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Angela M. Banks

William & Mary Law School, ambank@wm.edu

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PARTICIPATORY CONSTITUTION-MAKING IN POST-CONFLICT STATES

By Angela M. Banks*

A perennial challenge facing international legal scholars and practitioners is how to create effective mechanisms for broad and meaningful political participation in post-conflict states. One aspect of this challenge is drafting and implementing a constitution that creates a governance system based on a set of democratic principles and practices for which there is a national consensus. Despite the vast literature on the implications of various electoral systems on peace and democratic development in divided societies, there has been little systematic analysis of the various types of participatory systems used to facilitate citizen participation in constitution-making, and the ability of the various systems to bring about inclusive governance systems.

Participatory constitution-making is premised on the idea that democratic constitutions should be created and adopted through democratic processes. This new form of constitution-making is advanced by numerous international organizations and entities, such as the European Union, the Commonwealth Human Rights Initiative, the United States Institute of Peace, and the Centre for Democracy and Development. It is seen as a mechanism for adopting

⁴ *Islamic Law in Nigeria* [Rush Transcript; Federal News Service, Inc.], available at <http://www.cfr.org/publication/9994/islamic_law_in_nigeria_rush_transcript_federal_news_service_inc.html>. It is worth noting that this dependence on foreign donors cannot be divorced from the total absence of funding from local donors.

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

constitutions that lead to the creation of a governance system that achieves three instrumental goals. The governance system is effective, domestically legitimate, and has significant public support.

The literature on participatory constitution-making does not adequately address how choices regarding the institutional design of a participatory constitution-making system affect citizens' ability to be core participants in the constitution-drafting process. Advocates for participatory constitution-making overlook the qualitative differences between various forms of citizen participation, types of drafting bodies, rules regarding the drafting body's decision-making process, and rules determining how the constitution is adopted.

To examine the relationship between these choices and citizens' ability to be core rather than peripheral participants in the constitution drafting process, I propose conceptualizing participatory systems as either externally inclusive or internally inclusive. Externally inclusive systems provide opportunities for individuals to discuss governance matters with the constitution drafters. Such systems do not however provide for the consistent review and consideration of the public's feedback during the drafting body's substantive discussions and deliberations. Internally inclusive systems, on the other hand, not only provide citizens with the opportunity to engage the drafting body; they also have procedures for ensuring consistent review and consideration of the public's feedback and proposals. Externally inclusive systems, like that used in Rwanda, are more common in post-conflict states. While such systems represent an important shift toward democratic governance, they are likely to result in constitutions that govern political representation in ways that further the interests of political elites.

Rwandan citizens were able to participate in the constitution-making process by attending large public meetings, responding to a questionnaire prepared by the Legal and Constitutional Commission (LCC),¹ or submitting an independent memorandum to the LCC. The LCC organized public meetings at the district level. At this time Rwanda was divided into 63 districts with populations ranging from 8,000 to 149,000 inhabitants. These meetings took place between January and June 2002 and the LCC reports that the meetings averaged 90,000 attendees.² The public meetings were attended by LCC commissioners and the conversation was structured around the 60-item LCC questionnaire. Discussions at the meetings are reported to have continued until consensus was reached. Dissenting views were to be noted and discussed at a later time. The commissioners attending the meetings were tasked with taking notes and adding the information to the central pool of ideas gathered from the public.

This central pool also included information gathered from the LCC-issued questionnaire. This questionnaire not only structured the public meetings, but was available for individuals to complete and return to the LCC. The LCC planned to review a random selection of 7% of the questionnaires returned. The LCC chair explained that the questionnaire responses were graded "according to pertinence and where [they] came from (an individual person, a group of persons, an expert in a specific area, and institution or a department [])."³ It appears that this grading process was used to determine which responses would be included in the 7% random sample.

In light of the manner in which information was recorded at the public meetings, commissioners taking notes, and the selective review of the questionnaire responses, the public

¹ The LCC was the body responsible for drafting Rwanda's new constitution.

² Other reports indicate that attendance ranged from 200 to 2000 people. INT'L CRISIS GROUP, *END OF TRANSITION IN RWANDA: A NECESSARY POLITICAL LIBERALISATION* (ICG Africa Report No. 53) (Nov. 13, 2002).

