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Constitution Making and the Right to Take Part in a Public Affair

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Constitution making is a contest over the distribution, redistribution, and limitation of power. The making or remaking of a constitution is of particular significance in divided and conflicted societies, where the process frequently is part of peacemaking and nation-building endeavors. Traditionally, negotiating a constitution was the province of political leaders who held power or claimed it. Drafting the constitutional text was expert work. The public was, at most, drawn in only to give consent to the final version. In a significant change, it is now widely assumed that whatever the axes of conflict, the constitutional outcome will be more sustainable if those who experienced past injustices are involved in creating new solutions. The widening and deepening of public participation characteristic of many recent processes have involved power sharing with a general public that extends to groups that were previously excluded: women, minorities, the poor, and the otherwise marginalized. The resulting process may on the one

hand seem more just, but on the other be less controlled.

The International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976, declared a right to take part in public affairs. If this general right to democratic governance is taken to extend to constitution making, then the only issue for discussion—no small issue—is how best to implement the right through practices that are fair, efficient, and effective. This chapter explains that the first part of this proposition, that participation is a requirement of a constitution-making process, has only recently gained recognition in international law, and that the law remains in need of further clarification and development in important respects. Legal justifications matter, not least as a resource for disadvantaged members of the polity, and it is therefore worthwhile to substantiate the case for a legal right to participation, as this chapter aims to do. But constitution making is an inherently political as well as legal process. It is not sur-

prising, then, that the emergence of a legal right to participation has been paralleled by the emergence of normative political criteria for participation, along with considerable experimentation with participatory practices. Political practice has reinforced and even run ahead of the development of the law. The discussion that follows gives attention to the legal, normative, and practical aspects of democratic constitution making, all of which are involved in the realization of the high aspirations of the right to participate.

A Continuing Debate

Once the ICCPR came into force, and as legal thinking about the right to democracy developed, constitution making was at first ignored in favor of traditional assumptions about its distinctive nature as a process standing above and apart from the everyday business of governance. The right to democracy acquired a strong interpretation, but only in relation to the day-to-day activities of voting and office holding. In 1992, in his classic article “The emerging right to democratic governance,” Thomas M. Franck identified a change in the concept of democracy found in international law, from aspiration to entitlement, political vision to “normative rule of the international system.”¹ As a result of this article, much effort has been devoted to defining an applicable standard for what constitutes a democracy. The focus has continued to be on procedure—on, for example: free and fair elections; the rights of candidates, political parties, and other organizations to engage in the political sphere; and activities that allow for codes, remedies, and enforcement as befits a rule of the international system.² Progress has allowed Franck, revisiting the topic in this volume with coauthor Arun K. Thiruvengadam, to find the right now established as a clear “general requirement of public participation in governance.”³ Con-

stitution making, however, is still widely assumed to be a prior condition for, rather than a part of, governance, and so may remain beyond the reach of the right to participate in governance.

In parallel with such developments in international law, a philosophical argument has developed favoring a right to participate in constitution making. This has asserted the importance of democratic constitutions in a world of multiple and intersecting nations, cultures, and conflicts. James Tully, a leading exponent of this view, asks why the constitution is seemingly the “one area of modern politics that has not been democratized over the last three hundred years.”⁴ From his perspective, a dominant tradition defining constitutional matters as outside of and above normal politics, the province of an expert elite, is the fairy-tale emperor with no clothes. Constitution making is the foundation of democratic governance. Why should the people not share in making the constitutions that govern them, and have their moral claim to participate bolstered by a legal right that all are bound to respect?

In the recent unprecedented era of constitution making, political actors also have taken up the issue of participation. Constitution-making processes involving experiments in public participation have multiplied.⁵ The 2 million public submissions to South Africa’s constitutional assembly have set a standard for constitution makers, unmatched as yet in other nations.⁶ Even the 2004 Transitional Administrative Law for Iraq, itself written without public participation, mandated informed public debate in the constitutional process.⁷

No amount of intellectual or practical innovation necessarily creates a “normative rule of the international system,” a right in international law to take part in the making of constitutions. But Franck and Thiruvengadam now determine that there is “a growing

convergence around universal principles of legitimate governance and these are tending to be applicable also to the process of constitution drafting.”⁸ This chapter suggests that evidence of various kinds allows us to go further than this cautious conclusion. In legal developments, the right granted in Article 25 of the ICCPR “to take part in the conduct of public affairs” has been interpreted as extending to the making of constitutions.⁹ International, regional, and national charters of rights have embodied increasingly expansive guarantees of access to every aspect of democratic governance, leading, by implication or deliberate design, toward including constitution making as governance. The Canadian Supreme Court ruling of 1998 on the *Reference re Secession of Quebec*, influential beyond its borders, has made dialogue over constitutional matters an obligation of the state and citizens.¹⁰ In parallel, political theory and action provide both trenchant arguments and a body of practice that support public involvement as a requisite of democratic constitution making.

Yet both the authority and the merits of the right to participate in constitution making remain contested, unsurprisingly, when the exercise of power and its legitimacy are at stake. How might the issue best be taken forward to contribute constructively to the practice of constitution making? If the legal regime is all, then a more firmly established legal entitlement can serve advocates of participation. Political scientist Tony Evans has argued critically that such a legal approach so dominates the human rights field that inadequacies are naturally taken to require only more lawyerly “refining, polishing, and elaborating accepted norms and standards, in an attempt to make the regime more elegant, sophisticated, imposing, and magisterial.”¹¹ But establishing a firm legal basis would also be a politically significant move, fortifying a moral claim with an applicable right. The present (relative) legal reticence regarding constitu-

tion making does not diminish the significance of holding a legal right, and not just a political desire, to participate in constitution making. Rights are aspirations and resources as well as entitlements.¹² Aspirations will no doubt be pursued by every political means, but political means are mightily reinforced when a defined and potentially enforceable entitlement exists alongside. Thus, this chapter argues for a dual perspective, lawyerly refinement alongside political development as essential counterparts. To clarify the present state of both law and practice, I first review both international and national textual provisions and judicial rulings that clarify both the scope and limits of the ICCPR’s promise. Next, the recent practice of participation is discussed. Finally, I conclude that in principle, in law, and in practice, a right indeed exists. The public has a right to take part in the foundational affair of constitution making, and the powerful interests that will always be involved in the process must recognize and respect that right.

Textual Promises

International Instruments

The right to participate in public life was first articulated in UN documents. Article 21 of the declaratory UN Declaration of Human Rights of 1948 and especially Article 25 of the enforceable ICCPR, adopted in 1966 and entered into force in 1976, establish rights to participate in public affairs, vote, and have access to public service.¹³ Article 25 declares the rights:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

This language weights the right to democratic governance toward the “historically-bounded form of governance in modern states (i.e., liberal democracy)”—that is, toward a procedural, representative, electoral model.¹⁴ This was the model of democracy for the post–World War II world, understood to embrace the making of policy but not constitutions. The ICCPR set the stage for the electoral preoccupations of the predominant international human rights approach to the topic, leaving openings to participatory fortune in such open-ended wording as “take part” and “public affairs.”

The Council of Europe, formed in 1949, was another early and influential rights-making body.¹⁵ In Europe, according to Henry J. Steiner, a right to participation was controversial. Following a debate about whether “political rights stood outside the tradition of human rights, and hence outside the proper scope of the European Convention,” it was decided that the European Convention on Human Rights (ECHR) of 1950 should contain no such right.¹⁶ Even with the addition of the First Protocol to the ECHR in 1952, the limited meaning of participation for the framers of rights regimes in the immediate postwar years was clear. According to the First Protocol, “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”¹⁷

Steiner has compared the drafting discussions of the ECHR protocol with those of ICCPR Article 25. He points out that those negotiating the 1952 protocol could assume a Western European democracy, where “conditions” meant electoral choice through a pluralistic or multiparty system. The ICCPR drafters, on the other hand, had included a good many supporters of one-party states. Pluralism had been a bone of contention, and they failed to make it a requirement for a demo-

cratic system. Nevertheless, the protocol “says nothing about non-electoral participation,” offering, in this respect, a narrower conception of democracy than that of the potentially expansive “take part” clause of the ICCPR.¹⁸

Later international conventions show a progressive tendency to develop a broader paradigm, becoming more specific about both the arenas of participation and fair conditions of access.¹⁹ Article 5 (c) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination defines “political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”²⁰ The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 guarantees the right for women “on equal terms with men” to participate “in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government” and “to participate in non-governmental organizations and associations concerned with the public and political life of the country.”²¹ The European Framework Convention for the Protection of National Minorities (1995, Articles 15 and 17) further promises that “the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them,” and that “the Parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels.”²² While none of these refers specifically to constitution making, they cumulatively create a set of conditions for meaningful participation in any aspect of public and political affairs.

Regional Charters

Recent regional rights instruments have also progressively expanded the definition of participation. Several important examples can be cited. The African Charter on Human and Peoples' Rights of 1981 (the Banjul Charter) repeats the ICCPR Article 25 language with an added emphasis on "strict equality."²³ The Commonwealth's Harare Declaration (1991) recognizes "the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives," a form of words surely applicable to constitution making.²⁴ The Asian Charter of Rights (1998) builds into its text an understanding, which has developed elsewhere in legal and theoretical discussions, that the right to participate depends upon the existence of a panoply of supporting rights such as freedom of speech and assembly:

The state, which claims to have the primary responsibility for the development and well-being of the people, should be humane, open and accountable. The corollary of the respect for human rights is a tolerant and pluralistic system, in which people are free to express their views and to seek to persuade others and in which the rights of minorities are respected. People must participate in public affairs, through the electoral and other decision-making and implementing processes, free from racial, religious or gender discriminations.²⁵

The twenty-eight articles of the Inter-American Democratic Charter (2001) of the Organization of American States (OAS) take the right to participation to new levels of both normative and practical specification.²⁶ The charter was itself forged by an unprecedentedly participatory process, with the views of civil-society organizations invited and, to their surprise, taken into account.²⁷ Article 1—"the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it"—has been described as lifting

the concept of democracy "to a significantly advanced reciprocal contract of peoples with governments."²⁸ Section II recognizes a penumbra of civil and political rights that support genuine participation, including workers' rights, and the rights to seek redress, to be free from discrimination, and to enjoy respect for diversity. In language from the UN's Vienna Declaration of 1993, the charter also endorses the "universality, indivisibility and interdependence" of human rights.²⁹ Section III goes further: Article 11 again echoes the Vienna Declaration in pronouncing that "democracy and social and economic development are interdependent and are mutually reinforcing."³⁰ Social rights are integrally associated with the right to democracy in this charter. The traditional procedural elements of good electoral practice are also included, with the addition in Article 6 that

it is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.³¹

The OAS charter also contains language concerning the necessary framework of "constitutional order," the "constitutional subordination" of state institutions, and fundamental freedoms and human rights "embodied in the respective constitutions of states" as well as in international instruments.³² In this respect, the charter reflects the contemporary era of attention to constitutionalism. Indeed, this document may imply, though it does not develop, regional requirements for a constitution-making process in its assertion that "an unconstitutional alteration of the constitutional regime" is a sanctionable offense under the charter.³³

The effect of the above regional instruments—and of national constitutions, discussed below—may extend beyond their own territorial scope, even to states that are not yet signatories to the relevant treaties. As

Franck and Thiruvengadam observe, their adoption contributes to creating a “universal customary norm” that “reflects the common practice of states.”³⁴ The international circulation of rights and constitutional clauses has been a familiar story since the earliest studies of the influence of the United States Constitution or the Westminster model.³⁵ In new environments, some have simply gathered dust or their meanings have been transformed, yet, in the shorter or longer term, the formal legal ground they create may equally be a political stimulus and support for the development of new or improved practice.

National Constitutions

Including the right to participate in national constitutions is important for symbolism or for symmetry with international instruments, but also for a practical reason. Scholars have noted that the silences of constitutions as well as their express recognition of values or identities carry a symbolic message about the priorities of regimes.³⁶ A national right to participation says something about the character of the constitutional regime and about its commitment to meeting international standards. More practically, possession of a national right gives members of the polity faced with resistance to or neglect of their input the best chance of enforcement. Nations may be bound by their ratification of the ICCPR, but enforcing the treaty through the judicial process of the Human Rights Commission is cumbersome and slow and must follow the exhaustion of domestic remedies.³⁷ When constitutions inscribe the right to participate, they bring enforcement home to channels within the nation.

As noted earlier, a preoccupation with electoral systems and procedures, required by ICCPR Article 25, clauses (b) and (c), has tended to overshadow the ill-defined possibilities of clause (a), contained in the words of “take part” and “public affairs.” The rights

to run for office and to vote in free and fair elections fulfilled the definition of democracy dominant through much of the late twentieth century, famously declared by Joseph Schumpeter as an “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”³⁸ Whether the “institutional arrangement,” or constitution, preexisted democratic politics, or must be made democratically, became an issue once the concept of democracy came under scrutiny by theorists of “deliberative democracy.”³⁹ Their ideas fit well with the concurrent rise of debate about a “new constitutionalism” that envisaged constitution making as an open-ended and inclusive conversation.⁴⁰ It is a natural step from the conjunction of such ideas to the expansion of the democratic content of “taking part” and the logical assumption that constitution making is a “public affair.” New national charters and constitutions gradually have built stronger understandings of the terms of Article 25 (a) onto the traditional procedural foundation.

