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Though participatory constitution making processes in post-conflict states and in states transitioning from authoritarian rule have become a new trend, scholarly research has yet to approach the notion of participation in a sharp and distinct way. In this article, I develop a novel approach for differentiating participation in constitution making, depending on the extent of influence that participants are granted, illustrating this reasoning with eight empirical cases from the African continent.

1. Introduction

Since the dawn of the peacebuilding era, scholars of constitutional design have observed that a new norm, or at least a new 'best practices' standard, has developed with regard to the design of constitution making processes in post-conflict states and in states transitioning from authoritarian rule. This new standard puts ordinary women and men at the front and center of the making of their founding laws and it has developed into a peacebuilding strategy because of a number of perceived beneficial effects, not least because it is held to promote democracy and lead to sustainable peace. The emphasis on broad based public participation, nevertheless, challenges the customary way through which constitutions have traditionally been produced. To be sure, as noted by Arato (2000), Hart (2010) and Tully (1995), constitution making has for a long time been an area strictly reserved for political elites and lawyers. A normative change has, however, been accompanied by new policy standards enthusiastically promoted by international organisations and individual scholars (e.g. Ghai and Galli, 2006; Samuels, 2006; Banks, 2007; Wing, 2008). Hence, traditional methods of arriving at a final document have had to give way to the new trend of public involvement in constitution making.

Though public engagement in constitution making in post-conflict states and in states transitioning from authoritarian rule has increased since the 1990s, up to the point that the term 'participatory constitution making' is by now commonplace (Ginsburg *et al.*,

2009; Brandt *et al.*, 2011), scholarly research has yet to approach the concept of 'participation' in an analytically sharp and distinct way. In fact, as things stand today, different cases are being lumped together and designated a general label of being examples of participatory constitution making, in turn indicating that the participation of the people has been uniform with the same extent of influence in all cases. This is, however, quite far from the truth, and addressing what participation implies, how it can be distinguished and hence operationalised, is necessary for two distinct reasons. To begin with, if public participation in constitution making is going to be promoted as a policy, then those who are issuing this policy have an undeniable interest in understanding how participation can take different forms with different amounts of influence for participants. Second, a greater understanding of what participation in constitution making actually entails and how different types of participation can be differentiated from each other in a systematic way provides necessary knowledge for future research projects that may wish to focus on analysing the effects of participation in constitution making on different outcomes of interest (e.g. democracy, legitimacy, reconciliation, etc.).

In this article, my focus is on the conceptualisation and differentiation of public participation in constitution making. This is an important contribution because when it comes to differentiating participatory constitution making processes based on how participation has taken form, there is no previous research to lean on. Therefore, in the first part of the article, I engage in a novel approach of developing an analytical framework for analysing public participation in constitution making and a new typology of participation in such processes specifically. Depending on a) who the initiators of the constitution making process are; b) how the forms of communication with the public are constructed; c) how inclusive the process is; and d) where final authority over the constitutional document is vested, it is possible to categorise cases as different types of participation, namely: *false, symbolic, limited, consultative* or *substantial* participation. I then use this analytical framework to categorise eight African cases that are commonly (and uniformly) referred to as 'participatory processes' in order to illustrate that public participation in constitution making has indeed varied extensively across cases with very different extents of influence over the constitutional content for participants. The eight empirical cases are: Eritrea, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, Uganda and Zimbabwe.

When it comes to the method for constructing the analytical framework, it should be noted that it is developed by using a combination of deductive and inductive analysis. In practice this means that I have moved back and forth between theory and the empirical material, which consists of an original set of twenty participatory constitution making processes that have been carried out in different parts of the world (Saati, 2015). An inductive-deductive approach has been chosen because although the written works of classical participation theorists – particularly the scholarly contributions of Pateman (1970) and Arnstein (1969) – are valuable since they acknowledge that participation can take different forms and because they provide some theoretical guidance for developing a

typology of participation that is specific for constitution making, they also share a weakness. Existing categorisations and typologies of participation fail to be specific as to what exactly makes a specific case of participation an example of a specific type. In order to be as explicit as possible, the study presented here has found it critical to also allow the typology to be influenced by the empirical material. Hence, my typology of false, symbolic, limited, consultative and substantial types of participation in constitution making sets out to be as detailed as possible concerning why a specific case of participation is categorised as a specific type.

