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# Inclusive participation in law-making: good governance or a constitutional obligation?

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## ABSTRACT

In this article, we discuss the right to participate in law-making processes from a constitutional law perspective. The study frames the inclusion of people affected by legislation in the legislative process as a legal obligation of public power. According to various better regulation guidelines, the involvement of affected people and the quality of a law-making procedure are traditionally considered good governance, rendering them subject to political consideration. However, we argue that beyond these guidelines, there is a constitutional mandate for inclusive participation rooted in generally accepted constitutional principles and human rights. The article provides insights into the constitutional basis of participation, offering a clearer understanding of regulatory frameworks and their implications for the inclusion of people affected by legislation. This work's thesis understands and accounts for the nature of law-making as both a political and legal practice.

**KEYWORDS** Constitutional law; law-making; participation; human rights; legitimacy; democracy; better regulation; Europe; marginalised groups

## 1. Introduction

The participation of people potentially affected by the legislation in the law-making process offers them or their representatives an opportunity to promote their interests and offer personal insights on regulation under consideration.<sup>1</sup> Traditionally, participation in law-making processes is perceived as a consultation and used as a means to hear stakeholders' views as well as acquire their expertise of the matter under preparation. Ideally, the said participation offers benefits with respect to both the content of decision-making and the decision-making process. Specifically, it expands the knowledge base of the law-making process, thus increasing its legitimacy, transparency and efficiency,

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<sup>1</sup>Kathryn S. Quick and John M. Bryson, 'Public Participation', in Christopher Ansell and Jacob Torfing (eds), *Handbook on theories of governance* (Edward Elgar Publishing 2016), 158.

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while also promoting social justice by theoretically sharing some power with socially marginalised groups.<sup>2</sup> Therefore, participation is touted as one element of good law-making procedures. This reflects the notion that the quality of laws is greatly influenced by the process through which they are enacted. The current frameworks for good law-making and the quality of law are expressed in regulatory policy papers comprising various national, international and EU-level guidelines and recommendations.

Participation in law-making processes is intricately ingrained in the core values of European constitutional law.<sup>3</sup> The Venice Commission of the European Council emphasises the necessity of a transparent, accountable, inclusive and democratic law-making procedure from the perspective of legality. Together with democracy and human rights, legality, as one component of the rule of law, forms the core principles of the Council of Europe and the United Nations.<sup>4</sup> The connection between the core constitutional values and the quality of law-making is also acknowledged in the recent OSCE ODIHR Guidelines on Democratic Lawmaking for Better Laws, which considers good law-making fundamental to the functioning and strengthening of democratic institutions and procedures, and also to the protection and fulfilment of human rights, ultimately contributing to strengthened public trust in democracy. The ODIHR Guidelines align with our research in emphasising the centrality of the rule of law and human rights as the foundational principles guiding good law-making.<sup>5</sup>

In previous research, the enactment of laws through a transparent and inclusive process is acknowledged as a core element of the rule of law. Hitherto, the debate on the quality of law-making procedure focuses on various guidelines concerning better regulation. Thus, strong obligatory aspects, typically attached to legal, binding instruments, are typically lacking.<sup>6</sup> However, in the literature, the quality of laws from a procedural rationality perspective,

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<sup>2</sup>Judith E. Innes and David E. Booher, 'Reframing Public Participation: Strategies for the 21st Century' (2004) 5(4) *Planning Theory & Practice* 419, 422–23; Archon Fung, 'Putting the public back into governance: The challenges of citizen participation and its future' (2015) 75(4) *Public Administration Review* 513, 515–520; Deirdre Curtin, Herwig Hofmann and Joana Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19(1) *European Law Journal* 1–21.

<sup>3</sup>On participation as a rule of law requirement in the EU, see Joana Mendes, 'Rule of Law and Participation: A Normative Analysis of Internationalized Rulemaking as Composite Procedures', (2014) 12(2); *International Journal of Constitutional Law*, 370–401.

<sup>4</sup>Venice Commission of the Council of Europe, *Rule of Law Checklist* (CDL-AD(2016)007), 6 and 13; Venice Commission of the Council of Europe, *Report of the Rule of Law* (CDL-AD(2011)003rev), 10; United Nations, *The Declaration of the High-level Meeting on the Rule of Law*, (A/RES/67/1, 2012), para. 5.

<sup>5</sup>The Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE ODIHR) *Guidelines for Democratic Law-making for Better Laws* (OSCE/ODIHR 2023) 1, 3–4. For discussion, see, Tímea Drinóczy, 'The OSCE ODIHR Guideline on Democratic Law-Making for Better Laws: A Source of Inspiration for Strengthening Democracy' (2024) 12(3) *The Theory and Practice of Legislation* 281.

<sup>6</sup>Antonia-Evangelia Christopoulou, 'Civil Society and Rule of Law Backsliding in the EU' (2022) 28(2) *European Public Law* 267, 245–68; Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford University Press 2011) 461.

which falls under legal criteria, is analysed regarding the case law of the European constitutional courts and the European Court of Human Rights of the Council of Europe.<sup>7</sup> While the normative force of the guidelines and recommendations is weaker than legislation, compliance with them is often referred to simply as a question of good governance and/or political will.<sup>8</sup> However, due to the close connection between the quality of the law-making process and the core values of European constitutional law, we find the good governance perspective, on its own, inadequate.

In this article, we demonstrate that in addition to the existing soft law instruments<sup>9</sup>, there is a constitutional basis for inclusive participation that requires the inclusion of people affected by the legislation in the law-making process as a legal duty. By systematising the constitutional basis of participation, we offer a fuller picture of the regulation concerning the inclusion and discuss its implications from the perspective of the law-making process. By participation, we refer to the involvement of people potentially affected by legislation or their representatives such as civil society organisations in law-making, that allows them to voice concerns as well as provide their own insights on regulatory matters. We examine the theme from a constitutional law perspective within the European legal tradition which defines constitutional law as encompassing the structures and powers of state institutions, as well as the fundamental and human rights of individuals. The definition includes national constitutions, EU-law and human rights law, providing the broad normative basis for the national constitutional law that we consider here. A constitutional argument draws not only on the national constitutional framework but also on states' international obligations, particularly those enshrined in human rights treaties, as well as on various soft law instruments, which, while not legally binding in the traditional sense, nonetheless constitute a form of law – albeit soft.