Among the examples mentioned below, some constitutions remain more traditionally procedural, concentrating on electoral systems, while others expand the idea of participation, giving additional substance to the “take part” clause. Illustrating the traditional approach of procedural constitutionalism, South Africa’s 1996 constitution lacks the phrase “right to participate,” but makes universal suffrage, regular elections, and a multiparty system of government a “Founding Provision.”⁴¹ A bill of rights follows the ICCPR, containing the rights to free electoral choice; to form, participate in, and campaign for political parties; to regular, free, and fair elections; and to vote for and stand for public office.⁴² Like other recent examples of this procedural approach, East Timor’s constitution declares, more expansively than the South African text but without development of the ICCPR promise, that “every citizen

has the right to participate in the political life and in the public affairs of the country, either directly or through democratically elected representatives.”⁴³

Some constitutions, however, offer more specific guarantees. In optimistic experiments, several African states have gone further than South Africa in acknowledging new norms of participation. Among textual promises, the constitution of Angola makes it the “right and duty of all citizens . . . to take an active part in public life,” while Ethiopian citizens are assured that their “sovereignty shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation.”⁴⁴ Imposing a positive duty on the state, the Ugandan constitution declares that “the State shall be based on democratic principles, which empower and encourage the active participation of all citizens at all levels in their own governance.”⁴⁵ “Direct democratic participation” takes Ethiopia beyond the traditional electoral guarantees, but its promise is probably impossible ever to realize in practice and so vague in any case as to have value only as a rhetorical flag for waving. Angola and Uganda have introduced more substantial ideas of duty and obligation. Citizens with a duty to take part and states with an obligation to empower them to do so enter a relationship much closer than that offered by free and fair elections. Furthermore, when Uganda speaks of “all levels in their own governance,” it is possible to read a literal meaning of every structural level from local to national. In a state that had created a process with a rare degree of public involvement, it is plausible that such language could also embrace every level, from micropolicy decisions to macroconstitutional politics.⁴⁶

New constitutions also have elaborated political rights in Central and South America. The 1991 Colombia constitution aspires to “ensure its members . . . a legal, democratic and participatory framework.” This

text spells out in some detail both electoral provisions and the “people’s means of participating in the exercise of their sovereignty: the vote, the plebiscite, the referendum, the popular consultation, the open town council meeting, the legislative initiative and the recall of officials.”⁴⁷ Colombia had incorporated several of these practices into its constitution-making process. The process was initiated by acts of popular sovereignty: a referendum and election of a constitutional assembly empowered to write a new constitution, which Colombia’s Supreme Court deemed to create a legitimate override of the prior constitution.⁴⁸ Peru in 1993 placed the right to participate among its “fundamental personal rights.”⁴⁹ Ecuador (1998) and Venezuela (1999) enumerated political rights, Venezuela echoing decades of debates about the basic criteria for democratic governance by declaring as a fundamental principle that its government “shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist.”⁵⁰

Too few of the above regimes have lived up to their paper promises. But with or without participatory practices to draft their constitutions—and Venezuela for one was notable for the lack of general public participation—each enumeration of rights to participate in more than periodic elections contributes to defining a more generous norm for “taking part.” As and when “public affairs” fully embraces constitution making, this increasingly generous norm sets the standards for participation.

Thomas Franck’s original terminology of the “emergence” of a right amply conveys the process of accretion. In neither law nor practice does a single authoritative moment mark the arrival of a right within the field of constitution making, and none of the documents discussed above explicitly declares such a right. These texts do, first, extend the concept of “taking part” as an act and even an obligation of sovereignty and citizenship. They

bring the concept directly into national purview rather than leaving it as an obligation at one remove in an international treaty, they require governments to respect and even facilitate participation, and they specify expected practices in addition to elections. Second, with increasing specificity, these texts require the conditions that make authentic participation possible—equality, freedom from discrimination and state interference, tolerance, and civil and social rights. Such ever more idealistic promises build the foundation for claims as of right from within and without the nation, both against regimes that fail in their obligations and for inclusion in the process of nation building. The opportunities offered in all these clauses support both lawyers and political activists and provide openings to further specify and entrench the right. How the texts have been used, and with what success the right to participate in constitution making has been entrenched, is the subject of the remainder of this chapter, which looks first at legal and then political events.

Legal Interpretations

Rights on paper remain fine rhetoric until they are taken up, tested, interpreted, and applied. One route to such development is through challenges in the courts. Whether and on what grounds to litigate can be a highly political decision as rights campaigners choose the moment to make their claim. They hope for affirmative judgments that clarify the sweeping generalizations of conventions and constitutions and build a procedural manual for the application of rights. But even negative judgments may contribute, warning of limitations and suggesting new directions.

The right to participate has been little pursued through legal channels, and then principally with reference to electoral procedures and access to public office.⁵¹ The importance of formal interpretive rulings was noted by a

member of the UN Committee on Human Rights (UNCHR) during the drafting of a formal comment on Article 25, with the observation that “a general comment was undeniably stronger when grounded in the Committee’s jurisprudence.”⁵² A handful of cases addressing the right to participate in constitution making conveys a mixed message of both potential and limits.

Marshall v. Canada (1991)

Marshall v. Canada—brought in 1986 with a UNCHR ruling in 1991—pitted leaders of the Mikmaq tribal society against the Canadian government.⁵³ The claim was that the group’s exclusion from a series of constitutional conferences on changes to the Canadian constitution “infringed their right to take part in the conduct of public affairs, in violation of article 25(a) of the Covenant [the ICCPR].”⁵⁴ In a crucial statement for participation advocates, the UNCHR ruled that

at issue in the present case is whether the constitutional conferences constituted a ‘conduct of public affairs’ . . . [and] the Committee cannot but conclude that they do indeed constitute a conduct of public affairs.⁵⁵

For the Mikmaq people, however, this was a Pyrrhic victory. They learned that while they had the right to participate in constitution making, there had been no infringement in their case. Their efforts gained for posterity the most secure—and largely unnoticed⁵⁶—legal interpretation of the right to participate in constitution making, but also established a major limitation on its practical value. The UNCHR ruled that “it is for the legal and constitutional system of the State party to provide for the modalities of such participation” and that

Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in pub-

lic affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25(a).⁵⁷

Although the Mikmaq leaders had stated that their submissions through an intermediary body had never even been transmitted to negotiators, the UNCHR found the Canadian provisions for the representation of “approximately 600 aboriginal groups” by “four national associations,” and later by “a ‘panel’ of up to 10 aboriginal leaders,” adequate.⁵⁸ The record of judicial deference to political authorities to decide how participation shall be carried out remains a difficulty.

The UNCHR General Comment (1996)

In 1996, the UNCHR issued a General Comment parsing the meaning of Article 25 of the ICCPR, of which the committee is the guardian. This comment clarifies in a statement of general application what the Mikmaq people had learned, that constitution making is a public affair under the terms of the ICCPR. The comment first expounds Article 25 as universal and fundamental:

Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government.⁵⁹

Henry J. Steiner has commented that “for a right regarded as foundational, political participation suffers from serious infirmities.”⁶⁰ He notes the difference between “the relatively vague and abstract right to take part in the conduct of public affairs or government, and the relatively specific right to vote in elections.”⁶¹ The General Comment begins to correct this deficiency. Minutes of a UNCHR meeting drafting the comment confirm that

“the difficult issues had proved to be a definition of the concept of the ‘conduct of public affairs’ and the extent of citizens’ participation in those affairs.”⁶² No minutes record how the right to participate in constitution making came to be mentioned, but the drafters had a precedent in *Marshall v. Canada*. Regardless of how it came there, however, the assertion of the right is unqualified. As the comment first declares, “Peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”⁶³

Then, in enumerating forms and forums of participation, lest there be doubt, there is added: “Citizens also participate directly in the conduct of public affairs when they choose or change their constitutions.”⁶⁴

Such a statement from the authoritative UNCHR may offer the kind of legal peg, so helpful to marginalized citizens, on which to hang formal claims for participation and complaints about exclusion. Yet this empowering declaration is also very limited in more than one respect. A General Comment is at one remove from a direct treaty right. It clarifies the general right to democratic participation, but not the promulgation of a specific right to participation in the constitutional process. If the only binding text is the convention itself, not the comment, then it is technically the fact, as Franck and Thiruvengadam comment, that

since the principal treaty establishing rules pertaining to the lawmaking processes of states—the way legislators are elected, the public right to be consulted—is not specifically directed toward the constitution-drafting process, this can only be done speculatively, since it is far from clear whether the general terms of the normative structure are implicitly applicable to this particular aspect of governance.⁶⁵

Politically, the comment’s speculative status need not vitiate it for citizens claiming a share in constitution making. Legally, however, the distinction between the treaty and the comment is crucial and potentially

a serious limitation for constitution makers seeking a rock-solid foundation for claims for democratic rights.⁶⁶ General comments, according to the UNCHR itself, are “intended to make the Committee’s experience available for the benefit of all States parties, so as to promote more effective implementation of the Covenant; . . . [and] to stimulate the activities of States parties and international organizations in the promotion and protection of human rights.”⁶⁷ Nonetheless, minority rights lawyer Marcia Rooker notes the importance in her field of “the General Comments of the Committee, which are quite authoritative and indicate which case law can be expected.”⁶⁸ As a middle position, the view of Franck and Thiruvengadam on General Comment 25 is that “this comment, though not binding in actual cases before the committee, may indicate a tendency to regard constitutional drafting as coming within the purview of the ICCPR.”⁶⁹

The authority of UNCHR comments has been particularly questioned when they expand rather than merely explain the content of clauses of the ICCPR. One type of general comment uncontroversially offers specifications for mandatory reports by states to the UNCHR. A second type has been described as the “restatement, interpretation, and elaboration of provisions for the Covenant.”⁷⁰ The latter attract the critique that they “amount to a bold elaboration, an emphatic development of ideas in the Covenant itself, to ‘legislation by Committee.’”⁷¹ To constitutional traditionalists, including constitution making in the realm of public affairs might seem an unacceptably “bold elaboration.” For James Tully, the Mikmaq leaders, and other advocates of participation, the same words would be merely a logical clarification.

Canadian Courts (1994 and 1998)

Taking one step backward and one large step forward, two Canadian decisions also con-

tribute to the scanty jurisprudence concerning participation in constitution making. A case brought by the Native Women’s Association of Canada (NWAC) in 1994 clarified that the unresolved issue is no longer whether participation in constitution making is a right,⁷² but rather who decides on the modalities of participation, to borrow the UNCHR’s terminology, and on their adequacy in any particular instance.

In *Marshall v. Canada*, the UNCHR deferred to state authorities to decide who participates by right in constitutional negotiations, and how such participation occurs. The NWAC complained about the same negotiations. The Canadian government had chosen the four aboriginal associations that represented First Nations and funded them to prepare their submissions. NWAC argued that those organizations were male dominated and represented only one view of constitutional reform, favoring male interests; the denial of equal funding to NWAC further infringed the equality guarantees of the Charter of Rights and Freedoms, requiring that rights, including freedom of expression, be available to women and men without discrimination. NWAC argued that, thus, the constitutional negotiations had failed to meet standards of both symbolic (the presence of women) and substantive (the articulation of the interests of women) representation, as well as guarantees of gender equality.⁷³

NWAC won the equality point in the Federal Court of Appeal, which volunteered that it would “paralyze the process to hold that the freedom of expression encompassed a right for everyone to sit at the table.”⁷⁴ It lost on all counts in the Supreme Court of Canada. In particular, the highest court affirmed that the preparation of constitutional amendments was not governmental activity of a kind that was required to comply with the charter’s rights. The tradition of constitution making in Canada was of intergovernmental negotiations, and the court stuck

with this, saying that questions “as to whom federal and provincial governments ought to meet with and consult during the development of constitutional amendments” were “political questions for which there are no legal or constitutional principles to guide a court in its decision.”⁷⁵

Four years later, the Supreme Court of Canada advised on the legitimacy of a hypothetical unilateral secession by the province of Quebec.⁷⁶ In the *Reference re Secession of Quebec*, the court provided a widely noted philosophical underpinning for Canadian constitutionalism.⁷⁷ Defining democracy as a core Canadian constitutional principle, it recognized an “obligation to negotiate” over fundamental disagreements. In institutional terms, this required that “the system must be capable of reflecting the aspirations of the people.”⁷⁸ Because “a functioning democracy required a continuous process of discussion” and because “no one has a monopoly on the truth,” there was a duty to listen to “dissenting voices” and to seek “to acknowledge and address those voices.” The Canadian constitution, the court concluded, “gives expression to this principle [of democracy] by conferring a right to initiate constitutional change on each participant,” and imposing “a corresponding duty . . . to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change.”⁷⁹

The *Reference* confirmed that a right to participation in democratic governance includes constitution making. It required that participation be an egalitarian dialogue among citizens and between state and citizens. But the ways in which a legitimate debate should be conducted were left unspecified. Instead, the court relied on the traditional electoral definition of democracy without interrogating its adequacy, stating that “historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to par-

ticipate in the political process as voters.”⁸⁰ Beyond such clarification of the “relevant aspects of the Constitution in their broadest sense,” the court could not go: “Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations.”⁸¹

The Constitutional Court of South Africa (2006)

