

BOOK REVIEW

Public Participation in African Constitutionalism

(Routledge Abingdon and New York 2018)

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Abstract

This review explores why public participation in constitution-making matters for cultivating responsible governance and for fine-tuning justice, focused on immensely rich African evidence within a broader comparative constitutional law context.

Keywords

African women; duty of support; maintenance; unmarried opposite sex partners; same-sex partners; Muslim marriage; customary law.

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Review

The growing field of comparative constitutional law, connected to studies of legal pluralism, is presently experiencing a significant expansion of interest in South-South comparisons.¹ In this context, the book under review is an extremely valuable resource and helpful addition to knowledge about postcolonial scenarios of seeking to develop and maintain sustainable mechanisms of democratic governance in Africa, with a most welcome focus on recent struggles and developments. Arising from a panel on public participation and constitution-making at the 2015 European Conference on African Studies in Paris, this book contains 18 succinct and generally well-focused chapters, an analytical introduction and conclusion, as well as a quite detailed index. This collection provides multiple insights into the extremely varied forms and methods of public participation in constitutional developments of many African countries, covering mainly Egypt, Morocco, Tunisia, Kenya, Senegal and the Central African Republic, Zambia, Zimbabwe, Libya, Tanzania, Somalia, South Sudan, Malawi and South Africa.

The volume as a whole, which "aims to offer a systematic overview of participation forms and mechanisms across the continent",² seeks to dig beneath the general rhetoric of public participation in constitution-making as a positive factor. Indeed, it shows how various abuses and especially elite or partisan capture of such processes may cause significant damage. Key phrases, such as "constitutions without constitutionalism",³ indicate such crises of legitimacy, which impair democracy and show those who seek to rule and govern in a critical light. Sadly, this predicament is not unique to Africa or the Global South at all, playing itself out in current BREXIT-related dramas of British Parliamentary democracy with rhetoric self-serving battles over the use of referendum tools, while nasty and often xenophobic forms of violence against perceived and real "others" raise their ugly head. Indeed, public participation in governance is not necessary,⁴ worldwide, but remains a tough challenge also in late modern conditions of highly developed countries, including the "trumped" USA.

In Africa, the turbulent ambition-inspiring 1960s were a time of initial postcolonial state formation, in which public participation in constitution-making was as yet undeveloped, but dashed many initial hopes. The book's

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¹ See for example Singh (ed) *The Indian Yearbook of Comparative Law 2016*; Vilhena, Baxi and Viljoen (eds) *Transformative Constitutionalism*.

² Abbiate, Böckenförde and Federico "Introduction" 1.

³ Introduced by Abbiate, Böckenförde and Federico "Introduction" 3 and picked up by Prempeh "Conclusion" 297.

⁴ Prempeh "Conclusion" 298.

editors thus ask pointedly to what extent more recent patterns of public participation may serve as a "viable antidote against the longstanding African experience of having "constitutions without constitutionalism".⁵ The introduction highlights how, as part of the "constitutional wind" sweeping across Africa, constitutionalism and good governance have become prominent processes, as part of which public participation, "encouraged by both civil society and the international community",⁶ has been promoted. These exercises in democracy, affecting the Habermasian public space, saw people as a constituent power,⁷ but arose in a plurality of settings, involving everywhere the struggle for rights.⁸ As the evidence across Africa is extremely rich, the continent "has borne testimony to the highest diversity of constitutional reforms in the last decades".⁹ Focusing on Africa is also pertinent because of claims that Africa displays "a remarkable mix of similarities and differences among the countries".¹⁰ Indeed, the continent has become "a true laboratory for the elaboration of new forms and new content of the so-called globalised constitutionalism".¹¹ The introduction also summarises the various contributions and concludes with the pertinent observation,¹² illustrated throughout this collection and reiterated in the book's concluding chapter,¹³ that the struggles of everyday politics continue also once a particular constitutional text or arrangement has been devised and agreed upon. Public participation beyond this initial founding moment remains necessary at all times. Clearly, like justice, then, constitution-making is always an ongoing contested process, requiring constant vigilance and balancing everywhere, not just in Africa.

Chapters 1 and 2 make up Part I of the book and critically theorise conceptualisations of public participation in constitution-making. Its rationale is identified in Chapter 1 by Abrak Saati as a legitimising exercise, education in democracy, building social capital and a sense of ownership, and attempted reconciliation of conflicting positions, all leading to a higher level of democracy.¹⁴ However, presenting participation as a vague term, if not a myth, Saati also identifies lack of clarity and a proclivity to be concerned with quantity as deeply problematic.¹⁵ Calling for a focus on measuring influence, this article proposes four generic factors as relevant

⁵ Abbiate, Böckenförde and Federico "Introduction" 3.

⁶ Abbiate, Böckenförde and Federico "Introduction" 1.

