



# **Constitution Building Processes and Democratization**

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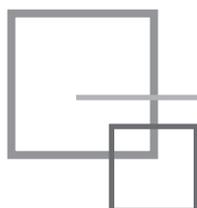
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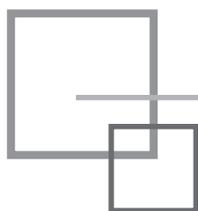


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# I. Introduction

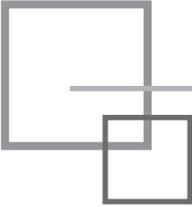
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In recent decades there has been considerable activity in the making or revision of constitutions.<sup>i</sup> This activity reflects a changed perception of the importance and purposes of constitutions. Various contemporary constitutions have marked the end of an epoch and the start of another, under the hegemony of new social forces (of which Eastern Europe provides a good example). Some reflect the commitment or the pressure to democratize, resulting from disillusionment with or the unsustainability of a one-party regime or military rule (as in Thailand, Brazil, Argentina and Mozambique). Others are the consequence of the settlement of long-standing internal conflicts, centred on the reconfiguration of the state, by a process of negotiation, often with external mediation, when neither side can win militarily or the cost of conflict becomes unacceptably high (South Africa, Northern Ireland, Afghanistan, Iraq, Bosnia and Herzegovina, Sudan).<sup>ii</sup> In almost all these cases, constitutions emphasize the principles of democracy and constitutionalism, and contain detailed bills of rights. Changes start with constitution-making, whether as a form of negotiation or the consolidation

of social victory or reform. However, the record of the effectiveness of these constitutions is uneven.

These developments have stimulated a growing interest in the politics and techniques of constitution-making, particularly in the context of conflict resolution. This paper examines the connection between constitutions and democratization, especially as the aim of these constitutions is to establish democracy in the belief that democracy is better suited to solve the problems faced by these countries. It then examines the importance of the process of constitution-making for the legitimacy of constitutions and progress towards democratization. The primary focus is the role of public participation, which is deemed to be critical to the acceptance and longevity of the constitution. However, in order to understand this role, it is necessary to identify other participants who have an impact on the process and its outcome, the principal ones being political parties and external agencies. The participation of the people at large is likely to pull in a different direction from the other two, and that is partly its significance.





## II. The Connection between Constitutions and Democracy

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There are two critical tasks that constitutions are expected to perform in many states as they resolve to move towards democracy and stability. The first task is to establish or reinforce the political community. Democracy implies the existence of a political community. The political community need not be a 'nation' in the sense of a culturally or linguistically homogeneous community (as expressed in the 'nation-state' theory). But it implies that the diverse groups that constitute the population of the country have agreed to live together. Colonialism brought these diverse groups together forcibly. One of the reasons for the lack of legitimacy of the colonial state was precisely the way in which it was constituted and constructed—its non-consensual basis. The absence of any consensual, acceptable basis for the formation of a political community continues to plague many previous colonies. The formation of the political community on consensual terms is prior to the agreement on a regime of governance. The basis on which the political community is formed will have a decisive influence on the terms of the constitution. Historically, some degree of force has been used in the consolidation and integration of all states (even though there was also an organic process of communities coming together and developing a sense of common belonging under various forms of national ideologies). Since, today, especially in multi-ethnic states, the ability of coercion to create or maintain a political community is extremely limited (and coercion may actually

be counterproductive), this task has to be performed through negotiation. However, the basis on which groups come together may not in all respects be compatible with democracy as it is traditionally understood, in terms of both underlying values (including the scope and orientation of the common public space) and rules for decision-making.

The second task is to establish or reform the rules for the allocation and exercise of state power. Contestation over these rules has been the cause of conflict and instability. The new constitutional system has to be responsive to the concerns of the previously warring factions, while at the same time being mindful of the anxieties and aspirations of the ordinary people or communities who may have had little direct influence on the negotiations on the constitution.

Historically, the process of formation of the political community preceded the establishment of democracy. Today, in many countries, constitutions have to perform these two tasks—now enormously complicated—simultaneously. As there can be serious tensions between these two tasks, the role of the constitution in establishing democracy is exceedingly complex and difficult. The centrality of the constitution is enhanced by the fact that many contemporary conflicts are about the design of the state and thus involve, fundamentally, its constitution. So how does a constitution secure democratic ideals and practices?

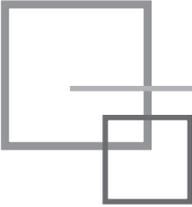
The constitution, as fundamental law, provides the framework within which state laws and policies must be conducted. The role of constitutions is to ensure the smooth operation of the political system by channelling the expression of politics through prescribed institutions in accordance with clearly understood and valued procedures as well as facilitating the resolution of differences and disputes that inevitably arise. The legality of state, as well as of private, action is determined by reference to its norms and standards. A constitution also plays an ideological role by inculcating the values that it seeks to enshrine. More specifically, it contributes to democracy by: (a) affirming common values and identities without which there cannot be a political community; (b) prescribing rules to determine membership of that community; (c) promising physical and emotional security by state monopolization, for legitimate purposes, of the use of force; (d) agreeing on the ways in which and the institutions through which state power is to be exercised; (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action; (f) protecting rights (empowering citizens as well as limiting state action); (g) establishing rules for peaceful changes in government; (h) ensuring predictability of state action and the security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements.