The legal sources discussed thus far leave to states and citizens to discover what forms of political practice can meet both normative standards and the requirement of practicality for “taking part.” Each defers to existing political powers to determine the form of participation, likely disadvantaging the powerless in crucial early decisions on process. Specifically noting this deficiency, South Africa’s Constitutional Court began to develop criteria for “reasonable” opportunities for participation, or at least to set a baseline for unacceptable practice. In *Doctors for Life International v. Speaker of the National Assembly and Others* and *Matatiele Municipality and Others v. President of the Republic and Others*, handed down in August 2006, the court considered the positive constitutional duty of legislative bodies to facilitate public involvement in the lawmaking process, including, in *Matatiele*, in formulating a constitutional amendment.⁸² In decisions that give an authoritative judicial imprimatur to the analysis offered in this chapter—thus strengthening the formal status of the right to participate—the court noted “taking part” as a requirement of international law as well as a foundational principle of the South African constitutional regime.⁸³ South African democracy, drawing on African tradition as well as international norms, was both representative and participatory.⁸⁴ “The participation by the public on a continuous basis provides vitality to the functioning of a rep-

representative democracy,” and the participatory component “is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”⁸⁵

Given the specific constitutional duty, the court asserted its right to review the legislative process itself, not to specify standardized modes of facilitating participation, but to rule on the reasonableness of those modes employed at the discretion of legislatures in any particular instance.⁸⁶ Thus, two of the three pieces of legislation under review in *Doctors for Life* had attracted great public interest.⁸⁷ In such circumstances, it was unreasonable to assume that the public could simply approach the legislature as it wished. The obligation to facilitate participation required such positive action as the provision of public meetings and the solicitation of submissions, especially at the most local, and thus most accessible, level.⁸⁸ The decision in *Matatiele*, closely following the lengthy reasoning of *Doctors for Life*, showed perhaps an even stronger sensitivity to the context of public participation, to the extent of putting legislatures on notice that mechanisms for aiding the public might on occasion extend to “providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing.”⁸⁹ Finally, *Matatiele* summarized this important development of the doctrine of “taking part”:

The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected part of the population is given a reasonable opportunity to have a say.⁹⁰

Legal Prospects

International law offers both promise and problems for the development of the right to participate in constitution making. General Comment 25 and *Marshall v. Canada* confirm that the right exists. The Canadian *Reference* adds the moral authority of a respected court to the idea of a dialogic process of constitution making. But in the eyes of lawyers, a general comment carries uncertain authority. And each of these utterances defers to existing political powers to determine the form of participation, disadvantaging the less powerful in crucial early decisions on process. Clarifications in international law may, however, be a long time in coming. After the formulation and pursuit of their case through Canadian channels, the Mikmaq people waited five more years for a UNCHR ruling. No cases addressing the constitution-making process are currently in the UN pipeline. Instead, momentum lies with the development of political norms and political experience. Their wide diffusion through international institutions and networks may throw up further grounds for litigation, as has happened in South Africa. In the meantime, the existing body of law supports the expectation that participation is a normal part of constitution making and increases the body of practical experience that informs new experiments.

Taking Part

A commonsense definition of “public affairs” surely includes constitution making, and this definition now finds support in international law. But we lack an adequate definition of what it means to “take part.” Constitution making traditionally has carried an aura of learning and technical expertise that has discouraged inexpert participation. Judges have backed away from expansive ideas about taking part, and international legal scholars have

viewed procedures cautiously. Can requirements of process be broadened to allow even the most marginal and disadvantaged groups to be heard and respected, and can standards be enforced? In considering the phrase “take part,” the complementarity of the legal and political aspects of rights becomes most apparent.

Three principal modes of participation have been used: the election of representatives to constitution-making bodies; referendums on draft constitutions; and education of, consultation with, and responsiveness to the public.⁹¹ These are not mutually exclusive, although each has its own merits and problems. States have chosen to use none, all, or any combination of the three. For example, during 1994–95, South Africa used the first and third; Rwanda in 2001 used the second and third; and the European Union between 2001 and 2005 gave token attention to the third, while some EU member states held ratifying referendums on the completed text.

Electing Representatives

The two most common modalities for giving the public a voice in constitution making, the election of constituent assemblies and constitutional conventions, and referendums on constitutional texts share all the strengths and weaknesses of general election procedures as the prime means of fulfilling a general democratic right.⁹² Voting in any of these forms does, on the face of it, meet the requirement of Article 25 of the ICCPR that citizens have the right to take part “directly or through freely chosen representatives.” A simple, culturally esteemed act is available to the public. Good practice can be codified and monitored. But elections offer citizens an agenda set from above: structured choices created by governments, candidates, or, most commonly, political parties. The classic political-science definition of the function of parties is that they order public preferences

into manageable packages. Ideally, they facilitate the stable democracy that has been a frequently stated goal of both constitutional and electoral design.⁹³ But few would claim that party platforms fully represent political diversity. More likely, they introduce a systematic bias against people and ideas that the political elites undervalue, dislike, or even fear. The effect is to exclude minority or radical views from electoral decision making, while simplifying the preferences of those who do engage.⁹⁴

In contrast, writers on a new, deliberative constitutionalism expect that constitution making will occur amid instability and assume that conflict and diversity will be continuing facts of political life.⁹⁵ Even if the best outcome can only be to agree to continue to debate disagreement, as the Canadian Supreme Court recognized, intransigent critics must be drawn into dialogue. The tentative language of new constitutionalism contrasts with the decisive intent of an election or referendum. For a Chilean observer, creating a new democracy is “an exercise in optimization,” the goal of which is to “seek” measures that are “both feasible and most conducive to the purpose of contributing to build or reconstruct a just order.”⁹⁶ James Tully spoke of the dangerous illusion of attaining a “constitutional settlement in accordance with the comprehensive theory of justice,” suggesting that “the philosophy and practice of contemporary constitutionalism offers a mediated peace.”⁹⁷ In such a world of seeking, contributing to, and mediating, a sole reliance on participation through elections designed to create winners and losers appears problematic. To create a constitution that allows the search for the ideal to continue makes a tough assignment for a process that codifies the judgment of one moment.

Despite their limitations, however, elections remain at the heart of conceptions of democracy. The vote is powerful for its history and symbolism, and electoral participation

in constitution making is the most concrete indicator of accessibility. Voting may be the only form of participation in politics about which citizens are knowledgeable and experienced. Thus the vote, as a means of consent to the process, its terms, its procedures, or its outcomes, is part of many participatory constitution-making processes. Those who would set standards for taking part must maximize the empowering potential of the vote and minimize its imperfections, enabling the representation of complexity, informed decision making, and continuing accountability to the electorate. Constitutional reformers thus have devoted much attention to the electoral aspects of consociationalism, the varieties of proportional representation, and systems of cross-community and supermajorities.⁹⁸

The drafting of a constitutional text is inevitably the task of some relatively small group. Full-scale direct democracy is never a practical proposition, although many would go much further than the cautious legal rulings. The issues for participation through electoral means are not whether the process will involve representation, but the nature and function of the representative body, the kind and degree of representation, constraints placed upon representatives, and their accountability to the public, specifically for constitution-making decisions.⁹⁹ Who is to be represented within the chosen forum of legislature, constitutional assembly, or commission? The choices include, descriptively, demographic groups in the population, geographical regions, or political parties; substantively, the choices include different views of national identity, constitutional purpose and principles, legal traditions, or key structural choices, such as federalism or a unitary state. The choice of electoral system biases the outcome, as no system can accommodate all of these. Even proportional representation—whether with multi- or single-member electoral (national or local) districts, lists, simple party labels or transferable votes, or quotas

and affirmative action—cannot be guaranteed to work as intended, as studies of the high hopes and mixed fortunes of women in proportional elections have shown.¹⁰⁰

Next, the most balanced system of electoral representation does not, in itself, ensure continuing accountability to the public throughout a drafting process, which can be expected to throw up new problems, solutions, and compromises along the way. The constitution-making body may be entrusted to act as it sees fit, required to return to public scrutiny during its proceedings, or required to subject the draft constitution to parliamentary, judicial, or electoral review before promulgation. Whatever the chosen mechanism, the principle of the accountability of decision makers does require that the “process is made receptive” and that the public be “regularly informed at every reasonable stage about the progress of the constitutional process.”¹⁰¹ As can be seen from recent examples, even the best formal procedures cannot guarantee that a democratic process ensues. Mechanisms for representation and accountability have a habit of inconveniencing powerful interests. In some processes, the mechanisms may be mere facades erected to conceal the exercise of power. For a public ostensibly taking part by right, however, early procedural choices regarding representation and accountability are both an opportunity for involvement and a necessary baseline for expectations of their role.

The incidence of key constitution-making practices has been recorded for 194 instances of nations making or revising constitutions or instituting regime changes between 1975 and 2002. In 83 percent of these processes, there was an electoral element in the selection of constitution makers. In some 17 percent of cases, the executive either comprised or appointed the main deliberative body. Constitution making was in the hands of a legislature in 36.6 percent of cases. Legislatures meeting in special session as constit-

uent assemblies were found in 5.7 percent of cases. Elected constituent assemblies with the sole function either of making or ratifying a constitution appeared in 17.9 percent of cases.¹⁰² In either of the last two modes, the electoral mandate knowingly includes responsibility for constitution making, presumptively enabling the electorate to choose between alternative constitutional visions.

In a recent analysis of peace processes, Catherine Barnes highlights two examples of what she calls “representative participation” in the negotiation of a new constitutional framework in profoundly divided societies.¹⁰³ Her examples of South Africa and Northern Ireland illustrate the possibility that while representative participation is likely to privilege organizationally experienced but not necessarily socially inclusive political parties, it can be constructed to mitigate such bias to some degree. South Africa’s 1994 election was primarily a multiparty contest favoring existing major parties. But the free hand of parties in the constitution-making assembly was circumscribed by the Constitutional Principles of the interim constitution, which had been negotiated in a process that had given all parties a voice, regardless of size. Representatives of women and minorities also moderated the domination of the partisan electoral victors through procedural rules guaranteeing equal membership on working committees. In Northern Ireland, the 1996 election mandated parties to negotiate at multiparty talks and the Peace Forum. The four sectarian parties, two on each side, dominated decision making. But while “perhaps not designed to do so, this [transferable vote] system also provided opportunities for those outside the political mainstream to participate.”¹⁰⁴ The effect was to bring into the talks a small but crucial number of delegates from three minor parties, including the Northern Ireland Women’s Coalition, that were unaligned with

the two conflicted communities and extended the bases of representation.

The election of constitution makers cannot guarantee effective representation. But, depending on the circumstances of each polity, elections improve access and can be designed to maximize the likelihood of this beneficial outcome. An elected assembly is undoubtedly better than a self-appointed elite group. Politically, it may be the most that can be won. Especially where the vote is on the single issue of constitution making, elections offer the public a chance to take part and to express broad preferences. However, a special election for a one-off body also exposes a weakness of accountability if there is no chance for the public to punish representatives who fail to fulfill their mandate. In an ideal world, negotiations among diverse political parties or among elected delegates would be responsive and accountable to the public. But these are contests among powerful interests over the future exercise of power. Negotiators develop new ideas and face new challenges. Without means to bind delegates or call them to be accountable, the public can only trust their elected representatives to observe their wishes. In the typical constitution-making process of recent years, trust has often been a commodity in short supply at any stage. Sometimes the process itself has been seen as a means of creating trust, “to clarify issues, grasp and articulate differences, let people speak in their own voice, and ultimately, build trust and recognition.”¹⁰⁵ Looking ahead to implementing the constitution, a participatory process is no automatic guarantor of respect. But a process from which trust remains absent must surely work against the longer-term legitimacy and sustainability of constitutionalism. Appropriately constructed from the overflowing toolbox of elections and referendums, the vote will always be an important mode of public participation.

Referendums on Constitutional Texts

Referendums on final texts were held in 41.5 percent of the 194 cases of modern constitution making.¹⁰⁶ An increasing frequency might be expected as a right to participation and a culture of democratic expectations has emerged.¹⁰⁷ For example, it was said of Canada's 1992 referendum on the Charlottetown Accord that "the very fact that the question was put to the Canadian people as a whole represents a new stage in Canadian constitutionalism."¹⁰⁸ But neither numbers of referendums nor their frequency automatically equate to a deepening of the public's ability to "take part" constructively. A referendum may seem as close as the process can come to direct democracy, permitting each voter a public judgement on the outcome. But rather than the voicing of complex desires and criticisms, the voter is faced with an up or down vote.¹⁰⁹ The vote may be seen as an opportunity for partisan comments on current politics; there may be partisan pressure to vote a certain way. Frequently, referendums have been devices "to be used by the executive, on issues, timing, and a question of its choosing."¹¹⁰ Governments, Arend Lijphart has claimed, tend to use a referendum "only when they expect to win," although in constitution-making processes, this tactic has by no means always succeeded.¹¹¹

As with the constitution-making process itself, the structure of a referendum vote, timing, funding, and accessibility may authenticate or manipulate participation. Acknowledging the potential power of even a nonbinding referendum, such as has been held on constitutional changes in the United Kingdom, it has been noted that a result may be politically obligatory even if not legally so.¹¹² But details can undermine the authority of the outcome, such as what majority of what group carries the day (e.g., of all registered voters or only those voting), whether

there is a minimum threshold for voter turnout, whether there are distribution requirements (e.g., for majorities in each region or province), and finally, whether a referendum was accompanied by an educational campaign or even circulation of the text in all the languages of the electorate.¹¹³ Failing clarity on all these points, as in Zimbabwe in 2000, where official observers reported that "very little preparation seemed to have been made in advance and virtually nothing was done to keep the public informed," a referendum will inevitably be weakened by "suspicion" of plans "to rig the vote."¹¹⁴

