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Angela M. Banks
William & Mary Law School, ambank@wm.edu

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EXPANDING PARTICIPATION IN CONSTITUTION MAKING: CHALLENGES AND OPPORTUNITIES

ANGELA M. BANKS*

INTRODUCTION

Internal exclusion is a substantial impediment to the successful implementation of participatory democratic reforms in post-conflict states. The recent use of participatory constitution making in states like Rwanda illustrates the challenge that inclusion presents.¹

* Assistant Professor, College of William & Mary School of Law.

1. Participatory constitution making entails the use of democratic processes in the drafting and adoption of a state's constitution. It is seen as a mechanism that can create democratic governance systems that robustly protect civil and political rights. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 668-69 (2006). Participatory constitution making is based on the idea that legitimate government action must include those who will be affected by the action in the decision-making process. Vivien Hart, *Constitution-making and the Transformation of Conflict*, 26 PEACE & CHANGE 153, 169 (2001) [hereinafter Hart, *Constitution-making*]; VIVIEN HART, U.S. INST. OF PEACE, SPECIAL

Inclusion ensures not only that individuals are physically present in the decision-making forums, but that they have an “effective opportunity to influence the thinking of others.”² This requires that participants review and reconsider their preexisting preferences and positions in light of reasons and justifications offered by other participants.³ Absent a willingness or ability to do so, the decision-making process becomes one in which original positions are zealously defended and decisions are made based solely upon factors such as numerical majorities and political power.⁴ Participants argue, rather than deliberate, which reduces their ability to influence the thinking of other participants. This creates a situation in which those in the numerical minority or without significant political power are internally excluded.

Internal exclusion was a prominent feature of Rwanda’s participatory constitution-making system. The system used a small, minimally representative drafting body, the Legal and Constitutional Commission, that rarely deliberated substantive issues with the

REPORT: DEMOCRATIC CONSTITUTION MAKING 3-4 (July 2003), available at <http://www.usip.org/pubs/specialreports/sr107.pdf> [hereinafter HART, DEMOCRATIC CONSTITUTION MAKING]. Furthermore, decisions should be made through a process of deliberation in which action is justified with reasons. This method of decision making requires a minimum level of political equality and inclusion to operate successfully. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 23 (2002).

2. YOUNG, *supra* note 1, at 55; see also Angela M. Banks, *Challenging Political Boundaries in Post-conflict States*, 29 U. PA. J. INT’L L. 105 (2007) (discussing contribution and engagement as components of internal exclusion). Internal exclusion is one of the means by which individuals have participation without power. Young explains this by noting that,

[h]aving obtained a presence in the public, citizens sometimes find that those still more powerful in the process exercise, often unconsciously, a new form of exclusion: others ignore or dismiss or patronize their statements and expressions. Though formally included in a forum or process, people may find that their claims are not taken seriously and may believe that they are not treated with equal respect. The dominant mood may find their ideas or modes of expression silly or simple, and not worthy of consideration.

YOUNG, *supra* note 1, at 55.

3. See JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1 (2000); AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 20 (2004); YOUNG, *supra* note 1, at 22-23.

4. GUTMANN & THOMPSON, *supra* note 3, at 16 (“By taking existing or minimally corrected preferences as given, as the base line for collective decisions, the aggregative conception fundamentally accepts and may even reinforce existing distributions of power in society.”).

public.⁵ The drafters focused on educating the public about the role of a constitution within a society and identifying widely held beliefs about general governance issues, such as whether the state should have a presidential or parliamentary style of government.⁶ Substantive engagement⁷ was limited to internal Legal and Constitutional Commission (LCC) meetings and LCC exchanges with government officials.⁸ Absent a representative within the LCC or the support of influential government officials, citizens lacked an opportunity to have the constitution drafters seriously engage their concerns, ideas, recommendations, or proposals.⁹ This lack of internal inclusion created a situation in which most citizens were denied the opportunity to participate in the substantive decision-making process.¹⁰ Rwanda focused on facilitating external inclusion through public meetings, questionnaires, and radio and television broadcasts.¹¹ This created a system with significant participation without power, which undermines the theoretical and legal

5. The Legal and Constitutional Commission (LCC) had twelve commissioners who were elected by the Transitional National Assembly. Legal and Constitutional Commission-Rwanda, About Our Commission, <http://www.cjcr.gov.rw/eng/about.htm> (last visited Feb. 16, 2008). Eight members represented the eight officially registered political parties, one represented the army and national police, two represented civil society, and one represented the private sector. NAT'L UNITY AND RECONCILIATION COMM'N, REPUBLIC OF RWANDA, REPORT OF THE NATIONAL SUMMIT ON UNITY AND RECONCILIATION 52 (2002), available at <http://www.grandslacs.net/doc/2998.pdf> [hereinafter UNITY AND RECONCILIATION REPORT]. Concerns have been raised about the political perspectives represented within the LCC and amongst the participants in the public forums. PRISCILLA YACHAT ANKUT, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE ROLE OF CONSTITUTION-BUILDING PROCESSES IN DEMOCRATIZATION: CASE STUDY RWANDA 21 (2005), available at <http://www.idea.int/conflict/cbp/upload/CBP-Rwanda.pdf> ("Only members of the Rwandan Patriotic Front (RPF) and sympathizers of the RPF-led government participated in forums and debates convened by the Constitutional Commission."); COMM'N TO STUDY AND EVALUATE THE PROPOSED CONSTITUTION (CSEC), AMAHORO PEOPLE'S CONG., THE CSEC' REPORT (Nov. 2002), http://www.newrwanda.org/csec_report.htm (finding that "the Rutaremara commission [the LCC] was entirely composed of supporters of the Kagame regime and devoid of any representation from the growing opposition").

6. See UNITY AND RECONCILIATION REPORT, *supra* note 5, at 17-21.

7. Engagement refers to participants taking the claims of other participants seriously and treating each other with equal respect. See YOUNG, *supra* note 1, at 55.

8. See *id.* at 20-21.

9. See *id.*

10. See *id.*

11. See LEGAL & CONSTITUTIONAL COMM'N, REPUBLIC OF RWANDA, TOWARDS A CONSTITUTION FOR RWANDA: ACTION PLAN 2002-2003, at 20-21 (Apr. 2002), available at <http://www.cjcr.gov.rw/eng/actionplancjc.PDF>.

justifications of participatory constitution making. Further research into the ways in which citizens are internally excluded is critical for evaluating states' use of participatory constitution making and assisting states in implementing it effectively.

Part I locates the theoretical and legal foundations of participatory constitution making within participatory democratic theory and the right to self-determination. This discussion identifies inclusion as a fundamental requirement for successful participatory constitution making. Part II examines the tension between inclusion and political power in post-conflict states, and Part III identifies the barriers to internal inclusion that existed in Rwanda.

I. CONSTITUTIONS AND PUBLIC PARTICIPATION

Scholars and policy makers concerned about democratization efforts in post-conflict states are beginning to focus on the process by which reforms are made, not just the substance of the reforms. This has led to an emphasis on citizen participation in the drafting and implementation of constitutions. This form of constitution making is referred to as democratic or participatory constitution making. Advocates advance both normative and instrumental benefits for process-oriented constitution making. The normative justifications are rooted in participatory democratic theory, emphasizing the importance of broad participation and deliberation for the creation of a legitimate governance system.

