



SPECIAL REPORT

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ABOUT THE REPORT

This report examines the role of constitution making as part of peacemaking, particularly in divided societies, where the process of participatory constitution making may sometimes provide a forum for reconciling divisions, negotiating conflict, and redressing grievances. The report analyzes recent practices of constitution making across the globe and documents the emergence of international human rights norms that recognize the right to public participation in changing or creating a constitution. The author concludes with a reflection on lessons learned and stresses the importance of process as well as outcome in evaluating the final product.

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Vivien Hart

Democratic Constitution Making

Briefly . . .

- We live in an era of constitution making. Writing a constitution is part of many peace processes. New nations and radically new regimes that seek democratic credentials make writing a constitution a priority. In a changing world, constitutional practice is also changing. Twenty-first century constitutionalism is redefining the long tradition of expert constitution making and bringing it into the sphere of democratic participation.
- How the constitution is made, as well as what it says, matters. *Process* has become equally as important as the content of the final document for the legitimacy of a new constitution.
- A *right* to public participation in democratic governance exists in international law. This right packs a moral punch but it lacks legal teeth and effective enforcement. Does this right extend from everyday governance to the process of constitution making? The United Nations Committee on Human Rights has recognized a specific right to participate in constitution making.
- Public participation is often taken to mean voting—for example, electing a constitutional convention or ratifying a constitutional text by referendum. Especially in developing nations in Africa and elsewhere, however, experiments with new forms of participation are attempting to place initiative in the hands of citizens and to create an open constitutional conversation in which the public shares in agenda-setting, content, and ratification.
- Genuine public participation requires social inclusion, personal security, and freedom of speech and assembly. A strong civil society, civic education, and good channels of communication between all levels of society facilitate this process. Only a considerable commitment of time and resources will make genuine public participation possible.
- A *democratic* constitution cannot be written *for* a nation, nor can one be written in haste. “*Interim*” or “*transitional*” constitutions that include guarantees for a continuing, open, and inclusive process for the longer term offer one solution to urgent needs for a framework of governance in new, divided, or war-torn nations.

- Participatory constitution making is today a fact of constitutional life as well as a good in itself. Despite challenging difficulties of definition and implementation, a democratic constitution-making *process* is, in the words of African observer Julius Ivonhberere, “critical to the strength, acceptability, and legitimacy of the final product.”

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Constitution Making: Tradition and Innovation

We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been written or re-written in the last quarter century. Constitution making has become a part of many peace processes. New nations and radically new regimes, seeking the democratic credentials that are often a condition for recognition by other nations and by international political, financial, aid, and trade organizations, make writing a constitution a priority. In many cases, both the ways in which constitutions are written and the ideas of sovereignty, citizenship, and rights that are embodied in these foundational documents depart radically from the tradition epitomized by the United States Constitution.

In 1787, the new United States of America was the originator and model of traditional constitution making by a hand-picked elite group, and of the constitution as marking a settlement of conflict and inaugurating a new regime of powers and rights. Mainstream scholarship has generally presented the American Constitution as the fixed outcome of a period of nation building and constitution making. Admirers, offering this as an example for others, tend to want to duplicate its perceived virtues: constitution making as an “act of completion,” the constitution as a final settlement or social contract in which basic political definitions, principles, and processes are agreed, as is a commitment to abide by them.

Constitution makers today still confront the problem posed by Alexander Hamilton in 1787, of whether “societies . . . are really capable or not of establishing good government from reflection or choice, or whether they are forever destined to depend for their political constitutions on accident and force.” The makers of “new” constitutions do not seek to throw the entire tradition onto the scrap heap. Constitutions remain higher law, specify the institutions of governance, define the rights, duties, and relationships of state and citizens, and set the tone or establish the identity of the nation-state. Onto this traditional foundation, however, today's framers seek to build new practices. Recent constitution-making processes have been accompanied by massive efforts to involve the public before, during, and after the text is finalized. Examples of new practice include: prior agreement on broad principles as a first phase of constitution making; an interim constitution to create space for longer term democratic deliberation; civic education and media campaigns; the creation and guarantee of channels of communication, right down to local discussion forums; elections for constitution-making assemblies; open drafting committees aspiring to transparency of decision making; and approval by various combinations of representative legislatures, courts, and referendums.