Human rights have become particularly important in contemporary constitutions, especially for mobilizing and developing the constitution: they give the people space to organize and aggregate interests, and the authority to challenge state institutions. The 'mobilization' of rights does not depend on the state, but on the people. Rights give people tools to protect themselves and to compel the state to take specified action (many contemporary rights regimes being highly programmatic). Rights are no longer devices for maintaining the status quo, as was the case in the US constitution, but are means critical for dynamic change and they assume an active citizenry (Ghai 2001).

However, the above analysis does not indicate the historical connections between constitutions and democracy. Constitutions have not always functioned to promote or consolidate democracy. Indeed, historically, constitutions have more frequently been instruments of domination or oppression. Such constitutions, when reflecting power structures, can be effective (colonial

constitutions, or modern dictatorships), and it may not matter if they are breached (for the ultimate sanction is coercion). But, lacking normative justification, they are also vulnerable to moral challenge. Contemporary democratizing constitutions, on the other hand, have normative values but less of a fit with power structures: they depend for their efficacy substantially on respect for the document, particularly by the power holders. (For more on these themes, see Ghai 2005.)

Historically, in democratic societies, constitutions followed social forces that promoted democracy; they did not create these social forces. There is a strong body of opinion (going back into distant history), which regards the primary function of constitutions as setting up the framework of government and leaving social goals and policies to the political process. The framework itself is rather skeletal, and even electoral systems (although regarded as central to democracy) play a small part in them. The exception to this austerity is the bill of rights which found its way into constitutions after the US and French bourgeois revolutions. These early bills of rights provide some indication of the conception of political order in those times. The critical element of 'democracy' was the restriction of political rights (particularly the franchise) to wealthy men. That kind of democracy depended on the values and interests of this class and, when the two clashed (as it is clear from class rhetoric that they did clash), interests prevailed over values. They were squared with values by the subterfuge that those outside its charmed circle were not quite human, a lower species not deserving of the full dignity of human beings. Within the charmed circle, there was to be equality, personal autonomy, protection of property, and the right to vote for and contest public office. But gradually, often as a result of violent or peaceful struggles, this 'democracy' became more inclusive, as slaves were emancipated, women given the vote, and racial barriers dismantled. However, the institutional values of democracy remained unchanged: the emphasis on electoral competition and process, the importance of citizenship, the protection of individualism through civil and political rights, and the restriction of the role of the state (although the last was hard to maintain in the face of the increasing complexity of social and economic life).



### III. Constitution-building

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The concept of constitution-building is more complex than the process of constitution-making alone, although the latter is an inseparable part of it. As we use the term in this paper, constitution-building refers to the process whereby a political entity commits itself to the establishment and observance of a system of values and government. It is necessary to make a distinction between the written text that is the constitution and the practices that grow out of and sustain the constitution. Constitution-building stretches over time and involves state as well as non-state organizations. Constitution-building in this sense is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics. So, for example, a text whose birth is in some respects inauspicious, even contested, can in time stamp its imprint on society and weave its way into public favour, while a constitution proclaimed with great enthusiasm can run into difficulties, be ignored or even be expressly discarded.

Constitution-building may, and usually does, require various forms of consensus-building before the formal process of constitution-making can commence. In 'new' or troubled polities, a constitution as a system of government may have to coalesce with a pact to form or redefine a political community. In these circumstances, best typified by a constitution for independence on decolonization, the document has a foundational character, giving birth to a new sovereignty. Sometimes

these constitutions have devoted more attention to the artefacts of sovereignty than to the negotiations for forming a political community. There is a price to be paid for this neglect—as the troubled political experiences of many Asian and African states show. In more recent experience, constitution-making has been preceded by a prior pact, sometimes called constitutional principles, long or brief, abstract or specific. In some instances, the formulation of the constitution (or its main provisions) is an inseparable part of the resolution of a conflict that necessitated a new political and social order. As we shall see, there are some fundamental problems of constitution-making when the pact and the constitution are so integrated.

The process of drafting and adopting a constitution is the centrepiece of constitution-building. This is so, of course, because of the nature and orientation of the document that the process produces. But the process is important in other respects, as well, which have an impact on how the constitution is actually rooted. The design of the process, that is, the *institutions* for the making of decisions and the *method* of making decisions, has a bearing on a number of factors such as which interests are articulated and which are excluded, how the views of participants are aggregated, and the congruence of the text with social realities. The process is also relevant to the degree of public participation and consequently the benefits and costs of such participa-

tion. It is now increasingly believed that participation is essential to the legitimacy of the constitution and the ability of the people to understand and mobilize its provisions. The process may also promote a sense of common belonging and destiny critical for national unity. A well-designed process can in itself be an education in and preparation for the deliberative and participatory politics that the constitution may call for. On the other hand, the risk of a participatory process is that it may lead to dissonance between those who influence the outcome of the drafting process and those who will be called upon to operate the constitution, potentially causing such conflict that the very enactment of the constitution may be put in jeopardy. Democratization is a difficult and delicate process, and the broadening of the constitutional agenda that comes from participation may precipitate a crisis as power holders resist the new system (this is, of course, less of a problem if the making of the constitution is preceded by major changes in the power structure, due either to external factors or to local revolution).

