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## Introduction

### Women as Constitution-Makers: The Promises and the Challenges of Participation

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Constitutions emerged in their modern, written form in the late eighteenth century, first in the United States and, soon after, in Europe. Throughout the following two centuries, many more constitutions were adopted, forming the foundational legal framework for new political states after revolutions or wars, for the union of previously separate territories or, eventually, for newly-independent nations after decolonisation or following the breakup of empires. The modern constitution, significantly, rested on an idea of popular constituent power; it was represented as the work or the voice of ‘the people’, the expression of the national spirit, or the embodiment of the popular will.

The actual processes of making a constitution, however, were historically rarely popular, at least in a sense we would understand today. In some pre-twentieth century instances, the electors played a role in the ratification of their country’s constitution (indirectly, via the legislature, or directly by popular referendum), but the processes of appointing the constitution-making body, determining its terms of reference and choosing the content of the constitution, were left primarily to the political class, almost always elite men who already exercised political power. The notion of public participation was largely abstract and the idea of ‘the people’ or ‘the nation’ behind the ‘the national will’ was correspondingly narrow. Moreover, with some few and limited exceptions,<sup>1</sup> even where there was a popular element (such as the election of delegates to the

<sup>1</sup> The first known exception was in South Australia, when enfranchised women (including indigenous women) voted in 1897 alongside men in an election for delegates to the Australian federal constitutional convention and in the subsequent referendums for ratifying Australia’s Constitution; in 1900, in the colony of Western Australia (white) women also voted in the latter. See Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, 1997).

constituent assembly or convention, or to the ratifying body), the constitution-makers themselves were all men.

Women were not unresponsive to these processes. From at least the mid-nineteenth century onward, women were active in many countries as campaigners for constitutional rights (in particular, the right to vote). Their activism expanded in the twentieth century. In the post-World War II years, a tiny number played an official role as appointed members of constitution-making bodies in a handful of countries (for instance, Burma, Japan, West Germany, Italy and Spain).<sup>2</sup> However, until the 1980s, the formal offices of constitution maker remained dominated by men, representing and advancing a predominantly male perspective on constitutional values and on what should be included in a constitution.

### I.1 The Participatory Turn

The 1980s witnessed a ‘participatory turn’ around the world. Among other developments, women began actively to mobilise and take part in constitution-making in noticeable numbers. This shift reflected or coincided with the growing global recognition of political participation as a human right<sup>3</sup> and its extension into the constitutional realm. It was also validated in the emerging paradigm of the ‘new constitutionalism’ in which old notions of constitution-making as a task exclusively for elite political actors and legal experts were challenged and the principle of popular participation in both the preliminary and the approval stages of constitution-making was advanced, along with the idea that constitutional legitimacy depended upon such participation.<sup>4</sup> It was also an era in which, in some countries at least, women’s independence and agency

<sup>2</sup> Thin Aung and Susan H. Williams, ‘Women in the constitutional drafting process in Burma’, in Susan H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009); Beate Sirota Gordon, *The Only Woman in the Room* (University of Chicago Press, 2014); Inga Markovits, ‘Constitution making after national catastrophes: Germany in 1949 and 1990’, *William and Mary Law Review* 49 (2008); Barbara Pezzini, ‘Donne e Costituzione: Le Radici ed il Cammino’, *Studi E Ricerche di Storia Contemporanea* 68 (2007); Asunción Ventura Franch, *Las Mujeres y La Constitución Española de 1978* (Madrid: Instituto de la Mujer, 1999).

<sup>3</sup> The right to participation is arguably based on Article 25 (a) of the International Covenant on Civil and Political Rights (ICCPR). Also, regional and transnational declarations such as the African Charter on Human and Peoples’ Rights (1981, Article 13.1), the Asian Charter of Rights (1998, Article 5.2) and the Inter-American Democratic Charter (2001). The United Nations Human Rights Committee has concluded that the right to participate in the conduct of public affairs extends to constitution-making.

