A COMPARATIVE ASSESSMENT OF THE LEGAL AND INSTITUTIONAL INSTRUMENTS FOR CONSTITUTION MAKING*

Abstract

In modern times, constitutional outcome will be more sustainable if citizens are accorded equal participation in its creation. As such, constitution making has now become the foundation of every democratic governance. The formal endorsement of democracy and its diffusion into many international conventions and emerging national constitutions has extended beyond the traditional connotation of the term to the realms of constitution making. Many textual authorities have now evolved in international law which reinforces the nexus between democracy, democratization, constitutionalism and constitution making by reinforcing and establishing minimum obligation to participate in public affairs. This paper shall examine some textual authorities in international, regional and municipal laws which reinforce the doctrine of public participation as condition precedent for every constitution making process.

Keywords: Constitution Making, Legal and Institutional Framework, Assessment, Comparison

1. Introduction

The contemporary age is dominated with heightened consciousness about democracy, constitutionalism, and constitution making. Every country is governed by a set of policies through a framework of laws, rules and regulations commonly referred to as Constitution. The notion of democracy and good governance is predicated upon the existence of a people oriented constitution that enables government to effectively manage the affairs of the state, and equally empowers citizens to freely participate in governance. A Constitution is understood to mean a fundamental legal document which lays down the basic structure of government and other public bodies.[1] Basically, it refers to norms, conventions, rules and procedures which have the objective of defining the behaviour of its constituents, individuals, groups or special decision-making and implementing institutions. In this sense, a constitution assumes the status of law, legislative acts, ordinances, decrees and bye-laws as well as custom.[2] Constitutions also provide solid foundation for a State based on the rule of law, equality and social justice. A Constitution may either evolve through formal enactment,[3] or from the accepted customs, political practices, conventions, judicial decisions and statutes of the country over a long period of time.[4]Constitutions operate at different levels of government, whether international, regional, sub-regional, national, state or provincial.[5]

There is no doubt that the entire world has over the years been witnessing Constitution making and constitutional modification or alteration.[6] The plethora of contexts by which constitutions emerge discloses its primary purpose which, amongst others, includes nation building due to emergence of new states; the consolidation of democracy after military rule, deposition of authoritarian regimes; peace and cooperation accord amongst factional communities to end internal conflicts.[7] Most recent constitution making experiences are reflections of a changed perception on the importance and purpose of constitutions. Many new and emerging constitutions have either marked the end of an epoch and eventual beginning of another era under the hegemony of new social forces.[8] Some other constitutions reflect the commitments or pressure to democratize as a result of disillusionment with one party regime or military autocracy,[9] while many others have evolved out of prolonged internal conflict and intervention of external actors leading to reconstruction of a state through negotiation with the new constitution establishing solid democratic principles, constitutionalism and detailed Bill of Rights.[10] On

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[1] A Sahoo and TPattanaik, 'Making of the Constitution of India: A Critical Analysis' (Jan. 2015) *Odisha Review*, 7.

[2]D R Mukangara, 'Forms and Reforms of Constitution-Making with Reference to Tanzania' (1998-2001) 4 *UTAFIT [New Series] Special Issue*, 131.

[3] That is, being formally passed into force as a law, For instance, 1999 Constitution of Nigeria.

[4] E Malemi, *The Nigerian Constitution*al Law* (Lagos: Princeton Pub. Co. 2012) p.20

[5]The separate state constitutions in the USA are living examples. Also, the Quebec in Canada and Wallonia in Belgium are examples of sub-national constitutions.

[6]This is largely due to the fact that the world order had changed due to factors such as the final mopping up of colonialism, the emergence of new states, the end of military regimes, the collapse of communism and efforts to end civil conflicts, majorly in multi ethnic states.

[7] M Bradt, *et al, Constitution-Making and Reform: Options for the Process* (Switzerland: *Interpeace*, 2011, p 13

[8] Eastern Europe, for instance, provides a lucid case study.

