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Participatory Constitution-Making as a Transnational Legal Norm: Why Does It “Stick” in Some Contexts and Not in Others?

Abrak Saati*

It could be argued that since the dawn of the peace-building era in the early 1990s, public participation in constitution-making processes has developed into a transnational legal norm. International organizations, NGOs, CSOs, scholars and think tanks around the globe repeatedly stress the value of including ordinary citizens in the making of their founding laws. As a consequence, the practice of participatory constitution-making has also increased. Though this is a seemingly established transnational legal norm, it is still a norm that has been more or less successfully adopted in different contexts. This article takes an interest in exploring why this is so. How is it that this norm is institutionalized in some contexts, internalized in others, institutionalized and internalized in yet other contexts, and simply rejected in still other contexts?

Introduction	114
Participatory Constitution-Making - Is It an Evolving Transnational Legal Norm?	116
Normative Understandings of the Benefits of Direct Citizen Engagement in Political Decision-Making.....	118
Legal Justifications in Support of Participatory Constitution-Making.....	121
How Can Norms Be Diffused?	123
Different Steps of “Norm Localization”	126
Capabilities	128
Conclusions	135

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INTRODUCTION

Much has happened since James Tully stated that constitution-making is the single activity in “modern politics that has not been democratized” over the last three centuries.¹ To be sure, over the past twenty-five years, the common perception of constitution-making as something reserved for political elites and lawyers to deliberate behind closed doors, the exclusive domain of the chosen few without public insight, has been seriously challenged. In the wake of former UN Secretary General Boutros-Ghali’s two influential reports, *An Agenda for Peace*² and *An Agenda for Democratization*³, constitution-making with the assistance of ordinary women and men has become part of a broader peace-building agenda. Engaging ordinary citizens in the process is envisioned to establish, promote and strengthen democratic institutions and, in consequence, bring lasting peace and stability to post-conflict states and states in transition from authoritarian rule. Because of this, there has been an upsurge of what is now commonly referred to as participatory constitution-making.⁴ Across the globe, in post-conflict states and in states in transition from authoritarianism in Africa, Europe, Latin America, the Middle East and North Africa (MENA) region, and Southeast Asia, ordinary people have been invited to voice their opinions and convey their aspirations as to what they believe to be important to include in their country’s founding laws as they move away from violent conflict and/or authoritarianism.

In this article, I argue that participatory constitution-making in post-conflict states and in states in transition from authoritarian rule has by now become something more than just a “trend.” I believe that it can be argued that it is, or at least that it is starting to, develop into a transnational legal norm and that the international community has been, and continues to be, important for the promotion of this particular norm. I have, in a previous study, theorized participation in constitution-making, and have suggested that we must approach this notion in a more analytically sharp and distinct way so as to be able to differentiate between different types of participation in terms of how much influence the public has been allowed to exert on the constitution through their so called participation.⁵ This is important because as things stand today, scholars and practitioners alike convey reference to public participation in a manner that many times suggests that

1. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (Cambridge Univ. Press 1995).

2. U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping*, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

3. U.N. Secretary-General, *An Agenda for Democratization*, U.N. Doc. A/51/761 (Dec. 20, 1996).

4. MICHELE BRANDT ET AL., *CONSTITUTION MAKING AND REFORM: OPTIONS FOR THE PROCESS* (2011); ANDREW LADLEY, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *CONSTITUTION BUILDING AFTER CONFLICT: EXTERNAL SUPPORT TO A SOVEREIGN PROCESS* (2011); *See, e.g.*, Todd A. Eisenstadt et al., *When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making 1974-2011*, 109(3) AM. POL. SCI. REV. 592 (2015).

5. Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* 123-24 (2015), <http://umu.diva-portal.org/smash/get/diva2:809188/FULLTEXT01.pdf>.

the practice of it is similar wherever it takes place. This could not be further from the truth.

If we were to imagine a scale of participation in constitution-making processes, we would, at the bottom of the scale, find cases that have involved minimal public input: cases in which “participation” has been a mere act of window-dressing and where the general public has not been allowed to influence the content of the constitution even in the least.⁶ Higher up on the scale, on the other hand, we would find cases in which public participation in the constitution-making process has been extensive in the sense that the general public has been provided opportunities to actually influence the content of the constitution.⁷ Between these two opposites on the scale, we would find a number of different types/in-between cases in which participation has varied as to the extent of influence participants have been allowed to exert on the content of the constitutional draft.⁸

These differences of participation in practice suggest that the norm of participatory constitution-making for some reason, or for some reasons, “sticks” better in some contexts than in others. In some contexts, the norm is rejected altogether – national governments do not seem interested at all in adopting the norm and in including their population in the making of the constitution, not even in a cosmetic sense. In other contexts, the norm is at least institutionalized, meaning that the norm is incorporated into law. In these instances we find domestic legislation that stipulates that the public are to be consulted in the making of the constitution. The extent to which these words transcend the paper on which they are written and are effectively implemented is, however, a different matter. Finally there are contexts in which the norm is both institutionalized and internalized. This means that national governments live up to their rhetorical claims of wanting to include the citizenry, fully institutionalize the norm and comply with it—leading to the general public being able to effectively participate, by exerting influence on the draft, in the making of their constitution.

These differences of norm diffusion are intriguing and they beg the question: Why? Why do some countries reject this norm whereas it is institutionalized without any actual effect in others, and both institutionalized and internalized in yet others? Why and how do transnational legal norms, such as participatory constitution-making, travel? These questions constitute the focal point of attention in this article. Although this is primarily a conceptual article that sets out to understand this particular transnational legal norm—participatory constitution-making—and how

6. Such was the case in the Iraqi constitution making process that resulted in the 2005 constitution as well as the Nigerian constitution making process that resulted in the 1999 constitution. See Saati, *supra* note 5. Such was the case in the Iraqi constitution making process that resulted in the 2005 constitution as well as the Nigerian constitution making process that resulted in the 1999 constitution (see e.g. Saati 2015).

7. Such was the case in the Kenyan constitution making process of 2009-2010. See *id.*

8. See Saati, *supra* note 5, at 86-108 for an exhaustive account of different types of participation in constitution-making processes and a categorization of twenty empirical cases illustrating how participation and the extent of influence granted to participants greatly differs between cases.

it can be diffused into domestic contexts, it also draws on empirical examples for purposes of illustrating differences as far as successful/unsuccessful norm diffusion is concerned. The empirical examples are also useful for being able to draw tentative conclusions as to *why* this norm appears to “stick” better in some contexts than in others. The article is organized as follows: I proceed with a discussion of whether or not a case can even be made for participatory constitution-making evolving into a transnational legal norm after which I trace this potential development. The article then moves on to a theoretical discussion concerning how norms diffuse, and in this context, I also discuss what is actually needed for a norm to transcend mere institutionalization to also become internalized. In the final section of the article, conclusions are discussed.

PARTICIPATORY CONSTITUTION-MAKING - IS IT AN EVOLVING
TRANSNATIONAL LEGAL NORM?