Rwanda's constitutional process provides a model of a validating referendum. The 2003 referendum was preceded by a two-year program of education and discussion that included women, reached into urban and rural areas, and contended with problems of literacy and multiple languages. Opportunities were given for learning and feedback, and changes in drafts were widely circulated before the final popular vote. As a result, the referendum was the culmination of a prolonged conversation, not the single point of access. The result was a resounding 93 percent vote of approval, with a turnout of at least 87 percent of eligible voters.¹¹⁵

The experience of referendums has generally been more ambiguous. Ratification of constitutions by a huge majority in Spain (1978) and a majority in a low turnout in Poland (1997) followed the completion of elite negotiations and parliamentary agreements. Voters who had been relatively uninvolved to that point nonetheless endorsed the outcomes. Both processes might be declared successful in approving the constitution and permitting its implementation. But neither electorate showed much enthusiasm for exercising the democratic right to "take part." The oft-cited function of legitimizing the text, essential if a culture of constitutionalism

is to support its implementation, may not be achieved merely by casting a vote.¹¹⁶ Albania's 1999 referendum resulted in endorsement by 90 percent of those voting. This vote followed efforts to enhance education and participation, both before the constitution was drafted and during the short referendum campaign. But the Albanian public was also conflicted by intense partisan pressure and disinformation campaigns.¹¹⁷ Political pressure was almost the sole influence in Venezuela's two constitutional referenda of 1999. In April, a majority of those voting authorized a constituent assembly, but upward of 60 percent of the electorate abstained. In December a majority of those voting approved the text, but more than 55 percent of the electorate did not vote. The country was deeply divided over President Chavez's intention to write a new constitution and the referendums did nothing to heal that division.¹¹⁸

For the purposes of developing the right to "take part," the most interesting examples of constitutional referendums may be those that reject the proposed text. If a referendum is prime ground for manipulating the public through their timing, wording, and procedures, it is also prime ground for voters to protest marginalization in a constitutional process, vote from different preferences, or manipulate the process themselves and turn it into a vote on another political issue. A referendum can be a tool, in Susan Marks' terms, for "self-rule on a footing of equality among citizens," with the unsettling, critical possibilities that the right to democratic governance can create.¹¹⁹

In 1992, a Canadian public that had relatively recently "come to aspire to a more democratic form of constitutionalism than their forebears" voted 54.2 to 44.8 percent to reject the Charlottetown Accord that was the product of prolonged intergovernmental negotiations.¹²⁰ It was said of this episode that "the development of constitutional pro-

posals was completely detached from the referendum process," and others as well as the Mikmaq people and NWAC disliked the deals that had been cut.¹²¹ Referendums in France and the Netherlands in April and May 2005 were expected to ratify the proposed Constitution of the European Union. Instead, in voting down the constitution, the referendums were used to protest in one case President Chirac's administration, in the other Dutch immigration policies.¹²² In 2000, the Zimbabwe electorate voted by 54 to 46 percent to reject the proposed constitution. This had been drawn up in an ostensibly participatory process that was actually tightly controlled by the regime and procedurally deeply flawed, as noted above. The Zimbabwe electorate had no other means of holding the government accountable. The reason voters most often gave to pollsters for a negative vote was that the draft "did not fully take into account the expressed wishes of the people."¹²³ The public did express its view by rejecting the government draft. But as an observer mission of the Centre for Democracy and Development concluded,

The debate about the constitution could have provided an opportunity for Zimbabweans to have taken a deeper look more calmly and soberly into key questions that define their body politic and shape their political configuration. . . . This was a missed opportunity to reach a historic settlement that would constitute the basis on which the way forward would be charted. Unfortunately, up to the day of voting, the debate degenerated into an un-refereed shouting match.¹²⁴

The circumstances differ, but the consistent lesson is that taking part in public affairs only after key decisions have been made is not adequate participation in democratic governance, and the public knows this. A referendum can be a means of holding representatives to account and creating legitimacy for the constitution, but only when it is embedded in a process of continuous and sustained participation.

Consultation and Education

A third cluster of participatory modes—education, consultation, and the free expression of views—may begin to meet criticisms of voting as a sole mode of participation. Uninhibited dialogue and deliberation around the vote can save that act from becoming a purely token or formal assent to constitutional proposals. Education does not, of course, itself constitute participation. But because constitution making, constitutional law, and constitutional practice in older constitutional democracies have been regarded as arcane specialities, and in many newer nations have short or nonexistent histories, broad public education in constitutionalism is often an essential preliminary to effective exercise of the right to “take part.” A number of recent constitution-making processes have tried to make direct and sustained participation possible through these modes.¹²⁵

Of the 194 constitution-making processes since 1975 recorded in the USIP-sponsored database, 70 included negotiations with various groups about the constitution-making procedure. Determining the process itself is where public involvement must start, given the propensity of procedures to be exclusionary even before any substantive discussion. Decisions on the time available, selection of representatives, and requirements of balance, transparency, and ratification may include or exclude parts of the public. In nearly a quarter of the cases, all political parties were consulted; in 39.3 percent, only those political parties represented in the legislature were consulted; and in 22 percent, some but not all parties were consulted. Among civil-society categories, in 10.2 percent of these cases, economic groups were consulted, in 8.5 percent, major social groups, and in 10 percent, major identity groups. In 8.3 percent of cases, religious leaders were consulted, while in a mere 4.9 percent of cases did women participate in these conversations as a recognized group.¹²⁶

Who should be considered as part of the public for consultation purposes? Article 25 of the ICCPR is the only article of the convention that limits its scope to citizens.¹²⁷ Depending on national citizenship rules, the effect may be to exclude some residents or include absentees in consequential ways.¹²⁸ The structure of representation can itself exclude or create bias. For example, negotiations with political parties are the traditional route and remain the most used channel to reach consensus on a new constitutional framework. Representation therefore has often been seen as a matter of accurately reflecting party strengths. Party negotiations input the views of existing power blocs, and party representation is characteristically oligarchic and exclusive. Civil-society organizations may be, but are not necessarily, more inclusive and less elitist. But many of the economic, social, identity, religious, gender, and class groups—or indigenous peoples—that form civil societies are less likely to be organized and experienced than partisan groups, and will often have interests that cut across party lines.¹²⁹ Some constitution-making processes have attempted public education and the free expression of views from below through open access channels, setting a broader goal for “taking part” than can be met solely by votes and organization-based debate. Of their nature, such modes are likely to make for a less orderly and less controlled process. In the end, perhaps, it is also a process with greater legitimacy, and certainly one that produces a public that will be better informed when constitution making is succeeded by implementation.¹³⁰

Under the database heading of civic education and popular participation, government-funded civic education campaigns were recorded in 35.5 percent of the 194 cases and civic (non-governmental) initiatives in at least 10 percent. Education initiatives included closed meetings among delegates, staff, and

civic leaders in at least 14.5 percent and open meetings with citizens in at least 20 percent of cases in the study. Consultation sometimes meant polling, but most commonly (25 percent of cases) gave citizens and civic groups opportunities to submit written briefs or comments. In at least 18 percent of cases, education and consultation were carried to remote rural areas, crucial in many new nations. In 23.2 percent of cases, there was an opportunity for public comment on a draft before a final text was adopted and ratified.¹³¹

Media campaigns and ad hoc and independent initiatives may be as significant as those of recognized governmental, partisan, civic, or economic organizations. Can there be operational standards for a process that is by definition open to both formal and informal involvement? The South African process between 1992 and 1996, widely hailed as a model of participatory constitution making, suggests some initial criteria for “taking part.”¹³² A staged agenda ensured that the stakes were never an all or nothing outcome. An interim constitution operated from 1992. This included a set of “Constitutional Principles,”—general propositions about equality, fairness, and democracy, with which it was hard to disagree and which were binding on the structures and rights negotiated for the next constitution. A parliament elected in 1994 on a new inclusive electoral roll doubled as the constitutional assembly and was bound by the principles. Public submissions were invited. A sequence of committees to work on drafts, expert consultations, public meetings, provisions for second thoughts, and a final surety of vetting by the Constitutional Court created trust that power would not trump the process. Efforts to inform and widen participation included a weekly radio program with 10 million listeners, a weekly assembly newsletter, *Constitutional Talk*, with a circulation of 160,000, colorful ads on buses, talk lines, and an open phone line and Web site.¹³³ An independent nation-

wide survey in April 1996 “found that the [constituent assembly] media campaign had succeeded in reaching 73 percent of all adult South Africans (or 18.5 million people).”¹³⁴ Two million public submissions were made. Twelve million free copies of the ratified constitution were circulated with a primer, *You and the Constitution*. Statistics, however, as Christina Murray recalls, “fail to convey the vitality and energy of the public participation program.”¹³⁵

Vitality and energy have characterized other recent processes in which creative solutions have been found to the difficulties involved in opening up the process. Inexperience, illiteracy, impoverishment, insecurity, prejudice, and lack of resources challenge many constitution-making processes. Countries may lack accessible channels of communication or channels where all feel able to speak freely: women to speak without the shadow of male authority, employees or estate workers without the oversight of the boss, minorities in their own language, entire populations without the threat of violence. However, populations sharing such disadvantages are demeaned by easy assumptions about their ignorance and incapacity. Effective communication to receptive audiences has proved possible through the inventive use of printed educational materials that are free, in clear prose, and that use pictures; eye-catching advertisements placed on buses; street theaters; and the widely available media of radio, text messaging, and the Internet.¹³⁶

It is considerably more difficult to create a bottom-up process in the insecure circumstances of some recent constitution-making exercises. Ideally, this requires openness to genuine and undirected input by the public, enabling them to create their own agenda, which will not necessarily replicate that of the experts. The principle was well taken by a member of the Uganda Constitutional Commission (UCC) who recalled that

whatever was raised was defended by the UCC as having a link with the Constitution-Making exercise. Women raised issues of domestic violence . . . young people raised issues of unemployment and drop-out from schools for failure to pay school fees. Elders raised issues of decay of good morals . . . As some members of the audience wished to silent [sic] them that their concerns were not constitutional, the UCC members were there to defend them that every concern of a Ugandan, every experience, every suggestion for the betterment of life and society was a key concern for the exercise.¹³⁷

In practice, the Ugandan process fell short of this ideal.¹³⁸ National Resistance Movement attempts to control the process raised doubts over whether commissioners who were government appointees were as open-minded as this account implies and whether the concerns of local meetings did receive attention in the constitutional text. Many proposals doubtless fell by the wayside. But some, with effective community mobilization, survived. Gender-equity clauses in the Uganda constitution are attributed to women's lobbying, especially to the sustained efforts of the non-partisan Women's Caucus.¹³⁹

Characteristic of many recent processes is the calling of open meetings, by constitutional commissioners, as in Uganda, Rwanda, Mali, or Kenya; local officials, as in Nicaragua; or civil-society groups outside of the formal process, as with the Citizens' Constitutional Forum in Fiji.¹⁴⁰ International and national women's organizations frequently have tried to tap women's views to compensate for exclusionary processes.¹⁴¹ Despite these sometimes heroic efforts, the authenticity of the participation achieved must be realistically evaluated in each case. This chapter has been critical of various types of electoral participation as adequate channels for diverse public opinions. Citizen activity, however, often has been problematic as well.

Ethiopia's constitutional commission was "specifically charged with the duty to promote the widest possible opportunities for

participation." Even to attempt to fulfill its duty, it had to seek external help, including funds. Its seminars, public assemblies, meetings for women and elders, and guidance sheets were models of their kind, yet in the end there was little open debate, much politicking, a boycott by opposition groups, drafting decisions made under time pressure in private commission meetings, and key final determinations reflecting the power of one party rather than the product of democratic deliberation.¹⁴² The South African process appeared to meet just about every criterion of good practice. Yet reactions ran from those who regarded the entire process as a cover for elite negotiation behind closed doors to sympathizers who were optimistic if modest: "one goal frequently invoked was that the new Constitution should be 'owned' by all South Africans." To African National Congress negotiator Cyril Ramaphosa, Murray reports, "this meant that the Constitution should be one which South Africans 'know' and which they 'feel' belongs to them."¹⁴³ Did the immense public relations exercise exist only to create a feeling? Few would go so far as that, but undeniably the process was driven from above, not below. There was no pretense that the public made final decisions on detail, and although at first drafting was undertaken openly, on "the most controversial issues . . . politicians started engaging in closed bilateral or multilateral meetings with their political counterparts."¹⁴⁴ The final word lay with the Constitutional Court to verify compatibility with the 1993 Constitutional Principles. Unlike Rwanda, the safeguards built in throughout were taken to obviate the need for a referendum, and there was none.

From her research in Uganda, Devra Moehler has suggested that the public view for or against constitutional proposals is unlikely to be spontaneous, but will reflect the position of opinion leaders in their communities.¹⁴⁵ Even in more open and multiparty negotia-

tions, including the acclaimed South African process, a fully free and effective system of public participation has yet to be approached. This remains a field of trial and both error and evolution, ripe for further development. But, particularly because the interests of previously disadvantaged, unorganized, or underrepresented groups, such as the poor, indigenous peoples, and women, may be undreamed of or misconstrued by even the most benevolent constitution-making elite, opening the process up is an obligation for democrats. The idea of a constitutional conversation, a dialogue among participants who are equal in standing, equally respected by others, and equally able to contribute regardless of formal education or political experience, may be far from attainment. The potential of dialogue for representing diverse and complex opinions must, however, be greater than that of an electoral system. The dialogue that proponents of participatory constitutionalism envisage remains open to creative methods that have, in the best cases, avoided some of the problems of hierarchy, resources, time limitations, cultural inhibitions, and insecurity that threaten spontaneity and responsiveness. Not the least of reasons for mitigating these problems is that, increasingly, the public expects access to the process. Even a limited participation process or a feeling of ownership sponsored by community leaders is preferable for the future prospects of a new constitution to a process that frustrates and disappoints the population's expectations.