Our focus is on the law-making process prior to any parliamentary procedures. By law-making process, we specifically refer to a state-level process conducted by the government before any proposal is sent and presented to the Parliament for the enactment of parliamentary law. While some characteristics of this process may also apply to the delegated or international law-making processes, our primary focus is not on these regulatory

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<sup>7</sup>Patricia Popelier, 'A Fundamental Right to Rational Law Making? An Exploration of the European Court of Human Rights' Case Law', in Jānis Rozenfelds et al. (eds), *The Quality of Legal Acts and its Importance in Contemporary Legal Space* (University of Latvia Press 2012), 27–34; Jānis Pleps, 'The Principle of Good Legislation', *ibid* 16–26.

<sup>8</sup>United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?* (UNESCAP 2009), 1 <<http://www.unescap.org/sites/default/files/good-governance.pdf>>

<sup>9</sup>For the discussion on the distinction between 'hard' and 'soft' law see e.g. Dinah Shelton, 'Soft Law', in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2011), 69–71. On the critique of the concept of soft law see Jan Klabbbers, 'The Redundancy of Soft Law' (1996) 65(2) *Nordic Journal of International Law* 167, 167.

instruments. This phase of law-making offers many opportunities for inclusion and plays a central role in determining the regulatory outcome because the form and content of future regulation are often defined at that early stage, thus rendering significant the people's meaningful opportunity to provide input in that particular stage of the process.

The regulation of law-making procedures, especially the phases before parliamentary deliberation, is often ambiguous. However, although many issues are subject to political consideration, law-making is not solely politics but also a central function of public governance and the exercise of public power as bound by legislation. As we demonstrate in this article, there are human rights provisions enshrined in several international conventions that pertain to the legislative process and establish procedural requirements for law-making. Considering these rights during this process goes beyond good governance; it is a legal duty of the public power.

The main aim of this article is to demonstrate that the legitimacy of law-making in a democratic society requires the involvement of people affected by the legislation or their representatives in the law-making process. Our argument is principally based on a general obligation under Article 25 of the International Covenant on Civil and Political Rights of the United Nations and the demand for participation contained in the democratic principle as a broad, and legal, requirement. These legal requirements serve as the legally binding basis for the better regulation guidelines and recommendations, and, through this, these softer sources of law actually carry more legal weight than their normative status necessarily suggests. The individual elements discussed in this article have been previously addressed in the research literature. For example, the guidelines for participatory law-making have been extensively analysed. The novelty of our perspective lies in its merger of these elements, demonstrating that their combination thus results as in a binding, legal argument for inclusion in the law-making processes.

Firstly, we highlight the normative basis of participation manifested in better regulation guidelines and supranational legislation, to examine the content and scope of the public participation that the regulation reflects. Thereafter, we discuss some constitutional tensions related to the results of the analysis. Finally, we present some concluding remarks. Our approach increases the understanding of the binding force behind the guidelines and justifies the need for better compliance with them. In that same vein, we challenge the traditional way of discussing questions of participation as a part of law-making that is solely based on softer sources of law.

In this article, we examine the participation in established liberal democratic societies from a European viewpoint.<sup>10</sup> We focus our analysis on

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<sup>10</sup>From the external perspective of Europe, see Diogo Coutinho et al, 'Participatory Democracy and Law-Making in Contemporary Brazil' (2017) 5(3) *The Theory and Practice of Legislation* 225; Li Rongxin,

regulative instruments relevant in Europe, from the perspective of the study. By these instruments, we refer not only to the relevant legislation and recommendations of the European Union in its member states or the OECD but also the international human rights treaties of the European Council and the United Nations. In addition, we offer some remarks regarding the corresponding guidelines of established European democracies to more clearly illustrate the varying approaches to the normative status of the subject at a national level.

## 2. The normative basis of inclusive participation in law-making

### 2.1. Better regulation guidelines and recommendations

The concept of better regulation guidelines refers to several different instruments of national and international law that aim to set certain criteria for the quality of law-making. Radaelli characterises better regulation as a meta-regulation by which he refers to protocols regarding rule-making activity.<sup>11</sup> In contemporary literature, the better regulation principles are connected to a model of rational law-making, in which the process produces the legitimacy of regulation.<sup>12</sup> For the most part, various better-regulation guidelines represent softer sources of law, all sharing the common goal of improving law-making practices. Despite their somewhat legal character, their nature as legally-obliging instruments remains vague. In practise, the law-making processes in European countries are influenced by the guidelines of different organisations with varying levels of intensity.<sup>13</sup>

Numerous recommendations, principles and tools connected to, for example, impact assessment, consultation or legislative evaluation are covered by the umbrella of better regulation. As a result, there is no established terminology.<sup>14</sup> For instance, the European Commission underlines the regulatory cost-efficiency perspective and defines better regulation as

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'Public Participation and Its Limits in Legislative Consultation: A Case Study on Local Legislation in China' (2019) 7(1) *The Theory and Practice of Legislation* 27.

<sup>11</sup>Claudio M. Radaelli, 'Regulating Rule-Making via Impact Assessment' (2010) 23(1) *Governance* 89, 89–90. See also Colin Scott, 'Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit' (2003) 25(3) *Law & Policy* 203, 203.

<sup>12</sup>Patricia Popelier – Victoria Verlinden, 'The Context of the Rise of Ex Ante Evaluation' in Jonathan Verschuuren (ed), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation* (Brill 2009) 13 and 18, 13–37.

<sup>13</sup>See also Claudio M. Radaelli, 'Halfway through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say' (2018) 56(S1) *Journal of Common Market Studies* 85, 85–88; Sacha Garben et al., 'The Multi-faceted Nature of Better Regulation', in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018), 3.

<sup>14</sup>See also Alberto Alemanno, 'How Much Better is Better Regulation: Assessing the Impact of the Better Regulation Package on the European Union – a Research Agenda' (2015) 6(3) *European Journal of Risk Regulation* 344, 355–56. For a brief historical overview of the concept, see, Claudio M. Radaelli, 'Occupy the Semantic Space! Opening Up the Language of Better Regulation' (2023) 30(9) *Journal of European Public Policy* 1860.

an open and transparent decision-making method that uses the best available evidence and considers a broad range of stakeholder views.<sup>15</sup> In this article, we use the term ‘better regulation’ to refer to any recommendatory tools that set standards for the quality of the law-making process. As the article focuses on the inclusion of people affected by legislation, we particularly highlight the guidelines related to comprehensive stakeholder involvement.