In order to understand if participatory constitution-making is a transnational legal norm, or if there are indications of it developing into a transnational legal norm, what is meant by the concept must first be established. In sorting this out, theory of transnational legal orders is useful. Now, what does transnational legal order (TLO) imply? In their edited volume, Halliday and Shaffer provide the following definition of a TLO.⁹ They state that a TLO is: “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”¹⁰ Transnational legal norms, in turn, “embody prescriptions for the regulation of activities in particular functional domains,” and they provide actors with tools and models so that they are able to redesign institutional arrangements such to address specific situations.¹¹ The source, or sources, behind transnational legal norms can be different, ranging from international treaties to foreign legal models that are endorsed by transnational actors.¹² In addition to providing definitional clarity to the concept of a transnational legal norm, Shaffer also makes a useful analytical distinction between the concepts of transnational law, legal norms, legal processes and legal orders, and argues that “transnational law consists of legal norms that are exported and imported across borders, and which involve transnational networks

9. Terence C. Halliday & Gregory C. Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 5 (Terence C. Halliday & Gregory C. Shaffer eds., Cambridge Univ. Press 2015).

10. By authoritative, the authors refer to the “acceptance of the legal norms as reflected in law’s understanding and practice.” *Id.* at 6.

11. Gregory Shaffer, *Transnational Legal Processes and State Change: Opportunities and Constraints*, 37 *LAW & SOC. INQUIRY* 229, 238 (2012); GREGORY SHAFFER, *TRANSNATIONAL LEGAL PROCESSES AND STATE CHANGE: OPPORTUNITIES AND CONSTRAINTS* 15 (2012). Gregory Shaffer, *Transnational Legal Processes and State Change: Opportunities and Constraints* at 15, Legal Stud. Res. Paper Series, Res. Paper No. 10-28. Univ. of Minn. Law School (2012).

12. *Id.* at 232-33.

and international and regional institutions that help to construct and convey the legal norm within a field of law.”¹³

When it comes to participatory constitution-making, there are indications that suggest that it has developed into a transnational legal norm since the notion as such, as well as its practice is, in fact, being exported and imported across national borders. However, it is not entirely accurate that the norm is firmly established as a transnational legal norm in the sense that it embodies clear prescriptions as to *how* the general public is to be involved in the making of their constitution. Though engaging the public in the making of their founding laws appears to be a trend that is here to stay, there are no exact rules, guidelines or clearly formulated prescriptions for during what stage of the process, to what extent, and with what amount of influence on the final draft the general public is to be involved. Also, the spread of this norm, though transnational in some sense of the word, is still not universal¹⁴ as it is primarily directed towards post-conflict states and states in transition from authoritarian rule, not towards stable democracies. This is an important note to make: public participation is developing into a core norm for constitution-making, not universally but specifically, for countries that find themselves in a post-conflict state or in a transition from authoritarianism. By consequence, this implies that this norm is most commonly expressed by different types of international organizations or international institutes towards post-conflict states or states in transition from authoritarian rule (i.e., this is a norm that is being *downloaded* from international to domestic law).¹⁵ The fact that the norm of directly engaging the public in the making of their constitution is, in some contexts, enforced from a higher standing authority (either an international treaty or an agent such as, for example, the United Nations) rather than from actors/organizations or institutions from the domestic environment, can perhaps serve to partly explain why it is not always successfully internalized in the recipient context (i.e., that there is a mismatch between the norm of participatory constitution-making endorsed from an outside force that does not fully resonate with existing domestic norms).¹⁶ I will return to and discuss this particular issue further below. For now, we shall direct our attention to analyzing the sources behind the development of participatory constitution-making processes

13. *Id.* at 233.

14. I would hence not agree with Franck and Thiruvengadam’s view that involving the people in the process of constitution-making is a worldwide trend. See Thomas M. Franck and Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3, 10 (Laurel E. Miller & Louis Aucoin eds., 2010); See also, HALLIDAY AND SHAFFER, *supra* note 9 (in regards to this issue Halliday and Shaffer also make a useful point of separating “global” law from “transnational” law. “Global” law suggests exactly that; that the law, or the legal norm, in question has global reach, while transnational law (or the legal norm in question) captures the phenomenon of legal ordering that goes beyond the nation-state but that does not necessary diffuse to all parts of the globe).

15. See Harold H. Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745 (2006) (for a useful operationalization of transnational law).

16. See, e.g., Shaffer, *supra* note 11.

into a transnational legal norm. As noted by Alldén¹⁷ and echoed by Halliday and Shaffer¹⁸, transnational legal norms do not travel by themselves, rather they originate from somewhere after which they are conveyed by different actors, such as international actors, domestic political elites and/or agents within civil society organizations.

Normative Understandings of the Benefits of Direct Citizen Engagement in Political Decision-Making

If we were to trace the ideas of direct citizen involvement not only in constitution-making but in political decision making in general, we would inevitably come across the writings of classical liberal theorists such as Mill¹⁹ and Rousseau.²⁰ To reiterate and analyze the complete set of arguments that these authors have emphasized in support of citizen involvement in matters of public relevance would require a full-length article solely devoted to this matter, and this article is not the place to provide such an analysis. Suffice it to say that much of their work, as well as the writings of contemporary participation theorists such as Pateman,²¹ Arnstein,²² Radcliff and Wingenbach,²³ Mutz²⁴ and Finkel²⁵ to name a few, spring from a highly normative understanding of public participation as something that *ought* to be pursued due to a number of perceived beneficial effects primarily for the individual who is engaging in the act of participation²⁶, but also because of perceived positive outcomes at the macro level of analysis.²⁷ Over the course of years, and particularly from the beginning of the 1990s and the ushering in of the peace-building era, this normative understanding has also made its way into official policy documents of international organizations in which it is often stressed that public participation is more than the involvement of recipients of aid in the

17. Susanne Alldén, *How Do International Norms Travel? Women's Political Rights in Cambodia and Timor-Leste* 21-23 (2009), <https://www.diva-portal.org/smash/get/diva2:274281/FULLTEXT01.pdf>.

18. HALLIDAY & SHAFFER, *supra* note 9, at 26-31.

19. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1873).

20. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND* (Lester G. Crocker 1967).

21. *See generally* CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

22. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS'N 216 (1969).

23. Benjamin Radcliff and Ed Wingenbach, *Preference Aggregation, Functional Pathologies, and Democracy: A Social Choice Defense of Participatory Democracy*, 62 J. POL. 4 (2000).

24. Diana C. Mutz, *Cross-cutting Social Networks: Testing Democratic Theory in Practice*, 96 AM. POL. SCI. REV. 111 (2002).

25. Steven E. Finkel, *Can Democracy Be Taught?*, 14 J. DEMOCRACY 137 (2003).

26. At the individual level of analysis, the educational merits of direct citizen participation in political decision-making are frequently brought to attention; participation in political decision-making as a way to educate people about democratic values and to support the growth of a democratic political culture in a society. *See, e.g.*, PATEMAN, *supra* note 21; Arnstein, *supra* note 22).

27. *See generally* DEVRA C. MOEHLER, *DISTRUSTING DEMOCRATS: OUTCOMES OF PARTICIPATORY CONSTITUTION MAKING* (2008) (as people become more knowledgeable about the political system when they directly engage in political decision-making, social capital is also envisioned to be built. This will in turn lead to more support for government institutions, which will make people feel a stronger bond to democratic principles).

implementation of projects. Rather, public participation should be understood as a development strategy in its own right that serves to strengthen local ownership.²⁸ This development has in turn been a response to failed, or at least broadly perceived as such, top-down approaches to development and peace-building.²⁹ Hence, what we see here is a shift in ideas and conceptualizations as to how peace-building ought to be practiced, which has contributed to altering our understanding of how post-conflict constitutions are to be produced as well.

