Practical Considerations for Public Participation in Constitution-Building

What, When, How and Why?

International IDEA Policy Paper No. 24

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Acknowledgements

Key recommendations

1. Public participation is an almost ubiquitous feature of constitution-building processes, but it is not a panacea. It is not a substitute for political bargaining, but it can influence both the process of building the constitution and the final content of the text if the participation process is well designed and responsive to context.

2. Constitution-building process designers, as well as international advisors supporting national processes, should bear in mind that there is no one ideal model for public participation.

3. When planning participation processes, designers must address a series of key questions and common dilemmas, the answers to which depend on context, experience, resources, practical considerations and the nature of the constitutional reform project. These include: *why* should public participation (beyond voting) be facilitated—what purpose does it serve? *Which* body or bodies should conduct public participation? *Who* among the public should be consulted about *which* issues? *When* should participation opportunities be used at different stages in the constitution-building process? *What* participation mechanisms should be used? And *how* should decision-makers process and weigh results?

4. Depending on context, it is important to consider which key stakeholder groups (e.g. marginalized groups, former regime members or ex-combatants) should be included or excluded—and why or why not. Planning must also take into account the existing legal framework, the security situation, the relationship between constitution-building and any peace or political process, people's past participation experiences and traditions, public trust in existing institutions, political parties and organizations, and resource availability and technical capacities.

5. Although public participation in constitution-building is an almost universal norm today, linked to legitimacy, peace and democratic outcomes, it also carries risks—particularly in conflict-affected and deeply divided societies. Participation processes that are poorly planned or executed or otherwise not meaningful can undercut the legitimacy of the process, lead to discord and/or challenge implementation. Participation processes can be manipulated to further self-interested ends or to foment divisions. Moreover, broadening participation can make it more challenging to negotiate the political agreements necessary for a final text to be adopted.

6. It is helpful to keep in mind that constitution-building takes place in stages (which are not always linear and which sometimes run in parallel) during which different decisions are made and institutions established. Public participation can be mobilized

throughout these stages, in different ways to serve distinct instrumental, substantive and normative purposes. Recent studies indicate, for example, that the early use of *inclusive* participation ahead of drafting may have a positive influence on constitutional content and longer-term outcomes for democracy.

7. In modern constitution-building, people often play a variety of roles at different stages of the process. This includes as *initiators* of reform, as *electors* to a constitution-making body, as *contributors* of ideas for constitutional content and sometimes process design, and as *approvers* of the final text. People are also *learners* and often *teachers* in related civic education processes. These roles depend on the participation mechanisms employed, the timing of participation opportunities, and the ways in which drafters and political decision-makers use public feedback.

8. When choosing from among a range of participation mechanisms, contextualization is crucial. It is important to consider people's past experiences and familiarity with particular participation types and identify which types may be optimal for the intended purpose. For example, in countries with high levels of literacy, numeracy and digital technology penetration, online participation opportunities may be very effective. In other countries, it may be important to integrate traditional structures and deliberative institutions into the participation process to support access and engagement. However, it is important that such structures are not allowed to constrain participation or exclude particular groups (such as women) from the process.

9. All participation processes should be paired with robust, well-resourced and well-planned civic education and awareness-raising campaigns. This is important so that the public understands the purpose of the reform endeavour, related procedures and timelines, the ways in which they can participate, and how their feedback will be used. This information will ensure that the public knows how and when to engage in participation opportunities, and helps manage public expectations at the outset. More fundamentally, civic education is crucial to improve understanding of constitutional issues so that people can take more informed positions and make more meaningful contributions throughout the process.

10. Participation can play an important role in influencing the dynamics of political bargaining. It is important to understand the benefits and limitations of these instrumental approaches from a comparative perspective when considering options for a given context. For example, participation may be used to establish a mandate for constitutional reform, to persuade reluctant parties to enter negotiations, to set the reform agenda, to contribute drafting ideas, to resolve specific decisions on constitutional content, and to foster elite consensus.

11. On the other hand, the publicization of public views can sometimes be counterproductive: for example, by enabling dominant groups to manipulate and impede changes that are necessary for the political inclusion of marginalized groups or the implementation of political agreements. This may be particularly relevant in conflict-affected settings. The tide of public opinion sometimes runs counter to enhanced representation and inclusion, and it is often difficult for political decision-makers to resist such public views once they are aired.

12. Despite the ability of public opinion to sometimes influence the dynamics of political bargaining, it cannot *replace* elite negotiations. Cooperation and buy-in among a plurality of elites is crucial for a process to succeed. Opportunities for political consensus-building should take place alongside—rather than merely subsequent to—

participatory constitutional drafting in order to limit the need for decisions to be made and remade. Processes should be designed so that public participation and elite negotiations complement one another, and to mitigate the risk of last-minute or unilateral changes to a draft that enjoys broad popular support.

Executive summary

This paper unpacks the forms and functions of public participation across different stages of the constitution-building process (the *what*, *when* and *how* of participation) and considers the ways in which public engagement can influence the dynamics of the process, including political negotiations (the *why* of participation).

Public participation has become a core element of modern constitution-building. Robust participation is credited with a range of benefits—from improving individual behaviours and attitudes to democracy to shaping elite bargaining dynamics, improving constitutional content, and strengthening outcomes for democracy and peace. Yet it is not well understood whether and how public participation can achieve these ends. Much of what we *think* we know about participatory constitution-building remains theoretical. No two processes are alike, and there is no agreed definition of what constitutes a 'participatory process'. Moreover, it is difficult to tease apart and understand how interactions between, and the sequencing of, elite negotiations on the (re)structuring of constitutional power and direct public participation influence constitution-building outcomes.

Despite these gaps in our empirical understanding, decision-makers must determine how to incorporate public participation in constitution-building endeavours. But what constitutes a robust participation process in a particular country, at a particular time, given a particular set of circumstances? These are complex and context-specific questions with which process designers must contend. Currently, there is limited guidance available to assist decision-makers in making informed, practical decisions about when, how and why to use public participation. This paper responds to this need.

The importance of context

Every constitution-building process is unique, and the forms and mechanisms of public participation, as well as the process as a whole, must be designed according to the specific context. Key contextual considerations include:

- the reasons for the constitution-building project—e.g. linked to a peace process, independence movement, or other transition or reform endeavour;

- which stakeholders are critical to the transition or reform and should be included in the participation process and which should be excluded, and why—and how to communicate these decisions transparently and effectively;

- the existing legal framework and rules, and any peace agreements or political commitments;

- the security situation;

- popular notions of who comprises 'the people', their experiences with political participation, their knowledge of constitutional and broader civic education issues, and any access barriers;

- participation traditions and practices among various peoples and across the country;

- the status of public trust in the institutions and parties engaged in the process;

- the nature of competition and cooperation between and among political parties and elites; and

- the availability of resources and expertise, including any civic education curriculum.

Mechanisms of participation: what, when and how?

People can act as the *initiators* of a reform process; as *electors* to a constitution-making body; as *contributors* of ideas for constitutional content; and as *approvers* or ratifiers of the text. The public should also be *learners* throughout the process through civic education and awareness campaigns.

The timing of participation opportunities is crucial. Engaging people at different stages of the process can serve specific instrumental, substantive and normative purposes. This relates to the ways in which feedback will be used to shape or make decisions about the reform agenda, the nature of the process, the content of the text, and, sometimes, whether the draft will be adopted or rejected.

There are three common participation mechanisms—referendums, elections and consultations. Referendums most commonly occur at the end of a process to provide popular legitimation or rejection of a draft proposal. But referendums can also be used earlier in the process to support more specific procedural and substantive decision-making. Participation by electing representatives is very common, but is often not sufficient on its own for a process to be considered robustly participatory. Public consultations have become increasingly common over the past decades and may be held for a variety of purposes at different stages in the process using a wide range of mechanisms. Notably, however, consultations can also be used as camouflage for an otherwise elite-dominated process. Moreover, even when undertaken sincerely, planning and logistical challenges can limit the quality of consultation data collected. Despite this, even limited or faulty consultations can still have important effects on the constitution-building process.

Why participation? Anticipated benefits and influence on the dynamics of political bargaining

Public participation is often associated with a range of anticipated benefits related to legitimacy and outcomes for democracy and peace. Although our understanding of how—and even whether—these outcomes occur in practice remains unclear, decision-makers should consider *why* public engagement is being sought at a particular point in the process and in a particular way. Participation cannot replace the elite negotiations and cooperation that are necessary for a successful process, but it can influence the dynamics of political bargaining.

Comparative experience reveals that well-structured constitution-building processes can provide mechanisms for both robust participation and elite consensus-building in ways that complement and reinforce one another. Public participation can be used, for example, to support a political mandate for constitutional reform; to persuade a reluctant party to come

to the negotiating table; to help define the reform agenda; to contribute constitutional content ideas; to resolve specific contentious issues; and to foster elite consensus itself. Such instrumentalization of participation is not always successful. However, it can be a useful tool.

Strengthening the impact of public participation: guiding considerations

Decisions about who to engage, when, using which mechanisms and for what purposes depend on a range of contextual, political and practical factors. Several key insights from comparative experience can help guide decision-makers. These include the following:

- Examine the legal and political frameworks in place, including any requirements for participation under the current constitution or peace agreements, and carefully consider the drafting of any new legislation that will guide the constitution-building process.

- Plan early and effectively and consider how public opinions will be fed into the decision-making and drafting processes.

- Avoid working in silos—this can lead to a disconnect between the process of engaging the public and developing a draft constitutional text, and the process of political negotiation and decision-making. Rather, ensure that processes to build popular support are integrated with processes to build political support through complementary and mutually reinforcing mechanisms.

- Carefully consider the timing of participation opportunities, the roles that the public will play, and how public feedback will be used by drafters and decision-makers.

- Ensure that transparency and communication procedures are in place to support trust and legitimacy, foster civic education, and enable the public to hold drafters and decision-makers to account for their use of public opinion data throughout the process.

- Tailor particular participation mechanisms and opportunities to enhance inclusion and access.

- Use multiple participation mechanisms and different levels of interaction.

- Include robust, well-resourced and well-planned civic education processes that operate in tandem with public participation.

Introduction

Since the second half of the 20th century, there has been a remarkable increase in the level of public participation in constitution-making and a significant expansion of the roles that the people play in constitutional reform processes (e.g. Hart 2003; Saunders 2012; Kirkby and Murray 2016). Traditionally, participation was 'hourglass-shaped', with the public engaging at the beginning of the process—for example by electing representatives to the constitution-making assembly—and at the end of the process, through a referendum on the final text (Elster 2012). Indeed, the use of referendums to ratify a constitution has become quite common (Tierney 2018). But the public also increasingly participates at different stages of the process during initiation, drafting, deliberation and approval (see e.g. Hart 2003; Saunders 2012; Ginsburg et al. 2009; Eisenstadt et al. 2015, 2017).

Notions of 'the people' have become more inclusive, and the mechanisms through which people exert their influence are increasingly innovative. This reflects a growing consensus that the *process* of constitution-making matters. This idea is linked to normative claims about self-determination and the desirability of participatory democracy globally. It also reflects a growing recognition that the normative 'good' of public participation not only holds intrinsic value for individuals but can also be used in ways that can support legitimacy, democratization and peacebuilding (see e.g. Eisenstadt et al. 2017; Ghai and Galli 2006; Elkins et al. 2009; Ginsburg et al. 2008, 2009; Hart 2003, 2010; Miller 2010; Moehler 2006; Samuels 2006; Widner 2005, 2008).

Constitution-*making* is perhaps better understood today as the centrepiece of a broader and more comprehensive process of constitution-*building*. Constitution-*building* stretches over time to incorporate not only the process of making and adopting the text, but also the development of practices and conventions for interpreting and implementing the text and building a culture of constitutionalism following its promulgation (Ghai and Galli 2006: 9). The notion that the (new) constitutional order must enjoy popular legitimacy among an aware and engaged public is therefore central to the expansion of participatory constitution-building.[1]

Constitutions today are longer, more detailed and more aspirational than ever before. Modern constitutions are not only legal-political documents; they are often symbolic and normative instruments that may enhance national unity, foster a national ideology and reflect a collective agenda for governance and societal change (Ghai and Galli 2006). Public participation at various stages of constitution-building may thus not only support popular ownership and national consensus, but may also—depending on design—constitute upstream and downstream constraints on decision-making by elites, influencing both the design of the process itself and the content of the constitutional text (Elster 1995).

But how can the normative and instrumental 'good' of public participation be applied at a country level? Public participation can be organized in many different ways, and much depends on country context. Moreover, just as the idea of who constitutes 'the people' has expanded since the 18th century, so have the potential roles of 'the people' within the constitution-making process. Although the 'hourglass' description remains apt, people are also increasingly involved, through direct participation, in the middle stages of the constitution-building process.

Accordingly, national decision-makers must contend with the key question: *What constitutes a robust, meaningful or efficacious participation process for a particular country, at a particular time, in a particular context?* To help them answer this question, what considerations and principles can be derived from comparative experience to guide decisions as to *why*, *when* and *how* participation should take place given a particular set of political, social and security dynamics?

Drawing on comparative modern practice and academic research, this policy paper seeks to unpack the forms and functions of public participation at different stages of the constitution-building process. We also consider whether and how particular approaches to public participation can influence the dynamics of the political negotiation processes that are at the core of the constitution-building endeavour. This framing is necessary because, although building a constitution is indeed an act of the people constituting the government, it also usually requires the cooperation and agreement of elites throughout the process.