### **Elections or Constitution-making First?**

In a country emerging from conflict when there are no institutions that enjoy general support, a special problem is: who has the right or legitimacy to make a constitution? Often this problem is solved by requiring elections to a legislative or constituent assembly and giving it the mandate to draft and adopt the constitution (this procedure is common when the international community becomes engaged in the process, giving possibly exaggerated significance to elections). In Iraq, for example, elections polarized the people and the Sunnis boycotted them, thus upsetting the communal balance and greatly complicating the task of constitution-making. In East Timor the elections to the constituent assembly provided one party with a clear majority so that it had no incentive to compromise on its own proposals and others had no power to negotiate. Constitution-making became a majoritarian exercise, whereas it should be based as much as possible on a consensus or a large majority. Before elections, no group has a reliable idea of its support in the country and therefore all groups have an incentive to reach an agreement. On the other hand, if the process goes on without elections, the interim executive can exercise a powerful influence on, or even control, the direction of the constitution-making process (as happened in Afghanistan).<sup>iii</sup> Sometimes this dilemma is resolved, as in South Africa, where the parties agreed on a number of constitutional principles which would govern the

contents of the new constitution before elections to the constituent assembly were held. South Africans also had an interim constitution and an interim government of national unity, which helped to create an environment conducive to constructive process.

### **Foreign Involvement and Local Ownership**

Another dilemma that faces the constitution-building processes in many countries is the degree of foreign involvement. In some situations, where there is a total breakdown in local institutions, or a breakdown in the relations between different communities, there may be no alternative to a very active role on the part of the United Nations, regional organizations, or a group of countries. There is often severe criticism of foreign involvement by particular sections of the people, and there is undoubtedly a danger that external forces will determine the pace of the process as well as the content of the document (as undoubtedly happened in Iraq and Afghanistan). The assessment of the usefulness or modalities of foreign engagement must disaggregate various components of such engagement: engagement *of what kind* (providing finance, technical assistance, documentation, etc.); engagement *by whom* (the UN, regional powers or one superpower); engagement *for what purpose* (giving voice to local people, privileging particular groups or leaders, or serving the interests of the interveners); and engagement *by what means* (laying down the procedures for the process or enabling local leaders to design it).

From this partial list of the kinds of intervention by external parties, it is obvious that there can be no overall assessment of the value of foreign involvement. However, the general principle should be that the foreign parties' role should be facilitative at all times, enabling local people and sometimes even empowering them to make their own decisions, assisting them with logistics, and making them familiar with the experience of other countries which have faced similar problems. As far as possible, intervention should be on a multilateral basis (with a key role for the UN). But it has to be acknowledged that the UN and regional organizations are not particularly well qualified to provide constitutional assistance, although now there is some attempt to draw lessons from past experiences. Equally important is, of course, drawing guidance from the general principles mentioned above.

## Post-enactment Stage

The post-enactment period is the most critical of all for the consolidation and stabilization of the constitution. Those who may have lost in the earlier stages will resist implementation and even those who may have favoured change may now find themselves in a position (e.g. through electoral victory) where their new interests are better served by the old dispensation.<sup>iv</sup> Sometimes through deliberate or benign inactivity, the progressive and democratic provisions of the new constitution are disregarded. The pressures that may have sustained the constitution-making process may disappear (for example, when the international community leaves after it has played a crucial role) or a sense of complacency may overtake local activists after ‘victory’ in the struggle for reform.

Even in the absence of these political dimensions, the task of consolidation and implementation is seldom easy. Even in a revolutionary situation, there remains much legal ‘sediment’, antagonistic to the new values, from before. Previous habits and styles of dominance persist, especially among bureaucracies. Old vested interests, armed with money and other resources, may capture new institutions and neutralize the progressive agenda of the constitution. Powerful foreign actors who may have pushed for a democracy are likely to find that their own economic and geopolitical interests are incompatible with genuine local democracy and seek to limit public participation.

What, in concrete terms, is required for the protection and stabilization of a democratic constitution, making it a living reality, the authoritative source of values, as well as the ‘forum’ for dealing with (and resolving) fundamental controversies? And what is required for developing respect for the constitution and its values, inculcating certain attitudes towards the form and exercise of power and the respect for rights and freedoms?