A. Normative Foundation

Participation in government decision making is emerging as an international norm. Participatory democratic¹² scholars connect the

12. Throughout this Article I will use the more inclusive term "participatory democracy" to refer to a set of democratic theories that prioritize public involvement in government decision making. These theories include deliberative democracy, communicative democracy, and discursive democracy. Although they differ from each other in the types of communication that deliberation should include and the spaces in which deliberation ought to take place, they all conceptualize democracy generally as

a framework of social and institutional conditions that facilitates free discussion among equal citizens—by providing favorable conditions for participation, association, and expression—and ties the authorization to exercise public power (and the exercise itself) to such discussion—by establishing a framework

legitimacy of government action to the participation of those affected by the decision in the decision-making process.¹³ The decision-making process is thus conceived of as a “well-conducted conversation,” and the goal is to give all affected individuals a

ensuring the responsiveness and accountability of political power to it through regular competitive elections, conditions of publicity, legislative oversight, and so on.

Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 95, 99 (Seyla Benhabib ed., 1996).

Deliberative democracy traditionally focuses on argument and reason as the sole type of communication within the public sphere. Iris Marion Young’s communicative democracy is premised on the idea that additional forms of communication must be permitted to ensure the external and internal inclusion of all members of the polity. YOUNG, *supra* note 1, at 40.

John Dryzek contends that deliberative democracy has taken a liberal constitutionalist turn that he seeks to move away from. The liberal constitutionalist turn sees liberal democracy as the “uniquely proper home for deliberation.” DRYZEK, *supra* note 3, at 3. He finds this focus unnecessarily constraining because it “ties deliberation to a needlessly thin conception of democracy, growing ever thinner in light of the constraints that the capitalist market economy imposes upon effective state democracy.” *Id.* Dryzek’s discursive democracy is more critical in its “orientation to established power structures, including those that operate beneath the constitutional surface of the liberal state, and so insurgent in relation to established institutions.” *Id.* at 2. It is

pluralistic in embracing the necessity to communicate across difference without erasing difference, reflexive in its questioning orientation to established traditions (including the tradition of deliberative democracy itself), transnational in its capacity to extend across state boundaries into settings where there is no constitutional framework, ecological in terms of openness to communication with non-human nature, and dynamic in its openness to ever-changing constraints upon and opportunities for democratization.

Id. at 3. These variations will be noted and addressed throughout the Article, but the focus is on participatory democracy as a category of theoretical conceptions of democracy that view democracy as

a model for organizing the collective and public exercise of power in the major institutions of a society on the basis of the principle that decisions affecting the well-being of a collectivity can be viewed as the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals.

Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE*, *supra*, at 67, 68.

13. See YOUNG, *supra* note 1, at 5-6 (“The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making process and have had the opportunity to influence the outcomes.”); Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 16 (“Democracy is about participating. Participation matters. It matters because the decisions that governments make affect everyone. Respect for those decisions, including those with which we disagree, demands meaningful participation in the decision making process.”).

genuine voice in the conversation.¹⁴ Thus the “decisive test of a democracy is its capacity to encourage its population to play an active role in its government.”¹⁵ This principle has influenced the development of international legal rules regarding citizen participation in governance matters.

The constitution-making conversation is a discussion of problems, conflicts, interests, preferences, and claims of need.¹⁶ Within participatory democracy, participants offer solutions for the problems raised or proposals to address the needs mentioned. They present reasons and justifications to persuade other participants to accept their solutions or proposals.¹⁷ Through dialogue the participants test and challenge the proposals and arguments of the other participants.¹⁸ Deliberation is to continue until the “force of the better argument” compels the participants to accept a particular conclusion.¹⁹ Proposals are rejected or refined based on their ability to withstand “dialogic examination.”²⁰ Thus decisions are made based on which proposals are supported by the best reasons, as decided by the participants, rather than which proposals are supported by the largest number of people.²¹ The idea that interests are dynamic and that the process of deliberating facilitates interest transformation is a key premise of participatory democracy.²² Politically equal actors deliberating political matters in an environ-

14. Guinier, *supra* note 13, at 21. Proponents of participatory constitution making refer to this form of constitution making as a conversation that takes place between and among elites and the general public. HART, *DEMOCRATIC CONSTITUTION MAKING*, *supra* note 1, at 11.

15. Geraint Parry & George Moyser, *More Participation, More Democracy?*, in *DEFINING AND MEASURING DEMOCRACY* 3, 46 (David Beetham ed., 1994).

16. See HART, *DEMOCRATIC CONSTITUTION MAKING*, *supra* note 1, at 3, 5, 7; YOUNG, *supra* note 1, at 22; Hart, *Constitution-making*, *supra* note 1, at 169-70 (drawing a connection between deliberative democracy and participatory constitution making).

17. YOUNG, *supra* note 1, at 22.

18. *Id.*

19. Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE*, *supra* note 12, at 120, 121 [hereinafter Young, *Communication*].

20. YOUNG, *supra* note 1, at 23.

21. *Id.*

22. See DRYZEK, *supra* note 3, at 1; GUTMANN & THOMPSON, *supra* note 3, at 20; YOUNG, *supra* note 1, at 26.

ment free from coercion or domination can often develop a consensus.²³

Inclusion and political equality are two foundational norms of deliberative democracy.²⁴ To increase the likelihood that the “best arguments” will emerge and be discussed, it is essential that a wide variety of interests, opinions, and perspectives are raised. The inclusion norm supports this goal. Furthermore, because decisions are made based on reasons and dialogic examination, those that participate are more likely to transform their positions than those who do not participate. Inclusion assists in interest transformation taking place on a much larger scale.

Political equality ensures that all affected individuals are included in the decision-making process on equal terms.²⁵ This includes having an opportunity to express one’s interests and concerns and to question one another, respond to criticisms raised, and critique the arguments and proposals of others.²⁶ This requires that the participants have equal respect for each other.²⁷ Additionally, participants must be equal “in the sense that none of them is in a position to coerce or threaten others into accepting certain proposals or outcomes.”²⁸ The political equality norm ensures that all participants are free to speak and have the same

23. YOUNG, *supra* note 1, at 5-6, 23; Seyla Benhabib, *Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas*, in HABERMAS AND THE PUBLIC SPHERE 73, 87-88 (Craig Calhoun ed., 1992) (noting that deliberation among political equals is the basis of democratic legitimacy because it enables “those affected by general social norms and collective political decisions [to] have a say in their formulation, stipulation, and adoption”). Deliberation will not always lead to consensus. As noted by Gutmann and Thompson, “[o]n many disagreements, especially reasonable ones, people will not change their minds, no matter how respectfully they deliberate with their opponents.” GUTMANN & THOMPSON, *supra* note 3, at 20. Deliberation does however, encourage participants “to consider their opponents’ positions on the merits, rather than to try to explain them as products of unfavorable conditions, such as impaired judgment, misguided motives, or cultural influences.” *Id.*

24. These two norms are similarly foundational for participatory constitution making. HART, *DEMOCRATIC CONSTITUTION MAKING*, *supra* note 1, at 11 (“Genuine public participation requires social inclusion, personal security, and freedom of speech and assembly.”).