2. Public Participation in Constitution Making: Towards a Conceptualisation

When it comes to public participation in constitution making, the lack of definitional clarity in present scholarly work has caused some confusion, in so far as it has led many to construe more participation as an issue of quantity. In a sense, this is a view that the more people that have been involved in a constitution making process, the more participatory the process has been. It is for example not at all uncommon, rather the contrary, that reference is made to the number of constitutional submissions that have been received by the people in a given process and the number of public hearings that have been held (e.g. Rosenn, 2010; Thier, 2010; Ebrahim and Miller, 2010) as an indication of how participatory a constitution making process has been. It is important to note, however, that even if a considerable number of individuals participate in their country's constitution making process, this does not reveal whether or not their participation has had an effect on the constitutional content or whether or not the constitutional draft enters into force. Hence, in order to be able to define 'participation', a first step is to acknowledge that participation in constitution making is in fact a political form of participation and as such entails the core notion of influence. To be clear, this study accepts the view that the concept of participation includes the degree of influence participants have over decisions being made in relation to the constitutional document – both in terms of its content and in terms of its adoption. To capture the degree of influence is, in turn, not easily done by the use of quantitative measures – rather a qualitative approach is required. In the next part of this section, I move on to present and discuss four factors that determine the extent of influence that participants are granted in a given constitution making process.[2]

2.1 The Initiators of the Process

The first factor that impacts the extent of influence that the public is allowed during a constitution making process concerns the *initiators of the process.* The agents who decide that constitutional reform should be undertaken and who also determine the rules of

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[2] These four factors are elaborated in much fuller detail in Saati (2015).

procedure that will guide the reform process, undoubtedly have the opportunity to design the process to encourage/discourage participation in a manner that results in influence for participants. As regards the agents of constitutional reform in post-conflict states and in states transitioning from authoritarian rule, an initial distinction can be made between initiators who are 'outsiders' (international and regional actors as well as individual states), and those who are 'insiders' (national actors). These two broader categories can be further differentiated into different types. When it comes to the 'outsiders', we on the one hand have actors who influence the actual content of the constitution, and on the other hand, actors who determine how the constitution making process will be carried out (but without getting themselves involved in formulating content). Without a doubt, between the two types, the first is more influential since authority over constitutional content rests with outsiders, rather than with national elites and even less so with ordinary citizens. 'Insiders' as agents of constitutional reform are just as the outsiders, a heterogeneous group of people and/or organisations whose motives for constitutional reform originate from different goals and purposes. On a general level, three different types of inside initiators can be discerned: national elites (political or military), civil society organisations or a broad array of national actors who jointly agree that constitutional reform is desirable. To sum up: the first of four factors that can be used to determine the degree of influence for participants in a constitution making process relates to the issue of agency and the actor/actors resolve (or lack of resolve) to allow the public to influence the content of the constitution.

2.2 The Forms of Communication

The second aspect that has a bearing on how the people can participate in the constitution making process, and thereby try to exert influence, concerns the *forms of communication*. The subject under consideration is: how is the process being communicated to the public and how (if at all) is the public called upon to actively participate? In constitution making processes, forms of communication can generally take one of four different modes. The first is a one-way model of communication in which the initiators of the process are primarily interested in keeping the people informed about the constitution making process, but without allowing them to influence the document. Channels for feedback from the public are hence shut. The second mode is a two-way model of communication, which signals that communication channels are at least open in both directions. However, this does not necessarily imply that participants are guaranteed influence, since those who are tasked with the actual drafting of the constitution might not be legally compelled to consider and include the feedback into the draft. The third approach is a two-way model of communication with integrated proactive measures. This communication plan is used by initiators of the process who are sincerely interested in listening to the opinions of the people on constitutional subjects. In response, different mechanisms are put in practice

during the course of the constitution making process that serve to enable the people's participation and to make it possible for them to provide feedback. An example of such a proactive initiative is to carry out constitutional education programmes prior to asking the public about their views on various constitutional proposals. The fourth mode is that of consultation. When the form of communication is that of consultation, the comprehensiveness of the communication strategy is even more elaborate than in the third approach. The communication scheme involves mechanisms for systematically reviewing the comments of the people in order to facilitate the gathering of additional opinions from them as regards specific suggestions, etc. As part of a more exhaustive communication strategy, constitutional education programmes are also carried out on a nationwide scale and constructed so as to be adaptable for people with varying degrees of previous knowledge concerning constitutional issues.