The answer is a great many things. Foremost is engaging the people in political and constitutional affairs. Even a participatory constitution-making process may leave the people bereft of mechanisms and opportunities to continue involvement in public affairs. To some extent this engagement can continue through civic education—but this, however necessary, is not sufficient. The constitution should itself create space for constant public participation, in the legislative process, in monitoring of government, in easy access to courts and other complaints authorities for protection of constitutional values, and so on. The legacy of inherited law,

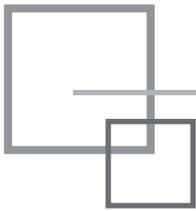
entrenching values or practices of the old regime, has to be dealt with, by thorough-going reform of the legal system, at the same time as legislation to implement the principles of the constitution is promulgated. All too often, old laws and regulations negate (and are used to negate) the values and procedures of the democratic constitution. Courts need also to play their part in the renewal of law, in ‘constitutionalizing’ other areas of the law, suffusing it with values of human rights and, where applicable, of democracy. Increasingly, constitutions themselves have provisions for the implementation and protection of their values and institutions in the form of extensive chapters and deadlines for transitional matters; independent authorities; and strong constitutional courts and generous rules of standing. The Kenya draft constitution (prepared by the Kenya Constitution Review Commission, 2002) provides guidelines to state institutions for the exercise of power, setting ethical standards and reminding elected as well as appointed officials of their duties and responsibilities (in the nature of a primer).

But a constitution cannot guarantee its own protection. Its fate depends on forces outside itself. The constitution tries to regulate these forces, and presupposes or even specifies these forces, giving them a role in the public sphere (principally the regulation of armed forces). A few constitutions have taken hesitant steps towards the recognition of civil society as an entity with responsibility for the constitution. Some recent constitutions have had to contend with the force of ethnicity, trying to channel and moderate their unruly passions by recognition of the collectivities and specificities of group rights (par excellence in Bosnia and Herzegovina). But even ethnicity manifests itself in and through political parties, and it is with political parties that constitutions have their principal conversation (even if through their silences). The primary agencies which are specified as instruments of rule are political parties, for example, by limiting candidacy for presidential and some other legislative and executive posts to those nominated by parties, by the role of political parties in electoral systems, especially in proportional representation systems, rules for the formation of government, especially in parliamentary, as opposed to presidential, systems, and by restrictions on ‘crossing the floor’ by abandoning the party with whose support a person was elected. Others have gone beyond, elaborating codes for the registration and operation of parties, and emphasizing internal democracy and external accountability (taking their inspiration from the German Basic Law). Yet the principal challenge to the authenticity and integrity of the

constitution has come from politicians (at least in many newly democratizing countries), who seem singularly immune to the values and imperatives of democracy. It is as if the principal beneficiaries of democracy are also its worst enemies. Many a coup has been justified on the basis of the irresponsibility of political parties, their feuding and extravagances (as the monarchs did in Nepal, more than once). And no way has yet been found to make constitutions politician-proof!

Perhaps even more critical, in the long run, is that the constitution should have resonances with society's concerns and incorporate appropriate norms, institutions and procedures to respond to these concerns. This depends fundamentally on the local context and gen-

eralizations are therefore difficult. But it is clear that the constitution has to allow the representation and articulation of different interests. Its legitimacy comes in considerable part from the perception of sectors and groups in society as to how fairly it has dealt with issues of particular concern to them. In this regard, questions of social justice are critical in countries still burdened with poverty. If the constitution can provide values and goals that the public is able to accept as the framework of public (and private) discourse, as well as resolution of troubling moral and political issues, the safeguarding of its status becomes an overriding concern of the people. Of all the modern constitutions, the Indian constitution perhaps comes closest to this ideal.



## IV. Participation

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### The Promises and Dangers of Participation

Constitutional processes are marked by original and ongoing negotiations. There is often no closure to the constitution-making process (Hart 2001; Tully and Chambers 1998). The art of negotiation is critical to the definition of the political community and the development and operation of the constitution, requiring habits of dialogue and compromise. It is in this context of the importance of dialogue and tolerance that we address the processes of ‘constitution building’ (a concept which goes, as stated earlier, beyond the making of the constitution and includes the many forms of activities which mobilize, use, and root it in social action). In this dialogue, the participation of the people is central.

It is only in recent times that popular participation in constitution-making has been accommodated. Traditionally, as typified by the Philadelphia Convention that drafted the US constitution, or the German constituent assembly (called the Parliamentary Council) after the World War II, there has been considerable distrust of the direct engagement of the people, and doubts about their ability to understand complex issues of the purposes, forms and structure of state power. The response was ‘representative democracy’. Now, however,

more regard is paid to the sovereignty of the people: if sovereignty is indeed vested in and flows from the people (an implication also of the principle of self-determination), it is natural that they should determine how it should be delegated and exercised. The emphasis on popular sovereignty is no doubt a response to the claim to and abuse of sovereign power by numerous governments in recent decades.<sup>v</sup> But there are also more pragmatic reasons for popular participation.

Unlike older, classic constitutions, perhaps, constitutions today do not necessarily reflect existing national polities or power relationships, consolidating the victory and dominance of a particular class or ethnic group. Instead, they are instruments to enhance national unity and territorial integrity, defining or sharpening a national ideology, and developing a collective agenda for social and political change—negotiated rather than imposed. Many constitutions in recent years have been made in the aftermath of civil conflicts, and an important task of the process is to promote reconciliation among the previously conflicting communities (which cannot easily be mediated by elites). If these are the contemporary functions of constitutions, then the process for making them is crucial to developing a national consensus.