25. YOUNG, *supra* note 1, at 23.

26. *Id.*

27. Young, *Communication*, *supra* note 19, at 126.

28. YOUNG, *supra* note 1, at 23.

opportunity to speak.²⁹ Political rights guaranteeing freedom of expression, conscience, and assembly support this norm.³⁰

Participatory decision making also provides a space in which innovative solutions and approaches to problems can emerge that are qualitatively better than the solutions and approaches developed in elite or exclusive settings. Effective solutions to concrete problems often require “the variety of experience and knowledge offered more by diverse, relatively more open-minded citizens and field operatives.”³¹ Designing an effective political system in a post-conflict state requires a similar cast of participants. Such societies are confronted with developing institutions, rules, and procedures to resolve political, economic, or social disputes that can effectively impede future armed conflict.³² Elite discussions or deliberations generally focus on addressing the security, political, and economic concerns of the elite. Such a narrow focus during constitution making can cause drafters to miss out on effective substantive governance solutions. Participation by those with the complaints, those experiencing the difficulties, and those tempted to take part in armed rebellions can lead to the emergence of different types of recommendations, proposals, and solutions. Participatory constitution making recognizes the public as a resource for democratization.³³ This approach to constitution making seeks to utilize the experiences, knowledge, and ideas of the public. It is based on a normative claim regarding the value of public participation and a legal claim based on the right to self-determination.

29. *Id.*

30. *Id.*

31. Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 *POL. & SOC.* 5, 18 (2001) (noting the effective solutions to school governance and policing in Chicago that emerged as a result of bottom-up neighborhood councils that would not have been developed if officials had acted autonomously); *see also* David Alan Sklansky, *Police and Democracy*, 103 *MICH. L. REV.* 1699, 1764 (2005).

32. T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 3, 21 (Catherine Brölmann, René Lefebvre & Marjoleine Zieck eds., 1993).

33. *See supra* notes 5-11 and accompanying text for a discussion of the Rwandan constitution-making process.

B. Legal Foundation

The right to self-determination and the right to participate in the conduct of public affairs provide a legal foundation for citizen inclusion in the constitution-making process. Constitution making is not only an aspect of public affairs, it is also a means by which citizens can participate in determining the State's political status and its economic, social, and cultural development.³⁴ There has been a considerable amount of scholarship on the evolution of the right to self-determination. Of specific interest to constitution making is what the right entails substantively.³⁵ This question has led to a conceptualization of the right as both external and internal. The external conceptualization refers to the "right for the peoples of the State to determine how the State will be run without external interference."³⁶ The internal right is an entitlement to participate in the State's decision-making processes regarding its political status and its economic, social, and cultural development.³⁷

The right to political participation not only refers to a citizen's right to participate in decision making regarding his or her State's political status, constitution, or government, but also to a right to participate in the conduct of political affairs. This participation right is based on Article 25 of the International Covenant on Civil and Political Rights (ICCPR).³⁸ Article 25 states that:

34. See U.N. Human Rights Comm., *General Comment No. 25: The Right To Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Dec. 7, 1996) (adopted at the fifty-seventh session July 12, 1996) [hereinafter *General Comment No. 25*]; Franck, *supra* note 32, at 20-21; Allan Rosas, *Internal Self-determination*, in MODERN LAW OF SELF-DETERMINATION 225, 229-30 (Christian Tomuschat ed., 1993) (defining the internal right to self-determination as the "right of a people to determine its *constitution*" and the "right of a people to *govern*, that is, to have a democratic system of government").

35. See, e.g., James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in PEOPLES' RIGHTS 7, 7-9 (Philip Alston ed., 2001); Franck, *supra* note 32, at 20-21; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 57-58 (1992); Inge V. Porter, *Two Case Studies in Self-Determination: The Rock and the Bailiwick*, 4 SAN DIEGO INT'L L.J. 339, 358-59 (2003); Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 457 (1996).

36. Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 325 (2002); see also Rosas, *supra* note 34, at 227.

37. See Franck, *supra* note 32, at 20-21; Rosas, *supra* note 34.

38. *General Comment No. 25*, *supra* note 34, at ¶ 2.

The rights under article 25 are related to, but distinct from, the right of peoples

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal 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.³⁹

The United Nations Human Rights Committee (UNHRC or Human Rights Committee) has concluded that the right to participate in the conduct of public affairs extends to constitution making.⁴⁰ In *Marshall v. Canada*, the UNHRC addressed a Canadian tribal society's claim of exclusion from the State's constitution-making process.⁴¹ The Mikmaq tribal society in Canada submitted a communication to the UNHRC under the Optional Protocol to the ICCPR claiming that its rights to self-determination and to take part in the conduct of public affairs had been violated.⁴² The Mikmaq tribal society contended that Canada's refusal to allow it to attend the constitutional conferences convened pursuant to the Constitution Act violated their above-mentioned rights.⁴³ The Constitution Act "envisaged a process which would include a constitutional conference to be convened by the Prime Minister of

to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

Id.

39. International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

40. U.N. Human Rights Comm., *Marshall v. Canada*, ¶ 5.3, U.N. Doc. CCPR/C/43/D/205/1986 (Dec. 3, 1991), available at <http://www1.umn.edu/humanrts/undocs/html/dec205.htm>.

41. *Id.* ¶ 3.1.

42. *Id.* ¶ 3.2.

43. *Id.*

Canada and attended by the first ministers of the provinces and invited 'representatives of the aboriginal peoples of Canada.'⁴⁴ Several conferences were convened by the Prime Minister, and he invited representatives of several national associations to represent aboriginal groups.⁴⁵ The associations were the Assembly of First Nations,⁴⁶ the Métis National Council,⁴⁷ and the Inuit Committee on National Issues.⁴⁸

The Mikmaq tribal society's claim amounted to one of internal exclusion. The Mikmaq maintained that their interests were not properly represented at the constitutional conferences because they could not get one of the invited associations to adequately represent them and they had not given the Assembly of First Nations (AFN) any right to represent them.⁴⁹ The Mikmaq tribal society attempted to influence the AFN by submitting a package of constitutional proposals to it and protested "in the strongest terms any discussion of Mikmaq treaties at the constitutional conferences in the absence of direct Mikmaq representation."⁵⁰ The AFN, however, did not submit any of the Mikmaq position papers to the constitutional conferences, nor did the AFN incorporate them into its positions.⁵¹

Addressing the alleged violation of article 25(a),⁵² the Human Rights Committee concluded that constitutional conferences constitute a conduct of public affairs, but that the Mikmaq tribal society's rights had not been violated.⁵³ The composition, nature, and scope of activities of constitutional conferences in Canada caused the UNHRC to conclude that such conferences "do indeed constitute a conduct of public affairs."⁵⁴ In determining the scope of citizens' right to participate in such activities, the UNHRC held that

44. *Id.* ¶ 2.2.