2.3 The Degree of Inclusion

For purposes of making a fair assessment of how participatory a constitution making process has been, the third factor that must be considered is the *degree of inclusion.* When it comes to this aspect specifically, we want to understand if all groups in society have been invited to participate or if some have been disqualified from making their voices heard, as well as whether invited groups have voluntarily chosen not to participate. While inclusion in and by itself does not equal influence, it is nonetheless an important aspect to take into account, because if some groups are banned from participating and/or some groups boycott the process then this impacts of the public's overall degree of influence on the content of the constitution. On a general level, the scope of inclusion in constitution making can take three different expressions. The first is that some groups/political parties are forbidden to participate. The second is that participation is an option made available for all groups/political parties in a country, some of whom, by choice, refrain from using their right to engage. The third is a constitution making process in which all groups/political parties are welcome to participate, and all groups interested in engaging do so.

2.4 The Question of Final Authority

The last factor that is also important to consider when assessing how participatory a constitution making process is, concerns the *question of final authority.* Although voting may be considered an insufficient form of participation, if one construes participation to hold deeper meaning than to merely vote 'yes' or 'no' on a political package of constitutional provisions, it is still a manifestation of public influence, and particularly so if approval via referendum is decisive for the adoption of a draft constitution. When it comes to constitution making processes specifically, the question of final authority can generally take three different expressions. Sometimes final authority over the document is vested in

the hands of an appointed or executive body whereas in other cases, final authority is indirectly vested in the hands of the people through, for example, a popularly elected constitutional assembly. Final authority may also be vested directly in the hands of the people through a referendum.

To summarise: there are four main factors that can be used to determine the extent of influence for participants in a constitution making process. These have been briefly discussed in this section. Table 1 illustrates how different combinations of these factors give rise to different types of participation, namely: *false, symbolic, limited, consultative* and *substantial.* This typology is the first of its kind to be developed for the sole purpose of distinguishing different types of participation in constitution making processes from each other and it is an important contribution because it aims to demonstrate that there are indeed vast differences between various forms of participation in constitution making. It should be noted that moving from false to substantial (from the far left to the right of the table) signals an increasing level of influence for participants. In the final row of the table, the eight empirical cases are categorised into the participation type that best reflects the extent of participation in that specific constitution making process. Of course, it is worth emphasising that all of these cases are unique as regards the circumstances that led up to the process and the exact procedures that were employed during the course of it. Consequently, some cases are more difficult to classify as a specific type of participation than others. Nevertheless, based on thorough and systematic research (Saati, 2015), the four factors and how they play out in each of the cases give a good indication as to how public participation in constitution making has taken form and with what degree of influence for participants.

Table 1. Typology of Different Forms of Participation in Constitution Making

	False participation	Symbolic participation	Limited participation	Consultative participation	Substantial participation
Initiators of the process	Outside actor (determines the content of the constitution or the process)	Outside actor (determines the constitution making process), or different types of inside actors	National elites (political or military)	National elites (political or military)	Civil society organisations, or broad array of national actors
Forms of communication	One-way model of communication	One-way model of communication	Two-way model of communication, or two-way model of communication with integrated proactive measures	Two-way model of communication with integrated proactive measures/ Consultation	Two-way model of communication with integrated proactive measures/ Consultation
Degree of inclusion	Certain groups banned from participation	All segments of the population/ political parties allowed to participate, but some choose to boycott the process	All segments of the population/ political parties allowed to participate, but some choose to boycott the process	All segments of the population/ political parties allowed to participate, and all interested in doing so participate	All segments of the population/ political parties allowed to participate, but some choose to boycott the process/ All segments of the population/ political parties allowed to participate, and all participate
Final authority	Final authority rests with the executive or indirectly in the hands of the public	Final authority rests with the executive or indirectly in the hands of the public	Final authority indirectly vested in the hands of the people	Final authority indirectly vested in the hands of the people	Final authority directly vested in the hands of the people through a referendum
	Empirical case(s): Nigeria	*Empirical case(s):* -	*Empirical case(s):* Rwanda, Uganda, Ethiopia	*Empirical case(s):* South Africa, Eritrea	*Empirical case(s):* Kenya, Zimbabwe