The central global guidelines for better regulation are the OECD’s recommendations on regulatory policy and governance (2012) and on citizen participation (2022). The OECD highlights the inclusion of people affected by legislation by emphasising the idea of broad consultation. Governments should actively engage relevant stakeholders during legislative processes to ensure that any regulation is informed by the interests of those it affects.<sup>16</sup> In addition, the consultation process should include a diverse range of stakeholders. The modes of consultation should also be considered in this light because not all participants enjoy similar access to resources and opportunities for expressing their views.<sup>17</sup> For its part, the recent guidelines on citizen participation acknowledges the need to provide concrete support to certain marginalised groups.<sup>18</sup> The guidance identifies stakeholder involvement methods such as consultations, referendums, ballot questions, and popular assemblies.

At the EU level, the participative approach is manifested in the European Commission’s guidelines for regulatory drafting (2021) and in the ‘Better regulation’ toolbox (2023). In the guidelines, the Commission outlines the minimum standards and principles for consultation that any consultation activity must fulfil. These principles also underline the importance of broad consultation, emphasising an inclusive approach.<sup>19</sup> In addition to emphasising broad consultation, the Commission and the OECD also highlight transparency, clear communication, timely and impactful stakeholder input, and coherence throughout the regulatory process.<sup>20</sup> In addition, the Commission has recently emphasised the significance of citizens and civil society organisations active participation in policy-making processes. These normative statements are also important at the Member State level because the Union is built on a multi-level basis where states and union level do interact.<sup>21</sup>

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<sup>15</sup>European Commission, *Better Regulation Guidelines* (SWD(2021) 305 final), 5.

<sup>16</sup>OECD, *Recommendation of the Council on Regulatory Policy and Governance* (OECD Publishing 2012) 8; OECD, *OECD Guidelines for Citizen Participation Processes* (OECD Publishing 2022) 58; The United Nations, *Guidelines for States on the effective implementation of the right to participate in public affairs* (2018), 15.

<sup>17</sup>OECD 2012, 24.

<sup>18</sup>OECD 2022, 58.

<sup>19</sup>European Commission, *Better Regulation Guidelines*, 14–15; European Commission, *Better Regulation Toolbox* (2023), 466.

<sup>20</sup>Ibid 14 and OECD, *Recommendation of the Council on Regulatory Policy and Governance* (OECD Publishing 2012) 8.

<sup>21</sup>European Commission, *Recommendation on Promoting the Engagement and Effective Participation of Citizens and Civil Society Organisations in Public Policy-Making Processes* (2023/2836, 12.12.2023).

Prior consultations are also examined in the recommendations on law-making procedures and the quality of law of the Venice Commission of the Council of Europe, which emphasises the constitutional complexity of balancing the requirements of meaningful democratic participation with the objectives of legislation that should manage the complexity of contemporary social and economic requirements. The Commission argues that the meaningful opportunity for stakeholders to provide input in the law-making process should be guaranteed, for example, through public consultations. It highlights that any major amendment requires an extensive public discussion and consultation. In order to build broader consensus, this process should involve participants from all relevant sectors. Nevertheless, the Venice Commission notes challenges with prior consultations, including risks of partiality and unequal resources, which can result in one-sided consideration of stakeholder views.<sup>22</sup> Despite these concerns, the Commission finds a purely internal parliamentary approach to law-making procedures insufficient.<sup>23</sup>

Due to the nature of the better regulation guidelines as softer sources of law, these well-meaning premises are vulnerable to practical arguments. For example, a lack of time and human resources may serve as an explanation for noncompliance. However, we find that establishing prerequisites for diverse and extensive participation in the early stages of the law-making process is the primarily the responsibility of public power. Behind this obligation, are the human rights norms that serve as the legally binding basis for the better regulation guidelines and recommendations. We will take a closer look at these human rights provisions in the following subsection.

## 2.2. Supranational legislation

Good law-making is embedded within the core values of European constitutional law. In addition to its links to legality and the rule of law, participatory rights belong to the principle of democracy, which is one of the basic constitutional principles in many international and European treaties. Constitutionally, the legal principle of democracy entails everyone's right to participate in, and influence the development of society in general, especially with regards to those issues that specifically concern them.<sup>24</sup> The principle

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<sup>22</sup>Venice Commission of the Council of Europe, *Compilation of Venice Commission Opinions and Reports on Law-Making Procedures and the Quality of the Law* (CDL-PI (2021)003), 16–18.

<sup>23</sup>*Ibid.* 8.

<sup>24</sup>UN Human Rights Committee, *CCPR General Comment No. 25: Article 25 The right to participate in public affairs, voting rights and the right of equal access to public service* (1996), para. 1; Jeroen Temperman, 'Public Participation in Times of Privatisation: Human Rights Analysis' (2011) 4(2) *Erasmus Law Review* 43, 47; On the right to participation see also Karen S Czapanik and Rashida Manjoo, 'The Right of

of democracy is enshrined in the Charter of the United Nations. In addition, Article 2 of the Treaty on European Union and the European Convention on Human Rights is established upon the principle, which is enshrined in the praxis of the European Courts.<sup>25</sup> In a democratic government, political power is grounded on the will of the people. The opportunity for equal, political participation in society is thus provided to all citizens.<sup>26</sup> The Human Rights Committee of the United Nations has repeatedly described democracy as the only system of political organisation compatible with the International Covenant on Civil and Political Rights.<sup>27</sup> However, the understanding of democracy in the international legal community varies.<sup>28</sup>

In the parliamentary systems, democracy formally reaches the law-making process through the government, which is politically responsible to the parliament. This type of representative democracy is defined with reference to popular sovereignty, effective government and political equality.<sup>29</sup> Nevertheless, during the 1990s, democratic theory experienced a shift towards deliberation and participation thus altering the conception of democracy. This participatory turn in democracy theory emphasises the active involvement of people in decision-making processes and advocates for direct engagement, beyond traditional voting mechanisms, through methods such as deliberation and consultation.<sup>30</sup> The key idea of participatory democracy is the engagement of people in the political processes, rather than the delegation of responsibility to representatives.<sup>31</sup> Participatory democracy is often connected to deliberative democracy, which is grounded in the ideal of a reasoned discussion between people of equal status and based on mutual respect as a core of a functioning democracy.<sup>32</sup> From that viewpoint, representative democracy as the sole constitutional criterion for democratic law-making is however inadequate. Instead, as we will illustrate, the legal basis of participation in law-making consists of several provisions

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Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of This Right' (2008) 19(1) DJCIL, 1.