45. *Id.*

46. This association was invited to represent primarily non-status aboriginal groups. *Id.*

47. This association was invited to represent the Métis. *Id.*

48. This association was invited to represent the Inuit. *Id.*

49. *Id.* ¶ 4.2.

50. *Id.* (internal quotation marks omitted).

51. *Id.*

52. The Human Rights Committee had earlier determined that claims for alleged violations of article 1 cannot be brought under the Optional Protocol. *Id.* ¶ 5.1 (citing U.N. Human Rights Comm., *Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (1990)).

53. *Marshall*, ¶¶ 5.3, 6.

54. *Id.* ¶ 5.3.

it is for the “legal and constitutional system of the State party to provide for the modalities of such participation.”⁵⁵ Article 25(a) protects citizens’ rights to participate in the conduct of public affairs directly or indirectly, and the UNHRC rejected the idea that this right allows citizens to decide whether they will take part in the conduct of public affairs directly or through freely chosen representatives.⁵⁶ Canada’s decision to design a constitutional review process that utilized conferences attended by the first ministers of the provinces provided for citizen participation through freely chosen representatives.⁵⁷ Article 25(a) does not create an unconditional right to direct participation in the conduct of public affairs; rather, it allows states to choose direct or representative modalities.⁵⁸ As long as the state’s chosen modality of participation does not discriminate on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” or unreasonably restrict participation, it will not contravene article 25(a).⁵⁹

The Human Rights Committee reiterated these conclusions in 1996 in the General Comment on Article 25, stating that citizens participate directly in the conduct of public affairs “when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b).”⁶⁰ In this comment the UNHRC refrained from specifying what participation should look like, but it discussed a variety of modalities. These included popular assemblies, consultative bodies, freely chosen representatives, referenda, elections, and public debate and dialogue.⁶¹

The UNHRC focused its analysis on external inclusion, whether citizens are present in the decision-making forums directly or indirectly through representatives.⁶² The Human Rights Committee did not address internal inclusion and whether the internal right to

55. *Id.* ¶ 5.4.

56. *Id.*

57. *Id.* ¶ 2.2.

58. *Id.* ¶ 5.5.

59. ICCPR, *supra* note 39, at art. 25.

60. *General Comment No. 25, supra* note 34, ¶ 6.

61. *Id.* ¶¶ 6-9.

62. *Id.* ¶ 6.

self-determination includes the right to have an “effective opportunity to influence the thinking” of the decision makers.⁶³ The focus on external inclusion has been adopted by post-conflict states utilizing participatory constitution making. This form of inclusion adheres to international norms and rules regarding citizen participation in the conduct of public affairs, which reinforces a State’s legitimacy within international society.⁶⁴ The lack of emphasis on internal inclusion, however, minimizes the normative and instrumental benefits of participatory constitution making.⁶⁵

II. POWER AND POLITICS

Participatory constitution making is fundamentally about enacting social and political change in post-conflict states.⁶⁶ Its supporters within the international community view it as a tool for implementing democracy where it has ceased to exist and for entrenching social and political rights where they have only nominally existed.⁶⁷ In all societies, but particularly post-conflict states, there is a significant disparity in the political and social power of elites and ordinary citizens.⁶⁸ A consequence of this power differential is that most segments of society are virtually precluded “from any meaningful role in the exercise of political power.”⁶⁹ Advocates of participatory constitution making acknowledge this

63. YOUNG, *supra* note 1, at 55.

64. *See infra* note 107.

65. *See supra* notes 5-11 and accompanying text (discussing Rwanda’s constitutional process as an example).

66. *See, e.g.*, Samuels, *supra* note 1, at 667.

67. *Cf. id.*

68. DOUGLAS MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970*, at 21 (2d ed. 1999). The power elite concept was first used by C. Wright Mills to describe those within society “whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences.” C. WRIGHT MILLS, *THE POWER ELITE* 3-4 (1956). National power resides within the economic, political, and military domains of society and its leaders represent the power elite. *Id.* at 6.

69. MCADAM, *supra* note 68, at 21 (“Elite theorists depict society as characterized by a marked disparity in power between some societal elite, however defined, and the mass of ordinary citizens. The effect of this disparity is virtually to preclude most segments of society—especially the lower class—from any meaningful role in the exercise of political power.”).

reality and argue that greater participation in the constitution-making process will provide new and important opportunities for more individuals and groups within the society to participate in political decision making.⁷⁰ Yet calls for increased citizen participation do not adequately address the problem of participation without power.⁷¹

A state's political system includes members and challengers. Members are those "groups possessing sufficient politico-economic resources to insure that their interests are routinely taken into account in decision-making processes."⁷² Challengers are those "groups whose interests are routinely 'organized out' of institutionalized political deliberations because of their lack of bargaining leverage."⁷³ The ability of members to facilitate political change within a society will be vastly different than the ability of challengers to do the same.⁷⁴ Member-driven change projects will generally seek limited reforms and utilize institutional strategies that build upon existing relationships with key decision makers.⁷⁵ Challengers, on the other hand, tend to seek changes that transform the status quo in ways that are incompatible with member interests.⁷⁶ Due to their controversial goals and limited access to elite decision makers, challengers utilize a combination of institutional and non-institutional strategies.⁷⁷

Increasing the participation of all members of society, including challengers, is a core goal of participatory constitution making. Yet power does not follow automatically from participation. Groups

70. See sources cited *supra* notes 1-2.

71. Robert R. Alford & Roger Friedland, *Political Participation and Public Policy*, 1 ANN. REV. SOC. 429, 431 (1975).

72. MCADAM, *supra* note 68, at 24; see also WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* 9-12 (2d ed. 1990); CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION* 52 (1978).

73. MCADAM, *supra* note 68, at 24; see also GAMSON, *supra* note 72, at 14-16.

74. The types of change sought, access to elite decision makers, and the strategies utilized will also vary significantly for these groups. MCADAM, *supra* note 68, at 24.

75. *Id.* Institutional strategies target political and legal decision makers and utilize methods such as lobbying and pursuing legal challenges.

76. Edwin Amenta & Michael P. Young, *Democratic States and Social Movements: Theoretical Arguments and Hypotheses*, 46 SOC. PROB. 153, 154-55 (1999).

77. Non-institutional strategies include activities like demonstrations, marches, and community education. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 3 (1998); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1504-05 (2005).

within a society have “access to different types of power that affect the level and consequences of their members’ participation.”⁷⁸ Based on research examining political participation opportunities for poor Americans in the 1970s, Alford and Friedland concluded that “institutionalized political participation does not have the power to reshape political priorities.”⁷⁹ While power and participation are “causally related phenomena,” they are independent.⁸⁰ Power can exist without participation and participation can occur without power.⁸¹ Alford and Friedland found that elites encouraged poor Americans to participate in the political system in the spaces in which policy making did not occur, which limited the effect of such participation to “spasmodic challenges.”⁸² A similar phenomenon can be seen in the use of participatory constitution making in post-conflict states. The drafting process is structured to facilitate discussions and deliberation amongst members—the victors or the parties to the peace agreements—and simultaneously insulate drafters from substantively engaging with challengers.