Participation and Change

In an evaluation of the constitution-making process in Ethiopia between 1991 and 1994, James N.C. Paul made an eloquent case for public participation in the "reconstitution" of states: "Participation is necessary to 'legitimate' the new constitutional order, promote awareness, acceptance and assertion of human rights and promote democratic gover-

nance at the outset . . . to promote 'human development' . . . to close social and political gaps . . . to promote reconciliation and the amelioration of widely shared grievances . . . [and] to eliminate discrimination."¹⁴⁶ Advocates of participation often assume that such desirable consequences result from participatory processes, as in a recent summary by Clarence J. Dias: "International experience in constitution-making has shown that there is a clear correlation between the degree of *transparency, inclusiveness and participation* and the *sustainability and longevity* of the constitutions that result from these processes."¹⁴⁷

Radical critics of participatory ideals might at this point bring the discussion back to the issue of power, proposing that, after all, constitution making is about the pursuit of power and constitutions are always instruments of domination. Other critics note that constitutions of long standing were normally made without the kind of participation that is attempted today, and yet have acquired legitimacy and observance from politicians and publics, while a good many of those cited above as models of participation have failed in practice. If South Africa is the success story, then Ethiopia, Eritrea, and other nations challenge easy generalization.

The widening and deepening of public participation imply a substantial redistribution of power to a general public and previously excluded groups. According to democratic ideals, such participation is a value in itself. Advocates of participation must take this value and develop ways of "taking part" that yield positive results. The strongest defense of the difficult enterprise of participatory constitutionalism, and a guard against such activity generating only frustration, must be that it makes a difference.¹⁴⁸ We do not yet have enough systematic research into this connection. But some specific positive outcomes address the questions of whether participation leads to change—in the public, the agenda, or the outcome.

Evidence of change in the public does not appear only in numbers, as in high electoral turnouts in South Africa or Rwanda, but also in a sustained and better-informed interest in politics during and after the constitution-making process. In Uganda, Moehler, whose research is the most systematic in this field, has found that involvement in the constitution-making process had the indirectly positive effect of creating informed citizens, whose enhanced political knowledge and energy carried over into postconstitution-making politics.¹⁴⁹ This confirms the anecdotal observations of a Ugandan parliamentarian who, despite her disappointment at antidemocratic political developments under the new constitution, remarked recently that her country's participative process had been an education in politics, rights, and ethical standards. As a consequence, "the Uganda government is dealing with a very different 'people' now from the early 1980s."¹⁵⁰

An increasing body of practical experience demonstrates that public participation can change the constitution-making agenda, with potentially the "emancipatory and critical force" that Susan Marks predicted. Canadian women organized to write their interests into the new 1982 Charter of Rights, and in so doing, stimulated other groups to mobilize, changing the previous concentrated focus on Quebec and language issues into a broader agenda of citizenship, gender, and indigenous peoples' concerns.¹⁵¹ At Brazil's public hearings, "government ministers, environmentalists, human rights activists, feminists, business associations, unions, landlords, Indians, street urchins, prostitutes, homosexuals, and maids" spoke out, and 61,142 amendments to the draft constitution were proposed.¹⁵² In Colombia, 1,580 working groups came up with 100,000 proposals. Open town meetings in Nicaragua raised issues missing in constitutional drafts but subsequently incorporated—women's issues again being an example.¹⁵³ In Albania,

as Scott Carlson describes in this volume, a series of modifications to the constitutional text have been attributed to public input.

But how many of the 2 million submissions in South Africa, 61,142 amendments in Brazil, and 100,000 proposals in Colombia found their way into constitutional texts, and how many, left unfulfilled, created new frustrations? There is some evidence of the incorporation of public demands into new constitutional texts. One of the strongest examples is undoubtedly the introduction of constitutional clauses establishing the rights of women in general, including a new right to be free from personal and public violence.¹⁵⁴ The inclusion of previously marginalized women and aboriginal peoples in recent constitutional texts provides one of the best arguments for institutionalizing the right to and practice of participation. Martha I. Morgan reports that even underrepresentation of women in making Colombia's 1991 constitution led to unprecedented "broad tri-generational civil and political, social, and collective rights, including not only provisions specifically addressing gender equality but also several other gender-related provisions."¹⁵⁵ Andrew Reding observes of Nicaragua that the "extent to which the popular input in the *cabildos* [town meetings] has been incorporated is striking," exemplified by women's rights at work and in the family, recognition of minority languages and indigenous communal landholding, and social and citizenship rights.¹⁵⁶ Joyce Green is sure that "without the collective activism of women and of Aboriginal peoples, neither would be explicitly protected in the [Canadian] Constitution," and itemizes crucial clauses unimagined at the start but included in the outcome.¹⁵⁷ The impact of women in Uganda has already been noted, while Cathi Albertyn observes that in South Africa, "what was perhaps unexpected was the extent to which women were written into the heart of the democratic process," attributing this to

their early mobilization to gain a voice in a constitution-making process that might have been expected to center on race.¹⁵⁸ More generally, one certain reason recent constitutions have incorporated social rights is the pressure exerted for their inclusion by disproportionately deprived, and even in previous texts “constitutionally stigmatized,” groups to whose lives such rights are central.¹⁵⁹

A handful of examples is enough to indicate the potential of participatory processes to bring previously unconsidered people and issues into the constitutional arena. The benefits of a firmly established right to enter the process, accruing particularly to those who most need support, offer the best hope of proving that constitutions are not necessarily always solely instruments of domination. Legal and practical hurdles remain, however, to achieving genuine and effective exercise of the right to democratic constitution-making processes. For advocates of participation, progress requires not only maintaining the momentum that has built up behind the emerging norm of participation, so that it is ever more widely demanded and expected, but strategizing to clarify and develop the law and build on the lessons of practical experience.

Conclusion

“Public affairs” is now assumed to include the making of a nation’s constitution, and “taking part” is an established right. Establishing these fundamentals in international law and political culture may, however, prove to have been the easy part. The developments reviewed in this chapter show that while much has been gained, a huge area of difficulty remains around the issue of what “taking part” means, in law and in practice. The idea of “taking part” is all too easily watered down. In what respects can the law be clarified? Can the right be enforced? Who decides how participation shall be structured?

Is agreement on basic standards of good practice possible, as a guide to processes and a marker for monitors? These are lead issues for any future agenda for securing more firmly the right to participate in constitution making.

Part of the agenda concerns legal procedures and substance. Where exclusion, inequality, insecurity, or manipulation impinges, there is currently little scope for legal redress. Procedurally, courts must be satisfied of the standing of plaintiffs, will develop the law only on a case-by-case basis, and may, as the Mikmaq people found, take years to reach a decision. Each of the handful of judicial rulings discussed above affirmed the right to participate but backed off from guidance on how it should be implemented. As opined in *Marshall v. Canada*, “it is for the legal and constitutional system of the State party to provide for the modalities of such participation.”¹⁶⁰ Using existing texts and channels strategically depends in large part on supporting appropriate cases that might clarify, for example, what modes of participation meet the requirements of Article 25, whether leaving fundamental decisions on process to national authorities is adequate in terms of Article 25, and whether redress is possible after the event. As with the handful of cases discussed above, the outcome of such a litigation strategy is liable to be piecemeal and partial. But case law is important both as formal legal confirmation of rights in particular cases and as a political resource demonstrating judicial backing of claims for inclusion, which typically come from those dispossessed of political power.

Developments in the law not only enhance political resources for effectuating change but often are themselves spurred by political developments. Any comprehensive restatement of the right to take part in constitution making will more likely come, as Franck and Thiruvengadam have observed, from the multiplication and elaboration of

participation rights in international and national charters, conventions, comments, and indeed, from authoritative writings such as their own, rather than from piecemeal judicial rulings.¹⁶¹ As noted above, regional charters and national constitutional texts increasingly have broadened and deepened their guarantees of participation and the social and political circumstances that make it effective. Momentum has built as progressively more texts have addressed participation seriously. However, none has yet incorporated the textual affirmations of UN bodies on constitution making.¹⁶²

As discussed earlier, the foundations of the right to participate in constitution making lie in clauses of the UN Declaration of Human Rights and the ICCPR. UN agencies themselves have recently been involved in constitution-making processes, testing the adequacy of their own precepts.¹⁶³ No constitution-making equivalent to their election-monitoring apparatus, in structure or code of practice, exists within the organization, however.¹⁶⁴ James Paul reflects that in the early 1990s, Ethiopia was disadvantaged by the absence of international standards for participation to provide a model and source of international pressure on its flawed national process. His challenge that the “international community can—I believe it is now obligated to—create a framework of standards governing the processes of reconstitution that would address not only participation but other necessary subjects as well,” remains open.¹⁶⁵ Can process requirements for constitution making be conceived that could provide both political guidance and legal guarantees? Could constitution making be monitored as electoral processes are monitored for their freedom and fairness?¹⁶⁶

Henry Steiner found that “infirmities” inherent in the idea of a right to participate—its “relatively vague and abstract” nature compared with the clarity of voting—presented an obstacle to securing a firm

legal grounding for participation.¹⁶⁷ Several international organizations and projects supported by non-governmental organizations and think tanks have assumed that at least the process, as opposed to the substance, is susceptible to codification by a standard of democratic practice.¹⁶⁸ The code presented by the Commonwealth Human Rights Initiative (CHRI) to Commonwealth heads of government in 1999 was an early attempt to address process issues: “governments must adopt credible processes for constitution making; that is, a process that constructively engages the largest majority of the population.” The CHRI code called for good management, responsiveness, accessibility, a positive duty to provide the public with “the necessary tools to participate,” respect for dissent, inclusiveness, mediation, and continuous review, evaluation, and feedback.¹⁶⁹ In addition to these principles, it enumerated practices such as ensuring the independence of the drafting commission, giving adequate time and funding, assisting civil society, facilitating access to international experience, using the media to communicate with and report to the public throughout the process, and providing representative means of ratifying the constitution and forward-looking means for regular review thereafter.¹⁷⁰

Many of these items are now general currency. But no single authoritative set of standards has yet emerged in law or from organizational sources to guide those trying to create participatory processes or monitor their progress. What we have to date perhaps most resembles traditional definitions of the uncodified British constitution, a “curious compound of custom and precedent, law and convention,” (“convention” in the British sense of “general agreement . . . about the ‘rules of the game’ to be borne in mind in the conduct of public affairs”).¹⁷¹ Such a compound may fit with the vague and abstract character asserted by Steiner and allow flexibility and attention to local context. But compared

with more formal codes of practice, bundles of miscellaneous advice are difficult for the uninitiated to know or use. Rules designed to be “borne in mind” by persons of goodwill are hard to enforce. Observance of custom and convention depends a great deal on goodwill and a culture of respect for the spirit of constitutionalism that is easily lost in the pursuit of power. The right to participate is legally enforced with difficulty. In politics, an advisory code of sufficient generality to provide a common starting point of principle for constitution-making processes in many different national contexts might at least begin to establish a bottom line that all can work to achieve.

To conclude that a right to participate in constitution making is established—and is, to varying degrees, being further defined by conventions and charters, national constitutions, judicial opinions and decisions, and practical experiments in numerous constitution-making processes—is clearly not to assert that authentic and effective participation always or even often takes place. A serious “participation deficit” still exists, a gap between that right and its implementation. Constitution makers are experimenting with ways to fill that gap. They have been backed on occasion by taking flawed processes to courts and to the UNCHR to test the extent of the right and seek enforcement. They are supported every time another process takes up the experiment and carries on the work. Even as the right is strengthened, however, the hardest task remains for advocates of participatory constitutionalism: how, in practice, to persuade powerful and power-seeking elites to abandon prior possession of the field and admit whole populations to this foundational political process. In an important step on the way, the evidence marshaled in this chapter suggests that the culture of constitution making has come to include the expectation of democratic practice. Only concerted legal and political work can ensure that optimis-

tic experiments in such practice become the binding precedents of an international right that resistant powers are either persuaded or forced to respect.

Notes

1. Thomas M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law*, vol. 86 (1992), p. 46.

2. See Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000). In particular, chapter 3 by James Crawford, “Democracy and the Body of International Law,” gives the substance of Crawford’s 1993 Whewell Inaugural Lecture at the University of Cambridge, published as *Democracy in International Law: Inaugural Lecture* (Cambridge: Cambridge University Press, 1994). This stands with Franck’s work as foundational to the debate about the right to democratic governance; to this later version, Crawford has added a reprise of responses to his lecture.

3. See the chapter in this volume by Thomas M. Franck and Arun K. Thiruvengadam.

4. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), p. 28.

5. In 1997, Giovanni Sartori recorded that “Of the 170 or so written documents called constitutions in today’s world, more than half have been written since 1974.” *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes*, 2nd ed. (New York: New York University Press, 1997), p. 197. A database compiled under sponsorship of the United States Institute of Peace by Professor Jennifer Widner includes 194 cases of constitution drafting, between 1975 and 2002, that produced new or extensively amended constitutions or changes in regime type (excluding processes where there was no risk of violence). See Jennifer Widner, Princeton University, *Constitution Writing and Conflict Resolution: Data and Summaries*, available at www.wws.princeton.edu/pwcr/index.html (January 2006; accessed on April 18, 2009). I am grateful to Professor Widner for advance data from this source.