The expansion of public participation across the various stages of constitution-building shifts the dynamics of political bargaining processes in interesting ways that are not well understood. While public participation is a normative and pragmatic good, elite buy-in remains fundamental. It is particularly important where constitution-building is part of a transition from conflict to peace or from authoritarianism to democracy, and when countries are undergoing both transitions simultaneously. Designers of participatory constitution-building processes must balance these sometimes competing aims of ensuring robust and inclusive public participation while facilitating space for the necessary political arguing and bargaining. A key challenge lies in designing these processes to be mutually reinforcing and complementary.

This paper is organized in four sections. The first addresses contextual factors that decision-makers should consider when developing participatory processes. The second part examines the *what*, *when* and *how* of public participation. It focuses on the ways in which the public engages in the process and draws links between the roles that people play in constitution-building and the timing of participation across the different stages of a process. The third part examines the *why* of participation—what public engagement can potentially achieve—with a focus on whether and how public inputs can influence the political negotiation process as the text is developed, deliberated and approved. The final section provides a number of considerations to help guide process designers in developing a public participation process. We end with a brief conclusion.

Endnotes

1. See also the 'Guidance note of the Secretary-General on United Nations constitutional assistance' (UN Secretary-General 2020) of 20 September 2020 for a discussion on the phases of the process from agenda-setting through implementation.

1. Contextual considerations

No two constitution-building processes are alike. Each operates within a unique ecosystem of constraints and opportunities shaped by a country's political and institutional history, security situation, demographics, customs and practices, access to resources, and a range of other factors. Context matters. This section identifies key contextual considerations that should be taken into account when thinking about how to incorporate participation in a constitution-building process.

What are the roots of the constitution-building project? Is it related to the formation of a new state, as with South Sudan's 2011 Constitution? Is it part of a transition from conflict to peace and/or from authoritarian or military rule to democracy? In these cases, public participation may play an important role in nation-building and in establishing the identity of a common political community (see Haysom 2005; Jacobsohn 2006: 8). Where a new state is being formed, it is important to consider whether and to what extent the institutions, laws and civic organizations needed to support participation already exist and to assess their capacity. Is the reform process primarily elite-driven? This is perhaps the most common situation, yet it comes with the risk that constitutional change will be perceived as imposed from above if the public is not sufficiently engaged in and educated about the process. This may have an impact on the efficacy of broader constitution-*building* in terms of popular legitimacy and implementation. Is constitutional change catalysed by social crises, such as popular protests or a revolution? Where the people are the prime drivers of transformation, and elites are open to or pressured into reform, demands for public participation are often a continuation of the popular movement. Issues relating to the level of inclusion, scope of participation and quality of representation may be particularly important for legitimacy, as in Tunisia in 2011. This is not always the case, however. Inclusive, participatory constitution-making was not a core public demand, for example, during many of the Eastern Europe transformations of the 1990s, or even in South Africa. Often, constitutional reform takes place as part of a peacebuilding process and seeks to reflect and entrench a political settlement among the parties to the process. In these situations, public participation during the initiation and agenda-setting stages may be more limited, so approaches that support expanded engagement during later phases may be particularly important for legitimacy.

Who are the stakeholders? Are there particular groups or communities within society whose inclusion and participation should be actively sought, for example due to past marginalization or because of particular power structures? Robust processes should always seek to include women, youth and historically marginalized groups both in decision-making roles and through targeted public consultations. Depending on the origins of the constitutional reform project and the type of transition at stake, other potential stakeholders may also be crucial. These may include victims' groups, ex-combatants, ethnic, religious or

traditional authorities, or former regime elites, among others. On the one hand, it is important to ensure that these stakeholder groups are *represented* in decision-making bodies; on the other hand, public participation processes should also ensure that individual members of these key groups have the opportunity to engage *directly* with the constitution-making body. This may require specific outreach and targeting. Public participation must also be tailored to reach out to groups that are not represented, or that are under-represented, on the constitution-making body.

What existing rules and agreements are in place? In most situations, there will already be some established laws, rules or agreements to guide constitutional change. Depending on context, such rules may be legally or politically binding, or both. Examples include provisions in the existing constitution that regulate constitutional amendment or replacement,[1] ordinary legislation, or commitments set out in peace agreements or interim arrangements. For most states, international obligations form part of this framework, some of which establish the *right* to participate in public affairs.[2] Existing frameworks and commitments may prescribe timelines, institutions and procedures as well as principles and guidelines relating to both public participation in the reform process and the content of any resulting new or amended constitution. The constitutions of Australia, Denmark and Japan, for example, require that all amendments be ratified by referendum, while those of Jamaica, Latvia and Spain require referendums if fundamental or total revisions are proposed. The Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) defines the parameters of the (future) permanent constitution-building process. In The Gambia, special legislation was passed to establish a Constitutional Review Commission. Such rules and commitments should be understood as a baseline for participation rather than a ceiling. Additionally, process designers should consider whether the broader legal framework in place may have a positive or negative impact on *how* people participate. This might require a review of laws on public order, defamation, media and related issues that could hinder freedom of expression as part of the participation process.

What is the security situation and do people have adequate access to participation opportunities? Particularly in countries emerging from conflict, participation mechanisms should account for and seek to mitigate security risks to individuals and groups—in terms of both the act of participation itself and publicizing any views expressed. Often, the security situation varies from region to region within a state, so specific approaches may be more appropriate in one area than in another. Efforts should be made to ensure inclusion in participation opportunities. In Somalia, for example, country-wide security challenges made it impossible to gather groups for consultation meetings, so communication by SMS provided a useful alternative (Brandt et al. 2011). In Iraq, consultations were limited to areas that were considered sufficiently secure; as a result, feedback tended to reflect the preferences of only one ethnic group (Gluck and Brandt 2015). Other access considerations that can affect participation include: the degree of Internet and cellular data penetration within the country and in particular areas; geography and infrastructure considerations, such as road access to particular communities; and environmental and seasonal issues, such as monsoons or flooding. In Kenya and South Sudan, planning for consultations had to take into account the rainy season, which would make large geographical areas difficult to access. Decision-makers should also consider the characteristics of individuals and groups, including, for example, linguistic differences. In South Africa, the Constitutional Assembly had a national radio talk show on constitutional debates broadcast in eight languages and organized a call-in telephone number for people to leave submissions in five languages. Other considerations include overall levels of education, literacy and numeracy among the population, as well as group, community or geographic differences in skills and behaviours that may require tailored or structured support. Finally, in indigenous or traditional communities, some type of formal meeting with traditional leaders is often necessary before public engagements can

be held. This was the case, for example, in parts of Fiji (2012) and in The Gambia (2019–2020).

Who are 'the people' and how do they participate in politics? 'The people' is a complex, abstract and often contested concept. 'The people' must be disaggregated in constitution-building, not only as a substantive exercise to define the political community but also to support the design of inclusive participation mechanisms. 'The people' is often highly diverse. It comprises a range of interest groups and communities, such as religious groups, ethnic communities, indigenous peoples, women, youth, persons with disabilities, pastoralists, farmers, business leaders, labourers, professionals, politicians, the diaspora, internally displaced persons and others. The way in which different individuals and groups participate in politics is an important consideration. A territorially organized community, for example, might be well represented by elected officials. Civil society organizations, on the other hand, may be able to speak on behalf of more dispersed groups with some common interests, such as the blind, women or youth.

What are the traditions and practices relating to participation? Depending on a country's political, governance and social history, people may be more or less familiar with particular participation and representation approaches, or they may have traditional or indigenous practices that guide communal decision-making. In Afghanistan, for example, people had limited experience using written surveys as a means of expressing individual political views, but there are strong traditions of collective negotiation through tribal legal councils. In part, this inspired the use of the Loya Jirga as a constitution-making institution (2003–2004). In Iceland (2011–2013), where the level of individual political activism is quite high, and in Egypt (2012), where significant segments of the population use social media, using tailored digital technology for participation was effective. Sometimes, traditional deliberation bodies can be used to channel public views, as with Chile's citizen councils, or *cabildos*, or *bantaba* gatherings in Gambian communities. In Fiji (2012), however, the requirement for people to participate as individuals created a dilemma for indigenous communities in which the chief is the traditional decision-maker (Kant and Rakuita 2014). It is also important to consider societal norms that may impede or even prohibit particular members of a community or polity—such as women, youth or minorities—from speaking out. If such groups are traditionally excluded from speaking in mixed gatherings, tailored outreach and specific targeting will likely be required to ensure inclusion.

To what extent does the public see existing institutions, parties or organizations as legitimate, trustworthy and able to represent their interests? Public trust in government overall and in particular institutions, parties or organizations involved in politics is complex and often misjudged by political elites (see e.g. Volpi 2013). Where trust is low, participation through representation alone may not be perceived as sufficiently legitimate. Moreover, a public participation process can itself heighten public scrutiny and suspicion of institutions in the short term as people gain new tools through which to evaluate both the legitimacy of the process and the constitutional text (Moehler 2008). Sometimes, however, existing institutions or organizations can be effective in channelling public views in a constitution-building process. In South Africa, the African National Congress (ANC) as an organization had earned the trust of a majority of people over several decades, so there were limited challenges around representation during the early phases of closed negotiations that involved the ANC. In Uganda in 1993, in comparison, although people trusted President Museveni, they questioned the legitimacy of the existing legislature, the National Resistance Council. Because the body comprised both non-elected and indirectly elected members working beyond their mandates, the public demanded that a directly elected constituent assembly be tasked with deliberating and approving the final constitutional text (Odoki 2001).

What resources are available? The availability of human, material and financial resources is a primary planning concern. Some approaches, such as citizens' assemblies, require a high degree of technical expertise and a rigorous methodology. Others, such as convening consultation meetings across the country, require high levels of staffing and labour, training, information management protocols, logistical planning, material resources, time and financing. These resources are necessary not only for organizing and managing participation events, but also to make the collected information useful for drafters in a systematic way. Tens of thousands of pages of public submissions or recordings will need to be organized, reviewed and collated. The availability of such resources and expertise varies from country to country. Sometimes, staffing support to constitution-making institutions is provided through secondments from other government bodies. This is a pragmatic approach, but it also presents risks for impartiality, individual capacity, availability and commitment. In other contexts, external actors such as the United Nations or the European Union may provide material and technical support for participation, but the scope and nature of such contributions must be balanced against the need to ensure local ownership. Civil society organizations can also be key resources. They often engage as *participants* to advance particular strategic interests and priorities, but they can also be implementation *partners*. In Albania (1997–1998), for example, civil society organizations held dozens of consultation events to gather public views on constitutional issues and supported official civic education campaigns (Carlson 2010).

Endnotes

1. Legal continuity is an important consideration. In Uruguay, for example, constitutions since 1934 have regulated their own replacement. In Bolivia and Ecuador, on the other hand, existing provisions on amendment procedures were amended or supplemented to give legal foundation for reform processes resulting in new constitutions for these countries in 2009 and 1998 respectively (Negretto 2018: 11).

2. See e.g. International Covenant on Civil and Political Rights (ICCPR) article 25; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 7; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) article 5. The scope of 'participation' under article 25 of the ICCPR has generally been interpreted narrowly with regard to constitution-making, to mean participation in the election of representatives—which would apply to an elected constitution-making body—and to voting in ratification referendums (UNHRC 1996). Subsequent international conventions, such as the 1965 ICERD and the 1979 CEDAW, expanded the scope of 'participation' to more specific arenas, and obligated state parties to create fair conditions of access. State practice since the 1990s has moved in the direction of involving the public in constitution-making in expanded ways, including through consultations, as a general trend (see Hart 2010; Franck and Thiruvengadam 2010).

2. What, when and how? Engaging 'the people' in constitution-building

Public participation is often discussed in a holistic sense—was a process 'participatory' or not? There is no generally accepted definition of 'public participation' in constitution-building (see Saati 2015). This, plus the fact that more participation is possible in places where the security situation is stable and the context more amenable, makes it hard to compare the experiences of different countries. In trying to understand different approaches to participation, some studies look at the nature of participation overall. Others look more at levels of inclusion, while still others focus on *when* participation takes place at different stages of the constitution-building process. Sometimes, discussions of public participation conflate or blend direct participation with indirect representation in constitution-making bodies. Another challenge lies in how scholars unpack the constitution-building process itself into a series of stages and decisions. No two processes are alike, and not all stages take place sequentially.

Given that participation is an almost standard element of modern constitution-building, the key question for decision-makers is not *whether* to involve the public, but *how* and *when* to involve them and in *what* ways.

This section addresses three aspects of participation: (a) the different roles the public can play; (b) the various ways in which the public can participate; and (c) the different stages in which public participation can occur. These issues and choices interact with one another and combine in various ways to shape the dynamics of the constitution-building project.

When determining *what*, *how* and *when* public participation will be engaged, process designers should keep in mind the following issues:

- *What* is the public engagement trying to achieve?
- *Which* body or bodies should conduct consultations?
- *Who* is to be consulted?
- *When* should the public participate?
- *What* methods of participation will be most effective?
- *How* should decision-makers weigh results?