[9] This was the case in Thailand, Brazil, Argentina and Mozambique.

[10]Such as the experiences if South Africa, Bosnia and Herzegovina, Neitherlands, Ireland, Afghanistan, Iraq and Sudan.

whose responsibility it is for making and approving a constitution, Nwabueze has posited that it is the duty of an assembly specially elected and specifically mandated by the people to adopt a constitution and institute a frame work of government on their behalf.[11] This means that a constitution must proceed from the exercise of sovereignty by the people in whom governmental power belongs.[12]

Globally, there are increasing trends that constitutions enjoy greater legitimacy if they are products of inclusive, representative and participatory processes. This is largely supported by the fact that constitution making, alteration and reform are very core to state building and democratic consolidation. That is why the making and re-enactment of every constitution should be seen as a national project which requires utmost care, skill and diligence. In most states, the enactment of a first constitution marks an important milestone in the political continuity of a country which was formally bedeviled by major political turmoil such as war, revolution, national independence or a shift in the political landscape.[13] Historically, constitution making was rather concerned with the content of the document rather than the processes. From the onset, it was the prerogative of the sovereign to make, adopt and impose constitutions on the people.[14] However democratic process of constitution making emerged in the 20th Century which situates the central focus of constitution makers within the realm of active and intensive participation of the people.[15] Thus, as the bedrock for governance, how the constitution evolved has now become the determinant factor for its survival and endurance.[16] What this mean is that the process of constitution making is also as important as the content of the final document. Therefore, constitution making presents an opportunity to create a common vision on the future of a state, which may have lasting impacts on peace and stability.[17]

2. International Legal Instruments on Constitution Making

Contemporary international law has established minimum obligations to participate in public affairs which now extend to constitution making as enunciated in many covenants.

Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political Rights (ICCPR)

The right to participate in public life was first articulated in the Universal Declaration of Human Rights of 1948,[18] and the enforceable International Covenant on Civil and Political Rights (ICCPR).[19] The right to self-determination embedded in Article 1 of the ICCPR has been extended to incorporate collective right to choose the form of government which broadly covers constitution making. The right to constitution making is logically derived from the general meaning of '*democratic participation*' in the United Nations Declaration of Human Rights and the ICCPR which grants the right to participate in public affairs, vote and to have access to public service. Specifically, Article 25 of the ICCPR declares;

> Every citizen shall have the right and opportunity…without reasonable restrictions:
> a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> b) To vote and to be elected at a genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> c) To have access, on general terms of equality, to public service in his country.

[11]B Nwabueze, *Ideas and Facts in Constitution Making* (Lagos: Spectrum Books, 1993) p1

[12]B Ige 'Constitutions and problems of Nigeria'. (1995) *Nigerian Institute of Advanced Legal Studies*, 7. See also the provision of the Constitution of the Federal Republic of Nigeria (as amended) 1999, Section 14(2)(a).

[13]Constitution Making is a central part of state and nation building processes. Historically, it has nexus with the process of democratization, particularly those states which have achieved independent statehood from past colonial rulers and, the transition to democracy saw the need for writing and adopting a new Constitution as foundation for the democratic existence of new states.

[14]Traces of this assertion can be found in several country's constitutions even as late as the 20th Century such as the Constitutions of Ethiopia, Jordan, Kuwait, Nepal, Nigeria and Saudi Arabia.

[15] See M Brandt *et al*(n7*)* p 17.

[16] D.R. Mukangara, (n2*)* p 135.

[17] A Sahoo and T Patnaik,(n1*)*. P.131.

[18] Particularly Article I of *UNDHR* 1948.

[19]The ICCPR was adopted in 1966 but entered into force in 1976 when the required 35 ratifications by states was attained in compliance with (Article 49). In June, 2003; the number of states that ratified the ICCPR rose to 149.