<sup>25</sup>See e.g. *United Communist Party of Turkey and others v. Turkey* App no 19392/92 (ECtHR, 30 January 1998), para. 45 the Court arguing that it appears that democracy is the only political model compatible with the ECHR.

<sup>26</sup>James Crawford, *Democracy in International Law* (Cambridge University Press 1994) 4.

<sup>27</sup>Jeroen Temperman, (2011) 4(2) *Erasmus Law Review* 43, 47; UN Human Rights Committee, *CCPR General Comment No. 25*, para. 1.

<sup>28</sup>Steven Wheatley, (2002) 51(2) *International & Comparative Law Quarterly* 225, 235. Also UN Commission on Human Rights, *Promotion of the right to democracy*, 1

<sup>29</sup>David Held, *Democracy and the Global Order: From the Modern state to Cosmopolitan Government* (Polity Press 1995).

<sup>30</sup>See e.g. John S. Dryzek, *Deliberative democracy and beyond* (Oxford University Press 2002); Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford University Press 2008).

<sup>31</sup>Joshua Cohen, 'Reflections on Deliberative Democracy' in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) 248; Jürgen Habermas, (1989). 'The structural transformation of the public sphere' (MIT Press 1989).

<sup>32</sup>Andre Bächtiger et al. 'Introduction' in Andre Bächtiger et al. (eds), *The Oxford handbook of deliberative democracy*, (Oxford University Press 2018) 2.

and principles that provide a rationale for a more comprehensive approach to its constitutional grounds.

From a normative perspective, the right to participate in decision-making is articulated in several international human rights treaties. Article 21(1) of the Universal Declaration of Human Rights maintains that everyone has the right to take part in the government of their country, directly or through freely-chosen representatives. Even though the Declaration is a non-binding instrument, it is nonetheless considered to represent customary international law. In a more legally-binding manner, participatory rights are regulated in the International Covenant on Civil and Political Rights of the United Nations. According to Article 25(a) of the Covenant, every citizen shall have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. Contrary to its United Nations-level counterparts, the European Convention on Human Rights of the Council of Europe does not contain any regulations on direct public participation. Article 3 of the first protocol to the Convention only regulates the duty to organise regular elections.

Moreover, there are relevant provisions in the specific Conventions of the United Nations such as the Convention on the Rights of a Child and the conventions aiming to combat specific forms of discrimination. For example, Article 7(b) of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women's rights to participate in the formulation of government policy and the implementation thereof. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5) regulates the right of all people to take part in government and the conduct of public affairs at any level. The International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities involves the duty of the state to guarantee participatory rights to persons with disabilities and afford them political rights on an equal basis with other individuals. Article 29 of the Convention prescribes the duty to actively promote an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others and encourages their participation in public affairs. The Declaration on the Rights of Indigenous Peoples of the United Nations also includes the right of indigenous peoples to public participation in matters that could affect their rights. Finally, the Convention on the Rights of the Child (Article 12) enshrines a child's right to express his or her views freely in all matters, including law-making, affecting him or her.

In the European Union, according to Article 10 of the Treaty on European Union, every citizen shall have the right to participate in the democratic life of the Union, and decisions shall be taken as openly and as closely as possible to the citizen. Moreover, Article 9 asserts that in all aspects of its operations,

the EU is committed to treating its citizens equally. Furthermore, Article 11 provides an open, transparent and regular dialogue between EU institutions and civil society. The basis of EU citizens' right to participate in social activity is manifested in the Charter of Fundamental Rights of the European Union (C 326/391). Even though the Charter does not include a general provision on participatory rights, it nevertheless recognises the need to promote opportunities for marginalised groups to participate in social activities and influence decision-making concerning themselves. Article 24 regulates the rights of the child, according to which, children may express their views freely and their views shall be taken into consideration on matters that concern them in accordance with their age and maturity. In addition, a child's best interests must be a primary consideration. Moreover, the Charter recognises and respects the rights of the elderly to participate in social life (Article 25) and aims to integrate people with disabilities, enabling their participation in the life of the community (Article 26).

Article 20 of the Charter regulates all individual's equality before the law and prohibits any form of discrimination based on social origin (Article 21). Moreover, the Charter enshrines one's right to good administration (Article 41), including, for instance, the right of every person to be heard before any individual measure that would affect him or her adversely is taken. As a legally-binding instrument, the Charter enshrines these rights in the primary EU law that must therefore be respected by EU institutions, including Member States, when they execute EU legislation. Article 41 primarily applies to individual measures. However, its content is somewhat ambiguous, and there are interpretations suggesting that it may also apply when an individual's rights or interests may be adversely impacted by a procedure.<sup>33</sup> The prohibition of discrimination as well as the guarantee of the constitutional right to equality, are also regulated in both the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

In addition to the international and European guidelines and provisions regarding the participation of individuals, there are similar normative instruments in national legal orders. These guidelines provide a domestic approach to regulatory practices from a better regulation perspective and are more capable of considering the national context; they may occasionally establish very detailed requirements for law-making processes. In practice, the majority of EU countries engage in public consultation when developing laws.<sup>34</sup> However, the legal status of consultation processes differs widely

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<sup>33</sup>Itai Rabinovici, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union', (2012), 18 (1) *European Public Law* 149, 173.