There is no simple transition to a new constitutionalism. Control of the process and of the ultimate distribution of power is at stake and participatory constitution making remains highly controversial. Constitution making has not been made easier, and by no means all of these innovations, nor of the constitutions that result, have been successful. But the process does move incrementally closer to the needs of the present day.

Constitution Making for the 21st Century

Alexander Hamilton's still-open question remains central to prospects for a peaceful and democratic world. In the 21st century, proof of our capacity for living together and sharing in good government is not only ever more urgently needed but also requires—and

is generating—creative thinking about the making and content of present-day “political constitutions.” Constitutional experimentation in many new and newly democratic nations challenges older constitutional democracies to rethink their own practice and to engage in a process of mutual learning about the contribution of constitution making to conflict transformation and sustainable peace.

A nation confident in a stable future of internal harmony and agreed purpose is not (if it ever was) the typical site of constitution making today. A changed world calls the utility of the traditional model of the constitution into question. Consider how high a bar that traditional model of an act of completion sets to establishing and legitimating constitutions in situations of conflict. Yet making a traditional constitution is seen by many as essential to the establishment of post-conflict governance by providing a framework to manage diversity and ensure stability.

The late 20th century has seen nations, old and young, that are deeply divided, often to the point of violence. Nation-states, defined by established boundaries and the sole possession of sovereignty, have been challenged from inside by claims for self-determination or secession, and from without by the proliferation of transnational political or economic treaties and powers with global reach. At the same time, successful economic and social development have been declared, as in the 1993 Vienna Declaration of the United Nations that now frames development and human rights policy, to go hand in hand with democratization. Meanwhile around the world many marginalized groups—indigenous peoples; the poor; racial, ethnic, and language identity groups; and, cutting across all social categories, women—have demanded inclusion, political participation, and power sharing.

Conflicts over the identities, powers, and rights of groups seem almost endemic, and, as such conflicts reproduce themselves in the form of new identities and claims, are likely to be a permanent feature of 21st century polities. The nature of many modern conflicts makes a final resolution hard to reach. In such circumstances, finding a way of living together within major disagreement is the more modest goal. Traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure. Citizens who actively reject a final act of closure seek instead assurances that constitution making will not freeze the present distribution of power into place for the long term, nor exclude the possibility of new participants and different outcomes.

To imagine a constitutional settlement under which diverse and disagreeing groups can live, while continuing to engage in a freely accessible debate about that settlement itself, is a challenging proposition. The tension between the security and stability offered by the traditional ideal of constitutionalism and the flexibility called for by new circumstances is what places process at the heart of the new constitutionalism. A permanently open process must itself satisfy qualitative standards that were previously applied only to the outcome of constitution making. We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.

It is in such an environment of conversational constitutionalism that the issue (startling to some traditionalists) of a right to participate in making a constitution has arisen. The idea is hotly contested by those who argue that only elites in modern societies possess the moderation, technical expertise, negotiating skills, ability to maintain confidentiality, and above all rational incentives to compromise so as to maintain power that make for effective constitution making. But it is hard to argue against democracy. The elite-made constitution, according to the new paradigm, will lack the crucial cultural element of legitimacy. It will do so because the process, not just the final text, is seen as flawed.

A democratic constitution is no longer simply one that establishes democratic

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governance. It is also a constitution that is made in a democratic process. There is thus a moral claim to participation, according to the norms of democracy. A claim of necessity for participation is based on the belief that without the general sense of "ownership" that comes from sharing authorship, today's public will not understand, respect, support, and live within the constraints of constitutional government. Whether there is also a legal right to participate, for whom, and what all of this means in practical terms, are also key issues for modern constitutionalism, whose reputation and effectiveness depend upon democracy in its process as well as its outcome. Experiments with public participation in the process of making constitutions are a striking feature of "new constitutionalism." It is with such issues of process that this report is concerned.

The Importance of Process

How the constitution is made, as well as what it says, matters. One of the most striking innovations in the constitution-making practice of recent decades is that norms of democratic procedure, transparency, and accountability that are applied to daily political decision making are now also demanded for constitutional deliberations. Is this window dressing with democratic rhetoric, or can new ideas and practices make a difference? A study in contrasts in North American constitutionalism illustrates the radical changes in attitude to constitution making involved.