6. Penelope Andrews and Stephen Ellmann, eds., *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (Johannesburg: Witwatersrand University Press, 2001), and the full discussion of the South African case by Ebrahim

and Miller in this volume. Other examples from the United States Institute of Peace Project on Constitution Making, Peacebuilding, and National Reconciliation that highlight experiments in participation include Albania, Brazil, Eritrea, Ethiopia, Nicaragua, Uganda, and Venezuela; the most recent may be Rwanda. In both Afghanistan and Iraq, the rhetoric of participation has been prominent. For examples of a large and scattered literature of books, articles, and reports, see the regional study by Julius O. Ihonvbere, *Towards a New Constitutionalism in Africa* (London: Centre for Democracy and Development, 2000), and studies of particular aspects, such as Yash Ghai, *Public Participation and Minorities* (London: Minority Rights Group, 2001); Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives* (Houndmills: Palgrave, 2003); and Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008).

7. Iraqi Governing Council, Law of Administration for the State of Iraq for the Transitional Period, March 2004, arts. 60, 61. Jonathan Morrow discusses the flagrant breach of this mandate in his chapter in this volume.

8. Franck and Thiruvengadam, this volume.

9. *Marshall et al. v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986), 3 December 1991; Human Rights Committee, "The right to participate in public affairs, voting rights and the right of equal access to public service" (Art. 25): 12/17/96. CCPR General Comment 25, 6(b).

10. Supreme Court of Canada, *Reference re Secession of Quebec*, 2 SCR 217 (1998).

11. Tony Evans, "International Human Rights Law as Power/Knowledge," *Human Rights Quarterly* vol. 27 (August 2005), p. 1048.

12. See, e.g., Owen M. Fiss, "Human Rights as Social Ideals," in *Human Rights in Political Transitions: Gettysburg to Bosnia*, eds. Carla Hesse and Robert Post, 263–76 (New York: Zone Books, 1999); Harold Hongju Koh and Ronald C. Slye, eds., *Deliberative Democracy and Human Rights* (New Haven, CT: Yale University Press, 1999); and a discussion in an American context, Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven, CT: Yale University Press, 1974).

13. The ICCPR was adopted in 1966 and entered into force in 1976 when the required initial number of 35 ratifications or accessions by states

had been filed (art. 49). By June 2003 it had been ratified by 149 states.

14. Robin Luckham, Anne Marie Goetz, Mary Kaldor, *Democratic Institutions and Politics in Contexts of Inequality, Poverty and Conflict*, IDS Working Paper no. 104, Institute of Development Studies, Brighton, 2000, p. 1.

15. The Council of Europe was founded in 1949 with ten western european members: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the United Kingdom. By 2003, it had grown to forty-five members, including many eastern european and former Soviet Union nations.

16. Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Yearbook* 1 (1988), p. 94.

17. ECHR, First Protocol to the Convention, 1952, art. 3.

18. Steiner, "Political participation as a Human Right," pp. 94–96, quotations p. 96.

19. See also the review of international provisions in Gregory H. Fox, "The Right to Political Participation in International Law," in *Democratic Governance and International Law*, pp. 50–69. These all refer to political participation in general without mentioning constitution making.

20. Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 5(c). See also United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, art. 2 (General Assembly Resolution 47/135 of 18 December 1992).

21. Convention on the Elimination of All Forms of Discrimination Against Women, 1979, art. 7.

22. European Framework Convention for the Protection of National Minorities, 1995, arts. 15 and 17.

23. African Charter on Human and Peoples' Rights, 1981, art. 13.1.

24. Commonwealth Heads of Government Meeting, 1991, The Harare Declaration, October 20, 1991, at www.dfaitmaeci.gc.ca/foreign_policy/the_commonwealth.org/Internal/20723/34457/harare_commonwealth/imoc310-en.asp (accessed April 18, 2009).

25. Asian Charter of Rights, 1998, art. 5, "The Right to Democracy." See text and a discussion of the drafting process led by the Asian Human Rights Commission, a body without governmental stand-

ing, in *Asia Pacific Journal on Human Rights and the Law*, vol. 1 (2000), pp. 126–66. As this source notes, the Asia Pacific region remains without a formal human rights system. In November 2007, leaders of the Association of South East Asian Nations (ASEAN) signed an ASEAN Charter with weak and non-sanctionable human rights and democracy provisions; the ten member states have yet to ratify it.

26. Organization of American States, *Inter-American Democratic Charter* (Washington: OAS, 2001).

27. See John W. Graham, “A Magna Carta for the Americas: The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections,” Policy Paper FPP-02-09, Canadian Foundation for the Americas, August 2002.

28. Inter-American Democratic Charter, art. 1, Graham, “A Magna Carta for the Americas,” p. 7.

29. UN, Vienna Declaration and Programme of Action, 25 June 1993, art. 5.

30. UN, Vienna Declaration, art. 8: “Democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.” See examples linking participation with development in Clarence J. Dias, *Peacebuilding: International Law and Constitution-Making*. Report for the United Nations Development Programme, July 10, 2005.

31. Inter-American Democratic Charter, art. 6.

32. Inter-American Democratic Charter, arts. 2, 4, 7.

33. Inter-American Democratic Charter, art. 19. The idea of sanctions goes against the tradition of noninterference in the affairs of a sovereign state, long a principle of international law and breached by the OAS only after tough intergovernmental debate. Graham, “A Magna Carta for the Americas,” p. 2, describes how the protection of national sovereignty was the key issue in the drafting of the charter, responsible for several major setbacks in the process, and perhaps only overcome by acclamation through the coincidence that the final vote took place on the morning of September 11, 2001, with U.S. Secretary of State Colin Powell delaying his return home from the signing ceremony in Peru to endorse this strong version.

34. Franck and Thiruvengadam, this volume.

35. See, e.g., Louis Henkin and Albert Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990); S.A. de Smith,

The New Commonwealth and Its Constitutions (London: Stevens, 1964).

36. Michael Foley, *The Silence of Constitutions: Gaps, “Abeyances,” and Political Temperament in the Maintenance of Government* (London: Routledge, 1989); Alan C. Cairns, “Constitutional Stigmatization,” in Patrick J. Hanafin and Melissa S. Williams, eds., *Identity, Rights, and Constitutional Transformation* (Aldershot: Ashgate, 1999), chap. 2.

37. Alex Conte, Scott Davidson, and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Aldershot: Ashgate, 2004), chap. 2; Bayeksky.com, “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights,” available at www.bayefsky.com/complain/10_ccpr.php (accessed on April 18, 2009).

38. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (London: Routledge, 1965), p. 269.

39. See John S. Dryzek, *Discursive Democracy* (Cambridge: Cambridge University Press, 1990), defining a collective, social, communicative, and argumentative democracy; also his overview of the considerable debate that developed in the 1990s, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000).

40. See, e.g., Tully, *Strange Multiplicity*; Simone Chambers, “Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis,” *Politics and Society*, vol. 26, no. 1 (March 1998), pp. 143–72; Vivien Hart, “Constitution-Making and the Transformation of Conflict,” *Peace and Change*, vol. 26, no. 2 (April 2001), pp. 153–76.

41. South Africa, Constitution Act of 1996, chap. 1, s. 1 (d).

42. South Africa, Constitution Act of 1996, chap. 2, s. 19.

43. Constitution of East Timor (2002), s. 46. See other examples across continents, such as the constitutions of Slovakia (1992, art. 30), and Venezuela (1999, art. 62). Like South Africa, the Hong Kong Basic Law (1991, art. 21) spells out under the heading “Right to Participate in Public Life” that freely chosen representatives, genuine periodic elections, equal access to public service are required.

44. Constitution of Angola (1992), art. 28; Constitution of Ethiopia, chap 2, art. 8.

45. Constitution of Uganda (1995), chap. II (i).

46. Macro (or mega) constitutional politics is Peter H. Russell's term to distinguish "efforts at broad constitutional renewal as compared with piecemeal constitutional reform." Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993), p. 275, note 8. Uganda presents an interesting example of a constitution-making process apparently designed in the spirit of inclusion, democratic consultation, and decentralization that theoretically guided the National Resistance Movement's so-called no-party politics. Yet this was systematically subverted by the same NRM in government, in order to control the process. Aili Mari Tripp's chapter in this volume describes the latter process. For the contradictions, see Anne-Marie Goetz, "The Problem with Patronage: Constraints on Women's Political Effectiveness in Uganda," in Anne Marie Goetz and Shireen Hassim, eds., *No Shortcuts to Power: African Women in Politics and Policymaking* (London: Zed Books, 2003), pp. 113–16. Goetz describes the paradoxical conjunction of the offer of openness and its simultaneous subversion as one of "various self-imposed moments of reckoning, each of which has stiffened the executive's resistance to political competition," p. 113.

47. Constitution of Colombia 1991, preamble and art. 103.

48. William C. Banks and Edgar Alvarez, "The New Colombian Constitution: Democratic Victory or Popular Surrender?" *University of Miami Inter-American Law Review*, vol. 23, no. 1 (Fall 1991), esp. pp. 80ff.

49. Constitution of Peru, title 1, chap. I, art. 2: "Every person has the right: (xvi) to participate individually or in association with others in the political, economic, social and cultural life of the nation." Constitutional reform, total or partial, may be subject to a referendum (art. 32).

50. Political Constitution of the Republic of Ecuador 1998, title III, chap. 3. Constitution of the Bolivarian Republic of Venezuela 1999, title I, art. 6; the standard English translation quoted in my text reads in the original: "El gobierno . . . es y será siempre democrático, participativo, electivo, descentralizado, alternativo, responsable, pluralista y de mandatos revocables." Professor Allan R. Brewer-Carias—author of the chapter on Venezuela in this volume—notes that the words *democrático*, *alternativo* (referring to the possibility for political or partisan alternations in power in the presidency and the legislature), and *responsable* have their origin in the 1830 Venezuelan constitution. Demon-

strating the importance of language and of retaining fundamental guarantees against future abuse in constitutional texts, Professor Brewer-Carias recalls that, as a delegate to the 1999 national constituent assembly, faced with the government proposal to delete the traditionally used word *representativo*, he succeeded in substituting the word *electivo* (email to author, January 12, 2006).

51. The summary compilation of cases on political rights at www.bayefsky.com/themes/political_jurisprudence.php lists three decisions on Article 25(a) and nineteen on clauses (b) and (c). Conte et al., *Defining Civil and Political Rights*, pp. 68–77, suggests a similar ratio.

52. Mr. Lallah, in UNCHR, "Summary Record of the 1460th Meeting," 30/10/95. CCPR/C/SER.1460, para. 41.

53. *Marshall et al. v. Canada*; see the documentary history, with an introduction by Sákéj Henderson on the history of litigation by the Mikmaq people, at www.usask.ca/nativelaw/unhrfn/mikmaq.php (accessed May 7, 2009).

54. *Marshall et al. v. Canada*, paras. 3.1 and 3.2. The UNCHR was acting in its judicial capacity to hear individual complaints under Optional Protocol I to the ICCPR. The constitutional conferences promised in art. 35.1 of the Canadian Charter of Rights and Freedoms of 1982 were for negotiations between federal, provincial, and territorial governments and representatives of indigenous peoples on amending the constitution as it affected those peoples. Art. 35.1 (b) promised that "The Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions." The Mikmaq case questioned the adequacy of representation in the crucial discussions in the Canada Round between 1982 and 1992 that produced the Charlottetown Accord (*Consensus Report on the Constitution*, August 29, 1992). This proposed sixty changes, including the controversial Canada Clause, which attempted to define basic Canadian values, acknowledged Quebec as a "distinct society" within Canada, and recognized aboriginal governments as "one of the three orders of government in Canada." The public rejected the accord in a referendum in October 1992.

55. *Marshall et al. v. Canada*, paras. 5.2 and 5.3.

56. The case is discussed in Mary Ellen Turpel, "Rights of Political Participation and Self-Determination in Canada," in H. Reynolds and R. Nile, eds., *Indigenous Rights in the Pacific and North America* (London: University of London and Sir

Robert Menzies Centre for Australian Studies, 1992), pp. 95–109. It is occasionally mentioned in recent literature on the general right to participate, e.g., Ghai, *Public Participation and Minorities*, p. 8.

57. *Marshall et al. v. Canada*, para. 5.5.
58. *Marshall et al. v. Canada*, para. 2.2.
59. UN Committee on Human Rights, CCPR General Comment 25, 12 July 1996, para. 1.
60. Steiner, “Political Participation as a Human Right,” p. 77.
61. Steiner, “Political Participation as a Human Right,” p. 78.
62. UNCHR, Summary Record of the 1399th meeting: 10/04/95. CCPR/C/1399.
63. General Comment 25, paras. 1–2.
64. General Comment 25, para. 6.
65. Franck and Thiruvengadam, this volume.
66. When the UNCHR claimed a determinative status for its own decisions (General Comment 24, 2 November 1994, CCPR/C/21/Rev.1/Add.6., para. 11), there was a speedy counterblast in defense of national sovereignty. The UNCHR asserted: “The Committee’s role under the Covenant . . . necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence.” The U.S. government replied that the comment “appears to go much too far” and denied any binding status for the committee’s interpretations. The UK government suavely noted that it was “of course aware that the general comments adopted by the Committee are not legally binding. They nevertheless command great respect,” and then adapted the language of the committee’s assertion above to conclude that “the Committee must necessarily be able to take a view,” a subtle shift of tone which negated the UNCHR’s authority. See UN, *Report of the Human Rights Committee*, vol. 1, General Assembly, Official Records, Fiftieth Session, Supplement no. 40 (A/50/40), pp. 126, 130.
67. UNCHR, 1994 report, vol. 1, GAOR 49th Sess., Supp. no. 40 (A/49/40), para. 50, quoted in Henry J. Steiner and Philip Alston, eds., *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996), pp. 533–34.
68. Marcia Rooker, “Monitoring Human Rights: The Importance of the Universal Level for Roma and Sinti,” *CPRSI Newsletter*, vol. 3, no. 1 (February 1997), p. 9.
69. Franck and Thiruvengadam, this volume.
70. Steiner and Alston, eds., *International Human Rights in Context*, p. 526; see pp. 522–35 for an overview of the functions of General Comments.