2.1. What? The role of the public

People can play several different roles in constitution-building, depending on when and how they participate. People can serve as:

- *initiators* of the reform project, for example through formal citizen initiatives for constitutional amendment (a handful of constitutions provide for this), or, more commonly, via informal demands for constitutional change through, for example, sustained civic activism, popular protests or mass mobilization;

- *electors* to a constitution-making body, which includes electing members to a regular legislature that assumes a constitution-making role (usually because the existing constitution allows it) as well as electing members to a constituent legislature or assembly with the express mandate of constitutional reform;

- *contributors* of ideas on constitutional content and sometimes on the design of the constitution-building process, most often through public consultations or referendums; and

- *approvers* of the final constitutional text through voting in a ratification referendum.

In order to play any of these roles—but particularly as contributors and approvers—people must also be supported as *learners*. A well-designed process must include civic education both on the constitutional reform process itself and on substantive constitutional and political issues. Where feasible, civic education and awareness campaigns should tap into the expertise of members of the public; this includes, but is not limited to, civil society organizations and experts in relevant subjects. In this way, people can also play the role of *teachers*.

2.2. When? Stages of the constitution-building process

The phases of constitution-building are fluid and overlapping and no model will adequately reflect all processes. Yet, for process designers, determining *when* to engage public participation is an important issue. Recent studies indicate that timing seems to matter, particularly with regard to desirable immediate and longer-term outcomes (the *why* of public participation, as discussed in the next section). Although empirical data is limited, a few findings related to timing are notable.

First, particularly in complex transitions, sequencing foundational elite agreements on basic constitutional principles *before* opening the process to public participation can contribute to longer-term democratic performance (Higley and Burton 2006; Negretto 2020b; Saati 2017). Of course, this two-step approach is not always planned. Moreover, procedural decisions (such as the nature of a constitution-making body) and contextual factors (such as an ongoing peace process) may make public participation more or less feasible, or more or less desirable, during or after such elite negotiations. This sequencing may also have the added bonus of helping to shape public support for or opposition to the resulting draft, and of helping to manage public expectations (Moehler 2008; Saati 2017).

Second, recent studies indicate that longer-term democratic performance is linked to levels of *inclusive* participation, and that outcomes are better when inclusive participation takes place earlier, during the drafting process, than when it is primarily used during later stages, to review and comment on an existing draft or to ratify a draft (Eisenstadt et al. 2015, 2017; but see also Eisenstadt and Maboudi 2019).

Finally, there is some evidence of a relationship between participation during both the drafting and ratification stages and constitutional content.[1] Large-scale comparative studies have found, for example, that constitutions approved by popular referendum tend to include a broader range of rights and direct democracy devices compared with non-referendum constitutions (Ginsburg et al. 2008). Similarly, case studies on **Iceland** (2010–2013), **Egypt** (2012), **Mexico City** (2016–2017) and **Tunisia** (2011–2014), as well as thematic studies on women's participation in and influence on constitution-building, indicate that, if the public is engaged in generating constitutional ideas and supporting or rejecting particular provisions, this can result in better protections for rights that enjoy popular support (Houlihan 2020b; Landemore 2017; Maboudi and Nadi 2016; Tamaru and O'Reilly 2018).

However, other experiences indicate that broadening participation in the drafting and political deliberation phases can lead to incoherence or inconsistency in the constitutional text. Coherence challenges are arguably seen in **Brazil**'s 1988 Constitution, which was developed through a strongly participatory process but which involved little coordination within the congress-cum-constituent assembly to systematically harmonize ideas. The resulting text reflects a mix of ideological perspectives that often conflict and, rather than establish fundamental principles and core procedures, it sets out detailed substantive rules that would likely be better addressed in legislation or regulations (Rosenn 2010). In part, such challenges arise because participation opens up the negotiation process to competing interests and passions, making bargaining more difficult, increasing transaction costs for compromise, and potentially leading to more extreme positions (e.g. Voigt 2003; Horowitz 2002; Tsebelis 2002; Arato 1995; Elster 1995).

While no constitution-building process occurs in neatly defined stages, and processes are rarely linear, a basic breakdown is helpful to map participation planning onto the overall phases. It is also helpful for considering how participatory feedback will tie into the decisions being made at each stage. Building on models defined elsewhere,[2] we divide constitution-building into a somewhat idealized model of four phases: an *initiation* phase; an *agenda-setting and process design* phase; a *drafting, deliberation and decision-making* phase; and an *approval* phase (see Figure 2.1).

Figure 2.1. Stages of the constitution-building process
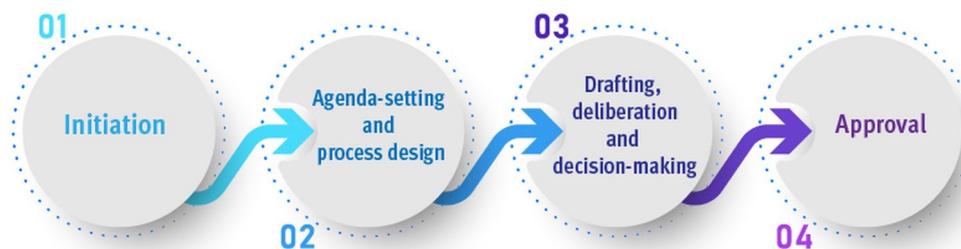
The *initiation* phase loosely covers the period in which calls for constitutional reform gain broad political salience and social traction, and considers where the impetus for constitutional reform comes from.[3] Depending on context, it may be rooted in a peace process in which constitutional change is a key element of a wider set of negotiated agreements to address conflict. In peacebuilding constitutional reform, the notion of 'who' initiates the process is often limited. People at the peace table are primarily parties to the conflict; these may include marginalized segments of society who have taken up arms.

In **Spain** (1978), **South Africa** (1996) and **Tunisia** (2014), for example, constitution-building was preceded by elite pacts on foundational principles. Political settlements forged at the peace table need to be entrenched in a new or amended constitution, so they must be

protected throughout the constitution-building process—including from majoritarian public feedback.

Photo: Frederik de Klerk and Nelson Mandela shake hands at the Annual Meeting of the World Economic Forum held in Davos in January 1992, © World Economic Forum, published with CC licence BY-SA 2.0, <https://commons.wikimedia.org/wiki/File:Frederik_de_Klerk_with_Nelson_Mandela_-_World_Economic_Forum_Annual_Meeting_Davos_1992.jpg>.

In the regular course of politics, initiation usually comes from political elites, but there are multiple mechanisms—both formal and informal—through which the public engages. In some countries, the constitution provides a pathway for citizens to initiate amendments, usually by acquiring a specified number of signatures for a proposal. Examples include the constitutions of **Kenya** (2010; section 257), **Micronesia** (1990; article XIV, section 1), **Slovenia** (1991; article 168), **Croatia** (1991; article 87) and **Switzerland** (1999; article 139).

Sometimes, public initiation is informal and is achieved through sustained civic activism (e.g. **Kenya** in the 1990s), popular movements or widespread protests. In **Ukraine** (2014), **Tunisia** (2010), **Chile** (2019) and **Iceland** (2008), for example, popular movements placed demands for constitutional change at the heart of their agendas, pushing governments to respond. In practice, however, it is difficult to unpack how such dynamics operate at a country level. Whether the parties in power are open and responsive to such pressures depends on context and politics.

The *agenda-setting and process design* phase involves both process and substantive decisions. Process issues include, for example, establishing institutions and procedures that will make decisions on the substance of constitutional changes. This might extend to: determining whether interim mechanisms will be used, and, if so, what they will look like; establishing the nature of the main deliberative body (e.g. a national conference, an appointed constitutional commission, or an elected or mixed constituent assembly); setting rules for the election or selection of members and procedural rules within the bodies; and defining timelines, etc.

Substantive decisions involve determining the scope of constitutional reform, setting constitutional principles and delineating a specific agenda.

The *drafting, deliberation and decision-making* phase covers the development of the new draft or amendment, deliberative decision-making about its content, and its initial adoption prior to final ratification. This is a long and complex phase that, depending on context, can be broken down into several sub-phases and involve one or more constitution-making bodies.

Participation during this phase has become increasingly common, with people contributing ideas on constitutional content. Whether and how public feedback will interact with the political bargaining process are particularly important questions, so planners must consider how data will be assessed and used. Cooperation and buy-in among a plurality of elites are crucial for the drafting, deliberation and adoption process to succeed. As will be discussed in Section 3 below, public feedback on the constitutional text can shape or influence the dynamics of political negotiations, but the extent to which it can—or should—constrain elite decision-making or influence existing elite agreements depends on country context and on the nature of the decision-making rules that are in place.

The *approval* phase covers the final ratification of the text. How a new text or amendment is ratified often depends on the existing rules. These may include the current constitution's amendment provisions, which commonly require a supermajority vote in the legislature or a popular referendum, or rules contained in a peace or transitional agreement. Sometimes the choice of whether to call a popular referendum is discretionary under the decision rules and is itself a matter of political negotiation.

2.3. How? Mechanisms for public participation

Mechanisms for participation can be categorized in several different ways. They can be *direct*—meaning that people engage as individuals, usually in person but increasingly online—or *indirect*, usually through elected representatives on a constitution-making body. Participation can be prompted and organized by state authorities, or it can occur at the instigation of the public themselves. This section and Section 3 focus mainly on state-supported, direct participation mechanisms.

The most common approach to engaging the public is through a combination of referendums, voting/elections and consultations.

Referendums

The most common form of participation is a ratification referendum, usually through a straight yes or no vote, during the approval phase (Tierney 2018). The idea is to provide popular legitimation—or rejection—of a draft proposal. Ratification referendums have been used in both democratic and authoritarian regimes. From a purely statistical comparison, it is notable that new or replacement constitutions are almost always passed at referendums, but amendments pass only about 60 per cent of the time (Elkins and Hudson 2019). In authoritarian regimes, referendums can provide a veneer of popular legitimacy for what may otherwise have been a relatively exclusionary process (e.g. **Chile** in 1980; **Egypt** in 2014; **Guinea** in 2020). In democratic and transitioning states, as well as in conflict-affected contexts, ratification referendums are a common element of a broader participatory process. Examples include referendums on new constitutions in **Kenya** (2005 and 2010) and **Ecuador** (2008), and on amendments in **Ireland** (2015 and 2018). Important considerations include whether there should be a turnout threshold, and whether approval should be by a majority or by a supermajority. The **Ghana** Constitution has both a turnout threshold of 40 per cent and a required supermajority of 75 per cent of those voting. In some contexts, turnout thresholds may empower minority parties that may otherwise boycott the

referendum if they can have no influence on the result (as in **Egypt** in 2014). In other situations, however, a popular referendum risks undermining carefully crafted compromises and/or being used as a tool of majoritarian oppression.

Photo: Egyptian constitutional referendum 2014, © Bora S. Kamel, published with CC licence BY-NC-SA 2.0, <https://www.flickr.com/photos/61928064@N05/11985905645>.

Referendums are also sometimes used for other purposes at different stages of the process. As discussed further below, they can be used to establish a popular mandate and influence political dynamics relating to constitutional reform, to help resolve contentious debates, or to make specific decisions about procedural or substantive issues.

Elections

Another common way in which people participate in constitution-building is through elections. Voting may contribute to the initiation of a process when parties or presidents who have included constitutional reform in their campaign platforms are elected. This occurred, for example, in 2005 when **Bolivians** elected Evo Morales as the first popularly elected indigenous president; with the 2013 election of Michelle Bachelet in **Chile**; with the 2015 election of Maithripala Sirisena in **Sri Lanka**; and in **Mongolia** in 2017 with the election of the Mongolian People's Party to a controlling majority in the legislature.

People may also participate through the election of representatives to a constitution-making assembly. This could be in the form of a constituent assembly elected for the sole purpose of making a constitution (e.g. **Bolivia**, 2006–2007); an elected constitution-making assembly that also acts as a legislature (e.g. **Tunisia**, 2011–2014; **South Africa**, 1994–1999); or the election of members to a regular legislature that takes it upon itself to reform the constitution (e.g. **Hungary**, 2010–2014; **Viet Nam**, 2011–2016).

Consultations

Today, participation often involves public consultations. Consultations can be carried out for a number of purposes, at different stages in the process, in a variety of ways. Common mechanisms include the following.

Consultative referendums and plebiscites

Referendums are sometimes used in a consultative way; this means that their non-binding results provide decision-makers with information about public views that can be used to shape constitutional reform processes and decisions on content. Referendums were used in **South Africa** in 1992 and in **Spain** in 1976, for example, as part of broader political transitions involving complex negotiations. The results in both cases showed that the public favoured the processes proposed by elites, and therefore facilitated the initiation of constitutional change. In **Colombia**, during a period of eroding state institutions and increasing violence, a student movement managed to attach an informal consultative referendum to legislative elections in March 1990; this referendum asked whether voters wanted to elect a constituent assembly to write a new constitution. Although the mechanism had no legal implications, the idea's popularity led the president to issue a decree for a formal referendum on the matter and to initiate the subsequent constitution-building process.

Referendums can also be used to assess public opinion on particular substantive issues, usually as a contribution to agenda-setting (as in **Iceland** in 2012 and **Luxemburg** in 2015), or to assess the degree of public support for a full constitutional proposal (as in **Canada** in 1992). These uses, however, are relatively uncommon.