No one would expect an 18th century process to match the standards of the 21st century. Nor would anyone describe the making of the American Constitution in 1787 as a democratic exemplar for today. Yet constitution making in the United States offers an important lesson. Scholars have recently reflected on Article V of the U.S. Constitution, the provision for constitutional amendment, as an admission by the framers of the likely imperfection of the Constitution and a permission to work within its frame to adjust its terms (see especially Sanford Levinson's edited volume, *Responding to Imperfection*, published in 1995). Yet the limitations of the amending process are considerable. The fact that the wishes and needs of indigenous peoples and African Americans were originally considered irrelevant, and that those of women were considered to be represented by men, left the American polity with long-term problems. When newly assertive groups eventually demanded recognition, finding solutions was hampered by the necessity of acting within the constitutional framework, drafting amendments and litigation according to a text set apart, a foundational document outside the bounds of regular politics. The Constitution is subject to special and especially difficult procedures for amendment and the language of constitutional law is arcane. Thus even the first step for excluded groups, entry to the constitutional debate, has never been easy. Gaining each amendment or new interpretation has typically involved a decades-long struggle for piecemeal reform.

Facing a similar upsurge of claims for constitutional recognition, Canada has taken a significant step towards opening the constitutional settlement to full democratic discussion. No less a body than the Canadian Supreme Court has endorsed democratic process, in its advice on the constitutional position of a potential act of secession by the province of Quebec. The Court's 1998 decision regarding the *Reference re Secession of Quebec* defined democracy as a core Canadian constitutional principle. This meant, the court declared, "that a functioning democracy required a continuous process of discussion." The court noted further that "no one has a monopoly on truth," a fact implying a duty to listen to "dissenting voices" and to seek "to acknowledge and address those voices," even when the most basic unity of the nation was at stake. The Canadian Constitution, the court concluded, "gives expression to this principle [of democracy] by conferring a right to initiate constitutional change on each participant" and imposing "a corresponding duty . . . to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change." The Canadian Supreme Court decision is a summation

of new constitutionalism, of constitution making as a process rather than a once-and-for-all defining moment, and of democratic re-negotiation as the heart of a politics of recognition and inclusion. The Canadian Constitution is defined as a forum for a historically continuous discussion of the identity of the Canadian nation.

In other words, participatory constitution making has become one criterion of a legitimate process. Where the premise of constitutionalism as conversation is taken on board, constitution making can no longer be confined exclusively to the domain of “high politics” and negotiations among elites who draft texts behind closed doors. In the context of a traditional constitution, presumed to stand above and to structure democratic politics, the extension of democratic process to include free, open, and responsive discussion of the constitutional settlement itself represents a radical departure, but one that attempts to overcome the problems of entry of new participants and of an equal voice for all concerned regardless of their expertise.

Participation by Right

It is easy to say that public participation in constitution making is desirable. But this remains a matter of opinion and matters of opinion are hard to enforce. A right to public participation in constitution making creates a stronger ground on which to stand. Major international rights instruments and national constitutions do grant a general right to democratic participation, although one that is lacking legal teeth and effective enforcement. However, the extension of the right to participate to constitution making, breaching traditional assumptions that the constitution-making process stands outside normal democratic activities, has been contested. For a long time, even general democratic participation has been considered at best to be an “emerging right,” in the words of an influential article on “The Emerging Right to Democratic Governance,” by international law professor Thomas M. Franck (published in the *American Journal of International Law* for 1992). But the formal endorsement of democracy does pack a moral punch and its diffusion in international conventions and new national constitutions supports expectations that it should be observed in constitution-making processes. And recent developments have given participation in constitution making a textual authority in international law that greatly strengthens its status. These occur in a decision of the United Nations Committee on Human Rights (UNCHR) acting in its judicial capacity, and in a General Comment from the same source, both interpreting the right granted in the United Nations International Covenant on Civil and Political Rights (ICCPR) as extending to constitution making.

The right to participate in constitution making might logically be derived from the general meaning of “democratic participation” in the UN Declaration of Human Rights (1948, Article 21) and especially Article 25 of the ICCPR (a covenant agreed in 1966 and entered into force in 1976). Article 25 establishes a right to participate in public affairs, to vote, and to have access to public service: “Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.”

Later UN conventions and declarations against race and gender discrimination and on the rights of minorities make similar promises. Regional and transnational declarations such as the African Charter on Human and Peoples’ Rights (1981, Article 13.1), the Asian Charter of Rights (1998, Article 5.2), and the Inter-American Democratic Charter (2001) all declare a general right to political participation to be a fundamental principle.