A grave lack in many newly democratizing countries is a populace that is able and willing to engage in the

political process and to insist on its rights. People may be accustomed to older forms of rule, based on tradition, often hierarchical, sometimes arbitrary, with little possibility of challenging authority. They may not understand the concept of constitutional government or may be unable to mobilize the protective provisions of the constitution. A constitutional review process with a careful scheme for public participation can, to a considerable extent, familiarize the people with the concept and procedures of political authority, and win support for the idea of a limited government that is bound by rules and accountable to the people. For this to happen, it is necessary to conduct a programme of education and discussion on the basis and forms of political authority, the working of governments, and the necessity of controls and accountability, based on the theory of popular sovereignty. People should be enabled to understand their constitutional history, and encouraged to assess the past and do an audit of past governments. The educational programme must enable the people to understand the nature of public power and imagine alternative forms of government, rejecting the notion of the inevitability of older systems. The process must also aim to educate the people in the values, institutions and procedures of the new constitution, and how they can participate in the affairs of the state and protect their constitutional rights. It can be an essential component of political development, inculcating elements of a democratic political culture, tolerance and pluralism. It can increase society's capacity to handle differences and conflicts, by encouraging habits of listening to others and searching together for common ground. For, unless people take responsibility for the respect for and the development of the constitution, the democratic process will remain precarious.<sup>vi</sup> In Kenya the participatory nature of the process gave visibility to and empowered communities hitherto marginalized by politics and economy, such as the forest people, pastoralists, the disabled and ethnic minorities.<sup>vii</sup>

People's participation is important to elaborate the agenda of constitutional (and social) reform. Generally the agenda is defined by elites, largely urban-based. When invited to give their views, rural communities, workers and so on are likely to present new perspectives on issues like participation, decentralization, land, basic needs, and the accountability of members of Parliament (MPs) and local officials, firmly rooted in local realities. Popular engagement can bring to the dialogue different social forces, interrogating the assumptions of the elites and officials, and to some extent setting up a counterbalance to politicians. Until recently, al-

most everywhere, politicians have played the decisive, sometimes the exclusive, role in constitution-making. But there now appears to be, worldwide, cynicism and suspicion about the motivation of politicians and political parties serving their narrow partisan interests. The broadening of the reform agenda that comes from the more popular participation is an important corrective. In some countries in Asia and Africa, parties are not mass-based and do not represent segments of the people, nor are there many intermediate bodies that can speak for them. Often, if engagement of the people is desired, the only alternative is their direct participation, in slums, villages and small towns.

An important justification for people's participation is said to be the legitimacy that it confers on the constitution. If people have participated, they are more likely to have a commitment to it, even if they have not fully understood the process or the constitution, or indeed even if their participation was largely ceremonial.<sup>viii</sup> South Africans justifiably feel proud of their constitution. Indeed, as a distinguished judge of the Constitutional Court told one of the authors, people used to travel with a pocket-sized version of the constitution that they would bring out when confronted by overbearing officials!

This is undoubtedly an over-romantic picture of a participatory process, perhaps an exaggeration of the benefits it can confer. We know that some of the most successful constitutions (and enjoying considerable legitimacy) since the middle of the last century (those of Germany, Japan, India and Spain<sup>ix</sup>) were not made with any degree of public participation, and in each case (with the partial exception of India) the process was designed to limit the transparency of the process. In more recent times, transitions to democracy (and market economies) in Eastern Europe have been made relatively peacefully and successfully without any active engagement of the people, through a series of round tables among elites (Elster, Offe and Preuss 1998), and significant progress towards reform has been made in Chile and Indonesia in similar forms of elite accommodation. On the other hand, there are examples of participatory processes that produced constitutions that were never implemented (Eritrea) or quickly modified (Uganda) or frustrated in key respects (Ethiopia). Thailand's excellent constitution (1997), made after perhaps the most participatory process in Asia, has had little impact on the political system; many provisions are ignored, and a politician who regularly criticizes the constitution (and violates its spirit) has been elected prime minister on two successive occasions with im-

pressive majorities. To some extent, therefore, these experiences raise important questions about the relative merits of elite bargaining and popular participation.

The critical factor may not be the legitimacy of the constitution but qualities of enquiry, scepticism, knowledge, confidence and organization that participation produces. The Uganda process was highly participatory<sup>x</sup> and the constitution enjoyed high legitimacy among Ugandans (Moehler 2006). But Devra Moehler found that there was little correlation between participation and legitimacy, as the constitution enjoyed about equal degrees of legitimacy among those who participated in the process and those who did not. It is possible, of course, that those who did not participate nevertheless noticed that many did, and this could contribute to their own sense of the legitimacy of the process. Moehler, however, says that views on legitimacy were influenced fundamentally by the representations of political leaders in their areas, so that in pro-National Resistance Movement areas there was general approval and in other areas general disapproval (Moehler 2006).<sup>xi</sup>

Some processes widely recognized as participatory have been seriously manipulated.<sup>xii</sup>

