

CONCEPT NOTE

Fourth Melbourne Forum on Constitution Building in Asia and the Pacific

Jointly organised by International IDEA and the Constitution Transformation Network

21-22 October 2019, Yangon, Myanmar

INCLUSION AND PARTICIPATION IN CONSTITUTION BUILDING PROCESSES

Purpose of the Forum

Inclusion and participation are familiar topics in constitution building. Each raises distinct issues, which are identified separately for the purposes of this note. They also are interdependent, however, in complex ways that justify examining them together. They can be mutually reinforcing, for example; even the most broad-based participation, for example, may raise questions about who to include. Equally, however, they can have a negative relationship. By way of example, mechanisms for the effective inclusion of stakeholders may preclude broad-based public participation. Broad-based public participation, in turn, may lead to outcomes with which critical stakeholders do not agree, affecting the chances of successful implementation.

Inclusion typically raises questions about “who” is involved in constitution building processes. Often, these questions apply at key points in the processes of negotiation and decision-making: when deals are made and when they are consolidated in constitutional form. Who is included and who is excluded may affect what is agreed, how it is agreed and the effectiveness of constitutional implementation. These questions may become particularly acute in constitution-building in conflict-affected contexts, when some of the principal stakeholders are or have been combatants, adding an extra level of complexity to the design of the decision-making process. This is an issue in Myanmar, for example, where MF2019 will be held.

Participation, on the other hand, typically refers to processes of engaging a wide range of people from society at large at different points in a constitution-building process. The significance of participation in this sense follows from the very nature of a constitution, as fundamental law, overriding other laws, intended to last over time, drawing on the authority of ‘the People’. A range of practical advantages are claimed for participation in this sense including, for example, greater public commitment to the constitutional settlement and increased “legitimacy” of the final constitution. Public participation has been actively identified as a key feature of constitution-building practice since the South African constitution-making process of 1994-1996, which demonstrated the public interest aroused by a highly participatory process. Public participation in constitution-building is sometimes said to be required by international law as well and in any event is often pressed by international institutions.

Despite all this, there is some ambivalence, both in the literature and in practice, about both the inherent value of inclusion and participation, the ways in which they can be made effective and the relationship between them. Concerns fall into at least five categories asking: why, who, when, how and to what effect? Experience offers insight into each of these questions, without finally resolving them. New constitution-making processes can draw on these insights but will also be shaped, in various ways, by the context in which they are taking place.

The many questions raised by inclusion and participation in constitution-building are canvassed more fully in the next part. The purpose of the Forum is to explore these issues, drawing primarily on the experience of constitution-building in Asia and the Pacific. The Forum seeks to identify new insights into inclusion and participation that might usefully inform the design and implementation of other constitution-building processes, including those in Myanmar, where the Forum takes place.

Challenges of inclusion and participation in constitution-building

Why inclusion and participation?

The reasons why inclusion and participation are sought in any particular constitution-building project may affect its design and the way in which it is put into effect.

To take an obvious example: if inclusion of particular groups is considered important in order to sustain peace, it will be necessary to choose institutions and procedures to suit this purpose. In many cases, such a purpose indicates that a constitutional assembly of some kind should be used for constitution making, rather than the ordinary legislature; at least where this is practicable. To take the example further: if a constitutional assembly is the mechanism of choice, the rules for election or selection must be designed to ensure that all relevant groups are represented including, potentially, though the implementation of quotas. It also may be necessary to design decision-making rules so that the views of all stake-holders are given appropriate weight.

Similarly, the purposes to be served by public participation may affect the manner in which it occurs. So, for example, public participation that seeks to gather new ideas may require a more deliberative process than a program for participation that seeks to ensure public understanding of a draft Constitution in preparation for a final referendum. To take another example, public participation that seeks the perspectives of women may be designed differently from a process that seeks the perspectives of youth, or territorial minorities, or economically disadvantaged groups.

Many other purposes of inclusion and/or participation may be identified, ranging from enhancing the legitimacy of new constitutional arrangements to partial fulfilment of a right to self-determination. Purposes of this kind are not necessarily mutually exclusive. Consideration of purpose nevertheless may assist in developing a constitution-building process.

Who should be included?

In any constitution-building project, questions are likely to arise at an early stage about both inclusion and participation.