⁷ Abbiate, Böckenförde and Federico "Introduction" 2. For India, see Ramnath 2012 *South Asia Research* 57.

⁸ Abbiate, Böckenförde and Federico "Introduction" 4.

⁹ Abbiate, Böckenförde and Federico "Introduction" 4.

¹⁰ Abbiate, Böckenförde and Federico "Introduction" 5.

¹¹ Abbiate, Böckenförde and Federico "Introduction" 5.

¹² Abbiate, Böckenförde and Federico "Introduction" 10.

¹³ Prempeh "Conclusion".

¹⁴ Saati "Participation" 15.

¹⁵ Saati "Participation" 15.

qualitative indicators.¹⁶ Examining initiators, channels of communication and degrees of inclusion, it is also suggested that questions of final authority, whether or not through a referendum, are pertinent. Overall, different practices of participation can be identified in empirical cases with the help of a typology,¹⁷ showing that detailed analysis might disclose cases of false participation, as in Nigeria in 1999.¹⁸

In Chapter 2, Böckenförde critically examines the role of referenda, often seen as best practice, also in international law.¹⁹ Based on significant African experiences, he reflects on the theoretical foundations of people's sovereignty in constitution-building processes and identifies positive and negative aspects in different contexts. He finds that referenda are one admissible instrument,²⁰ but certainly not useful in all scenarios. Intriguingly, this chapter also shows how in a moment of deep constitutional crisis, Kenyan judges relied on India's basic structure doctrine, developed earlier in the *Kesavananda Bharati* case,²¹ as a more effectively anchored and entrenched safeguard against elite or partisan capture of a constitutional framework.²² Since in many African contexts local factors act as constraints for democratically sound structures, this article warns against any romanticised visions of "the people" as a monovocal entity or a uniform body.²³ A safer approach, this suggests, would be reliance on a strategy of combining a carefully chosen representative Constituent Assembly with an optional referendum.

The book as a whole shows the rich diversity of constitution-making battles all over Africa. Any attempt to review the following 16 chapters and their individual accounts could not possibly hope to do justice to the richness of these various experiences and often quite specific argumentations and lessons learnt. This book is so comprehensive that it will attract a wide variety of readers, and the index will broadly guide them to any specific national scenario they might wish to explore. A finer subject index could have been produced to help identify more specialist interests or issues, such as "elite capture", but overall the conceptual focus of public participation is admirably well maintained throughout the entire volume, even if the factual scenarios vary so enormously,

¹⁶ Saati "Participation" 16-19.

¹⁷ Saati "Participation" 20-21.

¹⁸ Saati "Participation" 22.

¹⁹ Böckenförde "Letting the Constituent Power Decide?" 26.

²⁰ Böckenförde "Letting the Constituent Power Decide?" 37.

²¹ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²² Böckenförde "Letting the Constituent Power Decide?" 29-30.

²³ Böckenförde "Letting the Constituent Power Decide?" 37. Also see Ramnath 2012 *South Asia Research* 57.

Part II, headed "Participation in Constitution-Making Processes", comprises chapters 3 to 13. These are dedicated to specific country studies, tracing accomplished and ongoing processes. The latter include cases of severe challenges for meaningful public participation processes, particularly in countries, such as Libya, Somalia and South Sudan, which are still ravaged by violent conflict. Significantly, in different ways, "all three cases show the ambiguities that characterise the intervention of international actors".²⁴ This is one of the major themes of this volume, with many critical comments about the self-serving interventions of outsiders and "experts". Part III, titled "Participation in Context: Does It Make a Difference?", contains chapters 14 to 18. These present and explore some highly contested issues that have arisen along the way in relation to participatory experiences and the role of specific stakeholders or interest groups in many contexts, more so in certain countries than others. This allows the respective author to examine the specific impact of public participation of certain deeply contested constitutional provisions, which often go to the core of a nation's identity (re-) construction. In Kenya (Chapter 14), the central issue, apart from ethnic and religious diversity, is shown to be women's engagement in the 2010 constitution-making process, touching both on land rights and abortion matters, with different outcomes. In Malawi (Chapter 15), the delayed transition from authoritarian rule to democracy illustrates how the new winds blowing in African constitutionalism yielded strong public participation. This blazed an innovative trail, which allows an alternative reading of African constitutionalism,²⁵ with particularly strong evidence of societal participation at local level, indeed a unique participatory spirit,²⁶ probably sought to be captured in South Africa by *Ubuntu*. Connected to the strong powers of traditional local authorities, such battles could not avoid terrible tensions, yet the overall message is rather hopeful. This theme reflects, although in very different socio-political contexts, a potentially useful comparative and interdisciplinary analytical component in view of India's new-found and growing recognition of the voice of local people and stakeholders in governance as well as sustainable development planning.²⁷ A country of 1.3 billion people may not be comparable to any specific African scenario, but the public participation challenges are remarkably familiar and more cross-continental work seems advisable.