Since the early 1990s, public participation, not only in the arena of constitution-making but in general, is part of a broader development and peace-building agenda that emphasizes “the local”³⁰, “peace-building from below”³¹, and “grassroots peace-building.”³² And even though there are a few empirical examples of transitioning and/or post-conflict states that involved their respective populations in the making of the constitution prior to the 1990s³³, the trend of participatory constitution-making has increased substantially from the 1990s and onwards. As Samuels has suggested, constitutional theory has traditionally focused on constitutions in stable political contexts and not on the importance of constitutions in times of transition.³⁴ Also, among constitutional scholars, focus has traditionally been on the *content* of the constitution rather than on the *process* through which the constitution comes into being.³⁵ From the onset of the peace-building

28. The 1993 Human Development Report, for example, states that: “Participation, from the human development perspective, is both a means and an end. Human development stresses the need to invest in human capabilities and then ensure that those capabilities are used for the benefit of all. Greater participation has an important part to play here: it helps maximize the use of human capabilities and is thus a *means* of increasing levels of social and economic development. But human development is also concerned with personal fulfillment. So, active participation, which allows people to realize their full potential and make their best contribution to society, is also an *end* in itself.” United Nations Development Programme, Human Development Report 1993 21-22 (1993). Similar passages can be found in the 2002 Human Development Report.

29. For a more thorough discussion about this, please be referred to Asim Ijaz Khwaja, *Is Increasing Community Participation Always a Good Thing?* 2 J. EUR. ECON. ASS’N 427 (2004).

30. Roger Mac Ginty & Oliver P. Richmond, *The Local Turn in Peace Building: A Critical Agenda for Peace*, 34 THIRD WORLD Q. 763, 763 (2013).

31. OLIVER RAMSBOTHAM ET AL., CONTEMPORARY CONFLICT RESOLUTION 274 (4th ed. 2016).

32. John Heathershaw, *Unpacking the Liberal Peace: The Dividing and Merging of Peacebuilding Discourses*, 36 J. INT’L STUD. 597, 619 (2008).

33. Uganda, for example, underwent a rather lengthy constitutional reform process (1988-1995) in which the general public were invited to participate. In Brazil as well, constitutional reform with broad based citizen engagement took place during the years 1987-1988. In Nicaragua, the public were invited to participate in the making of the constitution during the constitutional reform process that lasted during the years 1985-1987. In a way Guatemala can also be regarded as a case of participatory constitution-making that at least started in the 1980s but that, as part of the broader peace process, lasted up until 1999.

34. Kirsti Samuels, *Postwar Constitution Building: Opportunities and Challenges*, in THE DILEMMAS OF STATEBUILDING: CONFRONTING THE CONTRADICTIONS OF POSTWAR PEACE OPERATIONS 173, 174 (Roland Paris & Timothy D. Sisk eds., 2009).

35. See generally Lakhdar Brahimi, *Foreword*, in CONSTITUTION MAKING AND REFORM: OPTIONS FOR THE PROCESS i, i-iii (Michele Brandt et al., 2011); Yash Ghai & Guido Galli, *Constitution Building Processes and Democratization*, Int’l Inst. for Democracy and Electoral Assistance (2006),

era, however, both of these concepts have changed: (i) the constitution has become a prioritized area of concern in post-conflict states and in states in transition from authoritarian rule, and (ii) the process of constitution-making has gained increased attention. It is in relation to the latter aspect that the importance of including ordinary citizens has been emphasized by scholars and practitioners alike.³⁶

To summarize, it could be said that within the political science field, as well as the peace-building community, there is a long tradition, and a strong bias in favor of direct citizen involvement in political decision-making. This has, in turn, influenced our thinking about constitution-making processes to the extent that “participatory constitution-making” is by now—and particularly since the onset of the peace-building era—a recognized concept, as well as an established practice. As a result, the once deeply-rooted idea that constitution-making should be limited to the smoke-filled chambers of political elites, lawyers and policy makers is no longer the dominant understanding, no matter how technically sound the constitutional content of such an elite-driven process may be.

With all this being said, it can still be discussed if it is accurate to refer to participatory constitution-making processes as a transnational *legal* norm (or as a developing transnational legal norm), or if it is rather, and only, a transnational *political* norm. Against the latter, there can be no serious objections. Public participation in politics is generally viewed as the defining element of democratic citizenship,³⁷ and although “participation” is perhaps most often construed as participation in free and fair elections, the range of issues that the public can influence through their participation, of course, exceeds merely selecting government officials every four or five years. Among the range of issues, constitution-making can be included, which—in light of the upsurge of empirical cases of participatory constitution-making processes in various geographical locations around the globe—it also appears to be. Moreover, seeing how involving the public in the making of a constitution seems to have an appeal that it is not limited to one specific geographic area in the world, it would likely not be too farfetched to refer to participatory constitution-making as a *transnational* political

http://iknowpolitics.org/sites/default/files/cbp_democratization_eng-2.pdf; Samuels, *supra* note 34; SUSANNA D. WING, CONSTRUCTING DEMOCRACY IN TRANSITIONING SOCIETIES IN AFRICA: CONSTITUTIONALISM AND DELIBERATION IN MALI (2008); Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L L. 105 (2007).

36. See, e.g., Samuels, *supra* note 34; Yash Ghai & Guido Galli, *Constitution Building Processes and Democratization*, Int'l Inst. for Democracy and Electoral Assistance (2006), http://iknowpolitics.org/sites/default/files/cbp_democratization_eng-2.pdf; Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L L. 105 (2007); Lakhdar Brahimi, *Foreword*, in CONSTITUTION MAKING AND REFORM: OPTIONS FOR THE PROCESS, BRANDT ET AL., *supra* note 4, at 80-81; SUSANNA D. WING, CONSTRUCTING DEMOCRACY IN TRANSITIONING SOCIETIES IN AFRICA: CONSTITUTIONALISM AND DELIBERATION IN MALI (2008).

37. ROBERT A. DAHL, ON DEMOCRACY 37-39 (1998); see generally SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995).

norm. However, it is still worthwhile discussing if it can also be considered a transnational legal norm. I turn to this issue below.

Legal Justifications in Support of Participatory Constitution-Making

In addition to normative reasons as to why ordinary people ought to be included in the making of their founding laws, there is a continuing debate concerning whether or not legal justifications can also be put forth in support of participatory constitution-making processes.³⁸ Advocates of including the general public in the making of a constitution often refer to the International Covenant on Civil and Political Rights (ICCPR), and more specifically to article 25 of the ICCPR.³⁹ Article 25 states that: “Every citizen shall have the right and the opportunity . . . to take part in the conduct of public affairs, directly or through freely chosen representatives.”⁴⁰ Aside from article 25 of the ICCPR, advocates also refer to article 21 of the UN Declaration of Human Rights (1948), which states that, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”⁴¹ In a similar manner, article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination has also been referred to, in which the right to take part in public affairs is established.⁴² The European Framework Convention for the Protection of National Minorities has also been invoked, in which article 15 settles that persons who belong to national minorities must be allowed to effectively participate in cultural, social and economic life as well as in public affairs.⁴³ Adding to these international treaties, a number of regional charters also underscore the right to participate in public affairs. Examples include the African Charter on Human and People’s Rights of 1981, the Commonwealths Harare Declaration of 1991, and the Asian Charter of Rights of 1998.

Despite these legal instruments, two separate but related questions are relevant to consider. To begin with, one might ponder if constitution-making is in fact a *prior* condition for citizens to participate in the governance of their country (either directly or through freely chosen representatives). If one would argue that such is the case, then public participation in the making of the constitution as such would

38. See generally Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 20 (Laurel E. Miller & Louis Aucoin eds., 2010).

39. See, *id.* (for a more thorough discussion and analysis of the International Covenant on Civil and Political Rights and how the treaty provides legal justification for public participation in constitution-making).