<sup>34</sup>OECD, *Better Regulation Practices across the European Union 2022* (OECD Publishing 2022) 50.

across European countries, from mandatory consultation processes to legally non-binding guidance on best practices in these discussions.<sup>35</sup>

Occasionally, the legal basis of participation is expanded at the national level to cover a general, positive duty of the public power to promote participation. For example, Section 14 of the Finnish Constitution establishes the duty of public authorities to promote opportunities for individuals to participate in societal activity and influence the decisions that concern them. The provision has also been interpreted to apply to law-making procedures.<sup>36</sup> In Switzerland, the consultation procedure that is regulated both in the Constitution and in ordinary legislation, highlights the participation of individuals in decision-making processes. Furthermore, it has been noted that the Constitutional Court of Latvia, at least, recognises the involvement of stakeholders as a duty of the legislator based on a general principle of good legislation, including the procedural and quality requirements of said law-making.<sup>37</sup> This demonstrates that, at least in some legal orders, questions regarding participation in legislative processes are inadequately addressed when solely viewed as matters of good governance dependent on political will.

### 3. Dimensions of the right to public participation

#### 3.1. Content of public participation

As illustrated above, the legal basis of participation is broad. However, to gain a more profound understanding of what the right of the public to participate in the law-making covers, it is necessary to analyse the relevant regulation in more detail. First, we will examine what public participation means (content), and then we will consider who it affects (scope). Traditionally, the right to public participation principally refers to participation in the government. For example, the provision of the Universal Declaration of Human Rights regulates the right ‘to take part in the government of one’s country’. The traditional approach has been interpreted to limit public participation to suffrage rights<sup>38</sup>, which, from our perspective, represents only a narrow understanding of participation. In a similar vein, the regulation on a duty to organise regular elections found in the European Convention on Human Rights, approaches participation as a right to vote and stand as a candidate in elections. Despite an extensive

<sup>35</sup>ibid 50, 55; OECD, *Regulatory Policy Outlook 2021* (OECD Publishing 2021).

<sup>36</sup>E.g. Chancellor of Justice, OKV/33/20/2017; Chancellor of Justice, OKV/41/20/2016; Parliamentary Ombudsman, EOAK/7077/2021; Hanna Hämäläinen and Janne Salminen, ‘Lainvalmistelun Oikeudelliset Puitteet’ [The legal framework of the law drafting process] (2024) 122(2) *Lakimies* 194.

<sup>37</sup>Jānis Pleps, in Jānis Rozenfelds et al. (eds), *The Quality of Legal Acts and its Importance in Contemporary Legal Space* (University of Latvia Press 2012) 22.

<sup>38</sup>Jeroen Temperman, (2011) 4(2) *Erasmus Law Review*, 46.

reading of the European Court of Human Rights, the content of the participatory rights of the Convention merely follows the more traditional understanding of participation.<sup>39</sup>

Notwithstanding its rather formal approach to participation as a right, the European Court of Human Rights nonetheless assesses the consultation process as part of the procedural rationality of law-making, aiming to provide legal certainty and prevent arbitrary government interference.<sup>40</sup> To achieve these goals, the Court notes that the involvement of appropriate analyses and studies is necessary in governmental decision-making processes. According to the Court, this consultation not only allows for the consideration of stakeholder interests but also fosters open dialogue, facilitates constructive discussions that incorporate the interests of all relevant parties and guarantees their careful balancing. The Court's line of interpretation has been interpreted to be somehow representative of the right to rational law-making, especially in cases concerning fundamental rights.<sup>41</sup> From the perspective of the European Court of Human Rights, participation in law-making is more than a mere formality. Participation serves as a fundamental aspect of procedural rationality in law-making and, as a mechanism for transparent, inclusive and just decision-making processes, it also enhances legal certainty (the legal certainty argument).

In the International Covenant on Civil and Political Rights, the content of the right to participation is more extensive.<sup>42</sup> The Human Rights Committee defines the right 'to take part in the conduct of public affairs' in the Convention as a broad concept related to the exercise of political influence including the formulation and implementation of policy. According to the Committee, it concerns especially the exercise of legislative, executive and administrative powers and is linked to all stages and levels of public administration. National constitutions and other laws should thus establish the allocation of powers and how individual citizens apply their participatory rights.<sup>43</sup> It is noteworthy that the Committee explicitly mentions the formulation and implementation of policy as a relevant forum for participation, even though the specific methods are at the discretion of the state.

Although the right to participation under the International Covenant on Civil and Political Rights also includes direct participation, the provision does not, however, regulate the specific means through which said right should be fulfilled. The Human Rights Committee identifies several forms

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<sup>39</sup>On the expansive reading of the provision, see e.g. *Mathieu-Mohin and Clerfayt v. Belgium* App no 9267/81 (ECtHR, 2 March 1987) paras. 46–54.

<sup>40</sup>Patricia Popelier, in Jānis Rozenfelds et al. (eds), *The Quality of Legal Acts and its Importance in Contemporary Legal Space* (University of Latvia Press 2012) 28–29.

<sup>41</sup>Patricia Popelier, *ibid.* 31, 33 and cited cases eq. *Hatton v. the UK* 36022/97 (ECtHR Grand Chamber 8.7.2003), para 128.

<sup>42</sup>See also Jeroen Temperman, (2011) 4(2) *Erasmus Law Review*, 48.

<sup>43</sup>UN Human Rights Committee, *General Comment No. 25*, para. 5.

of participation such as referendums, public debates and dialogues with elected representatives and the freedom to form associations.<sup>44</sup> The Committee has, however, also emphasised that the right provided for by Article 25 is not an absolute right.<sup>45</sup> Although, the equality principle, as enshrined in Article 2 of the Covenant, stipulates that distinctions made between people by the state may not be arbitrary. The right to participation may, however, be restricted but only if the limitation is non-discriminatory or unreasonable.<sup>46</sup>

The Human Rights Committee's interpretation of the right to participation under the Covenant follows the subsidiarity principle providing states a wide degree of discretion when deciding on the means for compliance with their requirements in accordance with international law. However, according to Nowak, as the formulation of the right to participation directly or indirectly enshrines participatory rights, states are allowed to choose in which manner they facilitate opportunities for participation at a national level. This provision offers citizens the right to seek to directly influence decisions if the prospect is provided by the state. The purpose of said provision's loose formulation is, thus, to provide states the capacity to structure their participatory rights consistent with their democratic systems. Despite this, Nowak finds that the provision should not be characterised as insignificant as it regardless recognises the potential for direct participation and provides governments an opportunity to form more inclusive legislation. Nevertheless, Nowak argues that in a parliamentary democracy, the 'conducting public affairs' is, however, primarily limited to the election of the parliament.<sup>47</sup>

Nowak's 'traditional' view emphasises participation as political representation. However, opposing views have also been offered by other analysts. In the OSCE ODIHR guidelines, Article 25 is acknowledged as a legal basis for the requirement of consultation during law-making.<sup>48</sup> In the literature, Steiner suggests the import of the right to political participation in Article 25 as a programmatic right, which expresses positive law but can only be executed through state action.<sup>49</sup> Maisley argues that if interpreted in accordance

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<sup>44</sup>*Staderini and De Lucia v. Italy* Communication no 2656/2015 (Human Rights Committee, 6 November 2019), paras. 8.4 and 9.3; *Brun v. France* Communication no 1453/2006 (Human Rights Committee, 18 October 2006), para. 6.4.