A key component of participation—civic education—is not neutral in terms of values or a country's political history.<sup>xiii</sup> In many processes there is no guarantee (and certainly no verification procedure) that the views of the people will be taken seriously or impartially or will not be distorted in the process of analysis.<sup>xiv</sup> In an open participatory process, some groups will have an advantage over others, because, for example, they have more funding or are better organized (women, for example, have generally done better than, and often at the expense of, other groups, like the disabled or ethnic minorities). A proper assessment of the impact of popular participation cannot be made if the concept of the 'people' is not disaggregated, nor without some moderation of romanticism about the 'people'. There is no such thing as 'the people'; there are religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, sometimes 'indigenous peoples', farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practising, failed or aspiring politicians, all pursuing their own agenda. They bring different levels of understanding and skills to the process. Sometimes the composition or procedure of constituting bodies privileges one or another of these groups. A participatory process can also be manipulated by warlords, ethnic entrepreneurs or religious bigots, and, led by them, the process can become a

source of fundamentalism and intolerance—and deep societal divisions based on ethnic, linguistic and religious differences. Populism can create a wedge between the people and the political ruling group that renders problematic prospects of a successful conclusion of the process. Unless one believes in the invisible hand of the political marketplace, not all these groups can be counted on to produce a 'good' constitution—certainly not the politicians, who have clear personal interests and are often in a position to dominate the process.

Public participation tends to lead to numerous demands and can greatly expand the scope of the constitution (which also suggests that serious consideration must be paid to what the population in general is good at, and what experts are good at, as well as to rules for decision-making). A high degree of participation may raise expectations that cannot be, or are not, satisfied; the emphasis on culture, which often results from participation, may lead to constitutions that look to an era long gone, with little connection to national or international social or economic realities, widening the gap between the constitution and society. The pressures to accept the views of the people lead to complex and ambitious constitutions which the government may not (or often does not) have any intention of fulfilling; this not only discredits the constitution but also leads to disillusionment with the political process. A fundamental reservation about a highly participatory process is the difficulty of building sufficient consensus, which is always necessary to make a constitution. Both because of the range of issues that emerge out of public consultation and because of the number of groups that seek recognition, decision-making is complex, confidentiality is difficult to maintain, and mechanisms to develop consensus are limited.<sup>xv</sup> But perhaps when a consensus does emerge it is more legitimate and lasting than bargains among elites. On the other hand, a product emerging from a process that politicians cannot control is likely to be greatly resisted and in due course emasculated, and only selectively enforced.

It is necessary to place participation within the set of factors that contribute to legitimacy and democratization. These include a clear and accessible text, opportunities for people to participate in the affairs of the state, access to institutions of justice, the opening of political space through a bill of rights, and the effectiveness and accountability of the government. People in general are not always best qualified to make decisions on these matters, which require technical and comparative knowledge. How public participation is balanced with

the contribution of experts and specialized groups is an issue that has seldom been addressed in highly participatory processes.

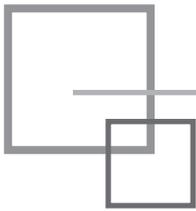
This paper (and much of the writing on popular participation) assumes the direct participation of the people. Often there is no alternative to direct participation.<sup>xvi</sup> This may explain the paradox that countries with the least developed culture of democracy (e.g. Uganda, Ethiopia, Thailand) have had the most participatory processes with the direct engagement of people, men, women, older persons and communities. This becomes necessary due to the absence of effective intermediary institutions—parties, trade unions, non-governmental organizations (NGOs) and social groups. It also necessitates a more directive role for a body like a constitutional commission, which has to engage in an active programme of consciousness-raising. Unfortunately such a process does not usually lead to institutionalization, and so participation may fail to produce long-term change or create new social forces. Once the formal structures and procedures of the process are dismantled, the situation can easily turn to ‘politics as usual’, and the people become marginalized once again. So other, more enduring, forms of participation must also be considered. In South Africa, for example, political parties played a key and constructive role. In contrast to many Asian and African countries, parties were genuine and effective vehicles for the representation of most societal interests, consulted with the different stakeholders, and had the authority to speak on their behalf; inter-party negotiations could substitute for direct engagement.

## **The Challenge of Participation**

The above reservations notwithstanding, the case for public participation is strong. However, the discussion above also points to the difficulties of organizing public participation in ways that minimize the risks. The challenge for participation is to avoid the perils of spontaneity and populism. It must address questions of the preparedness of the people, both psychologically and intellectually. It must engage in the process, the methods of soliciting views of the public and special and organized groups, and the analysis, assessment, balancing and incorporation of these views. The engagement cannot be ‘one-off’ but must be continuous, including fresh opportunities to comment on the draft, and meaningful forms of participation afterwards. Transparency and integrity are essential to win and sustain people’s trust and confidence, and to guard against the dangers

of manipulation; otherwise constitution-making can easily become just another form of politics, driven by narrow and short term interests, and generating bitterness instead of goodwill. In other words, the participation must be deliberative, not the mere aggregation of interests and demands.