71. Steiner and Alston, eds., *International Human Rights in Context*, p. 534.

72. Supreme Court of Canada, *Native Women’s Association of Canada v. Canada* [1994], 3 S.C.R.

73. *Native Women’s Association of Canada v. Canada*, pp. 634–36.

74. Quoted in the Supreme Court decision, *Native Women’s Association of Canada v. Canada*, p. 640.

75. From the initial decision in the Trial Division, *Native Women’s Association of Canada v. Canada* (T.D.) T-2238-92 (1993), conclusions, available at <http://reports.fja.gc.ca/eng/1992/1993fca0449.html/1993fca0449.html.html> (accessed on April 18, 2009).

76. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. For contemporary reactions, see David Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer, 1999), esp. Alan C. Cairns, “The Constitutional Obligation to Negotiate,” chap. 14.

77. See, e.g., the attempt to work out how the *Reference* might be applied in the Sri Lankan situation, in Andrew Pilliar, “Canada’s Unwritten Constitutional Principles and Their Relevance to Sri Lanka,” *Moot Point: Legal Review 2003–2004*, vol. 7 (Colombo: Centre for Policy Alternatives, 2005), pp. 103–11. Ran Hirschl has noted the impact of the *Reference* in “other fragmented polities (Spain, Britain, Belgium, India, France, Cyprus, Sri Lanka, Bolivia),” in “Canada’s Contribution to the Comparative Study of Rights and Judicial Review,” paper presented at the Canadian Political Science Association, London, Ontario, June 2005, p. 26.

78. *Reference re Secession of Quebec*, para. 67.

79. *Reference re Secession of Quebec*, paras. 68–69.

80. *Reference re Secession of Quebec*, para. 65.

81. *Reference re Secession of Quebec*, para. 100.

82. *Doctors for Life International v. Speaker of the National Assembly and Others*, CCT 12/05 (2006), ZACC 11, 17, August 2006; *Matatiele Municipality and Others v. President of the Republic and Others*, CCT 73/05A (2006), ZACC 12, 18, August 2006. I am grateful to Professor Christina Murray for drawing my attention to these decisions.

The duty to facilitate involvement appears in the Constitution of South Africa at art. 59 (National Assembly), art. 72 (National Council of Provinces), and art. 118 (provincial legislatures). The Constitution Twelfth Amendment Act of 2005 redrew pro-

vincial boundaries, with the effect of transferring the local municipality of Matatiele from KwaZulu-Natal to the Eastern Cape, which affected the provision of public services to the municipality; art. 97 of the *Matatiele* decision notes that: “While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence the decisions of the legislature.”

83. *Doctors for Life*, from para. 90. The court had begun to develop arguments about democratic participation in the earlier case of *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd.*, CCT 59/04A (2005), ZACC 25, 30 September, 2005, but with reference to secondary legislation, not to primary legislation as in *Doctors for Life* or constitutional amendment as in *Matatiele*.

84. *Doctors for Life*, para. 101, and the supporting opinion by Justice Albie Sachs, paras. 227–35.

85. *Doctors for Life*, para. 115.

86. *Doctors for Life*, paras. 125–29.

87. Proposals concerning the recognition of traditional health practitioners and facilities for the termination of pregnancies generated wide interest; a bill concerning the licensing of dental technicians did not. The first two were declared invalid, the third allowed to stand.

88. *Doctors for Life*, paras. 159–62.

89. *Matatiele*, para. 67.

90. *Matatiele*, para. 68. Both decisions were written by Justice Ngcobo.

91. Constitutional amending processes, which have not been addressed in this chapter, are analogous but usually may be differentiated from constitution making as concerned with relatively limited adjustments to existing texts rather than creating new regimes. This is the same distinction between mega- and piecemeal constitutional politics made in Russell, *Constitutional Odyssey*. The participation debate has impinged less on discussion of amending processes, which has been more prone to leave the process to legislatures, perhaps requiring supermajorities and only in some places and circumstances requiring referendums for ratification. See essays in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995), including Akil Reed Amar’s observations on the absence of direct public initiative or participation in the U.S. system, and the appendix of “Amending Provisions of Selected New Constitutions in East-

ern Europe” that vary considerably in the degree of citizen involvement.

92. Electoral standards have been the prime focus of discussions of the right to participation. See litigation discussed above, and see also Thomas M. Franck, “Legitimacy and the Democratic Entitlement,” and Gregory H. Fox, “The Right to Political Participation in International Law,” in Fox and Roth, eds., *Democratic Governance and International Law*, chaps. 1 and 2.

93. See Harry Eckstein, *A Theory of Stable Democracy* (Princeton, NJ: Woodrow Wilson School of Public and International Affairs, Princeton University, 1961), for the classic statement. Giovanni Sartori points out that while stable, in the sense of permanent, democracy must be a good thing, this is often mistakenly construed as meaning stable government. See his *Comparative Constitutional Engineering*, pp. 111–14.

94. In a particularly strong critique of the international law approach to democracy, Susan Marks alleges that “international legal scholars . . . precisely *do not* identify democracy with a concept or ideal of self-rule on a footing of equality among citizens. Rather they largely elide democracy with certain liberal ideas and institutions [and] attenuate the emancipatory and critical force that democracy might have.” Susan Marks, “International Law, Democracy and the End of History,” in Fox and Roth, eds., *Democratic Governance and International Law*, p. 533; for a similar criticism, see also Brad R. Roth, “Evaluating Democratic Progress,” in the same volume, chap. 17. A strong criticism of the American constitutional system on the same lines is by Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven, CT: Yale University Press, 2001).

95. See, e.g., Edward Said, “The Politics of Partition,” *Progressive*, vol. 63 (December 1999), pp. 18–19; Robin Luckham, Anne Marie Goetz, and Mary Kaldor, “Democratic Institutions and Democratic Politics,” in Sunil Bastian and Robin Luckham, eds., *Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-Torn Societies* (London: Zed Books, 2003), chap. 1.

96. Interview with José Zalaquett by Naomi Roht-Arriaza, “The Need for Moral Reconstruction in the Wake of Past Human Rights Violations,” in Carla Hesse and Robert Post, eds., *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), p. 197.

97. Tully, *Strange Multiplicity*, p. 211.

98. See, e.g., the works of Arend Lijphart, recently reviewed by him in “The Wave of Power-Sharing Democracy,” in Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford: Oxford University Press, 2002), chap. 2 (see also other essays in this volume); Donald L. Horowitz, “Constitutional Design: An Oxymoron?” in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions*, Nomos XLII (New York: New York University Press, 2000), chap. 9; Sartori, *Comparative Constitutional Engineering*; and critical essays in Bastian and Luckham, eds., *Can Democracy Be Designed?*

99. See Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972).

100. See e.g., Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2002), chap. 5; Shireen Hassim, “Representation, Participation, and Democratic Effectiveness: Feminist Challenges to Representative Democracy in South Africa,” in Goetz and Hassim, eds., *No Shortcuts to Power*, pp. 81–109; and Kishali Pinto-Jayawardena, “Proportional Representation, Political Violence, and the Participation of Women in the Political Process in Sri Lanka,” and Jon Fraenkel, “Electoral Engineering and the Politicization of Ethnic Friction in Fiji,” both in Bastian and Luckham, eds., *Can Democracy Be Designed?*

101. Commonwealth Human Rights Initiative (CHRI), *Constitutionalism: Best Practices of Participatory Constitution-Making*, available at <http://www.humanrightsinitiative.org/programs/constitutionalism/practices.htm> (accessed January 2003), arts. 4.4, 5.9. For a review of these issues from a gendered perspective, see Anne Marie Goetz, “Gender and Accountability,” in Dobrowsky and Hart, eds., *Women Making Constitutions*, chap. 3.

102. Figures provided by the project director, Professor Jennifer Widner, July 2005. The project, designed to support research on constitution making as a mode of conflict transformation, was sponsored by the U.S. Institute of Peace. Data are for 194 cases, between 1975 and 2002, of constitution drafting that produced new constitutions or changes in regime type (except those for which there was no risk of violence). The remaining cases involved transitional legislatures (appointed) at 5.7 percent; national conferences at 3.1 percent; roundtables at 1.5 percent (usually responsible for interim consti-

tutions or design of the process); and peace negotiations or decolonization conferences at 4.2 percent.

103. Catherine Barnes, “Democratizing Peace Processes: Strategies and Dilemmas for Public Participation,” in *Owning the Process: Public Participation in Peacemaking*, ed. Catherine Barnes, Accord no. 13 (2002), p. 2.

104. Barnes, “Democratizing Peace Processes,” p. 2. See also Kate Fearon, *Women’s Work: The Story of the Northern Ireland Women’s Coalition* (Belfast: Blackstaff Press, 1999), chaps. 1, 2.

105. Chambers, “Contract or Conversation?” p. 156.

106. Figure provided by the project director, Professor Jennifer Widner, July 2005.

107. See Lawrence LeDuc, “Theoretical and Practical Issues in the Study and Conduct of Initiatives and Referendums,” prepared for discussion at the International IDEA Workshop on Direct Democracy, London, March 13–14, 2004, p. 1., available at www.idea.int/news/upload/direct_democracy.pdf (accessed on April 18, 2009).

108. Chambers, “Contract or Conversation,” p. 149.

109. A particular problem when the vote is on an entire constitution. Referendums on single constitutional amendments often give a more reliable verdict, e.g., the vote to end the role of the monarchy in Australia (where voting in referendums as in elections is compulsory), rejected by 55 percent (see www.statusquo.org), or the simultaneous votes in Ireland and Northern Ireland to accept the Belfast Agreement, which received a 95 percent yes vote south of the border and a 71.2 percent yes vote with an 81 percent turnout in the north. See Quintin Oliver, “Developing Public Capacities for Participation in Peacemaking,” in Barnes, ed., *Owning the Process*.

110. Robert Hazell, “The New Constitutional Settlement,” in *Constitutional Futures: A History of the Next Ten Years*, ed. Robert Hazell (Oxford: Oxford University Press, 1999), p. 237.

111. Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, CT: Yale University Press, 1984), p. 203; Mads Qvortrup, “Is the Referendum a Constitutional Safeguard?” available at www.iandrinstitute.org (accessed on April 18, 2009).

112. The USIP-sponsored database does not distinguish binding from advisory referendums. The United Kingdom’s first ever referendum was held in

1975, on membership in the European Community. A series of subsequent referendums on devolution proposals effectively “make it impossible for the [sovereign] Parliament to abolish those assemblies without their consent,” and have begun to establish a precedent that this method should be used “to authorize constitutional change.” Hazell, “The New Constitutional Settlement,” p. 236.

113. See LeDuc, “Theoretical and Practical Issues in the Study and Conduct of Initiatives and Referendums.”

114. *The Zimbabwe Constitutional Referendum, 12–13 February 2000: The Report of the Centre for Democracy and Development Observer Mission* (London and Lagos: CDD, 2000), p. 46. Guidelines and a list of polling stations were only released two days before the vote (p. 46), while the authorities busied themselves with “perfecting the voters roll” (p. 40). The draft constitution was only published in the Ndebele language two weeks beforehand, and the English text “was sold at a price not affordable by many” (p. 39).

115. Figures from BBC News, May 27, 2003; this is the most conservative estimate from news reports. Details of the two-year program are on the Web site of the constitutional commission at www.cjcr.gov.rw/eng/ (accessed on April 18, 2009). Activities included training programs, the residences of constitutional commissioners in the districts, the circulation of drafts in French, English, and Kinyarwanda, and the preparation of visual material. Early in the process, the Inter-Parliamentary Union sponsored a meeting to address the special needs of women; see I-PU, “A New Gender-Sensitive Constitution for Rwanda,” www.ipu.org/english/press/doc/gen121.htm (accessed May 7, 2009).

116. In Spain, on December 6, 1978, 67.11 percent of eligible voters cast votes, and 87.87 percent of the votes cast were in favor of the constitution; see Andrea Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making* (New York: Studies of the Research Institute of Columbia University, 2003), p. 62. In Poland's 1997 referendum, held on May 25, 1997, after years of elite debate, party division, and Catholic Church opposition, only 42.68 percent of voters cast votes, 52.7 of them voting for the constitution, which was duly promulgated; see Lech Garlicki chapter on Poland in this volume.

117. Scott Carlson, “Politics, Public Participation, and the 1998 Albanian Constitution,” *Osteuropa Recht* (December 1999), p. 506.

118. Figures for abstention vary slightly in different sources. Brewer-Carias, in his chapter on Venezuela of this volume, gives 62.2 percent abstaining in April, 57.7 percent in December; the Centre d'études et de documentation sur la démocratie directe, Geneva, has 61 percent in April, 55.6 in December; see <http://www.c2d.ch/> (accessed April 18, 2009).

