



Summary

Direct public participation is a feature of almost every exercise in constitution-building in the 21st century. This issue of Constitutional *INSIGHTS* examines three different forms of direct public participation in constitution-building—consultation, deliberation and decision-making—and identifies ways to promote inclusive and meaningful direct public participation.

About this series

The Melbourne Forum on Constitution-Building in Asia and the Pacific is a platform co-organized by the Constitution Transformation Network and International IDEA. It brings together scholars and practitioners of constitution-building from across the region to share their perspectives on critical issues as a contribution to enhancing global understanding of the field. This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

For more Constitutional *INSIGHTS*, and to learn more about the Melbourne Forum, see <http://law.unimelb.edu.au/constitutional-transformations/MF>

About the Authors

This issue of Constitutional *INSIGHTS* was written by Anna Dziedzic. It draws on discussions at the Fourth Melbourne Forum on Constitution-Building in Asia and the Pacific, which was held in Yangon, Myanmar, on 21–22 October 2019.

Consultation, Deliberation and Decision-Making: Direct Public Participation in Constitution-Building

Introduction

Direct public participation is now regarded as an essential part of a constitution-building process. In the 21st century, almost every exercise in constitutional reform has involved an opportunity for members of the public to engage in the process. The right to participate in public affairs is internationally recognized and a consensus has emerged that public participation is good practice in constitution-building.

Direct public participation is the involvement of the people or the citizenry in decisions about the *process* of constitution making or amendment, and the *substance* of constitutional change. Direct public participation in constitution-building can be contrasted with indirect forms of public participation, such as through elected representatives in parliament or a constituent assembly. Public participation through representation is discussed in a companion issue of Constitutional *INSIGHTS*.

This issue of Constitutional *INSIGHTS* examines five issues that arise in relation to direct public participation in constitution-building: (a) the purpose of direct public participation in constitution-building; (b) critiques of public participation; (c) the different types of direct public participation; (d) inclusive participation; and (e) trends in public participation, and the rise of unofficial channels for direct participation in constitution-building.

1. Purpose of public participation

There are a range of reasons for directly involving the public in constitution-building. First, direct public participation generates legitimacy for new constitutional arrangements. It is a practical expression of the symbolic and theoretical idea that in a democracy, the

Direct public participation can generate legitimacy, support national ownership and ensure new constitutional arrangements address the needs of the people.

There is a risk that direct public participation can be manipulated by powerful political actors, become a mere ‘box-ticking’ exercise, or create unrealistic public expectations.

constitution is made ‘by and for the people’. Where certain groups have been historically excluded or marginalized, inclusive participation can be particularly important in order to build legitimacy.

Second, direct public participation supports national ownership of the constitution-building process and the resulting constitution. It can help to offset a process dominated by political actors, national and international elites and experts who might be perceived as serving only a narrow set of interests. Public participation increases public knowledge of the constitution and governance, providing a further point of ownership and empowering the people to monitor implementation of the constitution and hold constitutional actors to account.

Third, direct public participation can ensure that the substance of the constitution addresses the needs and reflects the preferences of the people. The public might identify issues that have been overlooked or direct attention to preferred solutions that might not be apparent to experts or on the agenda of political actors.

Direct public participation can also serve darker purposes. It can be manipulated by powerful political actors to claim public endorsement of a particular outcome or to unduly delay the process.

2. Critiques and meaningful public participation

Critiques of direct public participation focus on the quality of public participation and the need to manage the risks that can arise. Direct public participation, especially if it is part of a top-down constitution-building process, can be a ‘box-ticking’ exercise undertaken only to fulfil an externally imposed requirement for participatory constitution-building. In such cases, the people ‘participate in the act of participation’ (Saati 2017: 31). Where the public has only limited input and influence in the constitution-building process, participation can be tokenistic.

There can also be a concern that the public might have too much influence. Public participation, particularly in majoritarian forms, might crowd out unpopular but necessary constitutional protections. The views and preferences of the public are just one source. Constitution-makers should also be guided by research, expert advice and the negotiations between the political elites that will be primarily responsible for implementing the constitution. Direct public participation can create unrealistic expectations that public opinion will or should prevail in all cases.