For the purposes of inclusion, stakeholder groups and leaders who might be able to speak for them need be identified. These decisions are likely to be critical from the outset of a process, when key questions about the scope of constitutional change, the principles on which it is based and the process through which it is sought typically arise. Indeed, the decision about who is to be included in the process as a stakeholder is itself a critical issue, which may require determination in a manner that is appropriately inclusive.

In relation to participation, because it is never practicable literally to involve everyone, there are questions about how sufficiently broad participation can be achieved. Possibilities include, but are

not limited to, programs designed to involve a wide range of civil society groups or to ensure the participation of generally under-represented segments of society including women, youth, the underprivileged and any historically marginalised groups. Instead or in addition, such programs might involve the use of effective outreach mechanisms (public education programmes, public engagement activities etc) that offer participation channels that at least are open to all.

Depending on context, decisions as to whether, how and when to use representatives need consideration. Often, political parties are used as a proxy for inclusive representation in constitution-building. In some contexts, however, this may beg the question of whether parties are adequately representative. Do they truly represent the diversity of their constituents or only a smaller group of elite interests? Other contexts throw up other questions. In multicultural societies, for example, both inclusion and participation require consideration of different ethnicities, religions or tribes. Where such groups are territorially concentrated and/or the state is divided into sub-state units, consideration must be given to whether and how territorial groupings are included. In a post-conflict constitution-building setting there may be questions about the involvement of former/current combatants, on the side of both the state and non-state actors. In many constitution-building exercises, consideration now is given to involving the diaspora as well. This issue can be expected to become increasingly important, particularly where the diaspora includes migrant workers, refugees from conflict and, over time, refugees driven by climate change.

When should inclusion and participation be considered?

Any constitution-building process will be undertaken over a period of time. Some processes are lengthier than others. In every case, there are several phases, although these are not necessarily sequential. Thus there is likely to be a phase during which an 'agenda' is set, in terms of, for example, the proposed scope of constitutional change, the principles to be applied and the process to be followed; a period during which deliberation and drafting occurs; the point of ratification; and the post-ratification transition/implementation phase, during which the Constitution is put into practical effect. In some cases, an additional phase requires attention, during which an Interim Constitution is used. Questions about who to include and how to include them arise during each of these phases, although the answers may well be different. Advance attention to design and sequencing of inclusion and participation across these stages may assist the effectiveness of what is done.

In the early stages of a constitution-building process, inclusion may require that a core group of stakeholders are involved in negotiations. Who these are will vary, but consideration may be given to, for example, political elites, any outgoing regime with continuing authority, major groups challenging the current power-holders, other diverse and/or conflicting interests, including combatants. Such groups may have continuing involvement throughout the process including, for example, to resolve deadlocks or other problems that cause the process to stall. Inclusion must be balanced with an assessment of whether stakeholders with an interest in destabilising the process should be brought inside or left out.

As constitution-building develops, more broad-based participation may be sought, to engage the public at large. Again, however, this may happen at different stages of the process, possibly in different ways. Questions of both inclusion and participation may also arise in connection with an

Interim Constitution, if the constitution building processes requires this technique to be used to manage government during a transition process while a new Constitution is made.

In post-conflict constitution-making, there may be an additional and/or complementary phase, during which a peace settlement is negotiated and agreed, which sometimes has an impact on a constitution-building process. The inclusion of combatants is inevitable in this phase, raising questions about whether and, if so, how they are included as subsequent phases of constitution building unfold. Peace-building also requires attention to be paid to inclusion and participation, although how this works in practice depends on the circumstances. Peacebuilders, like constitutional practitioners, also continue to grapple with complex issues around the strengths and weaknesses of elite bargains and broader participatory processes.

Where constitution-building requires compliance with a process laid down by an existing Constitution, the prescribed process must be followed, in order to maintain legal continuity. At the same time, however, this way of proceeding may present challenges for inclusion and participation, for which a prescribed Constitution alteration process will not necessarily provide. In such circumstances, it may be necessary to consider how procedures for inclusion and participation can be put in place in parallel with the formal Constitution alteration process.

How should inclusion and participation be given effect?

Practical questions regarding how inclusion and participation should occur raise a host of additional issues, some of which are identified here.