Traditionally, peace negotiations take place amongst the individuals and entities that possess the power to effectuate a cessation of hostilities. These negotiations often lead to a constitution or political power-sharing agreement. The political aspects of the peace agreement will ensure that the negotiating parties will not be permanently excluded or exposed to political abuse in the future.⁸³ Political power-sharing agreements contain self-enforcing guarantees, as there is no third party monitoring compliance or enforcing the agreement. Such agreements tend not to distribute political power in competitive or ambiguous ways.⁸⁴ They articulate specific

78. Alford & Friedland, *supra* note 71, at 472.

79. *Id.* at 464.

80. *Id.* at 431.

81. *Id.*

82. *Id.* at 464. The authors found that the “impact of actual substantive participation was slight and, more important, was blocked whenever it attempted institutional change.” *Id.* at 460.

83. BARBARA F. WALTER, *COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS* 27 (2002).

84. *Id.* at 30. Elections, one of the benchmarks of democratic transition, will generally be resisted by the combatants for the early years of the post-conflict state. Elections only provide combatants with the opportunity to compete for political power; they do not guarantee a role in the post-conflict state’s government. Democratic institutions are not likely to be successful overnight, and combatants know that these institutions will be unable to prevent a rapid grab

power-sharing quotas, divisions of key ministries and executive positions.⁸⁵ This enables the parties to guarantee themselves key leadership positions, to insulate themselves from future harm, and to prevent rivals from consolidating power.⁸⁶

In limiting general access to political power, the parties negotiating the peace agreement address their fears of political exclusion, but they often exacerbate those fears within the general population.⁸⁷ Those outside of the negotiating parties' network have little to no chance of having any significant political power within the post-conflict state. Such exclusion can limit the legitimacy of the post-conflict state in the eyes of the state's inhabitants⁸⁸ and perpetuate feelings of exclusion and marginalization amongst portions of the state's population, which could fuel future armed attacks.⁸⁹ Participatory constitution making is one mechanism that has been advanced to address this exclusion. Within a political environment in which negotiating parties greatly fear political exclusion, participatory constitution making may only provide challengers with limited opportunities for political inclusion.

The 2002 North-South peace negotiations in Sudan and the current conflict in Darfur are examples of exclusive peace negotiations exacerbating fears of political exclusion. Sudan has been in the midst of an armed internal conflict since 1983.⁹⁰ A common explanation for the war is that southern rebels are attempting to exercise their right to self-determination after decades of being politically and economically marginalized by the north.⁹¹ This conception of the

for power. Thus a new government could ignore agreements to open up the political system and work instead to serve only its narrow interests. Additionally, civil society will not be strong enough to support the nascent democratic institutions or effectively control their misconduct. *Id.* at 29-30.

85. *Id.* at 30.

86. *Id.*

87. See, e.g., HART, DEMOCRATIC CONSTITUTION MAKING, *supra* note 1, at 3 ("Traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure.")

88. See, e.g., *id.*

89. See René Lemarchand, *Exclusion, Marginalization and Political Mobilization: The Road to Hell in the Great Lakes*, in *FACING ETHNIC CONFLICTS* 61, 67 (Andreas Wimmer et al. eds., 2004).

90. See *Millions Dead in Sudan Civil War*, BBC NEWS, Dec. 11, 1998, <http://news.bbc.co.uk/2/hi/africa/232803.stm> (last visited Feb. 16, 2008).

91. See, e.g., TED DAGNE, CONG. RESEARCH SERV., *SUDAN: HUMANITARIAN CRISIS, PEACE*

conflict led the international community to support the 2002 peace talks between the Government of Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/A).⁹² The GOS represented the northern interests and the SPLM/A represented southern interests.

The 2002 Naivasha Protocol addressing power sharing in post-war Sudan grants the National Congress Party (NCP)⁹³ and the SPLM 80 percent of the seats in the National Assembly and the National Executive during the six-year interim period before elections will be held.⁹⁴ In the newly-created Southern Sudan Assembly, the SPLM will hold 70 percent of the seats while the NCP will have 15 percent, leaving only 15 percent of the seats for "other Southern political forces."⁹⁵ This system grants political control to two parties, which together do not represent the interests of all of the major segments of Sudanese society. While the world welcomed this development in the Sudanese peace process, several prominent Sudanese political leaders critiqued the new constitution as a bilateral pact that excluded significant portions of the Sudanese population.⁹⁶

In 2003, a new chapter in the Sudanese civil war began when the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) attacked military installations in Darfur—a

TALKS, TERRORISM, AND U.S. POLICY (May 8, 2002), available at <http://fpc.state.gov/documents/organization/10861.pdf>.

92. *Id.*

93. The National Congress Party (NCP) is, and at all relevant times has been, the political party in power in Sudan. Therefore the GOS and the NCP are the same entity for negotiating purposes.

94. The NCP and the SPLM will also hold 80 percent of the seats in the state legislatures, with the NCP filling 70 percent and the SPLM occupying 10 percent of the seats in Northern states and vice versa in Southern states. Protocol Between the Government of Sudan (GOS) and the Sudan People's Liberation Movement (SPLM) on Power Sharing art. 4.4.2, May 26, 2004, http://www.usip.org/library/pa/sudan/power_sharing_05262004.pdf [hereinafter Power Sharing Agreement].

95. *Id.* art. 3.5.1. The same division is made for the executive branch of the Government of Southern Sudan.

96. See, e.g., Tanalee Smith, *Sudanese Former PM Criticizes Constitution, Says New Govt Is Not Inclusive*, SUDAN TRIB., July 11, 2005, available at <http://www.sudantribune.com/spip.php?article10583>; *Sudanese Opposition Parties Want Peace Protocols To Become National*, SUDAN TRIB., May 28, 2004, available at <http://www.sudantribune.com/spip.php?article3157>.

northern region of Sudan.⁹⁷ Despite being designated the representative of northern interests in the 2002 peace talks, the GOS failed to include the concerns of African Darfurians on the agenda.⁹⁸ As a result “many concluded that, if they ever wanted to see their needs met, they would have to do what John Garang had done in the South: take up arms against the Sudanese government and try to get the world’s attention.”⁹⁹ On April 25, 2003, the SLA and the JEM did just that,¹⁰⁰ and the humanitarian crisis in Darfur is now covered daily in newspapers around the world. In 2002 armed conflict had not reached Darfur, but there were significant problems regarding political representation and the distribution of economic resources. The exclusion of African Darfurians from the 2002 peace talks and the content of the power-sharing arrangements developed during those talks may have exacerbated tensions in Darfur and possibly contributed to the outbreak of violence in the spring of 2003.¹⁰¹

The Sudan experience exemplifies the tension that exists between political elites’ need for guaranteed political power and widespread citizen participation in designing the states’ governance system. Scholars have advanced two main theories articulating the factors under which parties to an armed conflict will enter into peace negotiations and the circumstances under which those negotiations will be successful. One theory focuses on the ripeness of the conditions on the ground and the other contends that civil wars end when the underlying conflicts are adequately resolved.¹⁰² These

97. Int’l Crisis Group, Conflict History: Sudan, <http://www.crisisgroup.org/home/index.cfm> (search “conflict history: sudan”; then follow first result hyperlink) (last visited Feb. 16, 2008). The rebel groups claim that the attacks were a response to the long-term economic and political marginalization of the region and an attempt to protect their communities from attacks by government-supported “Janjaweed” militias. *Id.*

98. Samantha Power, *Dying in Darfur*, NEW YORKER, Aug. 30, 2004, at 60 (noting that Darfuriian leaders were “excluded from the U.S.-backed peace talks”).

