have further argued that in societies emerging from conflict public participation might be more problematic given the sensitivity of and urgency for constitutional reform. It has been argued that calling for public participation in 'extreme conditions' such as in a society with 'unresolved ethnic tensions' might even be counter-productive (Tom Daly 'Introduction' to Section III: 'Constitution-making and Constitutional Change', in Richard Albert and Yaniv Roznai (eds), *Constitutionalism Under Extreme Conditions - Law, Emergency, Exception* (Springer, forthcoming, 2019)).

## Emerging International Consensus on Public Participation in Public Affairs

Today the obligation of states to respect human rights is interpreted as including the obligation to ensure and facilitate public participation and consultation in public affairs, including in constitution-making and/or reform. The *Draft Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs* adopted by the Human Rights Council in 2018 recognizes that the right to participate in public affairs is integral to the realization of other human rights such as the right of access to information and the right to freedom of expression.

At a community level, the right to participate in public affairs is essential for the realization of the internal right to self-determination as well. The Draft Guidelines are particularly useful for their emphasis on the responsibility of the state to ensure the participation of marginalized groups in public affairs.

For instance, the *Draft Guidelines* state that in the context of peace-building or in post-conflict contexts public participation must be designed to ensure the participation of those most affected – such as ‘children, young people, minorities, persons with disabilities, internally displaced persons, refugees and women and girls’ (*Draft Guidelines* para 60). The Guidelines recommend measures to be followed to ensure participation before and after decision-making.

Article 25 of the *International Covenant on Civil and Political Rights* (1966), Security Council Resolution 2122 (2013) which call for consultation with women in peace-building and peace-keeping,

Target 16.7 of Sustainable Development Goal 16 which relates to participation in decision making, and now the *Draft Guidelines*, together offer a robust rights-based defence for ensuring public participation in constitution-making at the international level.

This international guarantee has to be enforced at the domestic level, including in what has traditionally been considered the ‘high politics’ of constitution-making. In any legal system a constitution is possibly the most abstract level at which rule-making occurs. Constitution-making cannot be divorced from political negotiations and cannot be meaningful without expert input. Expanding this process to include meaningful direct public participation and consultation has been challenging.

### A Typology of Public-Participation

In the recently published volume by T Abbiate et al titled *Public Participation in African Constitutionalism* (Routledge 2018), Abrak Saati offers a typology of public participation in constitution-making. This typology helps to better understand the concerns about public participation in constitution-making.

Saati argues that the effect of public participation is determined by four critical factors. They are: (i) the initiators of the process; (ii) the forms of communication; (iii) the degree of

inclusion, and (iv) the question of final authority. She identifies four forms of communication – the ‘one-way model’, the ‘two-way model’, the ‘two-way model with proactive measures’ and ‘consultation’.

Saati explains that depending on the weightage given to the critical factors and the type of communication involved, public participation can be categorised under five ‘types’ – (1) false participation, (2) symbolic participation, (3) limited

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participation, (4) consultative participation or (5) substantial participation. Saati's typology clarifies the different ways in which public participation in constitution-making can be designed. The four forms of communication that she describes point to the distinction between participation and consultation and between including the public and allowing the public to influence the process of constitution-making.

### Comparative Experiences - an Evidence Gap?

Global experience in the last three decades reveals three interesting trends. Firstly, it is common for states emerging from intra-state conflict to initiate constitution-making exercises. Secondly, such exercises are almost always accompanied by public participation and/or consultation. Thirdly, there is little in terms of evidence of the success of ensuring public participation and/or consultation in constitution-making. In fact, there is no clarity, as of yet, as to what 'success' means in this context.

All three of these trends were evident in the constitution-making exercises in Uganda (1988-1995), South Africa (1994-95), Nepal (2008-2015) and more recently in Sri Lanka (2016).


One of the challenges in assessing such processes has been the difficulty in measuring the impact of public participation or consultation in constitution-making. These challenges apply to quantitative or qualitative attempts to measure the impact of public participation. In constitution-making exercises that take place in societies emerging from war or conflict these questions assume even greater significance. In such contexts, should limited human and physical resources be allocated to facilitate public participation in a politically volatile environment?

Some scholars point out that there is hardly any empirical evidence to justify the practice of public participation in constitution making. As Saati argued, it seems that the public 'only participate in the act of participation' (Saati A, 'Participatory Constitution-Building in Nepal: A Comparison of the 2008-2012 and the 2013-2015 Process' 10(4) (2017) *Journal of*

*Politics and Law* 29 at 31). Why then should international organizations, governments, civil society continue to demand an inclusive, participatory and/or consultative process in constitution-making?

It could be said that despite the consensus at the international level on public participation and/or consultation in public affairs, including in constitution-making, experience in operationalizing it at the domestic level has not been satisfactory.

Sceptics of public participation therefore continue to argue in favour of a more traditional approach to constitution-making which only place a symbolic value to public participation. While the answers to the question of objectives, impact and measurement are unclear public participation in constitution-making continues to be promoted as a best practice.



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### Potential Long-Term Benefits of Public Participation

Drawing on the Ugandan experience with public participation on constitution-making, DC Moehler in *Distrusting Democrats: Outcomes of Participatory Constitution Making* (University of Michigan Press 2008) argues that the process leads to the formation of 'distrusting democrats.' These distrusting democrats, shaped and enabled by their participation in constitution-making, have the potential to keep democratic institutions in check in the future.

In Moehler's analysis, public participation in constitution-making creates 'short term risks of disillusionment and instability and long-term

advantages from a more sophisticated citizenry with the capacity to monitor leaders and promote democratic governance.’ (DC Moehler in *Distrusting Democrats: Outcomes of Participatory Constitution Making* (University of Michigan Press 2008) at 2).

Even if public participation does not result in outcomes within the constitution-making process itself, as argued by Moehler, it can have a positive impact in terms of shaping, reviving the formation of a constitutional culture that is engaged and vigilant.

## Managing Public Participation

The intrinsic justification for public participation in constitution-making is gaining ground particularly at the international level.

However, given the lack of clarity on the tangible benefits of public participation, the instrumental justifications need to be reviewed and revised.

Comparative experience suggests that the defence of the design and implementation of public participation and/or consultation in constitution-making are best made if the following qualifiers are given due consideration:

1. The strongest justification for public participation in constitution-making is intrinsic. The public are included because they have a right to be involved in public affairs. It is useful to maintain a distinction between ‘participation’ and ‘influence’. (Saati A, ‘Participatory Constitution-Building in Nepal: A Comparison of the 2008-2012 and the 2013-2015 Process’ 10(4) (2017) *Journal of Politics and Law* 29 at 31).
2. The design of a procedure for public participation must pay attention to sequencing, to preparatory education, and to the duration of the participation process. Public participation that is based on a pre-established set of constitutional principles and/or agreements

that have been decided upon by the political elite makes the process more manageable.

3. The political elite and experts must accept the added roles of engaging the public actively for the purposes of informing them of the process, educating them and for debating the issues that are central to the constitution-making exercise.
4. As there is little in terms of evidence or experience that can defend public participation in constitution-making, it is best to acknowledge that the instrumental justifications for public participation are not in relation to the drafting of the constitution but relate more broadly to strengthening the ‘culture’ of constitutional democracy.

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In conclusion, a final reflection is that public participation in constitution-making should be viewed as only the first stage of a continuing process. Through provision for a robust regime of fundamental rights, liberal rules of standing for public law litigation, provisions for judicial

review of legislation and through other similar mechanisms, including the provision of legal aid, the state must also commit more broadly to facilitating public participation in the enforcement of the constitution and in public affairs more generally.

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