Inclusion through representation

Any inclusive constitution-building process uses the technique of representation at some points, in some ways. Sometimes representation is formal as when, for example, particular people or groups are elected to a Constituent Assembly or other constitution-making body. Sometimes it is less formal as when, for example, political or other leaders are involved in negotiations over disputed questions of principle or process or when members of civil society take part in constitutional discussions as proxies for the public at large. Use of representation as a mechanism for inclusion presents particular challenges in constitution-building. If representation is to enhance inclusion in a way that achieves its purposes, representatives need to be able to speak for their communities, to interact with their communities and to commit their communities to the decisions that are taken. These considerations make the selection of representatives important. In this context, while competitive elections were a traditionally preferred method for selecting such representatives, more recent experience suggests that electoral outcomes may need to be moderated to promote inclusion in other ways. Options include the use of quotas, to ensure that marginalised or other important groups are not left out. Mechanisms of this kind, however, have the potential to create problems of their own for the character and effectiveness of representation.

A different set of issues relates to the freedom of action of representatives participating in a constitution-building process. On the one hand, representatives need some kind of mandate from the constituency they represent, in order to legitimately reflect their views and interests. On the other, and importantly in a constitution-building process, they need flexibility to negotiate and find

bases on which to compromise. In such situations the value of transparency in constitution-building exists in tension with the need for confidentiality in political negotiations.

Balancing inclusion and participation with other goals of constitution-building

Despite the significance attached to it, inclusion and, especially, participation in constitution-building processes carries risks as well. For example, opportunities for either inclusion or participation may be used by spoilers to destabilise the process. In an example of another kind, the time taken to ensure participation may slow momentum for change. A risk of another kind, which also needs to be understood and managed, is that inclusive participation can raise expectations about social and economic outcomes once the Constitution is in effect. If these prove to be unrealistic, public commitment to the Constitution could be undermined, jeopardising stability in the longer term.

These considerations suggest that inclusion and participation should be understood as only elements of a larger process designed to reach a constitutional settlement that offers an agreed basis on which communities can co-exist in a single state, building a sustainable future. To this end, broad-based participation mechanisms need to be balanced with inclusion mechanisms that enable negotiation and agreement between key stakeholders and allow for compromise. Both may need to be tempered by a realistic appraisal of political, social, economic and geo-political realities.

Making public participation effective

Public participation in constitution-building risks being formal or symbolic, rather than substantive in effect unless it is carefully designed to feed into negotiation and decision-making processes. Going beyond symbolic public participation is a resource intensive exercise, in terms of human and financial resources. Depending on the purposes to be served, effective participation is likely to require genuine public engagement with issues relevant to the Constitution throughout the constitution-building process or, more usually, at particular points in the process. Mere consultation may not be sufficient, if that is understood to involve no more than information about the constitutional changes that are proposed in a largely top-down process or a managed process of consultation with no likelihood of affecting the outcome.

Active public participation is complicated, however, by the often-abstract nature of constitutional issues and, typically, a lack of knowledge and understanding of constitutional matters amongst the population at large. Active participation therefore may require a range of strategies: presenting constitutional issues in an accessible way; translating practical concerns raised by the public into constitutional form; organising public meetings in a way that encourages an active exchange of views; and using different forms of media, as appropriate, including social media. Active public participation may need to be accompanied or preceded by a program of public information and education, in trustworthy and accessible form. Active public engagement and a sense of ownership of the process and of the Constitution that it produces may be assisted by provision for feedback; explaining how public views were taken into account and justifying the decision when they are not.

The relevance of context

The extent of inclusion and participation in constitution-building around the world means that there is extensive comparative experience on which to draw in resolving these questions. On the other hand, local context ultimately will determine what effective inclusion and broad-based participation

can and should involve. A wide range of factors is potentially relevant to context for this purpose, including whether or not constitution-building is an element in peace-building and, if so, the characteristics of the underlying conflict; the identity of the principal stakeholders; relations between stakeholders and their principal constituencies; any problems presented by security concerns; the availability of financial and human resources for inclusive constitution-building; aspects of demography, including indigeneity, geography and linguistic diversity that might impact on constitution-building; and the urgency, or perceived urgency, of the constitution-building project.

Sessions, themes and cases

The aim of the Melbourne Forum 2019 is to move beyond generalisations about inclusion and participation to explore experiences with putting principles into practice and to identify insights that might assist others in the future. To this end, the Forum is organised around five principal themes. The first theme sets the scene, by considering the aims of inclusion and participation and the opportunities and challenges each presents. Each of the next four themes deals with particular aspects of inclusion and participation, which are examined initially through selected case studies, presented by participants from the countries concerned.