As international lawyer Gregory H. Fox noted in a volume edited with Brad R. Roth, *Democratic Governance and International Law* (2000), at the start this “modest approach

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to democratization" generally "focused on electoral processes." But successive documents and judicial interpretations have gradually expanded the content of participation itself, the arenas of participation, and the accompanying penumbra of rights (including political equality, freedom of speech and association, and rights to inclusion and equality) that genuine participation presupposes. Along the way, the meaning of the ICCPR phrase, "to *take part* in the conduct of *public affairs*," has increasingly been explored to discover what those open-ended terms, "take part" and "public affairs," might mean. In the course of this process of definition, two documentary sources have joined the record and now ground the international right to participate in constitution making. Remarkably well-hidden in the body of UN political rights doctrine, these can be described as both under-used to date, and also ripe for development.

The first is a ruling in 1991 from the UNCHR, acting in its judicial capacity to hear individual complaints under Optional Protocol I to the ICCPR. *Marshall v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991), a case brought in 1986 and decided five years later, first authorized a specific right to participate in constitution making as an undoubted part of public affairs. Leaders of the Mikmaq tribal society made the claim against the Canadian government that exclusion from direct participation in a series of constitutional conferences "infringed their right to take part in the conduct of public affairs, in violation of article 25(a) of the covenant [the ICCPR]." The UNCHR ruled that: "At issue in the present case is whether the constitutional conferences constituted a "conduct of public affairs. . . [and] *the committee cannot but conclude that they do indeed constitute a conduct of public affairs*" (italics added).

Winning only a pyrrhic victory, the Mikmaq people learned that while there was indeed such a right to participate in constitution making there had been no infringement in their case. Thus the Mikmaq people's efforts, while gaining legal standing for the right to participate in constitution making, also succeeded in establishing a major limitation to the practical value of the legal right. The UNCHR also ruled that: "It is for the legal and constitutional system of the state party to provide for the modalities of such participation," and "Article 25(a) of the covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25(a)." Although the Mikmaq leaders stated that their submissions through an intermediary body had never even been laid on the table, the UNCHR found the Canadian provisions for the representation of "approximately 600 aboriginal groups" by "four national associations," and later by "a 'panel' of up to 10 aboriginal leaders," adequate to meet the requirements of Article 25.

The second UNCHR textual authority is found in its General Comment on Article 25 of the ICCPR, the right to participation, issued on July 12, 1996. First, the key importance of Article 25's general right to participation is underlined: "Whatever form of constitution or government is in force, the covenant requires states . . . to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government." The General Comment then declares decisively: "*Citizens also participate directly in the conduct of public affairs when they choose or change their constitution*" (italics added). Although the prevailing opinion is that a General Comment is authoritative but not binding in law, this unequivocal statement, coupled with the earlier judicial precedent, undoubtedly does place participatory constitutionalism on a newly secure footing.

Like *Marshall v. Canada*, the General Comment lacks any specification of what a participatory constitution-making process would look like. But unlike most of the international conventions that preceded it, as well as the very limited notion of representation in *Marshall v. Canada*, the General Comment does explicitly expand the scope of democratic participation beyond the act of voting. Assemblies and accountable representation, referenda and electoral decision making, "public debate and dialogue," and citizens'

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“capacity to organize themselves” are all identified as modes of participation. Thus the support in international law for a right to participate in constitution making is, inch by inch, gaining footing and expanding in scope. In the meantime, the practice of participatory constitution making in many parts of the world is running ahead of the international rulebook.

Practicing Participatory Constitutionalism

Public participation is often taken to mean voting, as for example electing a constitutional convention or ratifying a constitutional text by a referendum. As we saw earlier, Canada provided one early example of groups from outside the closed circle demanding to join the constitution making process. But especially in developing nations in Africa and elsewhere, experiments with new structures and forms of participation are attempting to develop an open process that places initiative in the hands of citizens and creates a constitutional conversation. In many cases, rather than working within the framework of an existing body of procedures and precedents, these nations are starting with a clean slate.

Canada’s clean slate was the process of writing a new Charter of Rights and Freedoms, ratified in 1982. Canadian constitutionalism since the 18th century had been shaped by conflict, especially the search for reconciliation of francophone and anglophone interests and for a status for Quebec that would recognize its distinctive identity without giving it special privileges. In the early 1980s, women mobilized to insist that their interests be fully represented. Canadian first nations also seized the moment to claim a special status in Canadian governance. The constitutional conversation had broadened and deepened long before the open-ended discussion of diversity was endorsed as a principle by the Supreme Court. But we do not need to look only to the older western liberal democracies for new standards. The recent record of constitution making elsewhere abounds with experiments in public participation.