Requests for submissions and comments

Constitution-making bodies often establish one or several periods during which the public can provide feedback on constitutional reform priorities or issues, or on the content of a draft constitutional text. Such consultation opportunities often target both the general public through open submission opportunities across the country and specialized or expert organizations that may have particular insights into the issue at hand. Requests for submissions and public comment are common during agenda-setting, initial drafting, and deliberation and decision-making phases. Formats and timelines for submissions vary and are often set by a constitution-making body or bodies. Increasingly, online submissions through websites or social media forums such as Facebook and Twitter have been encouraged to supplement or complement paper submissions. For example, online submissions were frequent in **Egypt** (2012), **Tunisia** (2011–2014), **Iceland** (2011–2013) and **Mexico City** (2016–2017).

Surveys or questionnaires

Surveys and questionnaires can be used at various stages of the constitution-building process to assess views on both the process itself and substantive issues. Digital technology has made it increasingly easy for surveys to reach large swathes of the public in a cost-efficient way, but not all such processes are of equal value. Decision-makers must decide *who will be in charge* of designing and implementing the survey, *what kinds of questions* the survey will ask, *who* the survey will target, and *how* the data will be used.

Survey design and implementation are technical tasks requiring experience in survey research methodology. Asking the public a series of highly technical or formal questions about constitutional content often leads to responses that are of little value to decision-makers. This is due to limited public knowledge of the relevant topics, or because questions elicit responses prompted more by political interests and ideological alignment than by reasoning. Some constitutional issues—such as the appropriate period between an election

and a transfer of power—are technical matters, and non-expert public inputs may be of little use. Other issues may not be appropriate for public surveys: for example, if majoritarian public feedback would likely undermine political agreements that have already been made and that are necessary for the inclusion of marginalized groups in governance arrangements. On the other hand, well-defined surveys can be highly valuable if they help drafters and decision-makers better understand public views on a targeted set of constitutional options— particularly where the public has been supported with robust civic education. Accordingly, when designing surveys, it is important to ensure that questionnaires are tested in advance, are presented in a language people can understand, and are not too long or complicated.

In addition to considering *what* to ask, designers must consider *who* to ask. Surveys may be open to the general public or tailored to people from particular communities. These may include interest groups, marginalized or hard-to-reach communities, such as women, persons with disabilities, youth, the diaspora, national or ethnic peoples, or rural communities. When surveying the broader public, decision-makers need to consider whether they will use probability sampling through a nationally representative statistical sample or self-selection. If participants are entirely self-selecting, the sample will not be representative and it would be incorrect to treat the responses as representative of the population as a whole. When using more specific targeting, designers need to consider how best to tailor their tools to meet the demographic and contextual needs of the targeted group.

The Constitutional Review Commission of **The Gambia** (2017–2018) used several different survey tools, both online and in person, to collect public views prior to drafting the constitutional text. In **Kenya** (2002), the Constitution of Kenya Review Commission (CKRC) designed a survey covering 20 central issues and published a number of booklets with 199 specific questions to help people understand the issues and provide inputs. In **Nepal** (2008–2012), participants in face-to-face meetings were given a list of 150 questions for feedback, although participants often reported that the list was too long and used language they did not understand (Interpeace et al. 2009).

In-person meetings with individuals or groups

In-person meetings are both common and necessary for all participatory processes and are used for both educational and consultative purposes—sometimes in parallel. Approaches may include thematic events, town hall meetings, seminars, focus groups, random and self-selecting deliberation bodies or citizen councils, or limited invitation events. In-person meetings are often consultative, but they may also be deliberative or provide one-way information, depending on their design. They may be used in relation to process design and substantive agenda-setting, prior to drafting, during drafting, and/or during later deliberation and decision-making. In **Uganda** in 1995, around 140 in-person seminars were held with nearly 100,000 people to shape the reform agenda. This was followed by further meetings (paired with other consultation mechanisms) on specific issues identified through the initial consultations (Brandt et al. 2011).

Photo: Escuela de Verano 'El Proceso Constituyente… claves para entenderlo' [Summer school 'The Constitutent Process… keys to understanding it', Municipalidad de Santiago, © Luis Hidalgo, published with CC licence BY-NC 2.0, <https://www.flickr.com/photos/34361763@N03/24458376340>.

During the drafting and deliberation phase, constitution-makers often visit different constituencies throughout the country to gather and compile their views. It is important to ensure that face-to-face meetings address potential cultural, customary, physical, literacy or other access barriers to facilitate the inclusion of marginalized individuals and groups and to mitigate self-selection bias. In **Eritrea** (1997), for example, the constitution-making body provided food and water over several weeks to enable nomads to stay in one place for constitutional consultations (Brandt et al. 2011). In some contexts, permission from traditional leaders may be necessary before community-level meetings can be held (as in parts of **Fiji** in 2012).

Deliberative mechanisms or bodies
The use of deliberative bodies for consultative purposes is becoming increasingly common. Deliberative bodies can include 'mini-publics'—randomly selected groups that are representative of the public—as well as self-selecting groups. Such deliberative bodies have been used in consultative ways, for example, to:

- review a set of constitutional reform agenda items and prioritize amendment issues (**Iceland**'s 2010 National Forum and **Chile**'s 2016 *cabildos*);

- generate recommendations for a constitution-making drafting body (**Ireland**'s 2017 and 2019 assemblies and **Mongolia**'s 2017 deliberative polling);[4]

- generate recommendations for a binding referendum (**British Columbia**'s (2004) and **Ontario**'s (2006) Citizens' Assemblies on Electoral Reform in Canada); and

- review constitutional proposals prior to a referendum (**Oregon**'s permanent Citizens' Initiative Review process in the United States).

Photo: Iceland's national assembly (Þjóðfundur) brought together a large, randomly selected sample of citizens from across the country for a day-long discussion, 6 November 2010, © Matito, published with CC licence BY-SA 2.0, <https://www.flickr.com/photos/riggott/5155567757>.

Several criteria distinguish mini-publics from self-selecting deliberative bodies and from more purely consultative engagements such as town hall events. Mini-publics are formed through *random selection*—and sometimes *weighted* random selection—to ensure that the participants reflect the composition of society. The **Irish** Citizens' Assemblies (2016–2017 and 2019–2020) and Convention on the Constitution (2012–2014), as well as **Mongolia**'s deliberative polling process (2017), are examples of random assemblies, although they used different selection methodologies (see Fishkin and Zandanshatar 2017; Farrell et al. 2019). Mini-publics usually involve facilitated deliberation and decision-making (Smith and Ryan 2014). Recommendations are not usually binding, but in some cases proposals must be referred to a public referendum (as in **British Columbia** (2004) and **Ontario** (2006)).

Chile's *cabildos* are examples of traditional self-selecting deliberative bodies that use a common methodology. Their essential objectives are, generally speaking, to define and understand an issue or conflict and its origin, review information or previous work on the issue, establish collective and consensus-based points of view, and suggest a plan of action. *Cabildos* can be convened at municipal and regional levels and used to address both local and national issues.

All approaches to mini-publics and self-selecting deliberative bodies emphasize transparency and awareness-raising in terms of design, purpose, status and outcomes of deliberations. This is important if a mini-public is to realize its potential as a 'trusted information proxy' for people in their decision-making. Research on a limited number of cases, mainly in established democracies, has found that people tend to trust their fellow members of the public, if they have been educated and have deliberated on a subject, more than they trust proposals from politicians (e.g. Warren and Gastil 2016). Convening a mini-public to review and recommend on constitutional reforms may therefore be a useful consultative mechanism.

National constitutional conferences can also serve as deliberative bodies for consultative purposes, although they differ from mini-publics and self-selecting groups in important ways. National conferences involve a mix of ordinary people as well as representatives of the

government and different societal and interest groups. This composition, as well as the fact that national conferences are often (though not always) quite large, means that their use must be carefully considered. Conferences are sometimes used in a consultative way to develop initial agreements on principles or recommendations for constitutional reform, but they are used more often as one of several constitution-making bodies as part of a multistage process (see Brandt et al. 2011: Section 3.1.3). In **Zambia** (2007), for example, a National Constitutional Conference was convened as a political compromise after much debate. The conference was tasked with deliberating and 'adopting' the draft constitution proposed by the (Mung'omba) Constitution Review Commission. It was consultative to the extent that parliament needed to then legally 'enact' the new constitution in a separate step (Kirkby and Murray 2016).

While both mini-publics and conferences may be broadly *representative* (depending on design), they are not substitutes for inclusive and direct public participation. Moreover, depending on context and methodology, mini-publics and national conferences may require a significant degree of technical expertise, particularly in terms of sample selection, the development of information materials, the selection of experts, and—particularly in deliberative polling—the design of polling questions (see Center for Deliberative Democracy 2017).

Figure 2.2. Common types and uses of public participation across the stages of constitution building
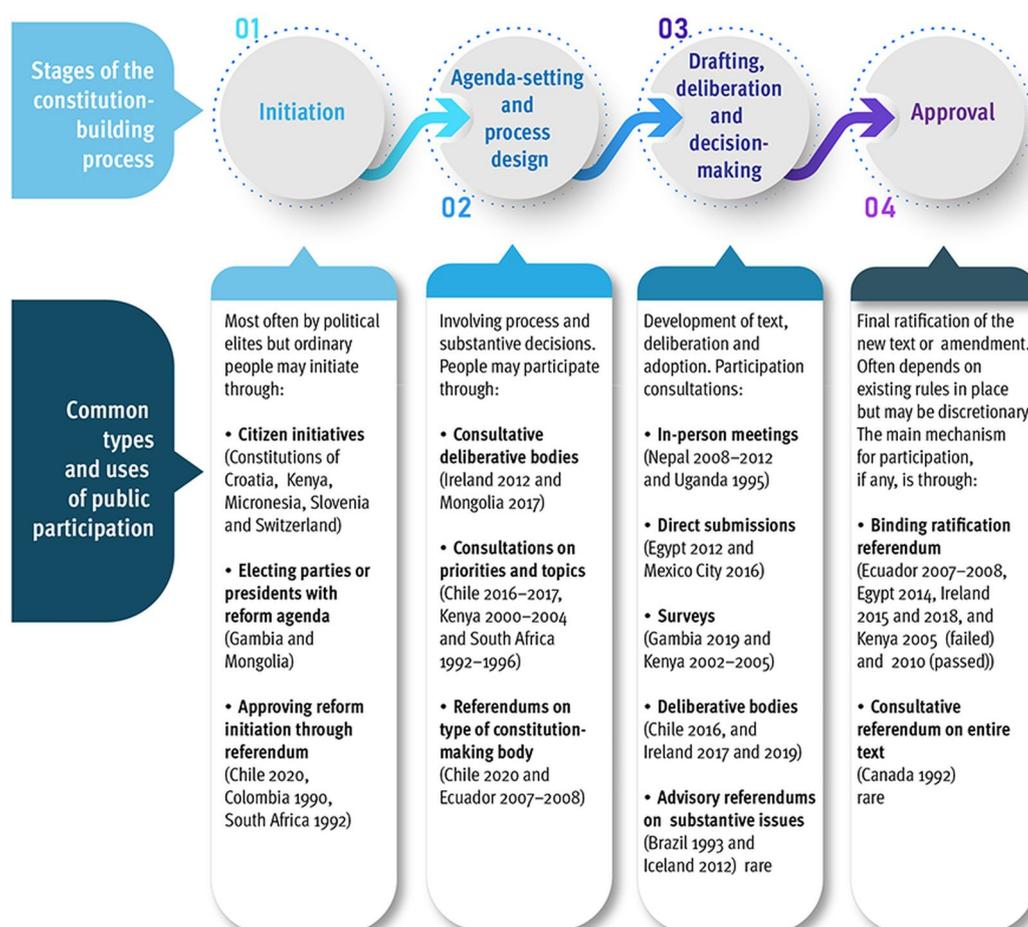
Endnotes

1. Such findings, however, do not necessarily indicate a causal relationship. Other factors, such as the type of constitution-making body, the role of international actors and the extent of external influence, peace agreement content, trends in constitutional 'borrowing', distinct elite pacts and the like, also play an important role in determining constitutional content.

2. Constitution-making, as defined here, may been broken down in several ways and in more or less detail according to the procedural and decision-making issues at stake. Widner (2007) breaks the process down into drafting, consultation, deliberation, adoption and ratification. Banting and Simeon (1985) add to this an earlier phase—interest mobilization—that takes place before the drafting of the constitutional text. Ghai and Galli (2006) similarly recognize an agreement-making and scope-setting phase, and add a step during which constitution-making institutions, procedures and rules are established. Elkins et al. (2009) simplify the process into writing, deliberation and approval, while Eisenstadt et al. (2015) similarly organize the process into drafting, debate and ratification stages.

3. There have been ideas proposed since the 18th century by Thomas Jefferson for automatic review of the Constitution after some period of years. In Micronesia, congress must ask voters every 10 years whether to call a convention to revise or amend the constitution (article 14, section 1), and similar mechanisms exist for some US state constitutions. Usually, however, the instigation of change remains an act of agency catalysed by one group or another.

4. For more information on deliberative polling, see <https://cdd.stanford.edu/what-is-deliberative-polling/>.

3. Why? The influence of public participation on constitution-building

Constitution-building almost always takes place in a contested political arena. For it to be successful, a new constitution or amendment must enjoy both popular legitimacy and a degree of political consensus.