Each speaker will briefly reflect on specific questions relevant to their case and to the theme of the session, before the session is opened up for discussion. A final session is designed to draw the themes together, both generally and more specifically for their relevance to Myanmar.

The themes and cases, organised in Forum sessions, are:

1. *Aims and opportunities of inclusion and participation*: Opening discussion designed to set the scene, drawing on the experience of all Forum participants. The discussion will be led by two Forum participants with knowledge of the field.
2. *Inclusion, participation and representation*: Nepal; Philippines (Bangsamoro); Papua New Guinea; and Indonesia.
3. *Insights for design of direct public participation*: Tuvalu; Mongolia; Australia (Uluru statement); and Taiwan.
4. *Inclusion of combatants*: Afghanistan; Indonesia (Aceh); Colombia; and the Autonomous Region of Bougainville of PNG.
5. *Managing the risks of inclusion and participation*: Thailand; Chile; Sri Lanka; and Kashmir.
6. *Conclusions*: insights from Asia-Pacific experience for inclusion and participation in constitution-building; the particular case of Myanmar.

1. *Aims and opportunities of inclusive and participatory constitution-building*

This session is designed to set the scene for the rest of the Forum. Its purpose is to explore the reasons for inclusion and participation in a constitution building context and the opportunities that they might offer. To this end, it is necessary to distinguish between inclusion and participation, to the extent that each has distinct purposes. It may be that the purposes of inclusion and participation vary between different contexts and between different points in a constitution-building process. These issues will be considered from the standpoint of both domestic constitution-builders and international institutions.

The objective of the session is to develop a list of possible goals for inclusion and participation at various points of a constitution-building process and to use these to test the effectiveness of some of the practices that are explored in subsequent sessions. The session will be led by two Forum participants with extensive knowledge of the field, including in their own jurisdictions. There are no specific case studies; this session seeks to draw on the views and experience of all the participants.

Questions to guide discussion include:

- What is the difference between inclusion and participation? How do these two concepts put different, complementary or competing demands on a constitution-building process?
- What are the intended purposes of stakeholder inclusion? Who are/might be considered 'stakeholders' for this purpose? Who decides?
- When and why are sub-national entities considered stakeholders for the purposes of inclusion?
- What are the purposes of public participation? Do they differ at different points in the process?
- Are typically underrepresented groups (including women) best considered at the points of stakeholder inclusion, public participation or both? What are the purposes, in either case?
- What are the purposes of involving the diaspora in aspects of a constitution building process?
- To what extent are any of these questions deliberately considered at the beginning of a constitution-building process? Does it/would it help to do so?

2. Inclusion, participation and representation

The device of representation is used in various ways and at different stages in constitution-building. Representation is essential to both inclusion and participation, but raises a host of questions about the credentials of representatives, their relations with those they are supposed to represent and the ways in which these relationships work in a constitution-building setting.

Questions to guide discussion include:

- At what points was representation used in each of the case studies?
- Who was represented and by whom?
- How were the representatives chosen? What, if any, issues arose?
- Were steps taken to ensure the inclusion of generally underrepresented and/or historically marginalized groups? If so, how were these representatives chosen? What issues, if any, arose?
- How did the representatives relate to those they were representing? Or how legitimate were the representatives in the eyes of the represented?
- What freedom of action did representatives have or assume, as they carried out their roles in the constitution-building process? Was freedom of action in any way related to level of legitimacy?
- Are there any other problems and/or solutions that arose for consideration in this session?

Case studies: Nepal, Philippines (Bangsamoro), Papua New Guinea, Indonesia

3. Insights for design of direct public participation

Constitution-building usually provides for direct involvement of the public, in ways that do not necessarily involve representation, at least in a formal sense. Practice differs as to the points in the process at which this occurs; the extent to which participation is interactive or deliberative; and the use that is made of public feedback. Specific sets of questions concern the use of a referendum or a plebiscite as a form of direct public participation as well as the random selection of citizens for deliberative polling (as used in Mongolia), citizen assemblies or citizen juries.