40. International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171.

41. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21, (Dec. 10, 1948).

42. International Convention on the Elimination of All Forms of Racial Discrimination art. 5c, Dec. 21, 1965, 660 U.N.T.S. 195.

43. Framework Convention for the Protection of National Minorities and Explanatory Report art. 15, Feb. 1995.

likely have to be precluded from the right to participate in governance.⁴⁴ On the other hand, it could also be argued that since it is the constitution that establishes the rules of the political game and decides how and through which institutional forms the general public will be able to engage in the political process of their country, it is *when* the constitution is being produced that the public ought to have the possibility to voice their opinions. It could, indeed, be argued that this goes to the very heart of participating in governance.

The other issue that deserves consideration is what to “take part” actually means in the context of constitution-making. Because even if article 25 of the ICCPR, article 21 of the UN Declaration of Human Rights, and article 5c of the Convention on the Elimination of All Forms of Racial Discrimination were unambiguous in supporting participation in constitution-making, “take part” is a vague formulation providing little guidance as to how it is or should be practiced. In order to “take part,” does it suffice to vote for members of a constitutional assembly whose members then have the responsibility of formulating the constitution? Or does “take part” include having the possibility to vote on a draft constitution? Or does “take part” perhaps involve receiving constitutional education in order to then be able to actively participate in the making of the constitution in an informed manner? Undeniably, the concept can be interpreted in different ways. As noted by Hart,⁴⁵ the regional charters, international treaties, conventions and declarations, when taken together, influence and frame our view on meaningful participation in political affairs even though they are not specific as to what “take part” exactly means and even though they do not mention public participation in constitution-making specially either. Of course, the fact that participation in constitution-making is not mentioned explicitly also ties into the question of whether or not it is accurate to refer to participatory constitution-making as a transnational legal norm. If one agrees with Shaffer’s understanding that transnational legal norms can encompass both soft as well as hard law,⁴⁶ then participatory constitution-making could arguably be referred to as a transnational legal norm if one is at least willing to accept it as soft law. Rather, the issue concerns the fact that the legal aspects of the norm are so unclear that they fail to properly embody prescriptions for the regulation of how exactly participation in this particular domain is to take form, leading to vast differences at the domestic level when the norm is adopted.⁴⁷

Since providing clarifications in international law that directly mention public participation in constitution-making might be a lengthy process, Hart suggests that it is now primarily a matter of seizing the momentum of including ordinary people in political decision-making in general to even further expand to the arena of

44. Hart, *supra* note 38, at 21.

45. *Id.* at 23.

46. See Shaffer, *supra* note 11, at 252.

47. See, e.g., Saati, *supra* note 5, at 307-18.

constitution-making,⁴⁸ in a sense, to diffuse this norm further through international institutions and networks but also by practical experience. This leads us to a discussion of how norm diffusion is brought about and how a specific transnational legal norm is successfully adopted in some contexts and less successfully adopted in others. This is the area of concern in the following section.

HOW CAN NORMS BE DIFFUSED?

Though it is generally accepted today that norms matter, the issue is how norms diffuse and how they work their effects in the domestic arena. In this article, I argue that the international community—as part of a broader peace-building agenda—brings the norm of direct citizen participation in political decision-making in general, and in constitution-making in particular, into post-conflict states and states in transition from authoritarian rule. The UN, particularly through its Department of Political Affairs (UNDPA), the United States Institute of Peace (USIP), and the International Institute for Democracy and Electoral Assistance (IDEA), are important actors for the promotion of participatory constitution-making processes in these types of contexts. The UN encourages this practice via interactions with actors at the domestic level who are then expected to understand, incorporate and conform to this norm. Hence, what we are currently observing is something that can be referred to as *norm enforcement from above*, alternatively *vertical norm diffusion*.⁴⁹ At the same time, these actors interact with domestic actors, meaning that they do not bring this norm into an empty void. Whether or not norm diffusion is successful depends on actors that operate on both of these levels. To be sure, international as well as domestic actors can be norm entrepreneurs. When it comes to actors within the domestic arena, a further distinction is also necessary to make, namely between national elites at the formal state level and the people at large/civil society.⁵⁰ This distinction is needed because it is not unlikely that while a specific transnational legal norm is embraced by the people and by the civil society of a given state, it is not accepted by national elites.⁵¹ When it comes to participatory constitution-making specifically, there are some empirical cases that demonstrate this: The struggle for constitutional reform with broad based citizen engagement in Kenya, for example, was initially driven by elites within Kenya's civil society.⁵² Their claims were, however, not met with sympathy from the ruling elite who had no interest in initiating a constitutional reform process that would most likely endanger their positions of power.⁵³ The consistent efforts of Kenyan civil society actors did,

48. Hart, *supra* note 38, at 31.

49. Alldén, *supra* note 17; Koh, *supra* note 15, at 745-46.

50. See Trine Flockhart, *Complex Socialization and the Transfer of Democratic Norms*, in *SOCIALIZING DEMOCRATIC NORMS: THE ROLE OF INTERNATIONAL ORGANIZATIONS FOR THE CONSTRUCTION OF EUROPE* 43, 50-51 (Trine Flockhart ed., 2005).

51. *Id.*

52. Alicia L. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 *YALE L.J.* 1824, 1831 (2007).

53. *Id.* at 1831-32.

nevertheless, lead up to the 2001–2005 constitutional reform process, which was a highly participatory endeavor.⁵⁴ The same holds true for the Zimbabwean constitutional reform process of 1999–2000. Just as in Kenya it was civil society organizations, and primarily the National Constitutional Assembly (NCA), that insisted on a people-driven constitutional reform process even though the Mugabe regime was very much against it.⁵⁵ In Colombia as well, it was primarily young people and student organizations that put constitutional reform with broad based public participation on the political agenda to begin with. This was in response to wide spread corruption and violence in the country during the 1980s. By mobilizing their efforts, these groups were successful in persuading both the sitting president, Virgilio Barco Vargas, and the Supreme Court of Justice to allow the Colombian citizenry to vote on the matter of establishing a constitutional assembly for subsequent constitutional reform.⁵⁶ Indeed, the election for the constitutional assembly in December of 1990 was unique in the sense that it was the first time members to a constitutional body were not only representatives of established political parties but also representatives of a number of citizens' constituencies and, perhaps more importantly, they were elected by universal suffrage.⁵⁷ Though the subsequent steps of the Colombian constitution-making process were less successful in terms of ensuring the full participation of the general public, the efforts of the student organizations must still be acknowledged, as without their struggle, constitutional reform in the beginning of the 1990s might not even have taken place.

Though these empirical examples capture instances of a particular norm being embraced by segments from the civil society sector of a given country, on a theoretical level, the opposite might of course also occur: that national elites embrace a specific norm while it is simultaneously rejected by the general public and/or domestic civil society organizations.

In order to make us better understand the ways through which transnational legal norms can be diffused, and how it is, in fact, an interplay between the international and the domestic level, Harold Koh provides a useful analogy to computer-age descriptions.⁵⁸ He says that the best operational definition of transnational law is the following:

54. See, e.g., Saati, *supra* note 5; see also Bannon, *supra* note 52, at 1832.

55. See Sara Rich Dorman, *NGOs and the Constitutional Debate in Zimbabwe: From Inclusion to Exclusion*, 29 J. OF S. AFR. STUD. 845, 848, 854-55 (2003); see also Muna Ndulo, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 176, 191-92 (Laurel E. Miller & Louis Aucoin eds., 2010).