Just a few examples suffice to illustrate the widespread adoption of new and open processes. In 1986, the Nicaraguan National Assembly invited comment on the draft of a new constitution. Some 100,000 citizens took part in open town meetings, forwarding 4,300 suggestions. In 1988, constitution makers in Uganda and Brazil requested suggestions before, as well as comment after, the drafting process, with equally impressive levels of response. In 1994, the South African Constitutional Assembly encouraged a nation of first-time voters to participate in the constitution-making process with the slogan: “You’ve made your mark, now have your say.” Polls estimated that 73 percent of South Africans were reached by the assembly’s campaign. The public made two million submissions. Between 1994 and 1997, Eritreans engaged in constitutional education and consultation, addressing a nation with markedly low literacy rates through songs, poems, stories, and plays in vernacular languages, and using radio and mobile theatre to reach local communities. In 2002, members of the Rwanda drafting commission and thousands of trained assistants fanned out to spend six months in the provinces, so that constitutional education and discussion could become an integral part of community life. In 2003, the constitution review process in Kenya is operating under a statutory requirement that Kenyans have every opportunity to participate. The goal, as the Kenyan Commission claimed, is “a people-driven review process whose final product will be a people-owned constitution.”

The South African Constitution of 1996 is widely regarded as a model constitutional text. Likewise, the process by which it was made has been hailed as a key part of the successful transition from the oppression of apartheid to a democratic society. The following features of the South African process illustrate the context and challenges of democratic constitution making and set the context for evaluating its general potential and problems.

In all, it took seven years, from 1989 to 1996, to achieve the final constitution.

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Almost five years elapsed between the first meeting of Nelson Mandela and Prime Minister P. W. Botha in 1989 and agreement on an interim constitution and the first non-racial election in 1994. Throughout these years, outbreaks of violence threatened the process.

In a key phase from 1990 to 1994, agreements on process were negotiated in private and public sessions between former adversaries. These included a 1990 agreement to negotiate about constitutional negotiations; prolonged arguments from 1991 through 1992 about the form the constitution-making process should take; agreement in April 1993 on procedures; and in December 1993 agreement on an interim constitution including principles and procedures binding on the final constitution-making process. In April 1994, the first non-racial election for parliament was held with a voter turnout of about 86 percent. The following month, the new parliament met for the first time as the Constitutional Assembly.

From 1994 through 1996 the South African process became a full-scale demonstration of participatory constitution making. Until that time, the public had had no direct role in constitution making. Now their elected representatives in the assembly reached out to educate them and invite their views. The educational effort included a media and advertising campaign using newspapers, radio and television, billboards, and the sides of buses; an assembly newspaper with a circulation of 160,000; cartoons; a web site; and public meetings; together these efforts reached an estimated 73 percent of the population. From 1994 through 1996 the Constitutional Assembly received two million submissions, from individuals and many advocacy groups, professional associations, and other interests.

In the final phase from 1994 through 1996, in tandem with the participatory campaign, committees of the assembly drafted a new constitution within the parameters attached to the 1994 interim constitution; a first working draft was published in November 1995, leaving aside 68 issues for further work; a revised draft was produced in April 1996; and a final text in May 1996. From July through September 1996 the Constitutional Court reviewed the text; the court then returned the text to the assembly for amendments, which were made in October. In November, the court gave its final certification and in December, President Mandela signed the constitution into law.

The South African process took time. It was phased. It benefited from an interim constitution that allowed the dialogue of transition to continue. Participation was invited at a chosen moment rather than throughout and then creativity and resources were committed to facilitating a serious dialogue. Trust that the outcome would be consistent with the 1994 democratic principles was created by the continuation of the conversation between judicial certification and parliamentary confirmation. As in Canada, groups including women and traditional authorities found voice and access and made sure that their interests were taken into account. Also important was the fact that South Africa had a pre-existing civil society that could be drawn in as a counterweight to the entrenched racial and partisan divisions of politics. Other important factors that sustained the formal process include patience, especially in the face of violence; a willingness by all concerned to take some bold steps; and a combination of negotiation in private over some of the most difficult issues and unprecedented public involvement.