<sup>4</sup> Justin Blount, ‘Participation in constitutional design’, in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham and Northampton, MA:

more broadly began to be recognised in law, with, among other things, the adoption of anti-discrimination laws, the extension of equality provisions to gender equality through constitutional amendment or constitutional jurisprudence,<sup>5</sup> and the promotion of constitutional and legislative gender quotas for women as candidates for, or incumbents in, political offices.<sup>6</sup>

Women's long-standing claim of membership of 'the people',<sup>7</sup> and their role in campaigning in civil society for constitutional rights and in promoting constitutional education, found incremental recognition. The democratic transformation of post-Apartheid South Africa, and the democratic revolutions in many other countries, saw the idea of participatory constitution-making extend to include women. Women's participation, in some cases (for example, in Morocco, as Sara Borrillo notes in Chapter 1 in this volume), became part of the official rhetoric of democratic transition. Women also began to find a place in post-conflict and peace-making processes,<sup>8</sup> with seventy-five countries (between 1990 and 2015) undertaking constitutional reform 'in the wake of armed conflict, unrest, or negotiated transition from authoritarianism to democracy'.<sup>9</sup>

Edward Elgar Publishing, 2011); Vivien Hart, *Democratic Constitution-Making*, United States Institute of Peace, Special Report 107, 2003.

<sup>5</sup> See Beverley Baines and Ruth Rubio-Marín (eds.), *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005).

<sup>6</sup> Ruth Rubio-Marín, 'Women's political citizenship in new European constitutionalism: Between constitutional amendment and progressive interpretation', in Helen Irving (ed.), *Constitutions and Gender* (Cheltenham and Northampton, MA: Edward Elgar Publishing, 2017).

<sup>7</sup> 'Are women of the people? Are they not half the people, and are their claims not to be considered?', asked Annie Golding of the NSW Womanhood Suffrage League, during the campaign in the 1890s for a federal constitution for the Australian colonies. See Irving, *To Constitute a Nation*, p. 171. Similarly, as Bertil Oder writes in Chapter 6 in this volume, Turkish feminists in the first decade of the twentieth century expressed disappointment that the Constitution's reference to the rights of 'all Ottomans' was not recognised as extending to women's rights: 'Does the meaning embedded in the term of "human" exclude the women?', they asked: 'No, no ... This is manifestly and obviously oppression, violation and usurpation'.

<sup>8</sup> Reflected in the UN Security Council's Resolution 1325 in 2000, which 'reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security'. See [www.un.org/womenwatch/osagi/wps/](http://www.un.org/womenwatch/osagi/wps/).

<sup>9</sup> Nanako Tamaru and Marie O'Reilly, 'How Women Influence Constitution Making after Conflict and Unrest' (2018), p. 5, [www.inclusivesecurity.org/constitutions/](http://www.inclusivesecurity.org/constitutions/).

In many countries, meaningful numbers of women began to be appointed to official constitution-making bodies.

Still, the numbers remain relatively small,<sup>10</sup> and women's involvement in constitution-making takes place more often through civil society than through official bodies. Formal constitution-making continues to rely overwhelmingly on established forms of political representation, and thus, given women's persistent under-representation in political institutions and in the senior levels of the legal profession, it is still available mostly to male politicians and male legal experts. The role of 'founding fathers' as constitution makers continues to be celebrated, to the detriment of women's recognition.

Nevertheless, an important shift has been registered in contemporary constitutionalism. Women's presence on constitution-making bodies and as players in associated official forums has grown. The opportunities for participation have been expanded and widespread. Close to half of the world's constitutions were adopted after 1990 and, significantly, almost two-thirds of current constitutions include equality or non-discrimination provisions that extend to sex or gender,<sup>11</sup> suggesting at least an awareness of women's interests among constitution makers.

The international community has played an important role in this process by increasingly embracing a normative commitment to women's participation in constitution-making. International agencies have promoted gender equality in their assistance to constitution makers. Constitution-making has also opened unprecedented avenues for women's organisations to have access to international aid and international networks. Regional integration processes have also had an impact, with aspirations of membership of the European Union<sup>12</sup> stimulating the women's movement for constitutional reform in some countries, as we see in Bertil Oder's Chapter 6. Romania's story of constitution-making, however, illustrates that supranational norms may not in themselves be sufficient. Elena Brodeala and Silvia Șuteu write that, 'despite the opportunities afforded by the

<sup>10</sup> Between 1990 and 2015, on average, women made up 19 per cent of members of constitution-drafting bodies: see Nanako Tamaru and Marie O'Reilly, 'A Women's Guide to Constitution-Making' (2018), p. 1, [www.inclusivesecurity.org/publication/womens-guide-constitution-making/](http://www.inclusivesecurity.org/publication/womens-guide-constitution-making/).

<sup>11</sup> Katharine G. Young, 'Introduction: A public law of gender?', in Kim Rubenstein and Katharine G. Young (eds.), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press, 2016), p. 1.