56. Donald T. Fox, Gustavo Gallón-Giraldo, and Anne Stetson, *Lessons of the Colombian Constitutional Reform of 1991: Toward the Securing of Peace and Reconciliation?*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 467, 470-71 (Laurel E. Miller & Louis Aucoin eds., 2010).

57. Iván Marulanda, *The Role of Constitution-Building Processes in Democratization: Case Study Colombia*, Int'l Inst. for Democracy and Electoral Assistance (2004), http://www.constitutionnet.org/files/cbp_colombia.pdf.

58. See generally Koh, *supra* note 15.

(1) law that is *downloaded* from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is “uploaded, then downloaded”: for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world, and (3) law that is borrowed or *horizontally transplanted* from one national system to another: for example, the “unclean hands” doctrine, which migrated from the British law of equity to many other legal systems.”⁵⁹

In keeping with Koh’s definition, when it comes to participatory constitution-making processes in post-conflict states and in states in transition from authoritarian rule, it is primarily a matter of the norm being *downloaded* from a higher standing authority (which signifies a vertical form of norm diffusion/norm diffusion from above, as discussed above) or that is it being *horizontally transplanted* from one national system to the other. As regards the first one of these modes, it is, as previously mentioned, mainly international organizations and institutions that encourage, and sometimes enforce, this norm upon post-conflict states and states in transition from authoritarian rule. For example, following its declaration of independence from Serbia in 2008, the leadership of Kosovo had no choice but to invite the population of the province in the making of the new constitution. This was because Kosovo had committed itself to the prescriptions in the Ahtisaari plan, which stipulated that a participatory constitution-making process was to be carried out.⁶⁰ The Ahtisaari plan, though facing challenges of being approved in the UN Security Council due to Russia threatening to use its veto, was endorsed by an “international steering group” consisting of several countries, among which the US and the UK were included.⁶¹ The mandate of the steering group, in turn, was to support the full implementation of the Ahtisaari plan. Hence, in this specific case, the norm of participatory constitution-making was, in a sense, *downloaded* from a higher standing authority, or perhaps more accurately, enforced from above.⁶²

59. *Id.* at 745-56.

60. *See generally* U.N. Security Council, *Comprehensive Proposal For the Kosovo Status Settlement*, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007).

61. The members of the “International Steering Group” were the UK, France, Germany, Italy, the US, Austria, the Czech Republic, Finland, Sweden, Turkey, Belgium, Denmark, Hungary, Slovenia and Switzerland, U.N. Security Council Report, *Chronology of Events, Kosovo*, <http://www.securitycouncilreport.org/chronology/kosovo.php?page=all&print=true> (last modified Feb. 2017).

62. It is, however, difficult to imagine that the extent of public input to the process can have been anything but limited since the time period between the declaration of independence (Feb. 17, 2008) and the finalization of the public participation phase of the process was a mere fortnight (Mar. 2, 2008); Saati, *supra* note 5, at 102.

With regard to norms that are *horizontally transplanted*, the norm of participatory constitution-making has indeed also travelled between different post-conflict states and between different states in transition from authoritarian rule. The South African constitution-making process of 1994–1996—frequently brought to attention for its highly participatory features—has, for example, become a reference point for many other countries that have set out to include their respective populations in the making of their constitution, and as such, constitutes a good example of how the norm is also horizontally exported.⁶³

Regardless of a particular norm being *downloaded* or *horizontally transplanted*, it is a matter of rooting the norm in the recipient country which commonly implies that domestic actors reconstruct the norm so that it fits with existing norms and norm hierarchies—something that Acharya describes as a process of “localization.”⁶⁴ Hence, norm diffusion is seldom a matter of downright rejecting a norm or wholeheartedly accepting a norm. A more nuanced understanding of how norms diffuse can perhaps be reached by acknowledging that domestic actors build congruence between transnational legal norms and local beliefs and practices.⁶⁵ In consequence, in contexts where a specific norm does not successfully diffuse, the case might be that domestic actors have not been able (or allowed) to find a way to harmonize the norm with local norms and practices, leading merely to a symbolic acceptance of the norm, or to the norm being institutionalized but not internalized.

Different Steps of “Norm Localization”

Acharya envisions norm localization as something that occurs in several steps.⁶⁶ The first step is that of *prelocalization* during which local actors might resist the new external norm because doubt/fear that it undermines local practices. The norm might however be localized if some domestic actors start to consider the external norm as something that could potentially strengthen already existing institutions. This line of reasoning finds resonance in Shaffer’s discussion about how transnational legal norms invariably depend on local supporters and perhaps primarily the support of domestic political elites.⁶⁷ Acharya refers to the second step as *local initiative*. This stage of the localization process implies that local actors frame the external norm such that the value of it becomes clear to the local population. In order for the general population to accept the norm, it is also imperative that they

63. See, e.g., Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING*, 111, 112 (Laurel E. Miller with Louis Aucoin eds., 2010); Fink Haysom, *Special Features and Mechanisms in Negotiating the South African Constitution*, in *CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA*, 93-113, 106-07 (Goran Hyden & Denis Venter eds., Afr. Inst. of S. Afr. 2001).

64. Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58, *INT. ORG.* 213, 239-75 (2004).

65. *Id.* at 240.

66. *Id.* at 251.

67. Shaffer, *supra* note 11, at 255.

do not view the domestic norm entrepreneurs who support the external norm as puppets of outside forces. The third stage that Acharya envisions in the localization process is that of *adaptation*. This implies that the external norm is reconstructed so that it agrees with local norms and practices at the same time as local norms are adjusted so that they find similarities with the external norm. This entails that the external norm is redefined and that local actors manage to relate it to already existing norms in the domestic environment; or that some parts of the external norm are accepted whereas other parts of it are simply rejected. The fourth and final stage is *amplification and universalization* which means that new instruments and practices are developed that include local influences. This aspect of the localization process finds echo in Risse and Sikkink's discussion about moral consciousness-raising which implies that domestic actors, elites, and members from the civil society sector or domestic NGOs, try to convey the universality of the norm—by so doing, they try to evade arguments against the norm on the basis of it being alien to the culture and way of life in the norm-recipient country.⁶⁸ This form of consciousness-raising can be done through a variety of techniques ranging from persuasion to actors invoking emotional appeals or presenting logically sound arguments. According to Risse and Sikkink moral consciousness-raising often also involves a process of “shaming.”⁶⁹ This holds particular relevance when a norm-violating state does not adhere to human rights norms. States that do not comply with the norm are exiled from the group of “civilized states,” which is in turn expected to work as an incentive for norm-violators to change their behavior and be persuaded to conform to the human rights norm/norms. Once the ruling elite in the norm-violating country start referring to the norm—in this case, participatory constitution-making—and begin making tactical concessions and reference to it in political rhetoric, they will sooner or later have to start to make behavioral changes as well. In a sense, they will become entangled in their own rhetoric making it difficult not to follow up “talk” with rule-consistent behavior.⁷⁰ Taken together, from the stage of local initiative, to adaptation, and lastly to amplification and universality, the norm is incrementally acknowledged and adopted in the norm-recipient country which in turn facilitates its institutionalization.⁷¹

These separate stages of the localization process set aside, the fact still remains that in some contexts external norms are simply more difficult to forge than in other contexts; sometimes the process of norm diffusion is more challenging and sometimes the incremental process as displayed above does not occur. Why is this so? According to Checkel, Cortell, and Davis, as well as Shaffer, it is, in a sense, a

68. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms Into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 13-14 (Thomas Risse et al. eds., Cambridge Univ. Press 1999).