99. *Id.* at 62.

100. *Id.* at 61.

101. *See id.* at 60-62.

102. *See, e.g.*, FRED CHARLES IKLÉ, EVERY WAR MUST END 13-16 (1971) (underlying conflict); GLENN SNYDER & PAUL DIESING, CONFLICT AMONG NATIONS 12-13 (1977) (underlying conflict); STEPHEN JOHN STEDMAN, PEACEMAKING IN CIVIL WAR: INTERNATIONAL MEDIATION IN ZIMBABWE, 1974-1980, at 25-28 (1991) (ripeness); I. WILLIAM ZARTMAN, RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA 267-73 (1989) (ripeness); James D. Fearon, *Rationalist Explanations for War*, 49 INT’L ORG. 379 (1995) (underlying conflict);

theories provide insight as to when combatants will begin to negotiate and what substantive issues the negotiations will need to address in order for the parties to sign an agreement. Barbara Walter helps us further understand what is necessary for the parties to adhere to the agreements they sign. She argues that it is the credibility of enforcement of the peace agreement that reduces the parties' uncertainty and increases the likelihood that they will comply with the peace agreement.¹⁰³ Security commitments enforced by third parties reduce the level of uncertainty the parties will face during the highly dangerous implementation period.¹⁰⁴ Similarly, political power-sharing arrangements enable the parties to self-enforce the political agreements, which reduces uncertainty.¹⁰⁵ Widespread citizen participation in the constitution-making process increases uncertainty.¹⁰⁶ One way political elites in post-conflict states address this tension is by creating participatory constitution-making systems that facilitate participation without power.¹⁰⁷

Robert Randle, *The Domestic Origins of Peace*, 392 ANNALS AM. ACAD. POL. & SOC. SCI. 76, 77-80 (1970) (underlying conflict). Ripeness theories maintain that particular economic, military, or political conditions on the ground encourage combatants to negotiate and settlements follow from that point. See ZARTMAN, *supra*. Scholars in the second group acknowledge the importance of the conditions on the ground but claim that the negotiations will not be successful unless the issues driving the war are resolved in a mutually agreeable manner. WALTER, *supra* note 83, at 7-8.

103. *Id.* at 26-31.

104. *Id.* at 26-27.

105. *Id.* at 27-31.

106. Walter argues that combatants who fear permanent exclusion from political power will not give up their military options if the peace agreement distributes power in a competitive, and thus ambiguous, way. *Id.* at 30.

107. See, e.g., HASSEN EBRAHIM, KAYODE FAYEMI & STEPHANIE LOOMIS, PROMOTING A CULTURE OF CONSTITUTIONALISM AND DEMOCRACY IN COMMONWEALTH AFRICA 8-14 (1999), available at http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf. The willingness of post-conflict states to utilize participatory constitutions is tied to their desire to have legitimacy internationally and domestically. *Id.* at 11. International norms regarding appropriate governance systems and methods for implementing those systems support the use of participatory constitution making. See, e.g., HART, DEMOCRATIC CONSTITUTION MAKING, *supra* note 1, at 4-7; Otive Igbuzor, Constitution Making in Nigeria: Lessons for Making a People's Constitution, Paper Presented at the Conference on Constitutional Development, Kibuye, Rwanda (Aug. 19-24, 2001), available at <http://www.cdd.org.uk/cfcr/constitutionlessons.htm> (author is the Secretary for the Citizen's Forum for Constitutional Reform, an organization founded out of a Centre for Democracy and Development project). Rwanda's LCC received substantial international support from entities such as the United Kingdom Department for International Development, United Nations Development Fund for Women, the government of Sweden, and USAID. UNITY AND

III. INTERNAL EXCLUSION

One of the most significant barriers to the effective use of participatory constitution making in post-conflict states is exclusion. Exclusion can be external or internal.¹⁰⁸ External exclusion refers to the ways in which individuals are precluded from participating in the forums in which substantive decision making occurs.¹⁰⁹ Internal exclusion occurs when individuals are physically present in the decision-making forums, but they “lack effective opportunity to influence the thinking of others.”¹¹⁰ One significant way in which internal exclusion occurs is lack of engagement.¹¹¹

Participatory democratic theory places a lot of confidence in the ability of elites and the general public to utilize deliberative decision-making methods. Some research has found that in high stakes deliberations, participants do not review and reconsider their preexisting preferences and opinions in light of reasons and justifications offered by other participants.¹¹² Participants have strongly held views at the beginning of the process and they have a difficult time changing those views.¹¹³ Even when participants’ views change, they have a hard time admitting it, because such a concession can cause them to lose credibility.¹¹⁴ Additionally, when

RECONCILIATION REPORT, *supra* note 5, at 54.

108. YOUNG, *supra* note 1, at 53-54.

109. *Id.* at 55.

110. *Id.*

111. *Id.*

112. Carolyn M. Hendricks, John S. Dryzek & Christian Hunold, *Turning Up the Heat: Partisanship in Deliberative Innovation*, 55 POL. STUD. 362, 362 (2007); see also John S. Dryzek, *Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia*, 33 POL. THEORY 218, 229 (2005) [hereinafter Dryzek, *Deliberative Democracy*].

113. See Dryzek, *Deliberative Democracy*, *supra* note 112.

114. *Id.* (noting that “[U]nder ‘hot’ deliberation, tied to collective decision and involving partisans, participants have more strongly formed views going into deliberation, and so cannot easily change”); Gerry Mackie, *Does Democratic Deliberation Change Minds? 2-4* (2002) (paper prepared for American Political Science Association Conference, Boston, Mass.) (on file with author). Mackie notes that unlike individuals involved in deliberative polls or citizens’ juries, those participating in parliaments and natural groups rarely change their minds. He attributes this to participants entering deliberative polls or citizens’ juries with “undeveloped views, shaped, if at all, by superficial symbolic attitudes, thus, participants more refine than change their views in deliberation; participants have no past public position nor future credibility to defend; participants are not directly responsible for creating or rectifying the

participants see themselves as members of an identifiable group and other participants as members of a different identifiable group, they are more likely to move toward a more extreme position in the direction of the views they held at the beginning of the process.¹¹⁵ Research focused specifically on constitution making in post-conflict states or transitional democracies, however, has found that more participatory and inclusive processes broadened the constitutional agenda and prevented the process from becoming a division of state resources amongst the powerful players.¹¹⁶

Rwanda's constitution-making process involved high stakes, yet some challengers successfully obtained internal inclusion while others did not.¹¹⁷ The experience of gender equity advocates and multi-party advocates illustrates that participatory constitution-making systems that facilitate external inclusion without internal inclusion can generate participation without power. This approach maintains the negotiated distribution of political power, but it

issue at hand." *Id.* at 3.

115. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 15, 30 (2001); see also Amiram Vinokur & Eugene Bernstein, *Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts: A Group Problem-Solving Approach*, 29 *J. PERSONALITY & SOC. PSYCHOL.* 305, 314 (1974). This process is referred to as group polarization.

116. See, e.g., Hart, *Constitution-making*, *supra* note 1, at 167 (noting that confrontation through participatory constitution making can lead to legitimate constitutional settlements); Samuels, *supra* note 1, at 670 ("The use of more participatory and inclusive processes does appear to broaden the constitutional agenda and prevent the process from degenerating into a mere division of spoils between powerful players."). But see Peter H. Russell, *Attempting Macro Constitutional Change in Australia and Canada: The Politics of Frustration*, 7-8 *INT'L J. CANADIAN STUD.* 41 (1993). Russell concluded that the process of enacting the Canadian Charter of Rights clarified old conflicts and created new conflicts: "Canada has the dubious honour of remaining a nation-state driven to constitutional politics at the mega level by deep dissensus. This dissensus is as much the effect as the cause of constitutional politics." *Id.* at 54.

Participatory processes, and particularly those that are deliberative, are not uniform. They will not always lead to the entrenchment of previously held opinions or promote division, nor will they always promote greater political inclusion and participation. The context and design of the participatory process will significantly impact whether or not participation and deliberation will promote legitimate and effective governance. Archon Fung, *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 *J. POL. PHIL.* 338, 347-52 (2003) (examining the consequences of public sphere design choices on the quality of democratic governance); Samuels, *supra* note 1, at 670 ("In Afghanistan, for instance, the participation process was managed in a careful fashion to prevent the warlords or Islamic extremists from dominating the process. Nonetheless, such divisive impacts are a possibility if the participatory and consultative process is not carefully designed.").

117. See *supra* notes 5-11 and accompanying text.

prevents the state from achieving the full range of normative and instrumental benefits of participatory constitution making.

Gender equity advocates successfully obtained internal inclusion in Rwanda's constitution-making process.¹¹⁸ Their efforts led to the inclusion of constitutional provisions that prohibit gender discrimination, grant equal protection, accord women equal rights and duties in marriage and raising children, and most notably reserve 30 percent of the national legislative seats for women.¹¹⁹ Multi-party advocates were internally excluded and achieved little substantive success. The constitution states that a "multi-party system of government is recognized," it permits the formation of political organizations, and it allows political organizations to operate freely.¹²⁰ Yet other constitutional provisions and the national regulations governing political parties significantly undermine these protections.¹²¹

External inclusion was widely available to Rwandan citizens, but internal inclusion was limited to the political elites and those within their network.¹²² Citizens were able to attend large public meetings with Legal and Constitutional Commission commissioners, complete an LCC-issued questionnaire, or submit independent written comments and proposals.¹²³ There were significantly fewer opportunities for internal inclusion. The LCC invited feedback and recommendations from the public, but typically the information

118. U.N. Office of the Special Adviser on Gender Issues and Advancement of Women (OSAG), Expert Group Meeting on Enhancing Women's Participation in Electoral Processes in Post Conflict Countries, *Strengthening Government: The Rule of Women in Rwanda's Transition: A Summary*, U.N. Doc. EGM/ELEC/2004/EP.5 (Jan. 26, 2004) (prepared by Elizabeth Powley) [hereinafter *Strengthening Government*].

119. RWANDA CONST. arts. 11 (discrimination), 16 (equal protection), 26 (equal rights and duties in marriage), 27 (equal rights and duties in child rearing), 76 (reserved seats in Chamber of Deputies), 82 (reserved seats in Senate).

120. RWANDA CONST. art. 52.

121. *Id.* Article 52 of the June 2003 constitution prohibits political organizations from having local level offices. All offices have to be at the national, provincial, or Kigali City levels. *Id.* A December 2005 revision now allows political parties to create and maintain local offices. *Id.* (amended Aug. 12, 2005). Article 57 states that an organic law will determine the modalities for creating political organizations and the freedom of speech, association, and the press are similarly subject to conditions to be determined by law. *Id.* at arts. 33-35, 57 (2003).

122. See UNITY AND RECONCILIATION REPORT, *supra* note 5, at 11.

123. See *supra* notes 5-11 and accompanying text.

was reviewed and entered into a database.¹²⁴ The ideas and opinions that “prevailed over the rest” were retained by the LCC.¹²⁵ These ideas and opinions were not deliberated, and sensitive topics like human rights were not available for public comment.¹²⁶ Consequently citizens had to independently create opportunities to engage the drafters. Gender equity advocates did this by obtaining an unofficial representative within the LCC.¹²⁷ Judith Kanakuze, one of the civil society representatives, supported the gender equity advocates’ goals.¹²⁸ As an LCC commissioner, she was able to ensure that proposals regarding gender equity were seriously reviewed and considered.¹²⁹ She facilitated LCC engagement with gender equity proposals, which facilitated internal inclusion for the gender equity advocates.¹³⁰

The LCC’s willingness to engage proposals from the public was affected by the impact such proposals would have on the distribution of political power.¹³¹ It was easier for the LCC to engage the

124. UNITY AND RECONCILIATION REPORT, *supra* note 5, at 53. Neither the LCC’s mandate from the Transitional National Assembly nor its internal rules required the drafting body to engage the feedback or recommendations.

125. *Id.* at 54-55.

126. Alfred Mukezambura, the Deputy Chairman of the LCC, explained that the public could not be consulted on some topics, such as human rights, because they “cannot suffer alterations.” *Id.* at 55. He also noted that, “ending the transitional period is not like cutting a rope; ending the transitional period is a process that will by all means keep up such valuable things as decentralization and empowerment.” *Id.*

127. *See* Banks, *supra* note 2, at 151.

128. *Id.*

129. *Id.*

130. *Id.*

131. Domestic and international commentators on Rwanda’s constitution have noted that the constitution drafted by the LCC retains the distribution of political power established by the RPF after its military victory.

The main feature of the draft Constitution is its closeness to the current institutional set-up of politics in Rwanda. As we all know, this is deeply beneficial to the perceived interests of the powers-that-be: it all but guarantees the continued exercise of power by the FPR [Rwandan Patriotic Front]. This reflects the fact that in Rwanda, power is exclusively in the hands of the FPR, which faces no solid political, military, or intellectual challenges.