<sup>12</sup> Which requires state candidates to ensure, among other eligibility conditions, respect for fundamental rights, including equality between men and women.

process of European accession . . . women's rights NGOs in Romania did not come out of the accession process better able to influence public policy and law-making'.<sup>13</sup> Iraq's post-Saddam story also demonstrates that international equality commitments made in the early constitution-making stages may be compromised in practice by political pressure or expediency, or, in the case of Somalia, by the priority of maintaining post-conflict stability leading to reliance on traditional male leaders as the stabilisers. Morocco in the 1990s offers a contrasting example, however, as we learn from Borrillo in Chapter 2, with opportunities for feminists created by, among other factors, the neoliberal policies that Morocco began to adopt 'under the international pressure of the World Bank and IMF'. Liberia's story, we learn from Susan Williams's Chapter 8, is one in which foreign advice and guidance feature significantly, both in assisting women in participating in constitution-making and as a source of learning on the part of those providing the advice themselves.

The lines of influence, we are reminded, the avenues for involvement in constitution-making and the forms this can take, are complex and contextual; each country's constitutional narrative is embedded in its own history, politics and culture. Constitution-making will take different pathways and reflect different priorities in, for example, post-colonial, post-communist or post-conflict settings, and each of these differences are reflected in case studies in this volume. Nevertheless, the democratising imperative and the associated movement of women into the constitution-making sphere remains a global phenomenon.

As women have increased in numbers in parliaments and legislative assemblies in many parts of the world – as a result of their expanding engagement in public life generally, the adoption of gender quotas for legislatures and also the prior loss of male representatives in some post-conflict nations<sup>14</sup> – women's participation in constitution-making bodies has also followed. In some countries, the direct involvement of citizens in debating options for constitution-drafting or constitutional amendment has created further opportunities for women's participation.<sup>15</sup> Gender quotas

<sup>13</sup> See Chapter 2, this volume.

<sup>14</sup> Hart, *Democratic Constitution-Making*.

<sup>15</sup> For example, in 2012–2014, Ireland held a constitutional convention to prepare a report on eight issues for prospective constitutional amendment. The Convention consisted of 100 members, two-thirds of whom were volunteers, randomly selected 'regular citizens'; the remaining third of the members were politicians (appointed by political parties based on their representation in parliament) plus a President. Thus composed, the Convention included forty-nine women, thirty-three of whom were selected randomly and sixteen

for the election or appointment of women to constitution-making bodies are a further important factor, serving both as indicators of at least some acceptance of women's participation, and also contributing numerically to the trend. In Uganda, for example, 39 seats were set aside for women in the direct election of a proportion (around 75 per cent) of the 284 delegates to the constituent assembly of 1994.<sup>16</sup> In Bolivia, members of the constituent assembly were elected in 2006 through 'zippered' party lists (alternating male and female candidate names) with the goal of parity in women's and men's representation.<sup>17</sup> Similarly, in Tunisia, as Borrillo writes in Chapter 2, a 2011 parity law required political parties to offer alternating 'man-woman' lists of candidates for the constituent assembly, leading to the choice of 49 women out of 217 members (27 per cent). In Iraq, as Noga Efrati reports in Chapter 3, women successfully campaigned for the inclusion of a quota provision in the country's interim constitution in 2004, requiring the electoral law to aim for the election of women in no fewer than one quarter of the seats of the National Assembly; the result was an unprecedented number of women (almost one third) in the Assembly, which had the role of approving the final constitution. Political party commitments to include women among their members on constitution-making bodies, as in the Philippines, are also to be noted.<sup>18</sup>

## I.2 Popular Participation in Constitution-Making

While many of these processes involved educated or 'elite' women and reflected their views and perspectives, they did not necessarily overlook

appointed by political parties. Silvia Şuteu 'Women and participatory constitution-making', in Irving (ed.), *Constitutions and Gender*, pp. 19–46. In 2016, a deliberative 'Citizens' Assembly' was established in Ireland as the Convention's successor; it debated and made recommendations on constitutional reform, including the repeal of the Constitution's Eighth Amendment (see Section I.6).

<sup>16</sup> Blount, 'Participation in Constitutional Design', p. 42. Other examples of gender quotas for constituent assemblies or associated bodies include Nepal, East Timor (Timor Leste), Rwanda and Kenya. See Tamaru and O'Reilly, 'How Women Influence Constitution Making'. For Kenya, see Wanjiku Mukabi Kabira, *Time for Harvest: Women and Constitution Making in Kenya* (University of Nairobi Press, 2012); also Jill Cottrell and Yash Ghai, 'Constitution Making and Democratization in Kenya (2000–2005)', *Democratization* 14 (1) (2007), 1–25.