Of unique comparative global interest are chapters 16 and 17 respectively on South African debates and constitutional adjustment processes

²⁴ Abbiate, Böckenförde and Federico "Introduction" 7.

²⁵ Nicolini and Trettel "Societal Engagement" 244.

²⁶ Nicolini and Trettel "Societal Engagement" 247, 253-4.

²⁷ Examples and illustrations are found in various articles in Vilhena, Baxi and Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*. Also see Saha 2019 *South Asia Research* 23 and Sharma 2019 *South Asia Research* 43.

regarding abolition of the death penalty and the success story of increasing formal recognition of LGBTI rights, which has given South Africa one of the most progressive legal frameworks in the world.²⁸ Both matters have been accepted as part of South Africa's post-reconstruction processes of legal reforms, despite widespread negative and, in the case of gender rights, openly hostile and often violent public opinion. This scenario raises important questions about the gradual emergence of new values and ethics in any specific society and the scope for revised forms of "modern" morality. Yet it also suggests that in some scenarios and circumstances public participation may not be appropriate,²⁹ as enforced imposition of certain values infringing sensitive private/public boundaries may become a double-edged sword.³⁰ In chapter 18, the Tunisian case is revisited, this time with specific focus on the role of religion, here specifically Islam, in relation to constitutional governance. This excellent final contribution highlights the difficulties of constructing some sort of consensus culture,³¹ given the constant temptation to disturb subtle, frail balances for the sake of scoring some political or economic benefits. This article also makes the valuable point that a Constitution, probably more often than those who are nervous about resurgence of "nationalism" want to know, should be perceived as a "national autobiography".³² Related to the more or less diverse composition of any specific nation, this illustrates various efforts to construct, modify or protect a particular identity postulate,³³ a conceptual term of art that remains highly pertinent in comparative constitutional law practice.

Overall, as the concluding section reiterates, constitution-making is not new in Africa,³⁴ yet underwent significant modifications especially during the 1990s, when more of Africa's common people rather than their elites claimed a right to a voice, which became a new international norm in the context of increasing stress on democratisation.³⁵ While some processes are still not just inchoate,³⁶ but rather chaotic, not only in Somalia, which is well-covered in Chapter 12, everywhere in Africa public participation seems to matter, but it depends how it is channelled and handled. While the absence of public participation indicates lack of democratic legitimacy,³⁷ the rich evidence from all over Africa is so intensely diverse and influenced by time/space/contextual factors that indeed every case is different.³⁸ Thus, no

²⁸ Federico "A Success Story" 272.

²⁹ "Public Participation" 268.

³⁰ Federico "A Success Story" 280.

³¹ Abbiate "The Cross-Cutting Issue of Religion" 290.

³² Abbiate "The Cross-Cutting Issue of Religion" 291.

³³ Chiba *Asian Indigenous Law* 6-7.

³⁴ Prempeh "Conclusion" 296.

³⁵ Prempeh "Conclusion" 297.

³⁶ Prempeh "Conclusion" 298.

³⁷ Prempeh "Conclusion" 299.

³⁸ Prempeh "Conclusion" 301.

clear-cut advice can be given to "solve" any particular bottlenecks of justice. However, as this impressive collection makes abundantly clear, alertness to the needs and/or claims of particular segments of the public necessitates a firm basic commitment to good governance and ethically sound and responsible forms of governing. When these are focused on public rather than private interest, and governance is seen as a public duty rather than some kind of right to exploit strategic advantages, there is better hope for justice and a reduction of suffering for many millions of less powerful people. Awareness of this shines brightly through the entire volume, which makes exciting and instructive reading not only for specialists.

References

Chiba *Asian Indigenous Law*

Chiba M (ed) *Asian Indigenous Law in Interaction with Received Law* (London and New York, KPI 1986)

Ramnath 2012 *South Asia Research*

Ramnath K "'We the People': Seamless Web and Social Revolution in India's Constituent Assembly Debates" 2012 *South Asia Research* 57-70

Saha 2019 *South Asia Research*

Saha A "Rural Employment Generation in India: A Critical View from Rajasthan" 2019 *South Asia Research* 23-42

Sharma 2019 *South Asia Research*

Sharma K "Hunger in Jharkhand: Dimensions of Poverty and Food Security in Palamu District" 2019 *South Asia Research* 43-60

Singh *The Indian Yearbook of Comparative Law 2016*

Singh M P (ed) *The Indian Yearbook of Comparative Law 2016* (Oxford University Press New Delhi 2017)

Vilhena O, Baxi U and Viljoen

Vilhena O, Baxi U and Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Press 2014)