For comparison, let us look at the recent Rwandan process, promised by the Arusha Peace Accord of 1999, with the main phase of constitution making implemented in 2002 and completed by a referendum in May 2003. The Action Plan of the Constitutional Commission elected by the National Assembly (it can be found in full at www.cjcr.gov.rw) required, in sequence, in its own words:

- The training and sensitization of the population about the Constitution;
- The consultation of the population on the content of the Constitution;
- The writing and validation of the draft text of the Constitution;
- The referendum on the text of the Constitution as approved by Parliament.

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The budget for these activities ran to about US\$7 million, the 12 commissioners spent six months participating in local programs and debates, and in the final referendum almost 90 percent of the electorate voted, with 93 percent of those voting approving the new constitution. Notably, public participation was initiated even before a constitutional text was drafted. Again, the process was carefully staged, the commitment of time and resources was considerable, and participation was not simply structured on existing party lines.

The Rwandan process, as too the current Kenyan process, also suggests another characteristic of these creatively participatory processes. Constitutional re-visioning comes into play when the alternative is unsustainable or too dire to contemplate, whether that be dictatorial oppression, violence, or genocide. A democratic constitution-making process contributes to making peace because the prerequisite of any livable alternative to the horrors many nations have experienced is that all parties are willing to try to keep talking about their disagreements. Using words that echo Alexander Hamilton's, quoted above, philosopher Stuart Hampshire concluded in his recent book, *Justice Is Conflict* (2000): "Because there will always be conflicts between conceptions of the good, . . . there is everywhere a well-recognized need for procedures of conflict resolution, which can replace brute force and domination and tyranny." The quality of the process as a means of conflict transformation lies in ensuring that all who have views and grievances have an effective voice, that participation is genuine and not a charade.

Constitution making is essentially about the distribution of power. Unsurprisingly, the idealism of the innovations described above must be tempered with realism about who is really in charge. In both South Africa and Rwanda, political elites initiated the process of constitutional change, provided the personnel for the key institutions, and framed the educational campaigns. Official ambivalence and continuing attempts to block the process in Kenya reveal how a participatory process initiated from perceived political necessity can threaten an elite with loss of control and incur their resistance. At the most cynical extreme, a determined elite or one that is confident of its continuing control may offer a participatory process as a charade, a democratic hoax intended to mollify unrest by granting the appearance of democracy without its substance. The achievements of participatory constitution making, then, are not to be romanticized.

Zimbabwe's recent experience provides a cautionary tale. In 1997 civil society groups and the political opposition formed an umbrella organization that pressed for a constitution-making process and insisted that this be conducted on participatory lines. In 1999, President Robert Mugabe reluctantly established a commission that was instructed to produce a draft constitution with the fullest public consultation. On paper, the official Observer Mission of the Center for Democracy and Development (CDD, a London- and Lagos- based non-governmental organization) reported a model process: public hearings, an outreach program of town hall meetings and other community activities, a multilingual media campaign, scientific polling, an international conference. Their report (*The Zimbabwe Constitutional Referendum*, published in 2000) estimates that "the commission received about 7000 written submissions, held more than 4000 meetings nationwide and interacted directly in public meetings with more than half a million people." But behind the formal facts lay a manipulative process. The appointed commission was controlled by the president's party; only 13 percent were women. Bitter partisan disputes, intimidation, and violence erupted. The commission's draft constitution was sent to President Mugabe without any opportunity for further public comment. He quickly forwarded it for a referendum vote without possibility of amendment. In February 2000, the electorate rejected the draft constitution by 54 to 46 percent.

Immediately after the vote Lewis Machipisa editorialized in *Africa News* that this "no" vote is also a "no" vote against the arrogance that we experienced from the government. They didn't treat us as people who mattered." A survey reported by Masipula Sithole and Charles Mangongera in the journal *Agenda* in March 2001 found that 43 percent of "no" voters believed that "most people rejected the draft constitution because it did not fully take into account the expressed wishes of the people." As the CDD concluded, "a flawed

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process could only produce a flawed product.” The process, CDD reported, was stacked, lacked transparency, was short on education and on translations from English, was rushed (taking a mere 10 months all told), and ultimately lacked credibility. The only recourse for frustrated Zimbabweans was the negative one of voting down the entire document.

Women Making Constitutions

Participatory constitution making . . . has often provided an opportunity for women to gain representation in process and outcome.