We use the word ‘deliberative’ to refer to a process of negotiation which is based on clear goals (of the national interest and social justice) and sufficient information and knowledge, aimed at exchanges of ideas, clarification of differences, persuasion and agreement. This requires a degree of facilitation, and a critical question is who does this and under what procedures. An independent commission is perhaps the best agency for the task. In so far as popular participation is our concern, the focus should be on people as ‘decision-makers’. Mere consultation is inadequate. The framers of the constitution must be obliged to take public views seriously into account and analyse and incorporate them into the constitution. Public views are best given, not in the form of technical recommendations, but in narratives—but this privileges those who have to interpret the narratives. Therefore some form of verification is essential. The views should be available for others to scrutinize. They should be analysed by a professional person or group of people with no axes to grind, and if sufficiently numerous presented to the drafting body and to the public in statistical as well as qualitative format.



## V. Conclusion

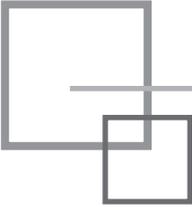
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When we design a process to review a constitution or start building a new one, even if the process includes popular participation, it is necessary to remind ourselves that a constitution-building process, though necessary and central, may not be sufficient to cover all aspects of the road map to peace and democracy. In many cases, constitution-making is part of a wider and more complex process which involves the restoration of peace and stability, bringing armed groups and militias under control, rebuilding the infrastructure, and dealing with the oppression of the past. These matters have to be handled correctly for the constitution to have a chance to root itself. They often raise similar dilemmas to those raised in designing a constitution process—trade-offs between the imperatives (and pressures) of the moment and long-term concerns and interests.

The present age has seen the adoption of many constitutions, as instruments of political and social engineering. But we lack knowledge as to their long-term impact: are they mere stopgaps, are they palliatives which fail to deal with the root causes of instability or authoritarianism, do they increase or minimize ethnic tensions? And if they bring peace, at what price? We know for example that inclusiveness and participation can make a major contribution to democratization. However, it is desirable to problematize these concepts

and to analyse their real meaning and impact in different contexts, particularly with regard to the dynamics of conflict. Under what conditions is participation valuable? What are the most effective ways to promote participation? How can we increase the effectiveness and reduce the intrusiveness of foreign assistance? In the present complex and conflict-ridden societies, a new constitution is like a delicate plant which needs careful nurturing. What does this nurturing consist of? Have we paid enough attention to the role of the courts, which are given the task of safeguarding and developing the constitution after the political process that gave birth to it has concluded? And, if it true that there is no closure to the constitutional process, do we have adequate mechanisms to continue the conversation? It is time to research these issues if we are both to understand the consequences of constitutions and to make them more effective as vehicles for democracy and social justice.





## Notes

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<sup>i</sup> Between 1990 and 2000, 17 African states, 14 Latin American states, and nearly all the post-communist states in Eastern Europe and the former Soviet Union drastically altered or replaced their constitutions (Van Cott 2000). Currently constitutional reviews are under way or the subject of negotiations in several countries or territories, including Bolivia, Kenya, Bhutan, Nepal, Sri Lanka, the Maldives, Solomon Islands, Bosnia and Herzegovina, Kosovo, Iraq, and the Democratic Republic of the Congo.

<sup>ii</sup> For a succinct discussion of some relevant issues, Zartman 2003. For a somewhat different approach, see, in the same volume, Lederach 2003.

<sup>iii</sup> On a more general note, the international community sets great store by elections as the insignia of democracy (and often the authority for exit). On the difficulties that 'premature' elections can cause, see Reilly 2003.

<sup>iv</sup> An almost classic instance of this occurred in Kenya in 2002 when Mwai Kibaki, the self-proclaimed champion of constitutionalism, won the elections and rapidly dropped his support for a draft constitution which had formed the principal part of his campaign, and has since striven to maintain the autocratic parts of the old constitution. See Ghai and Cottrell 2007.

<sup>v</sup> This is in contrast to the attitude of constitution-makers in Germany (and other European states) after

World War II where confidence in the ability and judgement of the people had been shattered. As Bogdanor writes, 'There was, in the constitutions of the immediate post-war period—the Fourth Republic in France, the Italian and the German (as well as the Japanese)—an understandable revulsion against any philosophy which exalted the political abilities of the average citizen ... Nowhere on the Continent is there to be found any genuine 'belief in the common man' (Bogdanor 1988: 8). He then goes on to make a judgement: 'Perhaps it is for this reason that the Italian, German and Japanese Constitutions have proved so much more durable than their predecessors in Central and Eastern Europe between the wars, marked by a massive positive enthusiasm for national-determination and for the fulfillment of social and economic rights. Optimism, no doubt, is rarely a good guide to constitution-making' (Bogdanor 1988: 8–9).

<sup>vi</sup> These ambitions are not utopian, as is shown by the awareness of constitutional issue and the commitment to democracy shown by Kenyans in the recent review of the constitution (Ghai 2006). Devra Moehler's research on the impact of participation in Uganda shows that people who participated became more aware of expected and actual institutional performance, obtained standards by which to assess the record of the government (and found the government wanting), and

became less trusting of state institutions. There was some increase in the commitment to democratic values. Despite this, her conclusion is that contrary 'to current optimism about participatory constitution-making, this article argues that citizen participation in the Ugandan process did not directly raise those citizens' support for the constitution. Quantitative analysis of survey data demonstrates that participants were no more or less supportive of the constitution than were the citizens who did not get involved' (Moehler 2006 [no page number available]).