In a democratic constitution-building process, robust participation is intrinsically valuable. It is credited with contributing to a multitude of benefits for the constitutional order and society more broadly. But public participation is not a panacea; there is a risk of overemphasizing both the importance of participation and what it can do. It is unclear, for example, how much participation actually contributes to shaping attitudes or outcomes compared with the importance of other factors, such as the relative strength of political parties, the nature of elite cooperation or contestation, and the institutional arrangements that are ultimately agreed on and set out in the text (see e.g. Negretto 2013, 2020b; Hudson 2021a, 2021b). In **Venezuela** (1999), high levels of participation throughout the process did not constrain the populist outsider, Hugo Chávez, from making self-interested design choices and using the constitution to impose an authoritarian regime (Brewer Carías 2010; Landau 2013). On the other hand, in **South Africa** (1988–1996), many of the most progressive and inclusive provisions were driven by the elite rather than by popular support.

In many constitution-making endeavours—particularly those involving transitions to democracy or from conflict to peace, but also in most multiparty political settings—elite negotiation, cooperation and agreement play a central role (if not *the* central role) in *building* democratic constitutions (see e.g. Arato 2016; Higley and Burton 2006; Negretto 2020b; Saati 2017). This can be seen in constitution-building processes linked to peace agreements, for example in **South Africa** (1988–1995) and **Nepal** (2006–2015). But it is also observed in places such as **Kenya** (2008–2010), where elite buy-in was finally secured in the wake of post-election violence; in **Mongolia** (2017–2019), where institutional reform was a long-standing but contested political priority; in **Bolivia**, where approval of the 2009 Constitution required cooperation between the incumbent and the main opposition parties; and in **Poland** (1993–1997), where the new constitution was a compromise between a plurality of political interests (see Bell and Zulueta-Fülscher 2016; Bisarya 2016; Houlihan 2020a; Murray 2020; Negretto 2020b; Negretto and Wandan 2020).

Process designers must therefore consider the relative roles of, and relationships between, public participation, elite negotiations, and desirable short-, medium- and long-term outcomes of the constitution-building project. What can public participation achieve given the reality of political dynamics? And how can participation and political bargaining be structured in complementary ways?

This section focuses on the ways in which public participation can be mobilized and instrumentalized to support specific or incremental objectives within a constitution-building process. It first examines theoretical and empirical research on what we *think* participation can achieve (and its associated risks) as part of the broader constitution-building and transformation process. The second part focuses on the relationship between public participation and the elite negotiations that are necessary for a successful constitution-building endeavour. This draws mainly on case studies to highlight how decision-makers have attempted to use particular participation mechanisms, at particular stages of the process, to achieve specific objectives.

Photo: Constituent Assembly, Nepal, 15 September 2015, published with kind permission from © UPF International, all rights reserved.

3.1. What we know and don't know about what participation can do—and its risks

Whether and how public participation 'works' is not yet well understood. There is limited empirical data on the ways in which participation may, in practice, influence individual attitudes and behaviours, shape bargaining dynamics, improve constitutional content, or strengthen outcomes for democracy and peace.[1]

Particularly in countries affected by conflict or transitioning from authoritarianism to democracy, participatory constitution-building is associated with broader peacebuilding and nation-building aims. It is understood as a mechanism through which to expand inclusion, entrench the political settlement established at the peace table, foster reconciliation and trust among society, and collectively (re)define the vision of the state and its values (e.g. Hart 2003; Samuels 2006; Ghai and Galli 2006; Gluck and Brandt 2015). These normative propositions have been supported by international and national legal developments since the 1970s that increasingly interpret the *right* of people to participate in public affairs to include in the process of constitution-building (Hart 2010; Franck and Thiruvengadam 2010).

At the individual level, participation is valued because it educates the public on constitutional issues and fosters a sense of civic engagement (see e.g. Rousseau 1923 [1761]; Mill 2004 [1862]; Moehler 2006). It is also credited with improving attitudes about democracy and supporting more democratic behaviour (Moehler 2008). At the country level,

participation is understood as contributing to democratic transition (e.g. Samuels 2006; Pateman 1970). In part, this is because participation is seen as being crucial for building popular legitimacy and a sense of guardianship over the constitutional text, which is necessary for future implementation (Hart 2003; Ihonvbere 2000; Gluck and Brandt 2015; UN Secretary-General 2020).

Public participation is also associated with constitutional endurance (Elkins et al. 2009) and, to some degree, with influencing constitutional content, particularly through increased provisions on rights and democratic institutions (e.g. Voigt 2003; Samuels 2006; Ginsburg et al. 2008, 2009; Hudson 2018; Maboudi and Nadi 2016; Landemore 2017).[2] Finally, participation is credited with contributing to more sustainable peace at the country level (Ghai and Galli 2006; Hart 2003; Samuels 2006; Wallis 2014, 2016) and—under democratic peace theory—at the global level (e.g. Levy 1989; Hegre et al. 2001). Efforts to empirically validate and refine these propositions are ongoing (e.g. Eisenstadt et al. 2015, 2017; Eisenstadt and Maboudi 2019; Elkins et al. 2009; Ginsburg et al. 2008, 2009; Hudson 2021b; Negretto 2020b; Saati 2015; Widner 2005, 2008).

On the other hand, public participation in constitution-building is not without its challenges and risks. There is no evidence, for example, that public engagement through the election of representatives, broad consultation or ratification referendums lead to a set of constitutional rights that protects *all* social groups (Negretto 2020a: 108). Moreover, as noted earlier, expansive participation may lead to inconsistencies in the resulting constitutional text or to more complicated bargaining processes or extreme bargaining positions. Sometimes, broad participation and majoritarian decision-making can have undesirable and potentially inverse impacts on the new constitution and democratic performance (Saati 2017; Wheatley and Germann 2016).

More serious risks may also arise in conflict-affected states and divided societies. Where participation is not *meaningful*, it may lead to discord between the decision-makers with ultimate authority over the constitutional text, those who will implement the constitution, and the wider public (e.g. Gluck and Brandt 2015; Negretto 2017). Other risks include exacerbating existing domestic challenges or inciting new forms of unrest through the manipulation of the participation process by a dominant party or interest groups, the ethnicization of public opinion, or the rise of an anti-pluralist or anti-constitutionalist populist agenda (Ghai and Galli 2006; Gluck and Brandt 2015).

In contexts where institutions are weak, recourse to 'popular will' can sometimes be abused by elites to unilaterally reorganize the state in anti-democratic ways. This has happened via referendums in **Belarus** (1996), **Russia** (1993 and 2020) and **Kazakhstan** (1995) (Partlett 2012). It can also occur through the dominance of a single party or coalition in a constitution-making body, as in **East Timor** (2001–2002), **Hungary** (2010–2011) and **Georgia** (2017) (Aucoin and Brandt 2010; Negretto and Wandan 2020; Morrison 2017), or when a party uses intimidation during public consultations to manipulate public feedback, as happened in **Zimbabwe** (2008–2013) (Ndulo 2010). Sometimes, self-interested political agreements are withheld from public debate. This happened in **Fiji** (2012–2013), where an elite agreement that the new constitution would grant unconditional immunity for events stemming from the 2006 military coup was not opened to public comment.

3.2. Public participation and political bargaining dynamics

The relationship between elite negotiations and public participation is complex and influence travels both ways (Moehler 2008). Elite agreements can influence public opinion, and public opinion, in some circumstances, can influence the dynamics of elite bargaining.

Where technical drafting is too separate from necessary political deal-making—even if public engagement is robust—problems can arise when the draft is handed over, or 'relayed',

to political forums. In **Iceland** (2013) and **The Gambia** (2020), for example, drafting bodies developed proposed constitutional texts through broad participation processes ahead of necessary elite agreements on the parameters of reform. When the proposals were handed over to political forums for deliberation and approval, the elites could not agree, and the processes ended.

But this does not mean that public participation plays an irrelevant or minor role. Rather, a well-structured process can provide mechanisms for both public participation and negotiations among elites in ways that complement each other. From this perspective, public participation can help shape political consensus-building in several ways. It can:

- support a mandate for constitution-building;

- persuade reluctant parties to enter into negotiations;

- help determine how the process should be run and who should be included;

- shape the reform agenda;

- contribute drafting ideas and inform decision-makers about public views;

- resolve specific contentious issues; and

- help foster elite consensus-building.

Public participation as a mandate for constitution-building

The involvement of the public through a referendum at the outset of the process is relatively uncommon, although it has occasionally been used to provide a popular mandate and legitimacy to begin reforms. In 1992, the 'de Klerk referendum' in **South Africa** was used to overcome disputes within the ruling regime. Although negotiations to dismantle apartheid had been underway with the ANC since 1989, hard-line members of the ruling National Party (NP) opposed the idea of transitioning through a negotiated settlement. The NP split and right-wingers formed the Conservative Party (CP), which capitalized on fears among conservative whites about their future position under a Black-led government. After the CP won several local elections, President de Klerk needed a mandate from 'the people' (meaning whites under the terms of apartheid) to legitimize the negotiations and sideline the CP's activist minority. It was a gamble with profound implications for the future of the country that ultimately paid off; it gave de Klerk popular support to negotiate with the ANC, sidelining hardliners.

Similarly, in 1976, emerging from the dictatorial regime of General Francisco Franco, **Spain** held a referendum on the initiation of a political and constitutional reform process. The vote served to legitimize decision-making by a regime that did not enjoy popular legitimacy (Comella 2013). Following his appointment by the King, pro-reform President Adolfo Suárez began to forge agreements across the political spectrum. In order to implement his agenda, he needed Cortes (legislature) approval and adoption by popular referendum as a matter of law.[3] Accordingly, President Suárez set out his proposals in the Ley para la Reforma Política (Law for Political Reform). Among other issues, the bill proclaimed the principle of popular sovereignty and provided for the possibility of enacting 'Laws of Constitutional Reform', which could be proposed by the government or the legislature. Over 94 per cent of voters supported the programme, providing the government with both a normative and a legal mandate to hold democratic elections and revise the Constitution (Comella 2013).

More recently in **Chile**, widespread popular protests against inequality and public frustration with key elements of the 1980 Constitution effectively pressured the administration of Sebastián Piñera—which had previously rejected constitutional

replacement following the Bachelet process in 2018—to negotiate constitutional reform. In 2019, the '15 November Agreement', which was agreed to by parties across the political spectrum, called for a national, binding plebiscite[4] in 2020 on whether and how to undertake constitutional reform.

Photo: View of the protests as seen in Plaza Baquedano in 2019, 25 October 2019, Chile, © Hugo Morales, published with CC licence BY-NC-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=83460148>.

Public participation to persuade reluctant parties to enter negotiations

Argentina in the early 1990s provides an example where the threat of a referendum was used to push the opposing side to enter into negotiations. President Carlos Menem sought to amend the Constitution to allow him to run for a second term, but he needed the support of the opposition in congress to do so. By threatening to use his popular support through a referendum on the issue, he pressured the opposition into accepting that they would be better served by negotiating with him than risk his proposals being adopted in full. Eventually, an agreement was reached and an amendment was passed. It allowed President Menem to run for re-election in exchange for demands negotiated by the opposition, including measures to weaken the presidency (Negretto 1998).

Referendums were also important bargaining tools in **post-Soviet countries** in the early 1990s. Popular support operated as a tool for competing elites to outflank political opponents and influence bargaining positions among Soviet Union institutions and between federal and regional structures. Mikhail Gorbachev first used a referendum in March 1991 to generate a popular mandate to preserve the Soviet Union as a 'renewed' federal structure, with the aim of manoeuvring around his political opponents. Although voters technically approved the proposal, the Union dissolved within a year. The 1991 referendum, however, sparked a series of counter-referendums among the republics. Leaders relied on claims to popular mandates to increase the power of executives or other groups relative to that of their opponents and to renegotiate autonomy, territory and institutional arrangements (Ross 2002: 18–20; Walker 2003; Partlett 2012).

The aborted process in **Chile** in 2015–2018 was another, though unsuccessful, attempt to leverage public engagement for political negotiations. In her presidential election campaign, Michelle Bachelet had promised participatory reforms to the 1980 Constitution. Under constitutional amendment procedures, she needed support from a reluctant opposition in congress. In October 2015, the government launched a vast participation process. A key objective was to foster public legitimacy and build momentum for constitutional reform that might push the opposition to agree to negotiations. In the end, however, the opposition was

able to exclude itself from the participation and political processes. Without the large political consensus required under the existing Constitution to enable the reforms to continue following submission to congress, the process collapsed in 2018 with the submission of the draft text to congress (Couso 2019; Verdugo and Contess 2018).

Public participation to determine how the process should be run and who should be included

Public participation can be used to help decision-makers determine how a process should be run and to support popular legitimacy for related procedural choices. Sometimes, participation is formally sanctioned through referendums. In **Ecuador**, for example, voters were asked in 2007 whether to convoke a constituent assembly to write a new constitution. In **Chile**, as noted above, the October 2020 plebiscite that resulted from the negotiated '15 November Agreement' asked voters two questions: whether they wanted a new constitution; and, if so, what type of body should draft it. Choices were for a mixed convention comprising equal numbers of directly elected members and currently sitting members of parliament or for a constitutional convention made up entirely of specially elected members. Given that popular protests had pressured the government into opening the process, voters unsurprisingly approved the drafting of a new constitution and preferred that a specially elected constitutional convention would lead the process.

Chile's 2020 referendum was also significant for women and demonstrates the capacity of informal popular mobilization to influence elite agreements on procedures and inclusion. Prior to the vote, in large part due to an established women's movement and strong network links between civil society and political coalitions, the two chambers of the congress enacted a gender parity rule that would apply to any constitution-making body approved by voters (see e.g. Arce-Riffo 2020). The election of the constitutional convention in 2021 makes Chile the first country in the world to have an equal number of women and men draft a constitution.