Peter Uvin, *Rwanda’s Draft Constitution: Some Personal Reflections on Democracy and Conflict and the Role of the International Community* (Feb. 16, 2003), <http://www.grandslacs.net/doc/2601.pdf>; *see also* UNITY AND RECONCILIATION REPORT, *supra* note 5, at 21; Peter Uvin, *Wake Up! Some Personal Reflections and Policy Proposals*, at 1 (June 2003), <http://fletcher.tufts.edu/faculty/uvvin/reports/wakeup.pdf> [hereinafter Uvin, *Wake Up!*] (“Those in power fear that truly free elections will mean an immediate end to the regime (and victory of any Hutu

gender equity advocates' proposals, because they did not disrupt the governance system envisioned by Rwanda's political elites. Rwanda's gender equity advocates sought equality and non-discrimination language that has consistently appeared in Rwanda's constitutions since independence.¹³² The guaranteed political participation of women was structured so as not to alter the balance of power amongst the political parties then participating in the transitional government. Thirty percent of the seats within the National Assembly and the Senate are reserved for women.¹³³ The women who hold these seats are representatives of the women's structures and they are indirectly elected by the sub-national women's councils throughout the country.¹³⁴ Women are also able to run as members of political parties, but that form of political participation is not guaranteed.¹³⁵ Women were added to the national legislature, but they were not structurally integrated. This approach did not introduce uncertainty or ambiguity regarding the general distribution of political power amongst the political parties participating in the transitional government.¹³⁶

Multi-party advocates' critiques of the proposed constitutional provisions regarding political parties, freedom of expression, and freedom of association threatened the political elites' sense of certainty.¹³⁷ These advocates sought to ensure that the constitution would support political competition rather than ratify the RPF's

candidate), which they consider tantamount to suicide."); AMAHORO PEOPLE'S CONGRESS, *supra* note 5 ("Clearly, the Rutaremara commission sought to propose a constitution that fits the current regime, instead of a system that will bring peace and stability to our country.").

132. RWANDA CONST. art. 16 (1991); RWANDA CONST. art. 16 (1978); RWANDA CONST. art. 16 (1962).

133. RWANDA CONST. art. 82.

134. *See Strengthening Government*, *supra* note 118, at 10-11.

135. The ability of women to participate in both tracks lead to women making up 48.8 percent of the members of the National Assembly, the highest percentage of women in a national legislature in the world. Inter-Parliamentary Union, *Women in Parliaments: World Classification* (Sept. 30, 2003), <http://www.ipu.org/wmn-e/arc/classif300903.htm>.

136. Requiring 30 percent of the national legislators to be women who are directly elected and representatives of their geographic locales rather than the women's structures, or requiring 30 percent of any party's delegation to the national legislature to be women, may have increased the prominence and power of any of the existing parties or supported the development of a new competitive party.

137. NAT'L DEMOCRATIC INST., *ASSESSMENT OF RWANDA'S PRE-ELECTION POLITICAL ENVIRONMENT AND THE ROLE OF POLITICAL PARTIES* 9 (Aug. 2003), available at http://www.accessdemocracy.org/Library/1642_rw_assessment_092203.pdf.

monopoly on political power. For example, one critical report raised concerns about the provisions regarding the Forum on political parties.¹³⁸ The Forum was seen as intruding in the internal affairs of political parties and creating a super-party that transformed the multi-party system provided in article 55 of the constitution into a one-party state.¹³⁹ These types of critiques led to individuals and organizations being labeled as divisionist.¹⁴⁰

Multi-party advocates faced challenges not only because of the substance of their ideas and comments, but also as a result of Rwanda's history with multi-party politics. Within Rwanda, multi-party politics was connected with ethnic division.¹⁴¹ Historically, political parties had distinct ethnic identities and past elections had "led to deeply divisive politics and major violence."¹⁴² Rwandans and the RPF feared that the emergence of robust political competition would lead to ethnic-based violence like that experienced during the 1994 genocide.

138. The Forum is a supervisory body for political activity. Between the February 14, 2003 draft of the constitution and the final draft, the Forum was transformed from an optional organization that political parties could join, to a mandatory consultative forum. Compare RWANDA CONST. art. 57 (Feb. 14, 2003) with RWANDA CONST. art. 56 (May 26, 2003). Initially this voluntary organization was charged with "[h]armonizing the points of view of the constituent political parties on the country's major political problems." RWANDA CONST. art. 57 (Feb. 14, 2003). After it became a mandatory organization, it became a forum responsible for "facilitating exchange of ideas by political organizations on major issues facing the country." RWANDA CONST. art. 56 (May 26, 2003).

139. AMAHORO PEOPLE'S CONGRESS, *supra* note 5.

140. Divisionism is a serious charge in Rwanda. The Organic Law on Political Parties states that "[a]ny political organization causing trouble or carrying out divisive acts shall face sanctions determined by the law." Organic Law Governing Political Organizations and Politicians, No. 16/2003, OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA, art. 18 (June 27, 2003) (Year No. 42 special), available at <http://www.grandslacs.net/doc/2733.pdf>. This law further states that all politicians and political organizations are prohibited from "carrying out acts, delivering speech or writings that cause any form of discrimination and divisions among Rwandans." *Id.* at art. 40. The Senate can lodge a complaint with the High Court of Rwanda for a violation of article 40. *Id.* at art. 42. Before these rules went into effect, the MDR was dissolved based on charges of division between the completion of the constitution making process and the first national elections. The moment when it appeared that this party might pose a significant electoral threat to the RPF it was found to be divisive and it was disbanded. Press Release, Amnesty Int'l, Rwanda: Escalating Repression Against Political Opposition (Apr. 22, 2003), available at <http://web.amnesty.org/library/index/engaf470042003>.

141. Banks, *supra* note 2, at 157.

142. NAT'L DEMOCRATIC INST., *supra* note 137, at 5; Uvin, *Wake Up!*, *supra* note 131, at 1.

CONCLUSION

Rwanda's participatory constitution-making process served an educational function more than a deliberative function. The process did not facilitate engagement between the LCC and the public. The LCC provided the public with information, but there was little deliberation by the public of that information, and when the public did deliberate, the LCC rarely responded.¹⁴³ The LCC used classic aggregative techniques to review and evaluate public feedback. Questionnaire responses were counted and summarized while written submissions were weighted according to author and relevance. The LCC attempted to identify the most widely held opinions regarding the political organization of the Rwandan state. There was less effort, institutionally or procedurally, to deliberate. The focus on identifying widely and strongly held opinions created an opportunity for interest-based political decision making. Yet the number of interests competing was limited because interests within the society did not have the same opportunities to organize and engage in traditional interest group advocacy. This contributed to the process being externally inclusive, yet internally exclusive for most Rwandan citizens. Obtaining internal inclusion required the support of influential domestic allies and a platform that did not undermine the existing distribution of political power. Such a process reinforces the existence of a narrow political elite, which maintains the importance of patronage in countries emerging from armed conflicts often fought in the name of rectifying political exclusion.

Participatory constitution making is advocated as a tool for facilitating the creation of democratic governance systems with broad citizen involvement and increasing the protection of citizens' civil and political rights. Post-conflict states that utilize participatory constitution making will often struggle with creating a process that is internally inclusive. The challenges facing political elites in

143. Public engagement with the government generally took place through written submissions to the LCC, which were responded to in the form of the Synthesis of Ideas and drafts of the constitution, but with little public discussion of the content of the submissions and the reasons for accepting or rejecting the arguments within them.

post-conflict states are significant and they should not be underestimated. Recognizing the extreme difficulty that such leaders face should encourage scholars and advocates to acknowledge the risks political elites in post-conflict states perceive from the use of participatory constitution making. Such acknowledgment can be the first step in thinking about strategies for increasing the number of citizens that are internally included, rather than supporting the use of institutions and procedures that ultimately reinforce internal exclusion.