³ NAT'L UNITY & RECONCILIATION COMM'N, *REPORT OF THE NATIONAL SUMMIT ON UNITY & RECONCILIATION* 53 (2002), available at <<http://www.grandslacs.net/doc/2998.pdf>>.

consultation process served more of an informative or educational function rather than a deliberative function. The LCC rules regarding the actual drafting of the constitution only required the commissioners to consult with the public, collect the views of the population, and assist in the analysis of the information gathered from the public consultations. These process design decisions created a situation in which the public was consulted regarding Rwanda's new constitution, but the LCC did not consistently review and consider the public's comments. Comments were randomly selected for review and weighted based on the identity of the submitter. As a result of these choices, the ability of citizens to be core participants in the constitution-making process depended upon their ability to obtain influential allies, to gain the support of a mobilized constituency, and to formulate proposals that were consistent with the goals of the political elites. This type of process can be useful in achieving domestic legitimacy and public support—two of the three instrumental benefits offered for using participatory constitution-making. It is less successful, however, in addressing the third instrumental benefit—creating an effective governance system that can address the political, social, and economic issues within the society.

Gender equity advocates were able to become core participants in Rwanda's constitution-making process despite their lack of formal representation in the drafting body.⁴ They were able to obtain this status through collective action that deployed an effective framing strategy and by obtaining the support of domestically and internationally influential actors. Absent these conditions it is unlikely that they would have been able to move from the periphery to become core participants. The distinction between peripheral and core participants is an ignored reality of participatory constitution making. This process oriented form of constitution-making can create new opportunities for political participation, but it is an opportunity that is limited to select citizens.

The gender equity advocates utilized a framing strategy that identified the unique predicaments of women and children in post-conflict Rwanda as threats to the state's unity and reconciliation. These predicaments included the financial and social challenges for female-headed households, lack of suitable shelter, care for orphans, medical needs, and limited access to food production resources. This threat could be mitigated by increasing women's participation in the state's governance. Rwanda's political elites had identified unity and reconciliation as key elements of the state's reconstruction project. These advocates were able to bridge the government's unity and reconciliation frame with their women-centered frame. Furthermore, gender equity advocates proposed a course of action for increasing women's political participation that did not upset the balance of power within or between the existing political parties.

The second key factor in the substantive success of the gender equity advocates was the support they had from influential allies domestically and internationally. Domestically, gender equity advocates found an ally on the LCC in one of the civil society representatives—Judith Kanakuze. The gender equity advocates also worked with the Forum of Women Parliamentarians and the Ministry of Gender and the Promotion of Women. All of these relationships were critical in ensuring that proposals regarding women's political representation were carefully reviewed and seriously considered by the LCC.

Internationally, the gender equity advocates were supported by the UN Development Fund for Women (UNIFEM). UNIFEM partnered with the LCC to organize a series of workshops

⁴ See Angela M. Banks, *Challenging Political Boundaries*, 29 U. PENN. J. INT'L L. (forthcoming 2007) for a more detailed discussion of Rwanda's participatory constitution-making process and gender equity advocates' roles within that process.

throughout the country that addressed Rwanda's obligations under the Convention on the Elimination of Discrimination Against Women. These workshops took place in 2001 before the LCC public consultation process began, and they were attended by LCC members, other government officials, and the general public. By holding these workshops before the LCC public consultation program began, UNIFEM assisted gender equity advocates in increasing the profile of gender equity and the constitution.

Gender equity advocates were able to become core participants in Rwanda's constitution-making process as a result of their successful framing strategy and the support of domestically and internationally influential actors. The externally inclusive nature of Rwanda's process made such a strategy a requirement for core participation. Peripheral participation by most citizens was, however, sufficient for achieving a constitution that is perceived to be legitimate domestically and supported by a significant portion of the population. This suggests that the proffered instrumental benefits achieved through participatory constitution-making are significantly influenced by the modes of citizen participation, the type of drafting body, and the mechanisms used by the drafting body to review and consider the public's proposals.