<sup>17</sup> Although women were rarely positioned at the top of the list, they still ended up occupying 88 seats, out of 255 (33 per cent, 45 per cent of whom were indigenous women). Stéphanie Rousseau, 'Indigenous and feminist movements at the Constituent Assembly in Bolivia', *Latin American Research Review* 46(2) (2011), 5–28.

<sup>18</sup> Tamaru and O'Reilly, 'How Women Influence Constitution Making', p. 11.

‘ordinary’ women. In some countries, wide-scale public consultations in urban and rural communities were held in the constitution-making processes. Among many examples, the Constituent Assembly in Colombia sought submissions from the public on constitutional content; it received 120,000 proposals. Unofficial initiatives also extended beyond the ‘elite’. In Egypt, the Arab Alliance for Women organised a constitutional consultation involving 3,000 community-based groups across the country. The case studies in this volume describe many other instances of constitutional outreach encouraging public input and popular involvement in constitution-making beyond official forums or bodies. Such initiatives, indeed, are promoted and validated by the participatory turn in constitution-making and the ‘new constitutionalism’.

Popular and informal participation in constitution-making has been enlivened by public education, debates, consultations and open meetings, the making of submissions and contributions to media, among others. Initiatives such as these may be particularly valuable for women, who, as noted, are typically under-represented in political institutions and may lack relevant formal experience and expertise. Informal political activism may also precede or serve as preparation for constitutional engagement and for the later articulation of political claims in the form of constitutional proposals (as in Turkey where ‘[d]espite the intense years of second wave of feminism in the post-1980 period, gender equality did not enter the constitutional agenda of Turkish politics until 2001’).<sup>19</sup>

Participation has also offered a positive experience for many women, acting as a form of empowerment and a means of developing skills and experience, a vehicle for women to think of themselves as ‘constitutional citizens’. Indeed, even unsuccessful participation can be positive. Kenya, for example, saw the defeat in 2005 of a referendum on a constitution that had incorporated, among other principles, a commitment to establishing ‘a broad framework within which to pursue the rights of women, including affirmative action and political participation of women’.<sup>20</sup> The defeat did not lead to women’s abandonment of such constitutional goals; rather, women re-organised with further demands. In 2010, following renewed processes of participation and public consultation, a new constitution, which included gender equality provisions, was approved by referendum and adopted. In Colombia, as Julieta Lemaitre

<sup>19</sup> See Section 6.5.1, Chapter 6, this volume.

<sup>20</sup> *The People’s Choice*, Report of the Constitution of Kenya Review Commission (2002), p. 13.



reports in Chapter 5, women's engagement in constitution-making in the failed attempt in 1988 offered the opportunity for renewal and the overcoming of old divisions in the women's movement, leading to the successful new attempt in 1991.

### 1.3 Questioning Participation

It must be acknowledged, however, that many women remain sceptical about constitutionalism and its 'lofty promises of democracy, representation, accountability and equality',<sup>21</sup> including those advanced in the name of participation. Participatory processes and mechanisms may be, or may appear as, mere 'shells', lacking in substance or real influence, or offered by those in power as a way to 'mollify unrest'.<sup>22</sup> In Bolivia, for example, the radical-autonomous women's collective, *Mujeres Creando*, was strongly critical of the constituent assembly in the belief that the government was using gender issues instrumentally as a means of consolidating its own power.<sup>23</sup> In Egypt, as Mariz Tadros observes in Chapter 7, feminist women were deeply divided over the constitutional amendment process following the ousting of President Morsy in 2013. Some saw the process as an opportunity to promote a new, more gender-sensitive constitution, but, for others, the threat of a military takeover posed a far greater danger to women's rights, and some boycotted the constitutional process, seeking full democratisation. Iraq too, as Efrati explains in Chapter 3, illustrates strategic divisions among women activists, some of whom denounced the foreign occupation and its apparent promotion of women's equality and refused to take any part in post-Saddam constitution-making; others, in contrast, saw this period as an opportunity for advancing women's equality.

In Morocco, the women's movement was divided between those who 'accepted the recognition of gender equality in the new constitution of 2011 under the patronage of the regime, and the independent activists who boycotted the constitutional process and continued to struggle for a truly democratic constitutional process'.<sup>24</sup> In the constitutional

<sup>21</sup> Alexandra Dobrowolsky and Vivien Hart (eds.), *Women Making Constitutions: New Politics and Comparative Perspectives* (Basingstoke and New York: Palgrave Macmillan, 2003), p. 2.

<sup>22</sup> Hart, *Democratic Constitution-Making*, p. 9.

<sup>23</sup> Rousseau, 'Indigenous and feminist movements at the Constituent Assembly in Bolivia', 21.