One further characteristic of the practice of participatory constitution making is visible in many of these accounts, yet has received little concerted comment. The pressure to resolve conflict through constitutional conversation has often come from long-term disagreements, conflicts, and wars over some combination of racial, ethnic, and territorial boundaries. Where participatory constitution making has offered a forum for reconciling division and redressing grievances, it has often also provided an opportunity for women to gain representation in process and outcome. Indeed, women have at times been instrumental in demanding such a constitutional opening, where governance or social conditions have previously made free entry difficult or silenced their voices.

In Nicaragua in 1986 women's effectiveness was a matter of comment by seasoned observer Andrew Reding. He reported in his article “By the People,” published in *Christianity and Crisis*: “The women stunned everyone. Hundreds of them took turns denouncing the language of the first constitutional draft. This in spite of the fact that the draft was already strong on women's rights.” Ugandan women mobilized to participate in the 10-year constitution-making process; the constitution that came into force in 1996 was described by Oliver Furley and James Katalikawe (in *African Affairs* for 1997) as outstanding in “the degree to which it attempts to promote and protect the rights of women.” In 1992–93, Cambodia, in a constitution-making process assisted by the United Nations as a way forward from a violent past, provided one of many examples of women's important role in newly open processes. Women comprised 63 percent of the Cambodian population, and, Stephen P. Marks reported in a paper prepared in 2003 for the U.S. Institute of Peace project on Constitution Making, Peacebuilding, and National Reconciliation, a women's movement emerged that demanded a role in making Cambodia's new constitution: “During a four-day National Women's Summit, . . . 109 women from eight provinces spoke out on this issue. One of the organizers . . . said, ‘We want to participate at all levels of policy-making, including drafting the new constitution.’ ” Thus South African women had precedents to follow when they called for (and won) a presence on the crucial drafting committees there, strong guarantees of gender equality, and protections against discrimination. In Rwanda as in Cambodia, in the wake of destructive civil war, women again comprised a large majority of the population. Three of the twelve commissioners in Rwanda were women, as were seven of twenty-nine Constitution Review commissioners in Kenya.

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Participatory constitution making is by definition inclusive. Yet in few nations do women, in the words of the ICCPR, “take part in the conduct of public affairs” on an equal basis with men. Women are usually demographically a majority, the more so in some post-conflict nations where the loss of male lives or the flight of males has grossly skewed the ratio. As democratization and development have become linked in international programs, women's education, social contribution, and political participation have been identified as important to success. The institutionalization of an international women's movement and opportunities for networking and sharing experience through events such as the United Nations' World Conferences on Women have provided motivation and support to women to seek out the formative moment of constitution making in order to ensure gender fairness in any new regime. Furthermore, women's presence across all party lines and demographic categories sometimes enables them to unite, or to resolve disputes across otherwise sharp dividing lines, as the Northern Ireland Women's Coalition is credited with having done on several occasions in the negotiation for and implementation of the Belfast Agreement of 1998.

Women are not primarily responsible for the initiation of participatory practices, whose origins are multiple—in human rights debates, in democratization movements, in anti-colonial movements structured on democratic lines, and other places. Women may, however, both particularly benefit from constitutional change, with its opportunities for inclusion, and support and encourage the expansion of participatory methods. Fiona Mackay and others, in a forthcoming essay (in *Women Making Constitutions*, edited by Alexandra Dobrowolsky and Vivien Hart, October 2003) offer evidence that women in politics on the whole display “a more outward looking and collective orientation,” and will emphasize “establishing a dialogue based on evidence and prior preparation.” We may learn from such evidence that women bring attitudes and experience highly appropriate to democratic constitution making and that their increasing participation will give impetus and depth to developing practice.

Lessons for the Constitution-Making Process

At its best, participatory constitutionalism works and counteracts the arguments in support of elite negotiation as the sole effective mode. At its worst, as in Zimbabwe, it provides only another guise for the exercise of raw power. In Zimbabwe, the public saw through the hoax and responded by negating the process with a “no” vote in the referendum of 2000. For vulnerable citizens to have some recourse other than such a negative response, however, internal contextual factors including a strong civil society or external factors such as an international right and/or an international enforcement mechanism are means of empowerment. Genuine public participation requires social inclusion, personal security, and freedom of speech and assembly. A strong civil society, civic education, and good channels of communication between all levels of society further facilitate the process.