69. *Id.* at 15.

70. *Id.* at 20.

71. *Id.* at 17.

matter of cultural match.⁷² In order for external norms, or transnational legal norms in keeping with Shaffer's terminology, to have an impact, they must resonate with domestic norms and domestic understandings.⁷³ In contexts where the transnational legal norm is in agreement with prevailing cultural and institutional norms, it is more likely to diffuse than in contexts in which this agreement is absent. Also, and perhaps equally important, the question of whether or not norm diffusion is successful depends on local power hierarchies and how incumbent persons in government positions as well as members of the political opposition believe that the norm in question will help them advance their own agendas and objectives. In the context of constitution-making processes, this aspect of agency is likely all but irrelevant. If current power-holders suspect that by opening up the process for public input, a new institutional order that undermines their positions will see the dawn of day, they may be quite reluctant to give the general public this opportunity. Difficulties to institutionalize and internalize a norm can also be challenging if citizens in a given country are not adequately informed about the benefits of the reform in question. Hence, even though they might benefit by it, they might still resist it due to poor information.⁷⁴ Hence, the obstacles of norm institutionalization and, even more so, norm internalization can be substantial. At this point it becomes relevant to make an analytical distinction between the two, because while institutionalization is a necessary condition for successful norm diffusion, it is not a sufficient condition.⁷⁵ For norm diffusion to be successful, institutionalization must be followed by internalization which, again, puts the issue of agency at the front and center of attention.⁷⁶ It is in this context that the notion of *capabilities* becomes central, and more specifically, an individual's "capability to function" as referred to by Alldén.⁷⁷

Capabilities

The *capabilities approach* is perhaps most commonly associated with Sen and focuses on the quality of life that individuals are actually able to achieve.⁷⁸ One could say that the approach centers on learning an individual's understanding of how satisfied she/he is with what she/he *does*, but also on what the person in question is in a position *to do*. It is the latter aspect of the approach that is of relevance when we try to understand how a transnational norm can become internalized. To place

72. Shaffer, *supra* note 11; Jeffrey T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, 3 EUR. J. INT'L REL. 403, 473-95 (1997); Andrew P. Cortell & James W. Davis Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L STUD. REV. 65, 73-76 (2000).

73. Shaffer, *supra* note 11.

74. Paul Collier, *Post-Conflict Recovery: How Should Policies Be Distinctive*, 18 J. AFR. ECON. 99 (Supp. 1 2009).

75. Alldén, *supra* note 17.

76. *Id.* at 13.

77. *Id.* at 30-31.

78. AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (2014).

this idea in the context of constitution-making would imply that an individual, to be able to effectively participate in the making of his/hers country's constitution, must be equipped with the relevant skills in order to be able to do so; that is, the person must be *capable to function* in this specific context. As expressed by Robeyns, "capabilities are real opportunities to functionings [. . .] such as being literate, being well fed, being healthy, being educated, being part of a social network, having a decent job and so forth."⁷⁹ Hence, these aspects are not primarily important in themselves, but more than anything else, important because they enable people to be capable to function. Many times, however, a variety of obstructions impede an individual's capability to function, ranging from the social institutions of a given country (e.g., the political system, the educational system, etc.), to the social norms that exist in a particular country (e.g., religious norms, moral norms, cultural norms, etc.), to environmental conditions in a given country/region within a country (e.g., lack of physical infrastructure, high levels of violence, etc.).⁸⁰ Such impediments are quite prevalent, particularly in many post-conflict states, which in turn, poses certain challenges for the norm of participatory constitution-making to transcend institutionalization to also become internalized. Let me illustrate this with some empirical examples, starting with the case of Afghanistan.

When one studies the mandate and the work plan of the Constitutional Commission in Afghanistan, one cannot deny the commission's high ambitions to include the Afghan people in the making of the draft which resulted in the 2004 constitution. The Constitutional Commission was formed, among other reasons: to make information about the constitution-making process available to the public for the duration of its work; carry out consultations with ordinary Afghan citizens in each province of the country as well as with Afghan refugees in Pakistan and Iran regarding what they believed to be important to include in the new constitution; receive written constitutional submissions from ordinary Afghans from inside as well as outside of the country; analyze the input given through written constitutional submissions as well as oral statements; produce a draft; and disseminate and educate people on the draft constitution.⁸¹ Though the aspirations of the constitutional commission were noble, to properly engage the Afghan citizens proved to be challenging due to a number of reasons. For one, it turned out to be difficult to include people, engage people, and gather ideas from people when they had not received constitutional education prior to the commission setting out to solicit their views.⁸² Indeed, for people to be able to genuinely participate, they must first of all

79. Ingrid Robeyns, *Sen's Capability Approach and Feminist Concerns*, in *THE CAPABILITY APPROACH: CONCEPTS, MEASURES AND APPLICATIONS* 82-100, 84 (Flavio Comim et al. eds., Cambridge Univ. Press 2008).

80. *Id.* at 84-85.

81. The Secretariat of the Constitutional Commission of Afghanistan, *The Constitution-Making Process in Afghanistan* (Mar. 10, 2003); U.N. Development Programme, *Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor & Afghanistan* at 19 (June, 2005) (by Michele Brandt).

82. Brandt, *supra* note 81, at 19.

have a good understanding of the issue(s) that they are to participate in voicing their opinion about. In Afghanistan, the illiteracy rate was a huge obstacle to genuine participation, as was poor infrastructure (it was difficult for the commissions to physically transport themselves to all provinces of the country as their mandate stipulated them to do), as were prevailing social norms that made it difficult to engage women in particular.⁸³ Hence, a number of circumstances made it difficult for people to acquire the needed capabilities necessary for the norm to transcend institutionalization to also become internalized. Perhaps this also explains why constitution-making in Afghanistan remained a quasi-endeavor from a public participation perspective.

The same type of circumstances prevailed in East Timor when this country embarked on, what was supposed to be, a participatory constitution-making process following the vote for independence in 1999.⁸⁴ Here as well, the East Timorese were not extended the opportunity to acquire the necessary skills in order to be able to genuinely participate.⁸⁵ The United Nations Transitional Administration in East Timor (UNTAET) carried out a civic education campaign, but it did not include education on constitutional issues. Hence, when the Constitutional Commission conducted hearings throughout the country in order to gather suggestions from the population, it was difficult for the general public to provide informed input. Adding to these unfavorable circumstances, the opportunity for the public to comment on the proposed draft constitution was also severely circumscribed, as it was published in Portuguese, which not everyone in the population reads and speaks. In some sense, the opportunity for norm internalization was lost in East Timor when the United Nations Security Council, on repeated occasions, chose to disregard the East Timorese civil society organization's plea for sufficient time and resources in order to be able to first inform and educate the citizenry, to then include them in a genuinely participatory constitution-making process.⁸⁶ The two empirical examples of East Timor and Afghanistan can be contrasted with the Eritrean and South African experiences of public participation in constitution-making.