<sup>45</sup>See also *Marshall v. Canada* Communication no 205/1986 (Human Rights Committee, 20 July 1990) para. 5.5.

<sup>46</sup>*Debreczeny v. Netherlands* Communication no 500/1992 (Human Rights Committee, 4 April 1995), para. 9.2; *Staderini and De Lucia v. Italy* (Human Rights Committee) para. 9.6; *Paksas v. Lithuania* Communication no 2155/2012 (Human Rights Committee, 25 March 2014), para. 8.4.

<sup>47</sup>Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Verlag 2005), 570–572.

<sup>48</sup>OSCE ODIHR 2023, 101.

<sup>49</sup>Henry Steiner, 'Political Participation as a Human Right', *Harvard Human Rights Yearbook* 1 (1988) 132–133, 77–134.

with the Vienna Convention on the Law of Treaties, the aforementioned Article grants civil society's right to participate not only in domestic but also in international law-making, at least through civil society organisations.<sup>50</sup> Secker explores participation as a human right and addresses the problematic implications of limiting participatory rights solely in relation to political representation. Such a limitation, she argues, only confines human rights to the political sphere and undermines their universal and foundational character and purpose.<sup>51</sup> Fox also highlights the human rights perspective on participatory rights in his research.<sup>52</sup> Consequently, even though the discussion on whether article 25 only grants indirect participation or also direct participation cannot be said to be settled. It is, nonetheless, clear that in the light of literature and Commission's statements on the matter, the content of Article 25 is not solely limited to the right to vote.

In summary, despite its somewhat vague character, Article 25 serves as a legal basis for a general right to participation that extends beyond mere representation. In contrast, the situation is clearer regarding the other human rights treaties that concern the rights of various minority groups. For example, concerning the content of the Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination highlights the importance of stakeholders' informed consent in any decision-making process regarding their rights and interests.<sup>53</sup> Further, the Committee on the Rights of the Child defines both the recognition and implementation of Article 12 of the Convention on the Rights of the Child as a clear legal obligation.<sup>54</sup> In conclusion, while the clarity and emphasis on the right to participation may vary across different human rights treaties, there is a notable agreement on the importance of informed consent and the involvement of relevant stakeholders in decision-making processes concerning the rights and interests of minority groups.

At the EU level, the participatory rights of union citizens include the right to disclose and publicly exchange opinions regarding the Union's actions. Moreover, Article 11 of the Treaty on European Union explicitly acknowledges and endorses a participatory form of democracy, which complements the traditional concept of representative democracy.<sup>55</sup> Under Article 11, the

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<sup>50</sup>Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) *The European Journal of International Law* 96, 89–113.

<sup>51</sup>Emilie Secker, 'Expanding the Concept of Participatory Rights', (2009) 13(5) *The International Journal of Human Rights* 698, 697–715, 702–03.

<sup>52</sup>Gregory Fox, *Democracy, Right to, International Protection* (2007 Wayne State University Law School Legal Studies Research Paper Series No. 07-22).

<sup>53</sup>Jeroen Temperman, (2011) 4(2) *Erasmus Law Review*, 56–57 and the cited cases.

<sup>54</sup>UN Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard* (20 July 2009) 5–6.

<sup>55</sup>Deirdre Curtin, Herwig Hofmann and Joana Mendes, (2013) 19(1) *European Law Journal*, 5.

Commission is legally obligated to conduct wide and transparent consultations before proposing any legislation. In addition, the Charter of Fundamental Rights expresses, in a binding manner, the need to provide marginalised groups an opportunity to participate in social activities and influence decision-making concerning themselves. The Charter also prohibits any form of discrimination based on social origin as noted in section two of this article. Based on these premises, much of the pertinent literature has argued on behalf of the legal right to participate in the EU rulemaking, asserting that the constitutional principles of transparency, openness and participatory democracy –emphasised by the Treaty–should serve as standards for designing and conducting administrative procedures within the EU.<sup>56</sup> Specifically, in the context of law-making, recent research finds that consultation plays a central role in advancing the principle of participatory democracy within the EU’s multidimensional law-making framework.<sup>57</sup>

A noteworthy aspect is also apparent in the conceptual change from participation ‘in the government’ of the Universal Declaration of Human Rights to the ‘conducting public affairs’ of the International Covenant on Civil and Political Rights and to children’s right ‘to express their views’ as stipulated in the Convention on the Rights of the Child. Does this conceptual change in various treaties suggest an implicit intention to expand the content of participatory rights in a more inclusive direction that corresponds to the contemporary understanding of participation emphasising a strengthening of inclusion?<sup>58</sup> If so, it would also reinforce the interpretation of the older provisions in light of the contemporary conditions in accordance with the principle of dynamic interpretation of human rights treaties.<sup>59</sup> The observation of conceptual change demonstrates the shift towards a more inclusive and participatory approach in democratic governance and supports its significance from the perspective of this study.

Thus, it is reasonable to conclude that the content of the right to public participation is the broadest at the EU level, which is clear in relation to

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<sup>56</sup>Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*. (Oxford University Press 2011); Deirdre Curtin, Herwig Hofmann and Joana Mendes, (2013) 19(1) *European Law Journal*, 1–21.

<sup>57</sup>Gloria Golmohammadi, *Realizing the Principle of Participatory Democracy in the EU: The Role of Law-making Consultation*. (PhD dissertation, Department of Law, Stockholm University 2023).