From the language of the enactments above, the right to democratic governance has been weighed towards a procedurally representative and electoral model.[20] The ICCPR therefore, set the electoral preoccupations of the predominant international human rights approach to participatory constitution making by leaving the terms '*take part*' and '*public affairs*' to variety of interpretations.

Council of Europe 1949

The Council of Europe which was formed in 1949[21] became another early and influential rights making body. According to Henry J. Steiner, a right to participation became so controversial in Europe following a debate as to whether political right stood outside the tradition of human rights, and it was later decided that the European Convention on Human Rights (ECHR) of 1950 should not include such right.[22] With the addition of the First Protocol to the ECHR in 1952, the limited meaning of participation became very clear and restrictive.[23] This Protocol had, however, offered a narrower conception of democracy than the potentially expensive '*take part*' clause of the ICCPR.[24]

Convention on the Elimination of all Forms of Racial Discrimination 1965

The 1965 Convention on the Elimination of all Forms of Racial Discrimination defines political rights, and in particular, the right to participate in elections as the right to vote, and to stand for elections on the basis of universal and equal suffrage, and to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public services.[25]

Convention on the Elimination of all Forms of Discrimination against Women 1979

The 1979 Convention on the Elimination of All Forms of Discrimination against Women guaranteed the right of participation to both men and women on equal basis in the formulation of government policy and the implementation thereof, and to hold public office and perform all public functions at all levels of government including non-governmental organizations and associations concerned with the public and political life of the country.[26]

European Framework Convention for the Protection of National Minorities 1995

The European Framework Convention for the Protection of National Minorities, 1995 states that the parties shall create condition necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, and in particular, those affecting them, and that the parties undertake not to interfere with the right of persons belonging to national minorities in their desire to participate in the activities of non-governmental organization both at the national and international levels.[27] It must be observed that even though none of these international instruments specifically refer to constitution making, they, however, cumulatively create some conditions for meaningful participation both in the public and political affairs.

Regional Legal Instruments

In recent time, many regional instruments have also progressively expanded the scope of participation in constitution making.

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[20]R Luckham *et al,* Democratic Institutions and Politics in Contexts of Inequality, Poverty and Conflict, (Brighton: *IDSWorking Paper* No. 104, 2000) p. 1.

[21]The Council of European was founded in 1949 with ten Western European members namely, Belgium, Denmark, France, Ireland, Italy, Luxemburg, Netherlands, Norway, Sweden and the United Kingdom. In year 2003, the number of membership rose to forty five.

[22] See H J Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book*, 94.

[23]According to the 1952 First Protocol "the high contracting parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of opinion. See Article 3 of the *ECHR, First Protocol to the Convention*, 1952.

[24]H J Steiner, *op. cit.,* p. 96.

[25]Article 5(c) of the *Convention on the Elimination of All Forms of Racial Discrimination*, 1965. See also Article 2 of *the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, (General Assembly Resolution 47/135 of 18th December, 1992).

[26] See *Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women*, 1979.

[27] See Articles 15 and 17 of the *European Convention for the Protection of National Minorities*, 1995.

African Charter on Human and Peoples' Rights 1981

The African Charter on Human and Peoples' Rights of 1981 popularly referred to as the '*Banjul Charter*' is a verbatim reproduction of the language of Article 25 of the ICCPR with an added emphasis on 'strict equality'.[28]

Commonwealth's Harare Declaration 1991

The Commonwealth's Harare Declaration of 1991 gave recognition to individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives. [29] This, by implication extends to constitution making.