<sup>vii</sup> Writing about the Kenya process, Ghai has written that 'The nature and degree of public participation had undoubtedly a profound impact on the process. It enlarged the agenda of reform and turned an elite affair into a national enterprise. It facilitated efforts to re-define politics and political process (and indeed substituted for ordinary politics). It was almost the first time since independence that the people engaged in "rational" and discursive politics, and focused on issues other than ethnicity. It promoted not only conversations between the people and the commission, but also among the people themselves. It produced firm articulation of the interests of groups based on non-ethnic affiliations (trade unions v. employers, rural versus urban, tradition versus modernity, agriculture versus industry, the unemployed versus the employed, elderly versus the young, disabled versus the rest, women versus men, pastoral versus settled communities). The discourse among the people made them aware of the histories, contributions, anxieties, aspirations of others, deepening understandings that are so critical to developing national identity and unity, and a sense of justice. This approach facilitated the CKRC [Constitution of Kenya Review Commission] task of balancing different interests. In turn it gave very considerable legitimacy to the process (which has frustrated the efforts of the faction around President Kibaki to dilute the draft' (Ghai 2006).

<sup>viii</sup> Yash Ghai was a consultant to the Constitutional Planning Committee in Papua New Guinea which prepared a draft of the independence constitution. The committee travelled throughout the country meeting people and discussing proposals for the constitution. Some years later when he returned to a village which he had visited with the committee, an old, wizened man came up to him and said with pride, 'I know you. You and I sat under that tree and we wrote the constitution!'

<sup>ix</sup> For Germany, see Merkel 1963; for Japan, see McNelly, 2000 and Koseki Shōichi 1998); for India, see Austin 1966; and for Spain, see Llorente 1988.

<sup>x</sup> The Uganda Constitutional Commission says that from 1988 to 1992, it (a) held 86 district seminars, (b) attended educational forms in all 813 sub-counties; (c) returned to each sub-county to collect oral and written memoranda; (d) analysed 25,547 memoranda; (e) officiated over a student essay contest; and (f) organized regular media discussions. Waliggo 2001.

<sup>xi</sup> No page number available.

<sup>xii</sup> Tripp (2003) argues that Museveni took various steps before the Uganda process started to soften opposition to his proposals and to win over potential opponents by enacting legislation favouring their interests. A ban was imposed on activities of political parties, except for Museveni's National Resistance Movement (NRM), and serious restrictions were placed on civic groups considered favourable to opposition groups from conducting civic education. Tripp also argues that the Constitution Commission itself, appointed by Museveni, was far from independent and tried to influence the views of the public in favour of his agenda. There is a wide perception shared by many scholars and commentators that the NRM used the process to consolidate and legitimize its own hold on political power. The largest number of submissions came from local councils, which were regarded as 'memoranda of the NRM' (see also Mugwanya 2001).

<sup>xiii</sup> In Kenya President Moi was extremely resistant to civic education provided under the auspices of the foreign community in conjunction with local NGOs, and used some members of the constitution commission to try to ban their activities by setting up rules governing civic education. Ghai disallowed this as violating the text and spirit of the law for the process. In Uganda Tripp (2003) asserts that NGOs seen to be favourable to the opposition faced serious restrictions.

<sup>xiv</sup> In both Afghanistan and Iraq, under pressure from local organizations and some extent external pressures, constitution commissions were compelled to consult the people, but there is little evidence that any attention was paid to their views (even though in both instances a secretariat was set up to analyse the views). In Afghanistan, the commission actually rewrote the report on the views of the public prepared by the secretariat to remove reference to the predominance of views that

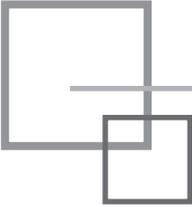
did not fit its draft constitution (personal knowledge). In Uganda the commission was accused of screening out views of people who advocated proposals opposed to that of the NRM (although the evidence is not conclusive: see Mugwanya 2001: 169).

<sup>xv</sup> The Philadelphia Convention, as is well known, operated on the principle of strictest confidentiality, to the extent that no minutes of its proceedings were kept officially. Madison, who in fact kept detailed personal notes, justified secrecy as essential to consensus-building and rational debate as it would be easier for delegates to be persuaded and to change their views if this process was not conducted in public. Jon Elster has noted two consequences of secrecy: 'On the one hand, it will tend to shift the centre of gravity from impartial discussion to interest-based bargaining. In private there is less need to present one's proposal as aimed at promoting public

good. On the other hand, secrecy tends to improve the quality of whatever discussion does take place because it allows framers to change their mind when persuaded of an opponent's view. Conversely, while public debate drives out any appearance of bargaining, it also encourages stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussion. Rather than fostering transformation of preferences, the public setting encourages their misrepresentation' (Elster 1995: 388).

<sup>xvi</sup> The possibilities of direct engagement are, of course, very limited in situations of conflict, as in Afghanistan and Iraq, and in parts of Sri Lanka (for example). These are often situations where truly representative organizations are few and far between. This paper is concerned with situations where there are possibilities of direct engagement.





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