Eritrea, to begin with, faced numerous challenges to ensure full participation in its 1994–1997 constitution-making process—much like the challenges faced in both Afghanistan and in East Timor. Through a range of different measures, however, the Constitutional Commission in Eritrea managed to overcome many of these obstacles and by so doing, it was successful in equipping parts of the Eritrean citizenry with the necessary capabilities to be able to effectively participate in the making of their country's constitution.⁸⁷

83. *Id.*

84. *Id.* at 8-9.

85. *See, e.g., Saati, supra* note 5.

86. Brandt, *supra* note 81, at 9.

87. *See, e.g., Bereket Habte Selassie, Constitution Making in Eritrea: A Process-Driven Approach, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING*, 57, 62-70 (Laurel E. Miller & Louis Aucoin eds., 2010).

The mandate of the Constitutional Commission in Eritrea was, just as the mandate of the constitutional commission in Afghanistan, quite ambitious. Its members were to: (i) organize and manage a wide-ranging and all-embracing national debate, an education campaign with public seminars, and a lecture series on constitutional principles and practice; and (ii) organize and conduct—or to cause to be organized and conducted by the appropriate bodies—seminars, symposia, educational lectures, and discussions on constitutional principles and practices.⁸⁸ These efforts were to be done through the mass media and they were to be aimed at educational and civic establishments as well as other appropriate institutions. The difference between the Eritrean case and the cases of Afghanistan and East Timor is, however, that these institutionalized promises made their way into actual practices. Over a period of three years, Eritreans within the borders of the country as well as the diaspora community were involved in the constitution-making process.⁸⁹ Constitutional education programs were held in all languages spoken in the country. Measures for reaching the illiterate were also taken, as were non-traditional forms of outreach, among other things, conveying the principles of constitutionalism through puppet shows, poetry sessions, and storytelling arrangements.⁹⁰ Questionnaires, contests and debates on the radio and television were also part of the civic education programs, which reached approximately 500,000 people out of a population of 4.5 million.⁹¹ Hence, the Eritrean population were much better equipped with the necessary skills to be able to participate in their country's constitution-making process compared to the general public in East Timor and in Afghanistan. In Eritrea, they were, in other words, more capable to function in the specific context of constitution-making. Now, the fact that the constitution that emanated from this highly participatory process was never enacted—and to this day remains on the shelf—is actually a separate matter. As far as ensuring that ordinary Eritreans were able to participate in the making of the constitution in an informed manner, the process was undeniably a fairly successful endeavor.⁹²

South Africa is another empirical example of public participation in practice where the population have been extended the necessary capabilities to effectively engage in the making of the constitution.⁹³ What is important to note, however, is that the South African constitution-making process was a two-step endeavor in

88. Proclamation No. 55/1994: A Proclamation to Provide for the Establishment of the Constitutional Commission.

89. Selassie, *supra* note 87, at 60.

90. *Id.* at 67.

91. *Id.* at 67-68.

92. Compare Bereket Habte Selassie, *Constitution Making in Eritrea: A Process-Driven Approach*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, 57, 67-68, with Saati, *supra* note 5 (illustrating nineteen other cases of participatory constitution-making processes).

93. See, e.g., Hassen Ebrahim and Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, 111, 112 (Laurel E. Miller with Louis Aucoin eds., 2010).

which the first phase of the process was completely elite driven without public participation.⁹⁴ Let me linger a bit at this particular constitution-making process since it has, and continues to, receive a lot of attention from the scholarly community as well as by practitioners in the field.

As just stated, the South African process was divided into two separate steps. During the first stage of the process, negotiations between all major political parties produced an interim constitution with guidelines for the transitional period from the system of apartheid to a democratic order.⁹⁵ The interim constitution was to guide the political life of the country while a permanent constitution was being drafted, and it was to be replaced by the adoption of the new one. Eventually, talks between the main players resulted in an agreement covering thirty-four “constitutional principles.”⁹⁶ These were included in the interim constitution and were also required to be incorporated in the final constitution.⁹⁷ In the second stage of the process, a popularly elected Constitutional Assembly was established to create and adopt a final constitution.⁹⁸ Although the mandate of the assembly granted it sole responsibility to formulate the constitution on its own, its members were convinced that public involvement in the process was necessary to assure the legitimacy of the final product.⁹⁹ An additional mechanism was inserted into the formal rules of procedure: a constitutional court was created that, in addition to its ordinary tasks, was mandated to oversee the final document to ensure that it conformed to the thirty-four principles that had been agreed upon during the first stage of the process.¹⁰⁰ A constitutional committee drawn from the members of the Constitutional Assembly was established after elections in April 1994.¹⁰¹

The commission envisioned three broad phases for the entire process. The first step would involve the participation of the public and the writing of a draft text. In the second stage, the draft would be published and circulated for further input from the people. During the final stage, the constitution would be negotiated and adopted by the constitutional assembly.¹⁰² Because the members of the constitutional assembly were aware of the fact that a large portion of the South African public was composed of illiterate rural residents with no access to electronic media, they understood the importance of education programs to raise consciousness about these issues.¹⁰³ The Commission agreed that the best approach

94. Baleka Mbete-Kgositsile, *The Principal Actors in the South-African Constitution-Making Process*, in CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA 25, 25-30 (Goran Hyden & Denis Venter eds., Afr. Inst. of S. Afr. 2001); Haysom, *supra* note 63.

95. Haysom, *supra* note 63, at 94-95.

96. *Id.* at 102.

97. Ebrahim & Miller, *supra* note 63, at 121.

98. *Id.*

99. Mbete-Kgositsile, *supra* note 94, at 106; Ebrahim & Miller, *supra* note 63.

100. Haysom, *supra* note 63, at 102.

101. Ebrahim & Miller, *supra* note 63.

102. *Id.* at 129; Haysom, *supra* note 63; Mbete-Kgositsile, *supra* note 94.

103. Ebrahim & Miller, *supra* note 63, at 134.

would be to carry out constitutional education before soliciting public input, and to continue with education programs during the second stage of the process as well.

During the first phase of the public participation program, a media campaign was launched.¹⁰⁴ Other measures included advertisements on television and radio and in local newspapers.¹⁰⁵ The Assembly ordered a national survey to assess the impact of the media campaign, the results of which showed that 65 percent of all adult South Africans had been reached by the campaign.¹⁰⁶ However, it also showed that the public was dubious about the intention of the assembly to really take their input into account.¹⁰⁷ The survey also indicated the continued need for education programs.¹⁰⁸ To this end, and for the purpose of ensuring the process's credibility in the eyes of the public, the constitutional assembly created additional measures for communication.¹⁰⁹ A newsletter, television program, radio program, website and a talk-line—all of which were entitled “Constitution Talks”—were launched.¹¹⁰ The newsletter provided exhaustive information about the constitution making process and one hundred thousand copies were distributed every fortnight through taxi ranks.¹¹¹ Another sixty thousand copies were sent to subscribers. The setup of the television shows was designed so that members of civil society could question assembly members from different political parties about their views on human rights, separation of powers, etc.

Because many South Africans did not have a television or computer, the radio was one of the most important and effective mediums for public outreach. The assembly cooperated with the South African Broadcasting Corporation and launched a weekly radio program that was broadcasted on eight different stations in eight different languages.¹¹² These radio programs reached approximately ten million South Africans each week.¹¹³

The communication process during the first phase of the public participation program was also structured to enable the public to provide feedback. The assembly arranged public hearings, public meetings and participatory workshops in order to solicit submissions from the people.¹¹⁴ All oral submissions were recorded and subsequently translated for the members of the assembly to take into consideration.¹¹⁵ In absolute numbers, a total of 20,549 people and representatives

104. Hassen Ebrahim, *The Public Participation Process in South Africa*, in CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA 93, 106-07 (Goran Hyden & Denis Venter eds., Afr. Inst. of S. Afr. 2001).