Only a considerable commitment of time and resources makes genuine public participation possible. Even if we count South Africa's starting point as the moment of agreement in 1991 to negotiate the process, constitution making in that highly successful case took at least five years. Many would argue that the process was underway at least two years before that, from the moment leaders began tentative approaches across the racial divide; clearly, part of the process is the building of an adequate level of trust between elites and among the general public to enable a constitutional conversation to take place at all.

Modes of participation vary considerably—there is no one model appropriate to all nations. South Africa elected a parliament that acted as the Constitutional Assembly. Rwanda elected a legislative assembly that itself then elected a Constitutional Commission. Both nations sought out public opinion through a variety of channels, used media imaginatively, and devised materials to make constitutional issues accessible in multiple languages to their populations regardless of levels of literacy.

The public were not involved equally at all stages of the South African and other processes. While South Africans could follow the progress of public negotiations up to 1994, some absolutely critical deadlocks along the way were resolved in secret meetings. The entire public was first invited to take part in the 1994 election, the most conventional form of participation. But in the South African context, where most of the population had previously been excluded on racial grounds, this was a momentous act. Approximately 86 percent of the population voted. The number of voters, as well as the number of submissions to the Constitutional Assembly, confirm that the public will participate where they see the issues and outcomes as important.

Literacy and language are only two of the factors that have operated to exclude groups and individuals from constitution making in the past. Participatory processes have worked to overcome these two factors as well as racial and ethnic exclusions and have been notable in some nations for the new participation of indigenous peoples and in most cases for the very visible inclusion of women.

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Participation is now promoted as both a right and a necessity. The right is established in international declarations and conventions adopted by most nations, as well as in many recent national constitutions. The necessity stems in part from the forceful advocacy of democracy as the sole model for legitimate governance in a would-be “new world order.” Ironically, older nations in the western liberal tradition from which such calls have come have not often themselves extended the idea of democratic governance to constitution making.

Participatory constitution making is a practice with growing momentum, which has produced some remarkably innovative processes that have helped a “process-driven constitutionalism” to evolve and have changed perspectives on what makes a constitution legitimate. Participatory constitution making is backed by an international norm and an emerging legal right. But we are far from any agreed set of standards that would both satisfy the advocates of “authentic” participation and be enforceable in law. The call for participation as a right will not go away—the effort for constitution makers must be to find ways to clarify, implement, and enforce the most effective processes and those most appropriate for each nation that embarks on this key task of democratic governance.

Despite efforts at external intervention, a democratic constitution cannot be written for a nation, nor can one be written in haste without breaching the requirements of democratic process. “Interim” or “transitional” constitutions with guarantees for a continuing, open, and inclusive process for the longer term offer one solution to urgent needs for a framework of governance in new, divided, or war-torn nations.

Participatory constitution making is today a fact of constitutional life as well as a good in itself. Despite challenging difficulties of definition and implementation, a democratic constitution-making process is, in the words of African observer Julius Ivonhberé, “critical to the strength, acceptability, and legitimacy of the final product.”

Much of the experience outlined here suggests that this is all easy to say but still hard to come by. But the idea of constitution making as an open-ended conversation between all the members of a political community, rather than as the legal and expert drafting of a contract by a technically qualified elite on behalf of the nation, no longer lurks only on the fringes of democratic theory. In many parts of the world, participatory constitution making is more than just an aspiration, it is an emergent international right and an experimental practice. Process has joined outcome as a necessary criterion for legitimating a new constitution: how the constitution is made, as well as what it says, matters.



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What can make constitution-making legitimate? *The Adventures of the Constituent Power* explores the democratic methods by which political communities make their basic law, arguing that the most advanced method developed from Spain and South Africa. The first part of this book focuses on history of the idea of constitution-making, before and during the democratic revolutions of the 18th Century. The second part traces the Democratic constitution-making. Reflections on the European experiment. John Erik Fossum.Â In clear contrast to previous instances of constitution making, which failed to spark a constitutional moment,¹ Laeken has ushered in the first continent-wide debate, on the issue of a European constitution; the question then is whether this could be said to amount to Europeâ€™s constitutional moment in a critical normative sense. *How Democratic is the American Constitution?* (2001, ISBN 0-300-09218-0, among others) is a book by political scientist Robert A. Dahl that discusses seven "undemocratic" elements of the United States Constitution. The book defines "democratic" as alignment with the principle of one person, one vote, also known as majority rule. The author praises the Framers of the Constitution as "men of exceptional talent and virtue" (p. 7) who made admirable progress in the creation of their republican government