Direct public participation may not be necessary where the purpose of such participation can be achieved in other ways. In some contexts, for example where there is a strong tradition of political and interest group representation, direct public participation may not be a high priority. In conflict-affected contexts, where new constitutional arrangements are being negotiated as part of a peace process, the interests of securing peace might outweigh the benefits of opening the process up to direct public participation.

These critiques highlight the need to clearly identify the purpose of direct public participation and to tailor the mechanisms of public participation to serve those purposes, but also to fit the context in which constitution-

Consultation focuses on obtaining information from members of the public about the existing constitution and potential new arrangements.

building is taking place. Being clear about the type of direct public participation envisaged can help to ensure that the public understands the extent of their role in the constitution-building process. Section 3 sets out three broad types of direct public participation based on the role and degree of influence of the public in the constitution-building process.

3. Types of direct public participation

Direct public participation in constitution-building processes tends to fall into one of three categories—consultation, deliberation and decision-making. This categorization focuses on the kind of influence that the public can have on the constitution-building process.

3.1. Consultation

The aim of consultation is to obtain information and feedback from members of the public about the constitution and any proposed constitutional changes. Consultation is sometimes used early on in a constitution-building process to seek information about the concerns or aspirations of the public and the types of issue they want a new or revised constitution to address. Consultation commonly also occurs after the preparation of a draft constitution in order to obtain feedback on specific proposals.

Consultation is largely a one-way form of communication, in which the people provide information to decision-makers. Decision-makers might have an obligation to report back to the public on how they have used that information, but this is not always the case. They are obliged to listen but are under no obligation to respond to or act on the ideas or feedback provided by the public.

Mechanisms for consultation include oral or written submissions, surveys and questionnaires. Channels for engagement increasingly use social media. A non-binding or advisory referendum (sometimes called a plebiscite) may be used to gauge public views on a particular issue as a form of consultation. A more interactive consultative mechanism is face-to-face meetings. These might involve hearings before a large group open to any member of the public or meetings with specific groups or representative organizations.

Participation in consultative mechanisms tends to be voluntary, and therefore generally only includes individuals and organizations with an interest in the constitution-building process and the means to participate.

3.2. Deliberation

In deliberative forms of direct public participation, members of the public work together with experts and decision-makers to identify and prioritize issues for constitutional reform, and to develop solutions. In contrast to consultation, deliberation involves two-way communication between decision-makers and the public, as they explore the issues in-depth and develop an agreed position together.

There has been recent experimentation with deliberative mechanisms for direct public participation in constitution-building. Many of these

Deliberation involves two-way communication between decision-makers and members of the public, to explore constitutional issues in depth and to agree solutions.

Members of the public might have a direct role in decision-making. Most often, this occurs through a referendum.

build on the standard face-to-face meeting but add certain features and innovations that support deliberation.

A citizens' assembly is a meeting of a randomly selected representative group of citizens. During the assembly, members learn about constitutional issues, deliberate and make recommendations. Ireland, for example, has convened several citizens' assemblies since 2016. These assemblies have deliberated on a range of issues, such as abortion, gender equality and the use of referendums. On some issues, such as abortion, the Assembly's deliberations helped to break long-standing political deadlocks and informed constitutional amendments that were agreed to in a referendum.

First used in Mongolia, deliberative polling gathers a randomly selected representative sample of citizens who are surveyed before and after they have engaged in face-to-face, in-depth deliberations on the issues. This process allows ordinary citizens—rather than interested parties and self-selected participants—to influence the agenda for constitutional reform. It also permits participants to safely change their opinions following deliberation. In Mongolia, for example, support for the creation of a bicameral parliament and an indirectly elected president fell dramatically after a deliberation exercise.

Such deliberation can be assisted by the provision of information to participations and making experts available to answer questions as they arise; bringing together citizens from diverse backgrounds and perspectives; and fostering an environment that emphasizes discussion and compromise. The deliberative process in Mongolia showed that 'if people think their voice matters . . . they will fully engage in fruitful discussion among themselves, ask the experts informed questions, and then make tough decisions about what is best for their communities' (Naran 2019: 26).