Asian Charter of Rights 1998

The Asian Charter of Rights of 1998 has maintained that the right of participation depends on the existence of some guarantees of supporting rights like freedom of speech and assembly. It provides:

> The state, which claims to have the primary responsibility for the development and well-being of the people should be humane, open and accountable. The corollary of the respect for human rights is a tolerant and pluralistic system, in which people are free to express their views and to seek to persuade others and in which the rights of minorities are respected. People must participate in public affairs, through the electoral and other decision making and implementing processes, free from racial, religious or gender discriminations.[30]

Inter-American Democratic Charter 2001

The Inter-American Democratic Charter of 2001 which contain twenty-eight articles has taken the right to participation to new height. The Charter which was an offshoot of the views of the Civil Society Organizations is another milestone within the domain of participatory democracy. Article 1 of the Charter states that 'The people of Americas have a right to democracy and their governments have an obligation to promote and defend it'. This provision has been acclaimed to have lifted the concept of democracy to a significantly advanced reciprocal contract between the people and government. Lifting from the UN's Vienna Declaration of 1993, the Charter equally endorsed the universality, indivisibility and interdependence of human rights.[31] Article 11 of the Charter also chooses the Vienna Declaration by restating that democracy and social and economic development are independent and are mutually reinforcing.[32] Article 6 of the Charter had even gone further to include the traditional procedural elements of good electoral practice. In actualization of these elements, social rights have been integrally associated with the right to democracy. According to Article 6;

> It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy, promoting and fostering diverse forms of participation strengthens democracy.[33]

Organization of American States (OAS) Charter

The Organization of American States (OAS) Charter made provisions on the necessary framework of the constitutional order, the constitutional subordination of states institutions and the fundamental freedom and human rights enshrined in respective state constitutions as well as international instruments.[34] Based on these provisions, the Charter had reflected the contemporary emphasis on constitutionalism by providing that an unconstitutional alteration of the constitutional regime is sanction able under the Charter.[35]

The adoption of the international and regional instruments on participatory democracy has no doubt created a universal customary norm on the best practice of states. That is why the international circulation of rights and constitutional clauses has assumed famous status since the emergence of the United States Constitution.

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[28] See Article 13(1) of *the African Charter on Human and peoples' Rights*, 1981.

[29]See *the Commonwealth Heads of Government Meeting*, 1991, *the Harare Declaration,* October 20, 1991 available at<www.dfaimacci.gc.ca/foreign-policy/thecommonwealth.org/internal/20723/34457/harareommonwealth/imoc310-en.asp> accessed 3/4/2017.

[30] See Article 5 of *the Asian Charter of Rights*, 1998.

[31] See UN Vienna *Declaration and Programme of Action*, 25 June, 1993. Article 5.

[32] Article 8 of the UN, Vienna Declaration.

[33] See Article 6 of *the Inter-American Democratic Charter*.

[34] ibid, Articles 2, 4 and 7.

[35] ibid, Article 19.

Domestic Legal Instruments

Where a right of democratic participation is provided for in domestic legal instruments like the constitution, it demonstrates the character of the constitutional regimes and its commitment to complying with international standards. Possession of national right provides ample opportunity to citizens to articulate their views with a view to enforcing their right where they are being violated. Even though many nations have ratified the ICCPR, enforcing this treaty through the judicial process of the Human Rights Commission has been very slow and cumbersome, as domestic remedies must first and foremost be exhausted.[36] A cursory examination of some case studies will show how some constitutions have traditionally remained procedural by concentrating on electoral systems, while others have expanded the ideas by embellishing the '*take part*' clause.

Constitution of South Africa 1996

The Constitution of South Africa, 1996 did not expressly provide for the phrase '*right to participate*' in constitution making, but, however made reference to universal suffrage, regular elections and a multiparty system of government part of the founding provision.[37] The constitution further contains a bill of rights modeled on the ICCPR provisions for the rights to free electoral choice; to form, participate in, and campaign for political parties, free, fair and regular elections; and to vote for and stand for public office without deprivation.[38] It can be gleaned from the constitutional provisions above that the guarantee of these rights, no doubt, by implication, extends to constitution making.