<sup>58</sup>See e.g. Sabine Saurugger, ‘The social construction of the participatory turn: The emergence of a norm in the European Union’ (2010) 49(4) *European Journal of Political Research* 471, 471–95; Chris Ansell and Alison Gash, ‘Collaborative governance in theory and practice’ (2008) 18(4) *Journal of Public Administration Research and Theory* 543, 543–71.

<sup>59</sup>The principle of dynamic interpretation is confirmed in *Soering v. the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para. 102; *ECtHR, Leyla Sahin v. Turkey* App no 44774/98 (ECtHR, 10 November 2005), para. 136; *Loizidou v. Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para. 71; *Roger Judge v. Canada* Communication no 829/1998 (Human Rights Committee, 26 July 2002), para. 10.3. On the notion in general see e.g. William Rehnquist, ‘The Notion of a Living Constitution’ (1976) 54 *Texas Law Review*, 693; On the notion in the context of the ECtHR see George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (University College London - Faculty of Laws 2012).

the nature of the Union's functioning. However, in the specific human rights conventions of the United Nations, the content of participatory rights is also explicitly extended from mere suffrage rights to more inclusive forms of participation. These conventions establish a positive duty to involve the people affected by legislation. However, regarding a general right to participate established by the International Covenant on Civil and Political Rights, the situation is not that simple. However, although Article 25 does not explicitly mention direct participation in national law-making processes as a duty, its content encompasses various aspects of public participation and is not thusly limited to the traditional suffrage rights.

### 3.2. *Scope of public participation*

In principle, everyone is entitled to the rights and freedoms recognised by international human rights treaties. For example, the Universal Declaration of Human Rights enshrines participatory rights for all individuals. The International Covenant on Civil and Political Rights guarantees rights to all individuals under the jurisdiction of the state. Nevertheless, in Article 25 of the Covenant, the scope of participatory rights is limited solely to 'every citizen'. The exception to the general principle is analysed by the Human Rights Committee, which affirms that contrary to other provisions of the Covenant, Article 25 protects the rights of 'every citizen'. However, the Committee also emphasises that among citizens, no distinctions are permitted if they are not based on objective and reasonable criteria.<sup>60</sup> Nevertheless, the scope of the public participation in the Covenant is narrower than its correspondent section in the Universal Declaration of Human Rights. At the EU level, participatory rights are guaranteed for EU citizens and representative associations.

In the context of national legal orders, the scope of participation rights divides opinions, even in Europe. For instance, in the United Kingdom and France, prisoners' voting rights are limited in the respective national legislations. These limitations have been analysed by the European courts, which although not holding the deprivation of rights completely illegal, nonetheless stressed the importance of the fulfilment of the criterion of proportionality when defining the scope of any voting rights ban.<sup>61</sup> Further, the Human Rights Committee underlines proportionality in its praxis.<sup>62</sup> Thus, although we find it obvious that individuals must be treated equally and all legislative proposals should fulfil constitutional requirements including,

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<sup>60</sup>UN Human Rights Committee, *General Comment No. 25*, paras. 3 and 4.

<sup>61</sup>See *Hirst v. United Kingdom (No. 2)* App no 74025/01 (ECtHR, 6 October 2005); Case C-650/13 *Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Girond* [2015] EU:C:2015:648.

<sup>62</sup>See e.g. Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012).

for example, the protection of the human rights of all individuals irrespective of their social status, national practices nonetheless vary among different countries.

As we have illustrated, the formulation of the right to participate in the International Covenant on Civil and Political Rights provides an opportunity to widen its content beyond traditional suffrage rights. In this light, systematically narrowing the scope of the provision solely to the citizens of the state is susceptible to criticism. The reason behind the formulation of Article 25 may be that during the adoption of the Covenant in the 1960s, discourses on active citizenship or inclusion had not yet been drafted. Nevertheless, the current systematic exclusion of noncitizens from the sphere of participatory rights is outdated, at least in the law-making context. Nevertheless, further research is needed to explore the scope of rights holders in this context in more detail.<sup>63</sup>

## 4. Constitutional tensions of the traditional approach to the participatory processes

### 4.1. Representation, participation ... or both?

The analysis of the content and scope of participatory rights hereto concludes that specific UN human rights conventions expand participatory rights to direct participation, requiring the involvement of affected individuals in law-making. While the International Covenant on Civil and Political Rights does not explicitly mention direct participation in law-making, its interpretation can nonetheless be extended to include the opportunity for public engagement beyond traditional suffrage rights. However, there are constitutional tensions associated with the participatory processes. One of these relates to the conception of democracy and the nature of participatory rights, while the other relates to the position of marginalised groups. In the following subsection, we discuss these tensions.

One reason for the tensions behind the fulfilment of participatory rights is the insufficient differentiation between the different forms of democracy within the legal understanding of democratic participation. As explained, the conception of democracy has shifted from mere representation to encompass more discursive and inclusive forms. Specifically, in the context of human rights conventions and better regulation discourse, the difference

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<sup>63</sup>For the discussion see e.g. Dahl, Robert Alan. *Democracy and Its Critics*. (Yale University Press 1989), 193–209; Joachim Blatter et al., 'Democratic Deficits in Europe: The Overlooked Exclusiveness of Nation-States and the Positive Role of the European Union' (2017) 55(3) *Journal of Common Market Studies* 449, 450; On status groups as producer of new forms of inequality see Kate Nash, 'Between Citizenship and Human Rights' (2009) 43(6) *Sociology* 1067, 1072–73; Elif N. Kayran and Anna-Lena Nadler, 'Non-Citizen Voting Rights and Political Participation of Citizens: Evidence from Switzerland' (2022) 14(2) *European Political Science Review*, 221–22 and cited articles.

in their underlying conception of democracy is evident. The latter is based on participatory approaches to democracy, while the general human rights provisions of participation are grounded in representative democracy. Balancing elected representatives' role with the need for diverse civil society voices is a complex challenge in contemporary governance.<sup>64</sup> While representation is fundamental to democracy in parliamentary systems, inclusive participation aims to broaden perspectives by involving civil society actors in the process to complement and strengthen decision-making.