119. Marks, “International Law, Democracy and the End of History,” p. 533.

120. Russell, *Constitutional Odyssey*, pp. 219, 227.

121. *Ibid.*, p. 207.

122. The referendums held in France and Netherlands in April and May 2005, occurring between regular elections, offered the opportunity to protest in France against President Chirac's administration, and in the Netherlands against immigration policies. See, e.g., “The French and Dutch say no” and “After the French and Dutch referendums,” *Economist*, June 2, 2005.

123. Masipula Sithole and Charles Mangongera, “Why the Referendum Rejected the Draft Constitution: A Public Opinion Survey,” *Agenda*, vol. 4, no. 1 (March 2001).

124. *The Zimbabwe Constitutional Referendum*, p. 44. See also the chapter on Zimbabwe by Muna Ndulo in the present volume, which elaborates upon the context and the reality of presidential power sheltered behind a facade of public participation.

125. Experiments in participation range from Nicaragua (1986), Brazil (1988), Colombia (1991), Uganda (1986–95), South Africa (1992–96), and Eritrea (1994–97) to Albania in 1998, and Rwanda in 2002–03. In addition to chapters in this volume, see Bereket Habte Selassie, “The Eritrean Experience in Constitution Making: The Dialectic of Process and Substance,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), chap. 12; and Carlson, “Politics, Public Participation, and the 1998 Albanian Constitution,” p. 506. There seems to be no escaping the fact that informed elites are bound to take a lead in devising programs, though there is escape from the worst kinds of external intervention. On the latter, see opposing views from Nicolas Guilhot, *Democracy Makers: Human Rights and International Order* (New York: Columbia University Press, 2005), and Louis Aucoin, “The Role of International Experts in Constitution-Making: Myth and Reality,”

Georgetown Journal of International Affairs, vol. 5, no. 1 (Winter–Spring 2004), pp. 33–49.

126. Figures provided by the project director, Professor Jennifer Widner, July 2005.

127. ICCPR art. 25: “Every citizen shall have the right and the opportunity . . . to take part in the conduct of public affairs”; compare the earlier Universal Declaration of Human Rights, Art. 21: “Everyone has the right to take part in the government of his country” (emphasis mine). The General Comment on art. 25 notes the contrast to “other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State)” and proposes that “State reports should outline the legal provisions which define citizenship,” which must accord with the nondiscrimination precepts of art. 25; Human Rights Committee, “The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25): 12/17/96,” CCPR General Comment 25, para. 3.

128. Whereas possession of a number of rights is now based upon residency, citizenship criteria might, for example, be affected by national boundary disputes; exclude longtime resident aliens, migrant, nomadic, indigenous peoples, or children of noncitizens; or include detached diaspora populations or the beneficiaries of grandfather clauses. See Ghai, *Public Participation and Minorities*, pp. 10–11; Mark Tushnet, “Partial Membership and Liberal Political Theory,” in Christina Duffy Burnett and Burke Marshall, eds., *Foreign in a Domestic Sense* (Durham, NC: Duke University Press, 2001), pp. 209–25; David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996); and Hassall and Saunders, *Asia-Pacific Constitutional Systems*, pp. 46, 241–48.

129. A classic example of the consequences of such exclusion is described in Jonathan Morrow, *Iraq’s Constitutional Process II: An Opportunity Lost*, Special Report 155 (Washington, DC: U.S. Institute of Peace, 2005), with reference to the Sunni Arabs; on this point, see especially “Imbalanced Negotiating Capacity,” pp. 12–13. Morrow elaborates upon this example in his chapter in the present volume.

130. See Devra Coren Moehler, “Participation and Support for the Constitution in Uganda,” *Journal of Modern African Studies*, vol. 44 (2006), pp. 275–308, in which she concludes that participation can teach citizens about the constitution even if it does not guarantee popular support. A full account appears in her book, *Distrusting Democrats:*

Outcomes of Participatory Constitution Making (Ann Arbor: University of Michigan Press, 2008).

131. Figures provided by the project director, Professor Jennifer Widner, July 2005. She cautions that these figures are only indicative. In many cases, records are incomplete and certainly underestimate the incidence. They also do not record independent activity by the media.

132. A detailed account and evaluation of the very complex South African process appears in Hassen Ebrahim and Laurel Miller’s chapter on South Africa in the present volume.

133. Christina Murray, “Negotiating beyond Deadlock: From the Constitutional Assembly to the Court,” in Andrews and Ellmann, eds., *Post-Apartheid Constitutions*, pp. 106–07. See also the detailed account of the process, including the difficulties of dealing with the submissions, by Eldred de Klerk, “South Africa’s Negotiated Transition: Context, Analysis, and Evaluation,” in *Owning the Process*, pp. 7–8.

134. Murray, “Negotiating beyond Deadlock,” p. 107.

135. South Africa Constitutional Assembly, *You and the Constitution* (Cape Town: Constitutional Assembly, 1996). This was a classic piece of civic education, portraying in vivid sketches a representative group of citizens, bags under their eyes from negotiating under the stars, who have made “lots of compromises” to achieve “a big step towards a united South Africa!” The same cartoon characters used in *Constitutional Talk* conveyed “a delightful racial ambiguity,” and “a sense of joyous excitement about our emerging democracy,” according to Murray, “Negotiating beyond Deadlock,” p. 108.

136. See, e.g., Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectic of Process and Substance* (Trenton, NJ, and Asmara: Red Sea Press, 2003), pp. 37–44, 58–62, 73–78.

137. John Mary Waliggo, “The Uganda Constitution-Making Process and Implementation: Lessons Learnt, 1986–2001,” unpublished paper in the author’s possession, for the USIP Project on Constitution-Making, Peace Building, and National Reconciliation, March 28, 2003, p. 19. The review commission for the constitution of Kenya included among its frequently asked questions, “What will the new constitution contain? This will depend on the views of the people.” A public consultation in Sri Lanka found similar demands for recognition of social rights. See International Centre for Ethnic Studies, *Final Draft Report: Public Consultations on the Constitution* (Colombo: ICES, 2005).

138. Tripp more fully discusses Uganda's flawed process in the present volume.

139. Goetz, "The Problem with Patronage," p. 117.

140. On Uganda, see Waliggo, "The Uganda Constitution-Making Process," and Tripp in this volume; on Mali, Kâre Lode, "The Regional Concertations Process: Engaging the Public," in *Owning the Process*; on Rwanda, Legal and Constitutional Commission, "Towards a Constitution for Rwanda, Action Plan 2002–2003," April 2002, www.cjcr.gov.rw/eng/ (accessed on April 18, 2009); on Kenya, Constitution of Kenya Review Commission at www.commonlii.org/ke/other/KECKRC/ (accessed April 18, 2009); on Nicaragua, Andrew Reding, "By the People': Constitution Making in Nicaragua," *Christianity and Crisis*, vol. 46 (December 8, 1986), pp. 434–41; and on Fiji, Jill Cottrell and Yash Ghai in this volume.

141. For example, women's activities reported for Rwanda, "Seminar on the Process of Engendering a New Constitution for Rwanda"; Women for Women International, *Our Constitution, Our Future: Ensuring Women's Rights in the Iraqi Constitution*, Dead Sea, Jordan, June 27–28, 2005, available at www.womenforwomen.org (accessed on April 18, 2009).

142. James N.C. Paul, "The Reconstitution of Ethiopia: 1991–1994: A Procedural History," unpublished paper for USIP Project on Constitution-Making, Peace Building, and National Reconciliation, pp. 33–34, in author's possession. Meetings for women and elders described in "The Making of the Constitution," www.ethiospokes.net/Backgrnd/b1011981.htm (accessed January 2003).

143. Murray, "Negotiating beyond Deadlock," p. 112.

144. *Ibid.*, p. 113.

145. Moehler, "Participation and Support for the Constitution in Uganda."

146. Paul, "The Reconstitution of Ethiopia: 1991–1994: A Procedural History," p. 1.

147. Dias, *Peacebuilding: International Law and Constitution-Making*, p. 6.

148. Some literature implies that public participation will be inherently flawed because the nature of a mass public renders it incapable of the reasoned and moderate input required for effective constitution making. An example of such views is found in postmortems on the inconclusive but prolonged constitutional debate that followed introduction of the Canadian Charter of Rights and

Freedoms in 1982; see, e.g., Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail," *Canadian Journal of Political Science*, vol. 27 (December 1994), pp. 747–71; Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics," *Canadian Journal of Political Science*, vol. 33 (June 2000), pp. 245–72. In other cases where participation is viewed critically, the problem is located in the way the process is structured and executed, as in the study of Brazil's constitution making by Keith Rosenn in this volume. Here a solution can in principle be found in improved practice.

149. Moehler, "Participation and Support for the Constitution in Uganda." See also her argument that "participation can create informed distrusting democrats—knowledgeable citizens who possess democratic attitudes but distrust their government institutions," in "Informed Distrusting Democrats: The Effect of Participatory Constitution-Making," unpublished paper, 2005, p. 1, as well as her book, *Distrusting Democrats* (Ann Arbor, MI: University of Michigan Press, 2008). On the valuable role of distrusting democrats, see Vivien Hart, *Distrust and Democracy* (Cambridge: Cambridge University Press, 1978).

150. Moehler, "Participation and Support for the Constitution in Uganda." Miria Matembe, comment at UN International Peace Academy workshop on governance and power after conflict, Greentree, New York, May 27–29, 2005.

151. Briefly summarized in Hart, "Constitution-Making and the Transformation of Conflict," pp. 161–62. See also Beverley Baines, "Using the Canadian Charter of Rights and Freedoms to Constitute Women," in *The Gender of Constitutional Jurisprudence*, eds. Beverley Baines and Ruth Rubio-Marin (Cambridge: Cambridge University Press, 2005), chap. 2.

152. Keith S. Rosenn in this volume.

153. Reding, "By the People," pp. 7–8.

154. Note the UN General Assembly Declaration on the Elimination of Violence Against Women 1993, GA Res 48/104; examples in regional conventions of rights noted in Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart, 2005), chap. 5, esp. pp. 161–65; cross-community demands for constitutional guarantees as found in Sri Lanka, see International Centre for Ethnic Studies, *Final Draft Report: Public Consultations on the Constitution*, pp. 14–15. See also Kenneth Roth, "Domestic Violence as a

Human Rights Issue,” in *Human Rights of Women: National and International Perspectives*, ed. Rebecca Cook (Philadelphia: University of Pennsylvania Press, 1994), chap. 13.

155. Martha I. Morgan, “Gender Jurisprudence under the Colombian Constitution,” in Baines and Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence*, pp. 75–76.

156. Reding, “By the People,” pp. 7–8.

157. Joyce Green, “Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada,” in *Women Making Constitutions*, p. 42.

158. Catherine Albertyn, “Towards Substantive Representation: Women and Politics in South Africa,” in *Women Making Constitutions*, p. 99.

159. Margot E. Salomon, ed., *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* (London: Minority Rights Group International, 2005). For a trenchant criticism of constitutions that have stigmatized social groups by ignoring or excluding their identities and needs, see Cairns, “Constitutional Stigmatization,” in *Identity, Rights, and Constitutional Transformation*, pp. 13–38.

160. *Marshall et al. v. Canada*, para. 5.

161. Franck and Thiruvengadam in this volume.

162. A place to start might be in the provisions made for amending constitutions (see note 84 above). Whether makers of new constitutions are obligated to follow procedures laid down in texts they seek to replace entirely is a different question; megaconstitutional politics is more likely to make its own rules. A case in point is whether the Colombian constitution of 1991 “was illegally adopted, in violation of the amending clause of the 1886 Constitution,” as discussed in Banks and Alvarez, “The New Colombian Constitution,” p. 42. In this volume, see Ebrahim and Miller for South African provisions for bridging the transition from one constitutional regime to another, and Ndulo’s discussion on amending procedures in Zimbabwe. See also Arato, *Civil Society, Constitution, and Legitimacy*, (Lanham: Rowman & Littlefield Publishers, Inc., 2000), pp. 129–38.

163. See, e.g., Michele Brandt, *Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor and Afghanistan*, Report for the UN Development Programme, June 2005; Morrow, *Iraq’s Constitutional Process II*, pp. 13–14.

164. UN Electoral Assistance Division, available at www.un.org/Depts/dpa/ead/index.shtml (accessed April 18, 2009).

165. Paul, “The Reconstitution of Ethiopia,” p. 40.

166. See details of criteria and activities on Web sites in addition to the United Nations: Inter-Parliamentary Union, “Declaration on Criteria for Free and Fair Elections,” 1994, available at www.ipu.org/cnl-e/154-free.htm (accessed April 18, 2009); Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, Denis Petit, “Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System,” available at www.osce.org/odihr/item_11_13590.html (accessed on April 18, 2009). In addition to many general elections, the OSCE-ODIHR monitored constitutional referendums in Azerbaijan in 1995 and Albania in 1998.

167. Steiner, “Political Participation as a Human Right,” pp. 77–78.

168. See, e.g., the USIP project reported in this volume; CHRI, *Constitutionalism: Best Practices of Participatory Constitution-Making*; International IDEA, Constitution Building Programme, December 2005, available at www.idea.int/ (accessed on April 18, 2009).

169. CHRI, *Constitutionalism: Best Practices of Participatory Constitution-Making*, para. 4, listing fourteen requirements.

170. CHRI, *Constitutionalism: Best Practices of Participatory Constitution-Making*, para. 5, listing twelve requirements.

171. Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London: Gollancz, 1995), p. 3; G.H.L. LeMay, quoted in Hennessy, p. 33.