Constitution of East Timor 2002

East Timor's Constitution of 2002 has made a more expansive provision than the South African Constitution, by providing that 'Every citizen has the right to participate in the political life and in the public affairs of the country either directly or through democratically elected representatives'.[39] The right of every citizen to establish and participate in political parties has also been guaranteed by the country's constitution.[40]

Constitutions of Slovakia 1992

The Constitutions of Slovakia assures citizens of their right to participate in the administration of public affairs directly or through the free election of their representatives, and this right also extend to foreigners with a permanent residence on the territory of the of the Slovakia Republic.[41]The constitution of Venezuela,[42] also contain similar provisions.

Honk Kong Basic Law 1991

Like South Africa, the Honk Kong Basic Law of 1991 also spells out the ingredients of the '*right to participate in public life*' to the effect that Chinese citizens who are residents of the Hong Kong Special Administrative Region shall be entitled to participate in the management of state affairs according to law.[43] In order to actualize this, freely chosen representatives, genuine periodic elections, equal access to public service are required. It must be noted that new norms of participation that are more advanced than the South African model have emerged in some recent constitutions by offering a more expansive and specific guarantees.

Constitution of Angola 1992

In Angola, the 1992 Constitution has made it right and duty of all citizens aged over 18 years, other than those legally deprived to take active part in public life, to vote and stand for election to any state body, and to fulfill their offices with full dedication to the cause of the Angolan nation.[44]The Angolan Constitution further imposed limitations on political affiliations of soldier, members of police forces and judges on active service.

Constitution of Ethiopia 1994

In Ethiopia, the Constitution had assured citizens that sovereignty shall be expressed through their representatives elected in accordance with the constitutions and through citizen's direct democratic

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[36]It must be stressed that when a constitution contains the right to participate, enforcement is normally done within domestic legal framework.

[37] Chapter I Section 1(d) of the South African Constitutional Act of 1996.

[38]ibid,Chapter 2 section 19.

[39] Article 46 (1) of the Constitution of East Timor, 2002.

[40] ibid, sub (2)

[41] See Article 30 of the 1992 Constitution of Slovakia.

[42] Article 62 of the 1999 Constitution of Venezuela.

[43] Article 21 of the Hong Kong Basic Law, 1991.

[44] Article 28 (1) of the 1992 Constitution of Angola.

participation.[45] In trying to impose a positive duty on the State, the Ugandan Constitution of 1995 provides that the state shall be based on democratic principles that empowers and encourage active participation of all citizens at all levels in their own governance.[46] From the foregoing discussion, both Angola and Uganda have introduced substantial ideas of duty and obligation. While the citizens have the duty to take part in public affairs, the state has an obligation of empowering them to do so.

Constitution, Federal Republic of Nigeria 1999 (as amended)

In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999, affirms the country as a state based on the principles of democracy and social justice.[47] The Constitution further situates sovereignty in the people of Nigeria from whom government through the Constitution derived all its powers and authority.[48] The Nigerian constitution further assured that the participation by the people in their government shall be ensured in accordance with its provisions.[49]Furthermore, the rights of Nigerian citizens to freely associate, form or belong to political parties of their interests have also been assured.[50]

Constitution of Colombia, 1991

In Central and South America, new and emerging constitutions have emphasized the importance of political rights. For instance, the 1991 Constitution of Colombia has assured its citizens a legal, democratic and participatory framework. It explicitly provides for the electoral provisions and the means by which citizens can participate in the exercise of their sovereignty through voting, plebiscite, referendum, popular consultation, open town council meeting, legislative initiative and the recall of officials.[51] The also requires the president of the republic, to, with the approval of the minister and senate consult the people on matters of the ministers, consult the people on matters of great national importance for which the people's decision will be binding.[52] It must be noted that the Constitution of Colombia was an offshoot of the above enumerated practices. The constitution making process which was initiated by acts of popular sovereignty followed by a referendum and election of a constitutional assembly was validated by Colombia's Supreme as overriding previous constitutional texts.