Deliberative forms of direct public participation require elite decision-makers to relinquish some control over the agenda and the process. This in turn raises expectations that the views of the public, developed through deliberation, will be reflected in any outcome.

3.3. Decision-making

A third type of direct public participation places decision-making in the hands of the public. In constitution-building, this kind of direct public participation occurs most often through referendums. In some states, approval in a referendum is a legal requirement for constitutional change.

Some referendums are advisory only, in that there is no legal requirement to implement the outcome. However, an advisory referendum might carry sufficient political weight to be a form of decision-making, rather than consultation.

Public participation in decision-making tends to occur towards the end of a constitution-building process, after new constitutional amendments have been developed by an elite or representative institution. Sometimes, however, a referendum might be used to initiate a constitutional reform process. For example, in the Federated States of Micronesia and Palau, the people are periodically asked, by referendum, whether they want to initiate a convention to consider constitutional change. A referendum

might also be used to break deadlocks in the constitution-making body. In the Maldives in 2007, for example, the Constituent Assembly was divided on whether the Maldives should have a parliamentary or a presidential system of government so the matter was referred to the people to decide by referendum.

Direct public participation in decision-making gives the public a critical role in constitution-building. It can often, however, be a limited role, especially when it is confined to approving or rejecting a proposal developed without public involvement. Where a referendum is determined by a simple majority vote, or even in some contexts a special majority vote, there is a risk that it will be divisive and polarizing, and drown out the voices and interests of minorities.

Direct public participation calls for processes that are inclusive of the whole of the public, not just particular groups and stakeholders.

4. Deciding what type of direct public participation to use

Being clear about the type of direct public participation involved in constitution-building has several benefits. First, it means that the goals of public participation are made clear, both to constitution-makers and to members of the public. This can help to manage expectations about the role of the public in constitution-building and the extent to which their participation will influence the outcome. Second, the choice of consultation—deliberation or decision-making—can inform decisions about the mechanisms for public participation. A particular mechanism for public participation will not automatically fall into one category. For example, face-to-face meetings might be consultative or deliberative while a referendum might be used as a form of consultation or as a decision-making tool. It is increasingly the case that a constitution-building process will include more than one type of direct public participation, combining, for example, consultations in the form of submissions and meetings with decision-making in the form of a referendum. Third, the timing of direct public participation can influence the choice between consultation, deliberation and decision-making. Deliberation will be more effective at the early stages of a constitution-building process where there is opportunity to shape the agenda. Consultation at a late stage when the agenda is settled and constitutional changes have already been drafted risks becoming a box-ticking exercise.

5. Inclusive participation

Regardless of the type of direct public participation used in a constitution-building process, public participation needs to be as inclusive as possible in order to reflect the views of the public rather than just a segment of it.

In ordinary governmental decision-making, public participation generally seeks to involve stakeholders who are directly affected by the decision. Some people and groups, such as the institutions of government and political parties, are obviously directly affected by constitutional change. However, everyone is potentially affected by the constitutional framework, be it in relation to allocating resources, oversight and control of political power, or the definition and enforcement of rights.

If direct public participation seeks to move beyond consultation with self-selected interest groups and draw more widely on the views of the public, members of the public will require information on the specific issues and proposals so they can participate in a meaningful way. They might also need help to understand what a constitution does and what the existing constitution says, in order to gauge the significance of any change. The provision of information and civic education underlies the success of all forms of direct public participation. It fosters inclusive participation by opening up the process to those who might otherwise not see the significance of the changes for themselves and their communities.

Inclusive participation can also be affected by entrenched social inequalities that determine who is considered to be part of ‘the public’ and who is empowered to speak on behalf of the public. It is also affected by choices about the timing of and mechanisms for public participation. Short deadlines for participation will exclude those who need time to properly consider the issues. A genuine commitment to inclusive direct public participation will require significant time. Face-to-face meetings require people to give up their time and make other commitments. Online mechanisms for participation can exclude those with no access to digital platforms. The language in which information is provided and consultations are conducted can also exclude some groups. There are many examples of ways to make direct public participation more inclusive, including flexible formats to accommodate different kinds of engagement and special arrangements for groups unable or unwilling to speak in an open public forum. Measures to promote inclusive public participation need to be tailored to the context, use familiar or traditional methods of engagement between government and citizens, and recognize the nature and extent of social divisions, exclusion and marginalization on the basis of gender or ethnicity, among other things.