3. Discussing the Categorisation of Two Empirical Cases

It is worthwhile to briefly elaborate the discussion through a few empirical cases that we find in Table 1 in order for the classification to become clearer. I will in this section, therefore, devote attention to the cases of Nigeria and Uganda.[3] When elaborating on these cases, the discussion will follow the structure that we find in the column to the left in Table 1.

3.1 Nigeria

The 1999 constitution making process of Nigeria was initiated by the military. As regards the forms of communication, a time span of two months to finalise the process made it nearly impossible to include Nigeria's large population of 115 million[4] people in the making of the constitution. Furthermore, judging from the set-up of the process it appears as though the Nigerian military was interested in soliciting the views of the public only if they expressed support for a strong military branch and not otherwise (Jega, 2000). In terms of degree of inclusion, the CDCC (Constitution Debate Coordinating Committee) did not engage the Nigerian opposition: the National Democratic Coalition, the United Action for Democracy and the Joint Action Committee of Nigeria, for example, were not consulted. The opposition was rather completely sidestepped in the making of the constitution (Ihonvbere, 2000). Lastly, when it comes to the question of final authority with regards to the adoption of the draft constitution, this was vested in the hands of the executive without any public influence at all. Hence, when taking all of these factors into account, the 1999 Nigerian constitution building process did not produce participation that resulted in actual influence for participants. This explains why it is categorised as an example of false participation in Table 1.

3.2 Uganda

Immediately after it gained power, the National Resistance Movement (NRM) government in Uganda declared that the country would embark on a constitution making process that would produce a new constitution made by the people of Uganda. As to the forms of communication, a 21-member Constitutional Commission was established to review the old constitution and prepare a new one. The commissions agreed that it was vitally important that the Ugandan people be the main agenda setters for the new document. Therefore, the Commission organised seminars throughout all 34 districts of the country in

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[3] For further details and discussion about the categorisation of all empirical cases in Table 1, see Saati (2015).
[4] 1999 estimation.

order to develop a constitutional agenda that was based on the input of the people. Over the course of an entire year, constitutional education programmes were carried out on a nationwide scale, in all of Uganda's 890 sub-counties, constitutional materials were disseminated. After that, for another full year, constitutional submissions were gathered from the public in all parts of the country. However, the degree to which the popularly derived constitutional provisions are actually reflected in the document is difficult to establish. It has been argued that although the magnitude of public participation in the process was extensive, the public's input had little real impact on the substance of the document and the ruling elites' main purpose in involving the citizens was to give the constitution a 'shimmer' of legitimacy (Tripp, 2010). Nevertheless, in terms of involving and preparing the Ugandans to participate in the process, the constitution making process in Uganda was successful (Waliggo, 2001; Wapakhabulo, 2001; Mugwanya, 2001). At the same time, regarding the degree of inclusion, the Ugandan process was not fully inclusive. Although politicians could engage in the process in their capacity as Ugandan citizens, they were not allowed to engage as representatives of a political party, because political parties as such were banned from participation (Tripp, 2010). When it comes to the question of final authority over the constitution, this was not directly vested in the hands of the people, but indirectly so. The Ugandans voted for members of a Constitutional Assembly who, in turn, voted on the final document. The combination of these factors explains why Uganda has been categorised as an example of limited participation in Table 1.

4. Concluding Remarks

The analytical framework for differentiating participatory constitution making processes into different types of participation, depending on how much influence participants have been granted, helps us approach this area of research in an analytically sharp and distinct way. This is a novel approach that seeks to be of value for future research projects that set out to both understand the extent of influence for participants in individual cases of constitution making, as well as to analyse whether certain types of participation affect various outcomes of interest in different ways. Indeed, as we move forth and aspire to increase our knowledge about participatory constitution making in post-conflict states and in states under transition from authoritarian rule, the outcomes of these processes at an individual as well as on a macro-level of analysis are an intriguing area of research waiting to be explored.

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