Constitution of Peru 1993

The Peruvian Constitution of 1993 had placed the right of participation amongst its fundamental personal rights by guaranteeing that every person has the right to participate individually or in association with others in the political, economic, social and cultural life of the nation.[53] The constitution further stipulates that any constitutional reform whether total or partial, may be subjected to a referendum.[54]

Constitution of Venezuela 1999

The 1999 Constitution of Venezuela had contains a fundamental principle that her government shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist.[55] It can be seen from the totality of the domestic legal instruments examined above that they have all emphasized the concept of '*taking part*' as both an act and obligation of sovereignty and citizenship. These instruments have directly situated the concept of participation within the national purview rather than leaving it in the realms of international obligation. However, the efficiency of these provisions and the level of successes recorded have often remained controversial.

Legal Interpretations of the Right to take Part in the Conduct of Public Affairs

Obviously, the ICCPR phrase '*to take part in the conduct of public affairs*' has been subjected to many interpretations aimed at excavating what the open ended terms, '*to take part*' and '*public affairs*' actually meant. The search for appropriate definition of these terms have ignited myriad of documentary sources. A cursory

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[45] See Chapter 2 Article 8 of the 1994 Constitution of Ethiopia.
[46] Chapter II (i) of the Constitution of Uganda, 1995.
[47]Section 14(1) of the 1999 Constitution of the Federal Republic of Nigeria.
[48]ibid, section 14(2)(a).
[49]ibid, section 14(2) (c).
[50]Ibid Section40
[51]See preamble to the 1991 Constitution of Colombia and Article 103 of the Constitution. See also W S Banks and E Alvarez, 'The New Colombian Constitution: Democratic Victory or Popular Surrender' (1991) 23:1, *University of Miami Inter-American Law Review*, 80
[52]ibid. Article 104.
[53] See Chapter I Article 2 of the Constitution of Peru.
[54]ibid, Article 32.
[55] See Title I Article 6 of the Constitution of the Bolivarian Republic of Venezuela, 1999.

assessment of some decided cases that has nexus with participatory right has disclosed a mixture of both potentials and limits.

Decision of the United Nations Human Rights Committee (UNCHR) in *Marshall v Canada*[56]

This case was instituted before the United Nations Human Rights Committee (UNCHR) in 1986, and was decided five years later, particularly in 1989. Here, the UNCHR, while acting in its judicial capacity to entertain individual complaints brought before it has held that the specific right to participate in constitution making is an undoubted part of public affairs. The abridged fact of the case is that aggrieved leaders of the Mikmaq tribal society in Canada claimed to have been excluded by the Canadian Government from direct participation in series of constitutional conferences which had infringed on their right to take part in the conduct of public affairs, contrary to Article 25(a) of the ICCPR. The UNCHR found that the issue for determination was whether such constitutional conferences constituted a 'conduct of public affairs'? After an exhaustive consideration of the issues raised, the Committee affirmatively held that constitutional conferences, indeed, constitutes the conduct of public affairs in the spirit of Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR). The committee also went further to establish a major limitation to the enjoyment of the participatory right by stating that the legal and constitutional system of the state party has an unrestricted right to provide for the modalities of such participation, and that Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities to participate in public affairs as such would be an extrapolation of the right to direct participation by the citizens, thereby taking it far beyond the scope of Article 25(a).[57] Notwithstanding the argument of the Mikmaq leaders that their submissions through an intermediary body were never transmitted to the constitutional negotiations, the UNCHR found that the provisions for representation of about 600 aboriginal group by four national associations and a panel of about ten (10) aboriginal leaders was adequate enough to meet the requirements of Article 25.[58]

General Comment of the United Nations Human Rights Committee (UNCHR), 1996

Another textual authority on the right to public participation is contained in the UNCHR General Comment on Article 25 of the ICCPR of which the Committee is the guardian, christened 'the right to participation'.[59] This comment copiously reiterates the key importance of Article 25 as both universal and fundamental. It states:

> Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public services. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government.[60]

Furthermore, the General Comment declares that: 'Citizens also participate directly in the conduct of public affairs when they choose or change their constitution.'[61]

The above discussion has, no doubt, reinforced participatory constitutionalism[62] by offering legal protection to the hitherto marginalized citizens. Like *Marshall v Canada,* the General Comment lacks any specification on the modalities for participatory constitution making process. Unlike most International Conventions that later emerged, as well as the very limited notion of representation in *Marshall v Canada,* the General Comment has explicitly expanded the scope of democratic participation beyond the act of voting to Constituent Assemblies and accountable representation, referenda, electoral decision making, public debate and dialogue and citizen's capacity to organize themselves.

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[56] Communication No. 205/1986, UNDOC. CCPR/C/43/D/205/1986, delivered on 3 December, 1991 particularly paragraphs 5.4 and 5.5 available at http://www.unchr.ch.65/doc.nsf/%29/6dc35863545e5fac12569de00492elb?

[57] This case shows that the Mikmag people only won by a pyrrhic victory.

[58] See *Marshall v Canada (supra)* par 2:2. See also V Hart, *Democratic Constitution Making* (Washington D C:*USIP* Special Report, 107, 2003) p. 6 available at www.usip.org accessed on 2/2/2017.

[59] Issued on July 12, 1996.

[60] See UN Committee on Human Rights, CCPR General Comment 25, 12 July, 1996, Par 1.

[61] See Para. 6, General Comment 25.

[62] The prevailing perception is that a General Comment no matter how authoritatively couched is not binding in law. That is why it has been postulated that General Comments within the spirit of the UNCHR are merely intended to make the Committee's experience available for the benefit of all State Parties, so as to promote more effective implementation of the Covenant and to stimulate the activities of State Parties and international organizations in the promotion and protection of human rights. See H S Steiner and P Alston (eds) International Human Rights in Context: Law, Politics, Morals (Oxford: Clarendon Press, 1996) pp. 533-534.

Decisions of the Canadian Courts, 1994 and 1998

In Canada, two judicial decisions have jurisprudentially contributed to the available literature on participatory constitution making. In 1994, the Supreme Court of Canada in the case of *Native Woman's Association of Canada v Canada*[63] clarified the controversial issues as to whether participation in constitution making is a right and which institution is responsible for deciding the modalities for participation.[64] In this case, instead of allowing general participation in constitutional deliberations, the Canadian Government rather selected and funded four aboriginal associations to prepare and make submissions on behalf of the entire citizenry. Thus, the Native Women's Association of Canada (NWAC) have vehemently challenged and opposed the selection by government on the ground that it was highly dominated by men, which obviously infringes their right to equal freedom of expression without discrimination. They further claimed that the constitutional negotiations had failed to meet the standards of effective representation and gender equality.[65] The Canadian Court of Appeal while agreeing with the NWAC held that the freedom of expression demands every citizen to sit at a roundtable.[66] On Appeal to the Supreme Court of Canada, it was held that the issue of constitutional amendment does not need to comply with the Charter of rights, and that the question as to whom federal and provincial governments out to consult during the process of constitutional amendment were merely political for which no legal or constitutional precedents ever existed to guide the court in arriving at such decision. Four years after the decision, the Supreme Court of Canada was called upon to advice on the legitimacy of a unilateral secession move by the Province of Quebec in the case of *Re Secession of Quebec.*[67] In order to accomplish that task, the court had to consider the philosophy underpinning the Canadian constitutionality by defining democracy as a core Canadian constitutional principle which recognized an obligation to negotiate over fundamental disagreements. The court, therefore, charged governmental institutions with the responsibility of reflecting the aspiration of the people.[68] The Supreme Court, while upholding the Canadian Constitutional principle of democracy in conferring a right to initiate constitutional change on each participant, went further to impose a corresponding obligation on the citizens to engage in constitutional discussions so as to acknowledge and address democratic expressions of a desire for change.[69] Even though this case has stressed that participation in democratic governance extends to constitution making, which must incorporate an egalitarian dialogue between citizens and state, there was no specification as to the procedure for conducting legitimate debate. This approach, has, no doubt, placed citizens at a disadvantage.