There is an emerging trend towards grassroots or unofficial channels of direct public participation, which can be understood as a reflection of ‘civic constitutionalism’.

6. A sign of the times

Decisions about direct public participation are not only made ‘top down’ as part of an official constitution-building process. Increasingly, direct public participation occurs through unofficial or grassroots campaigns for constitutional change.

This might take the form of petitions or popular protests that call for constitutional change. In Taiwan, for example, the Wild Lily and Sunflower protest movements demanded constitutional reform. Student and civil society organizations arranged public conventions and dialogues to develop an agenda for constitutional reform for the government to follow.

Other forms of direct public participation involve minority or marginalized groups making strategic use of the legal and political space. In Australia, the First Nations Regional Dialogues sought to ascertain the views of Indigenous peoples on what they wanted from constitutional recognition. Designed and run by Indigenous leaders, each meeting brought together a broad cross-section of Indigenous representatives. The dialogues were an example of deliberative public participation: the agenda for each dialogue included a session on the history of Indigenous advocacy for constitutional reform and civic education. Different options

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.
<<https://www.idea.int>>

About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation.
<<http://law.unimelb.edu.au/constitutional-transformations>>

Disclaimer

International IDEA publications are independent of specific national or political interests. Views expressed in the Constitutional *INSIGHTS* series do not necessarily represent the views of International IDEA, or those of its Board or Council members.

Colophon

© 2020 International IDEA and Constitution Transformation Network

The electronic version of this publication is available under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 (CC BY-NC-SA 3.0) licence. You are free to copy, distribute and transmit the publication, and to remix and adapt it, provided it is only for non-commercial purposes, that you appropriately attribute the publication, and that you distribute it under an identical licence.

For more information visit the Creative Commons website: <<http://creativecommons.org/licenses/by-nc-sa/3.0/>>

Design and layout: International IDEA

were then discussed in small groups and reported back to the group as a whole. The challenge now, however, is to persuade the government and a majority of Australians to accept the decisions of this Indigenous-led process.

Unofficial forums and the emergence of experimental official methods of direct public participation can be seen as a sign of public dissatisfaction with entrenched forms of representative democracy and political leadership. In this respect, direct public participation has a symbolic value as people seek to reclaim democratic involvement in government and marginalized groups assert their stake in the constitutional order. Direct public participation supports what Jiunn-Rong Yeh (2017) has described as ‘civic constitutionalism’—the foundational role of the people in strengthening and shaping the constitution.

References and further reading

- Brandt, M. et al, *Constitution-Making and Reform: Options for the Process* (Geneva: Interpeace, 2011), <<https://www.interpeace.org/resource/constitution-making-and-reform-options-for-the-process-2/>>, accessed 15 September 2020
- Naran, A., ‘Insights for Design of Direct Public Participation: Mongolia as a Case Study’, Melbourne Forum on Constitution Building, International IDEA and Constitution Transformation Network, 2019, <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/3224463/MF19-Mongoliaa-paper.pdf>, accessed 15 September 2020
- Saati, A., ‘Participatory constitution-building in Nepal—A comparison of the 2008–2012 and the 2013–2015 Process’, *Journal of Politics and Law*, 10/4 (2017), pp. 29–39, <<https://doi.org/10.5539/jpl.v10n4p29>>
- Samararatne, D., *Direct Public Participation in Constitution-Making*, Constitution Transformation Network Policy Brief, 1/2018, <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/3037974/Policy-Brief-1-19-PublicParticipation.pdf>, accessed 15 September 2020
- Yeh, J.-R., ‘Marching towards civic constitutionalism with sunflowers’, in B. C. Jones (ed.), *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements* (London: Routledge, 2017), pp. 49–61, <<https://doi.org/10.4324/9781315575063>>