Where open and direct participation is challenged by security concerns, the people can still contribute to process decisions through civil society representation in decision-making bodies. An example is **Yemen**'s deliberative dialogue in 2012. The Comprehensive National Dialogue was convened as a precursor to a constitution-building process and was intended, to some extent, to frame the process. The Gulf Cooperation Council, under which the dialogue was formally constituted, invited civil society to join the planning committee that established the procedures and decision-making rules that would be used. Civil society also participated in the dialogue itself. The inclusion of civil society in the planning committee, though largely an effort to strengthen perceptions of legitimacy and national ownership, played an important role in broadening the number and type of interests at the table that required accommodation through negotiated decision rules. Ultimately, the dialogue failed to determine the process for constitution-building because the parties could not reach an agreement (Murray 2017).

Public participation to shape the reform agenda

Setting the scope of the reform agenda is fundamental for a constitution-building project. Public feedback—via recommendations from deliberative forums, consultations and even referendums—can inform decision-makers about popular opinions on whether or how particular constitutional topics should be addressed, and whether additional matters should be added. In so doing, it can sometimes shape the dynamics and outcomes of elite decision-making.

In **Ireland** in 2012, for example, following the 2008 global financial crisis and a substantial decrease in recorded levels of public trust in the government, the Oireachtas (parliament) established a Convention on the Constitution. This was a deliberate effort to

demonstrate the value of citizen-centred deliberative processes in political reform. The convention was to consider eight predetermined issues for potential constitutional amendment; the government committed in advance to respond, within a prescribed period, to the convention's recommendations. Members of the public, who were selected using a weighted random sampling methodology, comprised two-thirds of the 100-member convention; other members were political representatives.[5]

Rather than limiting its focus to the substantive issues provided by the parliament, however, the body added two additional topics to the reform agenda and provided 18 recommendations. Although the process was criticized on several levels, including for not binding the government to put all convention recommendations to a referendum (as happened with the **British Columbia** (2004) and **Ontario** (2006) deliberative forums), the public attention generated by the convention supported a degree of continuing political accountability. Since the close of the convention in 2014, the Oireachtas has put only three of the amendment proposals to the public in referendum votes. Proposals to legalize same-sex marriage and remove the offence of blasphemy passed in 2015 and 2018 respectively, while a referendum on lowering the age of eligibility for the presidency from 35 to 21 years was rejected. In addition, the government has committed to holding referendums on lowering the voting age and on voting rights for the diaspora.

Photos: Poster campaign in Ireland for the thirty-fourth amendment of the Constitution (Marriage Equality) Bill 2015-REF-103885, © William Murphy, published with CC licence BY-SA 2.0, <https://www.flickr.com/photos/80824546@N00/17183722168> and <https://www.flickr.com/photos/80824546@N00/17164058087>.

Occasionally, though rarely, people help shape the agenda by voting in a referendum. In **Luxembourg** in 2015, decision-makers called a consultative, non-binding referendum to gauge public opinion on three proposed constitutional changes. All three suggestions were rejected by voters and the proposals were subsequently dropped from the political agenda. Recourse to public opinion in this way effectively concluded a process of political debate.

In 2012, **Iceland**'s leaders similarly asked voters in a non-binding, consultative referendum to consider six substantive questions about contentious matters on the reform agenda. The first was whether the proposal developed by the non-expert, non-political consultative Constitutional Council (2010–2012) should form the basis for a new draft constitution. The council's drafting process involved significant public input and used a form of online 'crowdsourcing', but it did not involve input from political parties in parliament and was not constrained by foundational political agreements. To address these open-ended agenda items, leaders included specific referendum questions concerning natural resources,

an established national church, the election of individuals, the weight of votes and referendums. Voter turnout was relatively high, at 49 per cent. Seventy per cent favoured using the Constitutional Council's proposal as the basis for a new constitution, but decision-makers could not agree on whether parliament was bound to the council's draft as written, or on how to interpret the answers to the substantive questions (Hudson 2018). In the end, despite extensive public engagement in drafting the council proposal and voting on substantive agenda items, the feedback did not tilt political negotiations toward agreement. The process collapsed in 2013 (Hudson 2018).

In **Mongolia** (2017–2019), the Mongolian People's Party (MPP) was elected in 2016 following a campaign to undertake participatory constitutional amendments. Although the MPP controlled enough seats in the legislature to unilaterally enact amendments, the legitimacy of the process required both public participation and negotiations across political divides. To this end, members of parliament built consensus around the idea of a random assembly mechanism, or 'deliberative polling', to gather informed public views on a proposed amendment agenda. Parliament agreed on a set of six thematic issues that would be submitted to deliberative polling participants for specific recommendations (Center for Deliberative Democracy 2017). As with the 2012 convention in Ireland, the recommendations were not binding on parliament and so assessing their influence is difficult. Later political negotiations among the MPP, opposition parties and the president resulted in significant changes to the scope and content of the final amendments compared with what was initially proposed, but a package was ultimately agreed (Houlihan 2020a).

Public participation to contribute drafting ideas and inform decision-makers about public views

Consultations are often used to enable the public to contribute ideas and opinions about constitutional content during the drafting stage. This can help decision-makers better understand public views and may influence respective bargaining power, particularly where a plurality of political views is represented in a constitution-making body.

Egypt (2012) is a notable case in point. The constituent assembly organized public consultations through a combination of in-person and online mechanisms during drafting. The body's online platform enabled the public to provide comments and vote on proposed drafts and specific provisions. The assembly received over 35,000 written submissions and over 650,000 votes and comments. A study of the process following enactment of the new constitution found that, during the period when the 2012 assembly included both Islamist and non-Islamist figures, provisions with higher public approval rates were less likely to be changed during political negotiations compared with those with lower public approval rates. Moreover, provisions relating to rights and freedoms were more likely to change based on the content of public inputs than were others. After the non-Islamist representatives boycotted the body, however, decision-makers—now dominated by a single group—became less responsive to public opinion (Maboudi and Nadi 2016). Ultimately, the 2012 Constitution was revoked six months later, but it remains a notable lesson on how public opinion can potentially influence constitutional negotiations.

In **Mexico City** (2016–2017), designers similarly wanted the public to be able to contribute to the drafting process, in part to support legitimacy (Laboratorio para la Ciudad 2018). As one of several consultation mechanisms, officials set up a digital platform developed in partnership with a social enterprise company. It allowed anyone to suggest any idea for inclusion in the constitution, but a certain threshold of supporters was required to advance a proposal for formal consideration. Those with at least 5,000 supporting signatures were automatically reviewed by legal experts; petitions with over 10,000 signatures were invited to present to the drafting committee; and those with over 50,000 signatures could present to the mayor, who would then present the initial draft to a 100-person constituent

assembly for deliberation, amendment and approval (Cities of Service 2019). This endeavour garnered around 31,000 submissions and 341 proposals that received over 400,000 votes in a city of 9 million. Decision rules on signature thresholds were intended to support accountability and responsiveness; all 12 petitions that surpassed the 10,000-signature threshold were included in the initial draft, but members of the constituent assembly were not bound to include popularly supported proposals in the final constitution. Around 76 per cent of ideas generated from the online platform and included in the initial draft were reportedly retained in the final version (Swiney 2019). The resulting constitution is aspirational and provides expansive rights, but 40 of its 71 articles are being challenged in court by the federal government and other organizations as conflicting with the federal Constitution of Mexico (Langner 2017). From a process design perspective, reliance on a numbers threshold for formal review should be considered with caution; it means that popular but potentially unrealistic proposals will receive attention, while high-quality but less well-publicized ideas will not necessarily be considered.

Sometimes, consultative referendums can help decision-makers weigh public opinion about a constitutional reform package before undertaking a formal adoption process. In **Canada** in 1992, political leaders called a non-binding referendum to gauge the level of public support, both overall and in particular provinces, for amending the Constitution based on the earlier negotiated 'Charlottetown Accord'. The Charlottetown Accord had been developed following the 1990 failure of an earlier accord that would have reformed the Constitution to grant increased autonomy to Quebec. Many Canadians felt that they had been insufficiently consulted in 1990, so the 1992 agreement included various civil society and identity groups as well as the federal and provincial governments. Despite this broader inclusion, a majority of Canadians—including 57 per cent of Quebecers—rejected the reform package. Some commentators now argue that this process created a precedent whereby any substantial constitutional reforms should be submitted to popular referendum (Albert 2019: 131–32).

Public participation to resolve a specific contentious issue

Where elites cannot agree on proposals for reform relating to a particular issue, or where some issues are perceived as being so fundamental that they require public approval, public participation can be an essential mechanism to support political decision-making.

In 1988, the constituent assembly of **Brazil** could not agree on whether the system of government should be presidential or parliamentary. In order to move forward, they agreed to provisionally install a presidential system, but to consult the public through a referendum after five years on whether to continue or switch to a parliamentary system (Martínez-Lara 1996).[6] Although voters ultimately wanted to retain the presidential system, the deferment of the issue and recourse to the public in an up or down vote helped political elites agree on the remainder of the constitutional reform package and enact changes.

In **Ireland**, the issue of abortion had long been contentious in both political and public discourse. The debate revolved around public pressure to repeal or replace the 8th Amendment, which restricted the grounds for abortion. A risk-averse political class was reluctant to take the lead on this issue. Building on the relative success of the 2012 Convention on the Constitution, politicians decided to convoke a randomly selected Citizens' Assembly in 2016 to discuss reforming the abortion prohibition. The assembly recommended that the provision be repealed. This result, and the Irish public's level of trust in the random assembly process, created a political environment in which the Oireachtas (parliament) was able to put the issue to a referendum. The public voted in May 2018 to repeal the amendment.

Public participation to encourage political consensus

As noted throughout, political consensus is crucial for democratic constitution-*building*. If all sides can feel satisfied with the constitution as a legitimate framework for politics, they are more likely to respect its constraints and resolve their differences through constitutional mechanisms. In some cases, public opinion can encourage such consensus.

In **South Africa** (1988–1996) and **Tunisia** (2011–2014), the threat of public engagement and potential public support for particular political positions were enough to promote political consensus among a plurality of political actors, thanks to an interesting rule of procedure. In both cases, the rules for decision-making in the constituent assemblies were the same: the draft could be approved by a two-thirds supermajority of members. If no consensus reached the two-thirds threshold, a draft passed by a majority could instead be approved by the people at a referendum. In both assemblies, there was a great deal of pressure to find a draft that would garner the required supermajority consensus lest the assembly be deemed to have failed in its mandate. The rule also provided specific incentives. It incentivized minority parties to compromise to avoid their fate being decided by a political and popular majority, and also encouraged majority parties to compromise to avoid the risk of losing the referendum. In the end, both constituent assemblies passed their drafts with the required two-thirds consensus.

Similarly, in **Mongolia** (2017–2019), the threat of further public engagement downstream in the process likely contributed to building political consensus among debating elites. After the deliberative polling and drafting process, politicians again asked for public comment on the proposed amendment package. There were significant disagreements on the text, and political negotiations began to break down. Around this time, the MPP passed legislation for the amendments to be ratified by referendum, possibly alongside early elections. This decision provided a mechanism to support the popular legitimacy of the amendments, but it also served as a reminder of the MPP's bargaining power, since the party held a supermajority of parliamentary seats. Both the opposition and the president opposed the idea of a referendum, though for different reasons. The president vetoed the referendum legislation, but the MPP had enough seats to override this. Ultimately, the situation pushed all parties to compromise. As a result, parliament accepted the president's veto and adopted the negotiated amendment package via a legislative act (Odonhkuu 2020).

Tunisia (2011–2014) provides yet another example of how targeted, if informal, external pressure can sometimes foster compromise and agreement. In the summer of 2013, negotiations in the constituent assembly were on the verge of collapsing when four civil society organizations, including the largest coalition of trade unions, called a 'national dialogue' to demand that the politicians finish the job of completing and passing the draft constitution. The dialogue ran in parallel to the constituent assembly. Although it was not formally part of the process, and was not particularly inclusive, the influence of these powerful broad-based civil society associations was instrumental in helping resolve underlying political disputes (Murray 2017).

Photo: Premiere Séance de l'Assemblée Constituante Tunisienne le 22 November 2011 [First session of Tunisia's Constituent Assembly, 22 November 2011], © Citizen59, published with CC licence BY-SA 2.0, <https://www.flickr.com/photos/t_abdelmoumen/6408021069>.

Endnotes

1. In fact, some scholars have questioned whether there is 'even a scintilla of evidence that [broad participation] improves the durability of the democratic content of constitutions' (Horowitz in Diamond et al. 2014: 100).

2. Other studies have found, in contrast, that public participation is unlikely to have a significant impact on the content of the constitutional text—at least not directly—particularly when political parties are strong (see Hudson 2021b).

3. The 1945 Ley del Referéndum Nacional (National Referendum Law) and the 1947 Ley de Sucesión en la Jefatura del Estado (Law of Succession in the Head of State) required that any changes to fundamental laws be approved by the Cortes and submitted to a public referendum.

4. Chile has a significant historical experience with the plebiscite as an institution. In 1988, a plebiscite required under the Constitution triggered the end of Augusto Pinochet's military regime when 56 per cent of voters opted for a transition to democracy through the holding of democratic elections rather than continue with military rule (Robinson 1988). The following year, voters elected Patricio Aylwin as the new president.