<sup>24</sup> See Section 1.2.1, Chapter 1, this volume.



referendum of June 2011, the '20FM' group (while showing 'strategic respect' for the monarchy as an institution) saw the process of constitutional reform as controlled by the monarchy and sought a boycott of the referendum. In contrast, some feminists supported the referendum as a strategic necessity, an opportunity finally to have gender equality recognised constitutionally, even if the constitution was otherwise flawed.

Overall, as Alexandra Dobrowolsky and Vivien Hart – the pioneering scholars of women and constitution-making – observed, 'when windows of reform have opened women have felt compelled to seize these opportunities and, wherever they can, to shape them'.<sup>25</sup>

#### I.4 Obstacles to Participation

Despite evidence of progress, many obstacles to women's participation in constitution-making remain. In addition to women's underrepresentation in government and in political institutions, women's groups have often been internally divided, inhibiting joint action in constitutional campaigns and on the part of women as candidates for constitutional assemblies. In some cases, divisions between religious and secular women's organisations have proved intractable. Additionally, the strategy of collaborating with established (male-dominated) political parties or aligning women's activism with campaigns for workers' rights has clashed with the commitment to independent feminist activism. 'Intersectionality'<sup>26</sup> – where the experience of gender discrimination 'intersects' with discrimination based on race, religion, sexuality, indigenous or other disadvantaged minority status – may also hamper the adoption of common constitutional goals or strategies for gender equality. Women who are members of, for example, indigenous or tribal, cultural or religious communities may align with their particular community's interests when conflicting values present themselves.

Intersectional alliances may also serve to entrench divisions. In Nepal's Constituent Assembly in 2008, it is reported, women from different classes and castes interacted primarily within their own group; those

<sup>25</sup> Dobrowolsky and Hart (eds.), *Women Making Constitutions*, p. 2.

<sup>26</sup> Kimberlé Crenshaw, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum* 1989(1) (1989), 139; 'Mapping the margins: Intersectionality, identity politics, and violence against women of color', *Stanford Law Review* 43(6) (1991), 1241.

from 'lower' classes 'felt that more elite women looked down on them, and in some cases felt humiliated for their ethnic dress, use of language and level of education'; on the other hand, women from the more elite classes felt that marginalised groups were given more opportunities, and they 'reported feeling sidelined'.<sup>27</sup> A women's caucus was created in the Assembly with the aim of bringing groups together and finding a common agenda, but the lack of unity remained.

In some cases, however, constitution-making or constitutional reform may forge intersectional alliances, as in Bolivia, between indigenous and non-indigenous women; Liberia, between women's organisations, youth groups and disability organisations; and Romania, between feminist organisations and LGBT organisations.<sup>28</sup> Constitution-making may also bring hitherto-divided women's groups together. This is illustrated in Colombia, as Lemaitre relates in Chapter 5, where feminist women's attempts to organise for the election of women to the Constituent Assembly in 1990 confronted long-standing divisions, including between the ideologies of autonomous feminism and feminism built on alliances with political parties. Against a history of constitution-making failure and unrelenting civil violence, the renewed constitution-making initiative 'helped bring together different feminist factions and united them in the defense of human rights, in spite of passionate histories of long-standing enmities between organizations and individuals'.<sup>29</sup> Sakuntala Kadigarmar's account of Somalia's constitution-making in Chapter 4 also illustrates how the hope of overcoming long-running civil conflict can unite previously divided women's groups. Among other remarkable initiatives, in a context where five male-led tribal clans were the foundation of

<sup>27</sup> Tamaru and O'Reilly, 'How Women Influence Constitution Making', p. 52.

<sup>28</sup> In Bolivia, in the constituent process leading to the 2009 Constitution, women's associations formed an alliance through the initiative *Mujeres Presentes en la Historia* (Women Present in History) which was designed to be inclusive of indigenous women's voices: see Rousseau, 'Indigenous and Feminist Movements at the Constituent Assembly in Bolivia', 13. In Liberia, as Williams notes in Chapter 8, women's groups engaging in constitutional consultations (supported by the Ministry for Gender, the Law Reform Commission, the Constitution Review Committee and UN Women) formed constructive alliances with both youth groups and organisations representing the disabled; they worked together on, for example, proposing that quotas should include the disabled as well as women. For Romania, see Chapter 2, this volume.

<sup>29</sup> See Section 5.1, this volume. The network *Red Mujeres por la Constituyente* (Women and Constituent Assembly Network) included seventy-five organisations from around the country and was supported by funds from a Spanish international cooperation. See also the discussion of Turkey's *Women's Constitutional Platform* in Chapter 6, this volume.