Decisions of the Constitutional Court of South African, 2006

The South African Constitutional Court had set the criteria for reasonable opportunities for citizen's participation. In the case of *Doctors for Life International v Speaker of the National Assembly and Others*[70] and *Matatiele Municipality and Others v President of the Republic and Others,*[71] the Constitutional Court was called upon to consider the constitutional duty of the legislature in relation to law making and constitutional amendment. In discharging this onerous task, the court observed that 'taking part' is both a requirement of international law and a foundational principles of the South African Constitutional regime,[72] and, that, both the South African tradition and many other international norms are representative and participatory.[73]The court further held that continued participation of the public provides vitality to the functioning of a representative democracy and also plays crucial role in the lives of South Africans who have been neglected due to disparities of wealth and influence.[74]As such, the obligation to promote participation requires taking such steps like convening public meetings, public submissions both at the village, local and accessible levels.[75] On the other hand, the decision in *Matatiele's* case[76] which adopts the earlier holding in the case of *Doctors for Life,* further

[63] [1994] 3 SCR.

[64]In *Marshall v Canada (supra)* the UNCHR, vests the states with rights to decide on who participates and the modalities for such participation.

[65]*Native Women's Association of Canada v Canada (supra)* pp. 634-636

[66] ibid p. 640.

[67] [1998] 2 SCR.

[68] ibid, paragraph 67.

[69] ibid, paragraphs 68-69.

[70] CCT 12/05 (2006), ZACC 11, 17, August, 2006.

[71] CCT 73/05A (2006), ZACC 12, 18, August, 2006.

[72]See Doctors for Life (supra) paragraph 90. Here the court adopted the argument about democratic participation held in the earlier case of *Minister of Health and Another v New Chicks South African (Pty) Ltd.,* CCT 59/04A (2005), ZACC 25, 30 September, 2005, only with reference to secondary legislation.

[73] ibid.paragraph 101, particularly the opinion of Justice Albie Sachs at *paras*. 227-235.

[74] ibid, par. 115.

[75] ibid.pars. 159-162.

[76] See *Matatiele's Case (supra)* par. 67.

buttressed the doctrine of participation by mandating the legislatures to, after giving sufficient notice of hearing to citizens, to also make adequate transport arrangements for the conveyance of citizen's to and from the venue of hearings, and to also host radio programs in different languages for the citizens to be carried along. On the doctrine of taking part, the court went further to restate that;

> The nature and degree of public participation that is reasonable in a given case will depend on the number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected part of the population is given a reasonable opportunity to have a say.[77]

3. Conclusion

Globally, the right to participate in constitution making has now become a norm and no longer an option. Since constitution making and reform are very core to state building and democratic consolidation, the making and alteration of every constitution should neither be construed as a legal subject to be situated within the domain of lawyers and legal experts nor should it be the exclusive preserve of the politicians, but should rather mirror the interest and aspirations of the people.[78] Even though no constitution is immutable from plethora of criticism by both present and subsequent generations, it is less probable that a constitution which was historically approved by the vast majority of citizens will be subjected to gross sectional disapproval. It is against this backdrop that this paper strongly recommends that only a participatory constitution making model has the potential of advancing a culture of democracy, constitutionalism and good governance.

[77] ibid.para. 68.

[78]See VVMartin,WWinlock, and M Augustine, Constitutional Reform Process and Political Parties. Principles for Practice (NIMD The Hague, The Netherlands, 2012), particularly, the forward by His Excellency, JoaquimChissano, Former President of Mozambique.