5. For more information on the selection methodology, see Behavior & Attitudes, 'Constitutional convention—members of the public recruitment process', 2012, <http://www.constitutionalconvention.ie/Documents/BehaviourAndAttitudes.pdf>, accessed 13 February 2021.

6. A monarchical system was also listed on the referendum ballot, but not given serious support.

4. Strengthening public participation: guiding considerations

This last section provides some guiding considerations, assembled from recent cases, for decision-makers to keep in mind when designing participation processes. They focus on issues or steps that may help make an overall participation process, and particular participation opportunities or mechanisms, more effective given specific contexts, resources and needs.

In considering *effectiveness* here, we do not mean the *impact* of public participation on desirable outcomes of a broader constitutional transition—such as increased democracy or a decrease in violent conflict. While this is extremely important, it is not possible for this guidance paper to effectively account for all possible external variables that may contribute to these long-term aims.

Rather, effectiveness here refers to the immediate context of the constitution-building process—whether and how public participation mechanisms can more meaningfully engage the attention and contributions of a large and inclusive portion of the public, and how public feedback can be collected, analysed and used to help shape, in some interactive way, the dynamics of decision-making and political bargaining.

4.1. The legal/political framework

The frameworks governing a constitution-building process are often the basis for whether, and sometimes when and how, public participation will take place. Framing rules may be found in the existing constitution, in legislation passed or decrees ordered specifically to govern the constitution-building process, and/or in related political or peace agreements. Wherever the framework is situated, careful consideration should be given to explicit, binding commitments to public participation. Where constitution-building is part of a negotiated transition, frameworks sometimes also establish decision rules intended to shape the ways in which public engagement and elite bargaining processes interact.

An example of a peace agreement framework is the 2018 Revitalized Agreement on the Resolution of the Conflict in the Republic of **South Sudan** (R-ARCSS). The R-ARCSS not only mandates a participatory process, it also sets some requirements for timing and inclusion. Public consultations must be held, for example, prior to the reconstitution of the National Constitution Review Commission, and must include outreach to civil society, women's groups, youth and faith-based groups (article 6.6). The R-ARCSS also specifies various non-state actors who must be represented in the commission, mandates the

commission to carry out 'wide consultation' and civic education during drafting, and requires that a national conference be established to adopt the text produced by the commission.

Both **Chile**'s (2019–2022)[1] and **Kenya**'s (2008–2010) processes were governed by a combination of frameworks. These included: a political agreement among elites preceding the reform process; constitutional amendment to entrench the political agreement and enable a process to replace the existing constitution; and regular legislation to establish relevant constitution-making bodies and address issues relating to participation and inclusion. As noted above, Chile's framework facilitated public engagement in decision-making to initiate constitutional reform and select the type of constitution-making body that would be used, as well as a ratification referendum. Legislation also established gender inclusion requirements for representation on the constitution-making body. In Kenya, the Constitution Review Act (No. 9 of 2008) established a Committee of Experts (CoE) mandated to educate and consult with the public and to set up a 'reference group' of civil society representatives. The law also established substantive constraints that made earlier popular and political agreements on constitutional content binding on the CoE, and put in place a series of decision rules to help build political consensus around the draft (articles 3(d), 30(1)(a) and 33; see also Murray 2020; Ndegwa et al. 2012).

Beyond this, it is important to consider how other laws or regulations that are already in place may have an impact on meaningful participation. In **Fiji**'s 2012–2013 process, for example, existing decrees on public order and media regulation contributed to restricting public gatherings and censoring media reporting on procedural and substantive aspects of the constitution-building process. This was problematic for both civic education and public participation (Kant and Rakuita 2014).

4.2. Early and effective planning

It takes time to strategize, plan, gather resources, identify expertise and build capacity for a public participation process. Decision-makers charged with these tasks should therefore start as early as possible. Common questions (and planning dilemmas) often include the following:

- On what issues (procedural and substantive) will the public be consulted?

- Will all members of the public be consulted on all issues or some segments on some issues?

- Will participation take place at community, regional or national levels, or at all of them?

- When during the process should the public be engaged (and on which issues)?

- How will public opinion data be captured and organized and fed into the drafting and deliberation processes?

- Who (which institutions or groups) will lead the public participation process? Who will be partners?

- How will the public—or different groups within it—be educated and prepared to discuss these topics effectively?

- Who (which institutions or groups) will lead the education process and develop curricula?

- What human, financial, material and technical resources are needed for all of this? What resources are available?

- What timelines are feasible and realistic for gathering, collating and reviewing public inputs?

It is important to consider these matters at the start, particularly as it can take several months to make relevant decisions, develop work plans, gather resources, and capacitate the institutions and individuals involved. Plans and timelines, once established, also need to be conveyed to the public in a transparent and understandable way.

Often, a constitution-making body is organized to include a specific committee charged with running the participation process, as in **Nepal** or **Ecuador**. This allows specialization and focus for public engagement, but it does not supplant the need for early and detailed planning. Specialist staff capable of setting up and running information management systems are also important. Different participation mechanisms require different degrees of methodological or technical expertise, and the organization and management of thousands of data inputs are complex and often daunting tasks.

Accordingly, the planning process should include an assessment of existing resources. This might involve potential partnerships with civil society, governmental or semi-governmental organizations, international organizations,[2] social movements, traditional or customary bodies and religious organizations, among others. To maximize these potential resources, the planning process can be collaborative, where feasible, while ensuring that there are appropriate mechanisms for oversight and accountability. The design of a process should realistically account for the resources and expertise available.

To support credibility more broadly, it is also important to ensure that methodologies are sound (rooted both in good scientific methods and practices and in country context), that tools are tested, and that procedures for data analysis and use are set out in advance. In **Nepal** (2008–2012), for example, despite earnest efforts to ensure broad inclusion and participation, insufficient planning undermined the credibility of the participation process to some extent and diminished the utility of opinion data. The first constituent assembly formed two committees dedicated to public participation: one to keep people informed and one to gather public views. The latter held consultations prior to initial drafting so that public views could feed into the writing process. To gather information, it used 11 different surveys totalling nearly 300 questions, set a short participation window of around one month (for this phase), and had no clear plan for how the constituent assembly would organize, review and address the data received for drafting purposes (Khanal 2014: 16–18). As a result, participation dwindled, the quality of public feedback decreased, many submissions were effectively ignored during drafting, and the resulting analysis of public opinion did not accurately reflect the nature and status of public views.

On the other hand, in **Uganda** (1992), the Constitutional Commission used multiple levels of review for all data entry in its statistical analysis, which helped support data integrity. In **Kenya** (2000–2003), planning included a degree of logistical decentralization: the Constitution of Kenya Review Commission (CKRC) set up documentation centres in all administrative districts whose tasks included serving as depositories for public submissions that were then sent to the central body for analysis (Constitution of Kenya Review Commission 2005).

4.3. The timing of participation

As part of an early and effective planning process, it is important to make decisions about *when* public engagement will be sought during the different stages of constitution-building. This, of course, is tied to decisions about *how* public comments and opinions will feed into planning and drafting decisions and political deliberations. As comparative research indicates, the timing of participation is linked to a range of desirable outcomes—from longer-term

democratization to the protection of rights within the text (Eisenstadt et al. 2015, 2017; Fruhstorfer and Hudson 2021). As noted elsewhere, specific timing choices will largely depend on the roots of the constitution-building project and the specific context of the country. With that in mind, however, a good rule of thumb is that there should be early and inclusive engagement ahead of drafting and consultations during drafting.

4.4. Avoid working in silos

It is helpful to avoid situations in which participatory drafting and political decision-making operate in silos. An example would be when one constitution-making body (such as an appointed constitutional review commission charged with public participation) drafts the text and then hands over, or relays, that text to a different political decision-making body (such as a regular legislature) for deliberation and adoption. This can be problematic because it separates the process of building *popular* support and legitimacy around the draft from the process of building *political* support. The risk is that a draft that enjoys broad popular support might not have the backing of political elites. In that case, the draft could be dismantled, fundamentally altered or rejected during later negotiations. This occurred, for example, in **Kenya** (2000–2005), **Iceland** (2011–2013), **Tanzania** (2011–2014) and **The Gambia** (2018–2020).

As much as possible, the public participation process should feed into the drafting process, and the drafting process should be integrated with political consensus-building processes. Public participation and elite negotiations seem to work best when they complement one another (see e.g. Negretto 2017; Maboudi and Nadi 2016).

A comparison of **Kenya**'s two recent processes illustrates this issue. The 2005 process involved a number of separate decision points, which enabled negotiated agreements to be reopened and renegotiated multiple times. The initial draft developed by the constitutional review commission reflected a number of popularly supported views, which had been gathered through a robust participation process. It also reflected the technical and normative assessments of commissioners themselves. In reality, the public was deeply divided, as were commissioners and politicians, on a number of contentious issues (Cottrell and Ghai 2004). The resulting draft was then deliberated and adopted by a National Constitutional Conference (NCC) that comprised all members of parliament plus district delegates, political parties and interest groups. Following this, parliament still needed to separately approve and adopt the draft despite the fact that its members had been part of the NCC. Parliament was not bound by the NCC decision, and for various reasons it reopened the negotiation process. Members ultimately set aside the NCC draft and instead formally approved a different draft that had been developed by the government. A final decision point was a ratification referendum. Ahead of the vote, campaigns focused on ethnic mobilization and divisions, seeking to rally Kenyans around the positions of their ethnic leaders. Ultimately, voters rejected the draft, in part because of genuine disagreement over its content, and in part as a repudiation of the handling of the NCC draft, but voting was largely along ethnic lines. The longer-term impact of this collapse in negotiated consensus was terrible. The highly charged referendum campaigns, which often involved violence, exacerbated existing ethnic tensions and set a course for the 2007 post-election violence, which killed over a thousand people (Murray 2020).

To avoid these challenges, designers of the 2008–2010 process sought to reduce the number of decision points and to more effectively integrate participatory drafting and political decision-making. Under the framing legislation, drafters and political decision-makers had to adhere to existing agreements—meaning the large, consensus-based elements of (three) earlier drafts developed during the 2005 process. The Committee of Experts (CoE), as the technical drafting body, was tasked with identifying these issues of consensus

and contention and then consulting the public on the unresolved topics. Using public feedback, the CoE was to develop potential resolutions, articulate pros and cons, and make recommendations to a parliamentary select committee (PSC) made up of leaders from different sides of the political divide. Among its other functions, the PSC was tasked with deliberating on the CoE draft, building political consensus on contentious issues identified by the CoE, and feeding these resolutions back to the CoE so that it could revise the draft accordingly. Neither body was technically allowed to alter previously agreed provisions, but some alterations were nevertheless debated in critical exchanges between the CoE and the PSC (Constitution of Kenya Review Act, No. 9 of 2008, articles 3(d), 30(1)(a) and 33; see also Murray 2020; Ndegwa et al. 2012). Getting buy-in among political elites through the PSC *during* the development of the draft was a key advantage when passing the draft through parliament at a later stage.
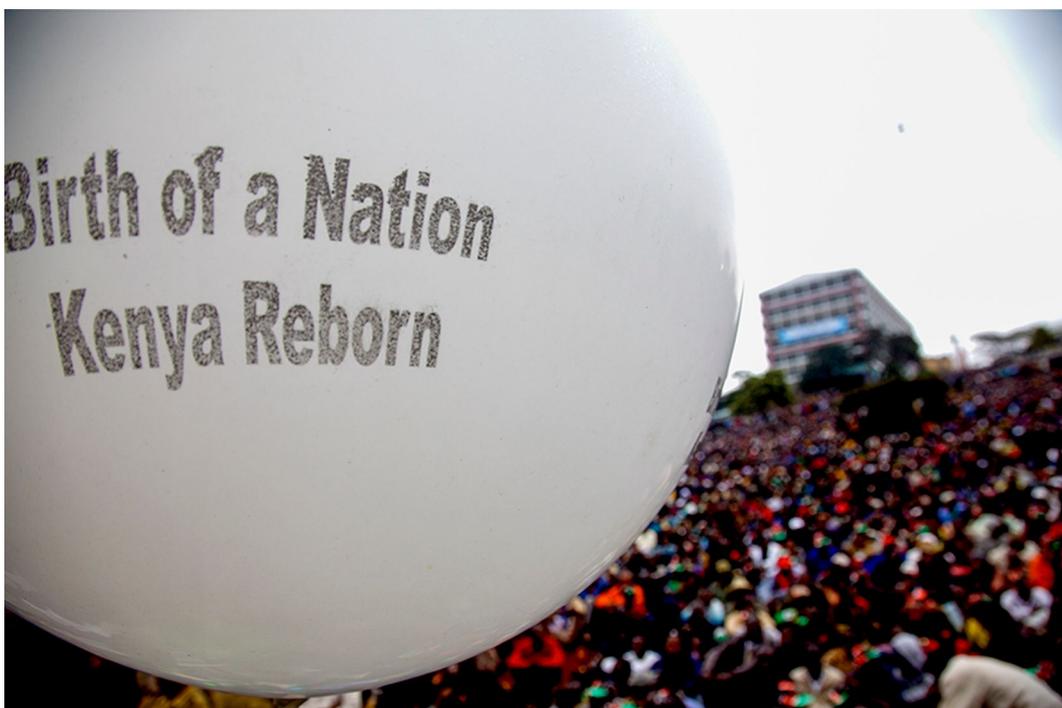
Photo: Kenya's President Mwai Kibaki signed the new constitution at Uhuru Park in Nairobi witnessed by thousands of citizens, 27 August 2010, published with kind permission from © Felix Masi, all rights reserved.