Questions to guide discussions include:

- At what stage(s) in the constitution building process did public participation occur? For example, at the outset when the 'agenda' is set; during the deliberation and drafting process; at the ratification stage; subsequently?
- How was participation extended to the public? Who is involved, in consequence? How diverse were the groups?
- Was participation interactive, or largely top-down?
- Was there a public education and information program? How was this run? Did it make a difference?
- Was social media and information technology used? If so, how? With what results?
- Did the programme include any strategies for minimising the risk of public participation leading to polarization? Were there instances in which public opinion expressed through consultation was contrary to consensus among the political elite?
- Was a deliberative process used, such as a Citizens' Assembly? What role did this play in achieving the goals of public participation?
- Was a referendum or a plebiscite used? At what point(s) in the process? What role did this play in achieving the goals of public participation?
- To what extent, if at all, was public participation in the constitution-building process anticipated or protected in a road-map for the process as a whole?

Case studies: Tuvalu, Mongolia, Australia (Uluru statement), Taiwan.

4. Inclusion of combatants

Many constitution-building processes take place in the wake of conflict, in circumstances where non-state actors have been active often for a considerable period of time. Furthermore, constitutional negotiations often already happen when the parties to the conflict negotiate a ceasefire or a comprehensive peace agreement. The inclusion of combatants in constitutional negotiations raises distinctive issues, which this session is designed to explore.

Questions to guide discussions include:

- Was consideration given to the inclusion of combatants? Who was included? With what consequences?
- At what point(s) in the process were combatants included? What difficulties, if any, arose?
- Were (some) categories of combatants excluded? Why? With what consequences?

- Did (some) categories of combatants exclude themselves from the process? Why? With what consequences?
- Was there opposition to the inclusion of combatants? From whom, and on what grounds?
- What arrangements, if any, were made for amnesty or immunity in association with the inclusion of combatants?
- What lessons might be drawn from your experience for constitution building in countries in similar circumstances elsewhere?

Case studies: Afghanistan, Indonesia (Aceh), Colombia, Autonomous Region of Bougainville of PNG

5. *Managing the risks of inclusion and participation*

Experiences with inclusion suggest that there are risks that can usefully be anticipated and managed. Some have been canvassed earlier. Inclusion and/or broad-based public participation might, for example, raise expectations unreasonably; complicate and even undermine negotiations between leaders; produce impractical solutions; make a process unmanageable. Often, greater participation by the public in terms of numbers is viewed as a measure of success. However, questions remain as to how such participation is to be evaluated in terms of substantive impact on constitution-building. The inclusion of marginalised groups might require targeted measures to make their inclusion meaningful. If not, such inclusion may remain as symbolic. The aim of this session is to explore these potential risks, identify others and examine ways in which they might be avoided or minimised.

Questions for discussion include:

- What approach was taken to inclusion? At what points were inclusion strategies used?
- Was there broad-based inclusion of stakeholders? If so, was this effective? What, if any, were the downsides?
- Was there widespread public participation? What, if any, were the downsides?
- With hindsight, would you have designed the approach to inclusion or participation differently? How and why?

Case studies: Thailand, Chile, Sri Lanka, Kashmir

6. *General conclusions: Insights for Myanmar*

Myanmar is a distinctive case regarding constitution-building. Issues of constitutional change have been raised in the course of the peace process. If change occurs, it is possible that it will take the form of amendments to the existing Constitution, rather than making a new one. There has been relatively little public participation so far. Both the peace process and constitutional change raise a series of questions about the inclusion of potential ‘stakeholders’, including current or former combatants. This session is an opportunity to explore the challenges for inclusion and participation in constitution-building in Myanmar, drawing on relevant insights from the experiences of other countries examined in the course of the Forum. This session also offers the opportunity to draw together the threads of the Forum discussions and to respond to any outstanding issues.

Logistics

The Forum is organised under the auspices of International IDEA's Asia and the Pacific, MyConstitution (Myanmar) and Constitution Building Programs in collaboration with the Constitutional Transformation Network at Melbourne Law School. It will take place over two days on 22-23 October 2019 in Yangon, Myanmar.

The format is designed to encourage the interchange of ideas, leading to shared insights on how inclusion and participation are considered in and influence constitution building processes; the challenges that arise; and how they might be met. The format is similar to that of other Melbourne Forums on Constitution Building in Asia and the Pacific. Presenters for each case study country will be asked to provide brief written responses to questions which will be circulated to them in advance of the Forum, based on the theme of each session. These written responses will be circulated to participants in advance of the Forum. Presenters will give a short oral presentation on the key insights offered by their case at the beginning of each session, for a maximum of five minutes, so that the majority of time in each session is devoted to questions and discussion.