105. *Id.* at 151-61 (Goran Hyden & Denis Venter eds., Afr. Inst. of S. Afr. 2001).

106. Ebrahim, *supra* note 104.

107. Ebrahim & Miller, *supra* note 63, at 134.

108. *Id.*

109. *Id.* at 134-35.

110. Ebrahim, *supra* note 104.

111. Ebrahim & Miller, *supra* note 63, at 135.

112. Ebrahim & Miller, *supra* note 63.

113. *Id.* at 135.

114. Mbete-Kgositsile, *supra* note 94, at 30.

115. Ebrahim, *supra* note 104, at 157-58.

from 717 civil society organizations attended the public meetings.¹¹⁶ By the end, two million submissions had been written by the South African public and sent to the Assembly.¹¹⁷ Over 4.5 million copies of the working draft were distributed across the country; the media campaign continued, and now also included a booklet titled “Constitutions, democracy and a Summary of the Working Draft,” which contained information about constitutions and the constitution building process.

For the second time, the public was invited to share their comments and views, this time on the provisions in the working draft. Two hundred fifty thousand submissions were collected during this second stage.¹¹⁸ Once the submissions were reviewed, the Assembly prepared a revised edition of the draft.¹¹⁹ A copy of the revised draft was subsequently sent to each person who had made a submission. As stipulated in the rules of procedure, after it had been approved by the constitutional assembly, the negotiated working draft was sent to the constitutional court, so that it could verify that it corresponded to the thirty-four constitutional principles. The court ruled that the draft did not fully comply with all of them, so it was referred back to the assembly for revision.¹²⁰ It was subsequently revised by the constitutional assembly, and sent back to the constitutional court, which certified that the amended text was in keeping with the thirty-four mandatory principles.¹²¹

To be sure, the South African experience of participatory constitution-making stands in stark contrast to the experiences of Afghanistan and East Timor. In South Africa, it is clear that substantial efforts were made by the constitutional assembly and the constitutional commission to properly prepare the South African population so that they could in fact genuinely participate in the making of their founding laws. I have argued elsewhere, that it appears that the increasing power and strength of the “participation-norm” in constitution-making processes is being nourished by the South African case.¹²² And indeed, this case was impressive in terms of the many avenues through which people were able to get involved in the process; there is no denying this fact. Nonetheless, in the somewhat idealized story that has developed around the South African process, it is often “forgotten,” or at least not mentioned—that the participatory elements of the process were preceded by elite negotiations on the highest political level. As mentioned above, it was *after* the South African political elites had reached consensus on a number of contentious constitutional issues that the South African population at large was invited to participate, and even when the people had done so, final authority over the content of the constitution was still not directly vested in their hands.

116. Ebrahim & Miller, *supra* note 63, at 135.

117. *Id.* at 137.

118. Ebrahim & Miller, *supra* note 63.

119. Ebrahim, *supra* note 104, at 158.

120. Ebrahim & Miller, *supra* note 63, at 141.

121. *Id.* at 142.

122. Saati, *supra* note 5, at 273-74.

The purpose of directing attention to the four empirical examples of Afghanistan, East Timor, Eritrea, and South Africa is to show that participation in practice differs immensely from one context to the other and that we may start to understand the reason behind these differences by making an analytical distinction between norm institutionalization and norm internalization. Indeed, as these empirical examples illustrate, it is one thing to provide a right (to participate in the making of one's constitution), and another for individuals to be able to actually access that right (to have the capability to really participate). Moving from norm institutionalization to norm internalization, in the context of participatory constitution-making, can be eased by a number of different measures among which awareness raising for (particularly) marginalized groups who have traditionally been excluded from the political arena entirely, is one. Judging by the empirical examples above, however, the carrying out of various types of *constitutional education programs* before, during, and perhaps even after the constitution-making process, stands out as a particularly effective measure for this specific norm to move beyond institutionalization to also become internalized.¹²³

CONCLUSIONS

Whether or not transnational norms, be they legal, political or social, diffuse into a specific domestic arena can certainly depend on a variety of different reasons, and the answer to why successful norm diffusion has occurred in one context and not the other will invariably differ. In cases of norm diffusion from above, the issue of cultural mismatch should not be downplayed, especially if it is a case of norm *enforcement* which would make it difficult, if not entirely impossible, for domestic actors to try to reconstruct the norm so that it can become harmonized with already existing local norms, institutions and beliefs. At the same time, the issue of cultural match should not be overemphasized as the most important factor, or our default explanandum, for why transnational norms diffuse successfully or not.

It is easy, and perhaps also convenient, to become entangled in a post-colonial line of reasoning that points out international organizations and institutes as culturally ignorant enforcers of western norms that simply do not find resonance in countries outside of what we perceive to be the West. This, however, appears to be a one-dimensional analysis that does not likely resonate with reality—but then again, it depends on the norm in question. If one takes for granted that enjoying political rights is a natural component of an individual's life, then the norm of participatory constitution-making should not be regarded as an alien concept to nations outside of the West. This is not to say that people must necessarily exercise this right, but that they should have the possibility, and capability, to do so should it be decided that their country is to embark on a participatory constitution-making process.

123. See *id.*, for a discussion on the importance of constitutional education programs and their sequencing where the comparison of twenty cases of participatory constitution-making processes illustrate the relevance of these types of programs, particularly, in the early phases of the process before setting out to solicit input from the general public.

Here, again, the matter of capabilities becomes central. Though it is seldom, if at all, discussed in the literature on participation in political decision-making in general and in constitution-making in particular, it must be acknowledged that participation may not always be problem free; that it might potentially have dark sides as well. Public participation in the making of the constitution, which is envisioned to promote dialogue and consensus between former adversaries of violent conflict,¹²⁴ might also—at least on a theoretical level—bring about the precise opposite: increased polarization between different groups in society. This risk is more imminent if some individuals/some segments of the population are better positioned to participate in terms of being more educated, more familiar with the workings of the political system and more used to participate in various deliberative forums; i.e., more capable to function in the context of constitution-making. Hence, in order to decrease the possibility of increased polarization between various groups in society, it might be worthwhile to carefully consider how constitutional education programs can be designed such to suit different segments of the population based on their previous level of knowledge so that the possibilities of participating on an equal basis at least increases.

Another potential dark side of public participation in the making of the constitution is that it increases people's expectations of having their input reflected in the final draft. When/if these expectations are not met, frustration might follow which can lead to violence. With this potential risk in mind, it might be a sound idea to investigate if public participation in the making of the constitution can be sequenced to junctures that are more suitable for involvement. Though this is an issue that deserves further systematic empirical research before any general suggestions can be made, the South African experience is valuable in terms of at least starting a discussion on how these processes can be sequenced and if it is a sound idea to allow the first stage of the process to be limited to negotiations between political elites and the following stage/stages to be open to public input. Again, however, this is a field of research that must be probed further—and perhaps this is where our attention needs to be as we move forth investigating participatory constitution-making so that potential perils are avoided, while institutionalization and internalization are facilitated.

124. See, e.g., Ghai & Galli, *supra* note 36; VIVIEN HART, U.S. INST. PEACE, DEMOCRATIC CONSTITUTION MAKING, S. REP. 107 (July, 2003), <http://www.usip.org/files/resources/sr107.pdf> (last visited Oct. 4, 2016).