In addition to integrating political consensus-building and participatory drafting, the process included some fail-safes. If parliament failed to approve the draft (as negotiated by the CoE and the PSC), it was required to propose amendments and submit them to the CoE for redrafting. After redrafting, parliament no longer had the option to reject the draft; it could only approve it and submit it to the attorney general for publication (Constitution of Kenya Review Act, No. 9 of 2008, article 33(10); Ndegwa et al. 2012: 59). It is notable that these rules were enacted *by parliament* in order to constrain itself.

4.5. Transparency and communication

The constitution-making body and other relevant public authorities should try to make the constitution-building process as transparent as possible. That includes sharing information on how the process will incorporate public engagement. Once the process is decided, the

plans, timelines and objectives should be widely publicized so that people know what to expect and when. This should include information on the mechanisms for public engagement that will be used and, importantly, what will be done with public inputs. If, as is likely, consultations are to be analysed and weighed by the constitution-making body, but no single input will be decisive, it is important to communicate in advance on how this will take place. This is crucial for managing expectations and to mitigate the risk that the public will feel ignored or let down.

Relatedly, any constitution-making body should be required to provide a final report at the end of a process. The report should document all aspects of the participation process, including how public input was used and the ways in which decisions were made. Where public feedback was not incorporated into the proposed draft, the report should explain why. Often there will be significant divergence of views on particular issues, and in some cases majoritarian public opinion may be rejected at the drafting stage if, for example, it undermines necessary political agreements or otherwise diverges from agreed principles. Transparency and accounting of such decisions support trust and legitimacy in the process as well as civic education about the draft and its development.

In situations where the drafting body is not the same body that will deliberate and adopt the constitution (see above on avoiding silos), the report may also provide guidance and clarification for decision-makers. The Constitution of Kenya Review Commission's reports and civic education manuals (2003 and 2005) have become a model for this. Other useful examples include reports from the Uganda Constitutional Commission (1995), the Commission to Review the Constitution of Sierra Leone (2008), The Gambia Constitutional Review Commission (2020), and the Constitution Review Commission of Ghana (2011).

It is important to keep in mind, however, that the broadcasting of all public views can also create potential complications, for example by making the public conscious of issues that either were not particularly important before but will gain momentum in the public arena, or are quite important but not necessarily appropriate to address at the constitutional level. In Brazil in 1987, for example, several thousand submissions asked for Esperanto to be taught in public schools, and thousands more wanted to constitutionalize the regulation of private detectives. These matters are generally addressed at the regulatory, rather than constitutional, level. Due attention and sensitivity should be given to the process of reporting (Hudson 2021b).

4.6. Inclusion and context

Participation should not only be broad; it also needs to be *inclusive*. The term *inclusion* often refers to the groups represented in the constitution-making body, but there are also inclusion considerations for the design of direct participation processes. Inclusion is about *who* is provided with effective opportunities to share their views and about identifying ways in which groups can be accessed and empowered. This means that process designers need to work out, first, *which* groups and communities might be marginalized, under-included, under-represented or otherwise hard to reach. And, second, they need to figure out *how* to provide meaningful opportunities for individuals within these communities and groups to understand and discuss the issues at stake and to share their needs and opinions.

For the first task, participation processes often need to specifically target indigenous peoples, women, people from rural areas, diaspora, youth, persons with disabilities, and ethnic/religious/linguistic minorities. Members of these groups often have distinct and intersectional constitutional interests in addition to their interests as members of the broader political community. How might the needs and priorities of an elderly woman from an ethnic minority community living in a rural area differ from those of a woman from the capital city who runs her own business?

Photo: The forum 'The Constituent Process in CDMX and indigenous peoples' was held in Mexico on 1 September 2016, © Carlos Luna/Secretaria de Cultura CDMX, published with CC licence BY-SA 2.0, <https://www.flickr.com/photos/113756879@N03/29415096465>.

For the second task, process designers need to consider what potential access barriers individuals within these groups may face. These include, for example, the existence of customary or cultural practices that may facilitate or hinder communications; the group's past experience with political engagement and its overall communication methods and styles; language, literacy and numeracy issues; any special accommodation needs; and a host of other contextual and group-specific issues. Importantly, planning should ensure that there are no risks of reprisals or discrimination against those wishing to participate.

Often, meetings that include men, women and young people together can encourage fruitful dialogue, but sometimes culture or custom means that older persons or men are more likely to speak up than women or youth. In **The Gambia** (2018–2019), the drafting body accounted for the tendency of elders and men to lead discussions in the public space by organizing separate focus groups with youth, women, persons with disabilities and the diaspora. Commissioners coordinated in advance with elders and local leaders to sensitize them to the planned participation process and gain their support in working with the communities. This meant that, when village forums and focus groups were held, local leaders encouraged targeted participants to attend. This helped to foster trust and also to mitigate challenges due to self-selection bias.

In **Afghanistan**, customary practices and deep religious conservatism in many areas of the country required special targeting to gather women's diverse views. Civil society organizations and the Ministry of Women's Affairs were important partners for the constitutional commission and helped survey and channel women's views to the drafting body. A number of women's community meetings in groups of 30–60 people were held around the country, as well as a larger meeting in Kabul. This targeted outreach on women's direct participation was complemented by women's inclusive representation on the body that adopted the new constitution. The use of a Loya Jirga (a type of legal tribal council in

Pashtunwali) for this purpose was itself a reflection of Afghanistan's particular context, history and experience. The body's traditional structure was modified to reserve 20 per cent of the seats for women, including refugee women.

4.7. Use of multiple participation mechanisms and levels

As noted above, the choices of *which* mechanisms to use, *where* in the country, with *whom* and *when* during the constitution-building process all depend on context and the experiences and skills/capacities of targeted communities and groups. Not only should participation opportunities be provided at different stages of the constitution-building process, but a range of participation approaches should also be used during each participation opportunity.

Different levels of interaction can be useful depending on participants' knowledge of or expertise in key issues. For some topics, professional or specialized knowledge may be more useful than lay opinions—for example, on the number of days that should pass between elections and assuming office, or on particular qualifications for public service appointments. For these topics, national consultations or deliberations with professional or specialist organizations or individuals should be built into participation planning.

Similar considerations apply when distinguishing between national, regional and local participation interactions. Some locales and peoples will have more relevant experiences or knowledge than others, or they may have a particular stake in the issue at hand.

The use of digital technologies—for example, online petitions and surveys or social media platforms—may be useful to target people familiar with technology and who live in areas with high Internet penetration. These people are likely to have higher levels of literacy, numeracy and education. But digital outreach should always be paired with more classic or conventional mechanisms, such as town hall meetings, public consultation forums, traditional gatherings such as *bantaba* meetings or *cabildos*, or targeted focus group discussions—all of which can be both deliberative and consultative in nature. This is important to reach communities and individuals with less access to or familiarity with online tools and people who may have less literacy or numeracy knowledge or who may need other accommodations or adaptations. The incorporation of deliberative forums, such as mini-publics and self-selecting bodies, in addition to purely consultative engagements, can further support *informed* public inputs to the constitution-building process.

Processes that have famously embraced digital communication technologies, for example in **Mexico City**, **Egypt** and **Iceland**, also held in-person and local participation opportunities, while processes that primarily used more traditional or conventional consultation methods, as in **The Gambia**, **Chile** and **Mongolia**, also employed deliberative forums and some digital communications throughout the process.

4.8. Civic education

Civic education is a crucial element of any effective public participation process. Participation requires people to navigate an often complex array of institutions, to be aware of and follow timelines and procedures, and to share opinions or make decisions about complicated issues. In order to do this effectively, civic education is the backbone of any meaningful participation process and should be used throughout a constitution-building project.[3] It is important to note, however, the risk that civic education materials may be skewed (e.g. towards international norms), biased (e.g. towards a particular party, ethnic group or position), or inaccurate or misleading (e.g. when developers of civic education materials have limited knowledge of constitutions and constitution-building processes). It is important not only to include a robust and continuous civic education component (one that

preferably starts early in the reform process), but also to task or collaborate with civic education providers that are able to provide impartial, informed information.

For example, during the initiation and agenda-setting phase, civic education can provide valuable information on the implications of different process-related decisions that the public may be asked to make (e.g. by voting in a referendum to select the type of constitution-making body to be used). It can also enhance knowledge of constitutional issues to support the provision of feedback on constitutional reform priorities. In **South Africa** in 1995, for example, the Constitutional Assembly was not mandated to conduct civic education, but it recognized its importance for public participation and knowledge more broadly. The outreach department distributed 160,000 copies of the 'Constitutional Talk' newsletter on a biweekly basis, published booklets and comic books, broadcast weekly TV shows and multilingual radio programmes, ran adverts in national, regional and local newspapers, and put up outdoor billboards.

Once a draft constitution is developed, civic education campaigns ensure that the public can understand and evaluate its content. In **The Gambia** (2019), the drafting commission disseminated the draft with an explanatory memorandum published in six languages.

Understanding the content of a draft constitution or amendment, how decisions were made, and implications for the future of the country and individual lives is also important in the run-up to a ratification referendum. Particularly ahead of a referendum, civic education should include information on the procedures for the referendum itself. In **Ecuador**, for example, ahead of voting in 1998, leaders developed and disseminated a glossary of important terms relating to the upcoming referendum to help familiarize the public with the process and their roles (Brandt et al. 2011).

It is also useful for a constitution-making body to create an official website where educational and information materials (including relevant legal frameworks and process plans) can be accessed, and to disseminate the website widely.

As noted above, civic education processes often involve partnerships with civil society, universities or governmental semi-state organizations (such as national councils for civic education). These groups can provide technical expertise and access to communities in ways that are more efficient and effective than constitution-making bodies working alone. Where such partnerships are developed, it is also important to ensure that appropriate coordination, oversight and accountability mechanisms are in place. In **Fiji**, for example, although the government committed to robust civic education for the 2012–2013 process, the regime's programme had significant gaps. Attempts by civil society to supplement the government's education programmes were hindered, in part, by limited time for coordination and, in the run-up to the convening of the Constitutional Review Commission, by restrictive public order decrees that required permissions before people could gather to learn and discuss (Kant and Rakuita 2014).

Endnotes

1. At the time of publication in 2021, Chile's process was ongoing, with plans to extend into 2022.
2. International IDEA, for example, has developed a Public Participation Platform (PPP) system to support the development of online questionnaires on constitution-building issues, the management and export of survey data for separate analysis, and the storage and organization of written public submissions and communications. The PPP was piloted in The Gambia in partnership with the Constitutional Review Commission and may be tailored for use in other countries. In Mongolia, the 2017 deliberative polling process was supported by the Center for Deliberative Democracy at Stanford University, while Mexico City's online public consultations were developed in partnership with Change.org.
3. International IDEA has developed three videos to support civic education for constitution-making processes. The videos are available in several languages on YouTube or ConstitutionNet.org. These include 'What is a constitution?' (<https://www.youtube.com/watch?v=0UzKD8rZCc0>), 'Why do constitutions matter?' (<https://www.youtube.com/watch?v=EeWfe2eZ_CI&t=12s>) and 'How are constitutions made?' (<https://www.youtube.com/watch?v=J36s0MTTxc8>). All videos are available on ConstitutionNet.org, along with a range of other constitution-making knowledge products, resources and tools.

Conclusion

Perhaps the most notable trend in constitution-making in recent decades is the emphasis on public participation. Today, it is a nearly ubiquitous feature of the constitution-building process. Participation is assumed to both normatively and instrumentally contribute to the legitimacy and quality of the (new) constitutional order, though in ways that are not well understood. The emphasis on participation reflects an enhanced focus on the broader constitution-building *process* itself and its relationship to cultivating a sense of national ownership, supporting sustainable transitions from conflict to peace and authoritarianism to democracy, and building a common notion of 'the state'. Participation is fundamental to the idea that a constitution is 'not an act of government, but an act of the people constituting a government' (Paine 1791).

But while participation can be valuable, it cannot resolve all constitution-building issues on its own. A 'people-driven' process that does not also secure a sufficient consensus among elites will rarely come to a successful conclusion—whether to enact the new or amended constitution or for its effective implementation. The question should not be whether to pursue a participatory process or an elite-driven one, but rather how can the role of the broader public be organized in ways that complement, constrain and shape the dynamics of political arguing and bargaining around both process and content decisions, at all stages of the constitution-building project?

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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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Public participation has become a core element of modern constitution-building. Robust participation is credited with a range of benefits—from improving individual behaviours and attitudes to democracy to shaping elite bargaining dynamics, improving constitutional content, and strengthening outcomes for democracy and peace. Yet it is not well understood whether and how public participation can achieve these ends. Much of what we think we know about participatory constitution-building remains theoretical. No two processes are alike, and there is no agreed definition of what constitutes a 'participatory process'.

Yet national decision-makers must contend with the key question: *What does a robust participation process look like for a particular country, at a particular time, in a particular context?* What considerations and principles can be derived from comparative experience to guide decisions?

This Policy Paper unpacks the forms and functions of public participation across different stages of the constitution-building process and considers the ways in which public engagement can influence the dynamics of the process, including political negotiations.