Fox, for example, identifies two contrasting approaches to democracy: procedural and substantive. According to Fox, procedural view focuses primarily on elections and the method of government selection – political participation. Democracy and human rights are considered entirely separate ideas. Accordingly, the substantive view of democratic governance defines democracy through a framework of rights, primarily political, which are designed to safeguard people against governmental abuse of power. This view supports the intertwined and mutually dependent nature of democracy, human rights and the rule of law.<sup>65</sup> A similar multidimensional approach has also been presented by the Human Rights Commission and in the Guidelines on Democratic Lawmaking for Better Laws.<sup>66</sup> Due to its multidimensionality, the substantive approach more appropriately aligns with the principle of participatory democracy, the rule of law, and the requirement for respecting fundamental and human rights inherent in democratic decision-making as a constitutional obligation

Representative and participatory democracy are not, however, isolated from each other. From our perspective, the inclusion of those affected by legislation also serves a vital function within representative democracy by safeguarding the legislature's right to receive the necessary information from the government when considering legislative proposals. To effectively exercise parliamentary control, it is essential that Parliament has confidence that it has obtained from the government all the pertinent information necessary for decision-making.<sup>67</sup> The Parliament's right to information imposes an obligation on the government to provide the necessary information. Therefore, in terms of parliamentary accountability, in combination with the separation of powers and the legislature's right to information, the participation of people affected by legislation is also a significant function of

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<sup>64</sup>Ruth Lightbody, 'Evaluating the Role of Public Hearings within Deliberative Democracy: Operationalising the Democratic Standards as a Framework' (2024) 20(1) *Journal of Deliberative Democracy* 2, 1–14.

<sup>65</sup>G.H. Fox, *Democracy, Right to, International Protection*, 5–6.

<sup>66</sup>UN Commission on Human Rights, *Promotion of the right to democracy*, (resolution 1999/57, E/CN.4/RES/1999/57), 1; OSCE ODIHR 2023, 16.

<sup>67</sup>Venice Commission, *Compilation of Venice Commission Opinions and Reports on Law-Making Procedures and the Quality of the Law*; Florian Meinel, 'Confidence and control in parliamentary government: Parliamentary questioning, executive knowledge and the transformation of democratic accountability' (2018) 66(3) *The American Journal of Comparative Law*, 317–67.

representative democracy. The combination of elected representation and active public participation fosters a more comprehensive, responsive and legitimate decision-making process within democratic governance.

#### 4.2. Position of marginalised groups

The international regulation emphasises the participation rights of various minority groups. In the case of certain minority groups, participation frameworks may require not only general consultation procedures but also substantive opportunities to influence the decision-making process or even prior and informed consent from the affected communities.<sup>68</sup> Neglecting those in marginal or vulnerable positions is problematic as they often belong to groups holding the strongest legal rights to participation. Moreover, political decision-makers are bound by legal norms that emphasise equality. Thus, there are strong normative demands for ensuring that all individuals are empowered to participate in law-making processes that affect them. In this respect, Marks concludes that democracy should be conceived as a requirement of all citizens' rights to participate in decision-making that concerns them.<sup>69</sup> The Human Rights Committee links minority protection and non-discrimination to the foundations of a functioning democracy, emphasising procedural rights and broad participation across all sectors of society.<sup>70</sup> In a similar vein, the General Assembly of the United Nations emphasises the importance of pluralism, maximising individual participation in decision-making, promoting human rights and fostering social cohesion and solidarity to promote democracy.<sup>71</sup>

The exclusion of minority voices is occasionally defended by the argument that democratic governance should prioritise the policies favoured by the majority. The deprivation of an equal voice from minorities, however, represents a misunderstanding of democracy's meaning and purpose. Wheatly highlights the European Commission on Human Rights' argument that the primary goal of political participation is to sustain a democratic society, not democracy itself. Thus, the majority's role is to advance the interests of all, not only its supporters.<sup>72</sup> Consistent with this value, the

<sup>68</sup>Hanna Philippe – Frank Vanclay 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent'. (2013) 31(2) *Impact Assessment and Project Appraisal* 146.

<sup>69</sup>Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000) 60.

<sup>70</sup>UN Commission of Human Rights, *Ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy* (resolution 1995/60, No. E/CN.4/RES/1995/60) preamble.

<sup>71</sup>UN General Assembly, *Promoting and consolidating democracy* (resolution 1996/55, A/RES/55/96) 3.

<sup>72</sup>Steven Wheatley, 'Democracy in International Law: A European Perspective' (2002) 51(2) *International & Comparative Law Quarterly* 225, 245 citing to the Commission's interpretation of article 3 of the First Protocol of the ECHR in the Greek case. Also, Venice Commission, *Compilation of Venice Commission Opinions and Reports on Law-Making Procedures and the Quality of the Law*, 12.

European Court of Human Rights asserts that democracy demands balancing majority views with the fair treatment of minorities, rather than simply favouring the majority.<sup>73</sup>

Despite the strong demands for equal participation opportunities, there are some practical challenges to the fulfilment of this right. Even if the state inclusively includes individuals in decision-making, those whose voices are heard often represent, in practice, a limited group of participants such as prominent lobbyists and stakeholders in possession of superior knowledge and capacity. In some countries, there have been attempts to foster the inclusive participation through a citizens' initiative procedure, which offers citizens the possibility to propose and vote on legislative initiatives and policies. However, for a citizens' initiative to succeed, the initiators and supporters must possess specific competencies, which, in practice, restricts the range of potential participants. Thus, the existence of the initiative procedure does not remove the need to provide other avenues of participation.<sup>74</sup> Consequently, traditional participatory processes often focus on groups that can actively and independently engage, frequently neglecting those in marginal or vulnerable positions.<sup>75</sup> Therefore, participatory methods should be designed to be fair and inclusive, guaranteeing every stakeholder's equal opportunity to contribute.

Conversely, the demand to efficiently involve all members of society in decision-making may be unrealistic. The law-making processes are largely applied by unrepresentative civil servants with limited resources. In this context, it seems inevitable that consultation processes can only play a complementary and advisory role in the process. Moreover, political pressure may, for example, affect the consultation process by narrowing the group of stakeholders who are heard.<sup>76</sup> In such instances, there is a risk that consultation merely serves as a facade, legitimising decisions that have already been made.<sup>77</sup> Furthermore, due to the modest amount of binding regulation on national consultation procedures, stakeholders are at risk of becoming merely symbolic figures if the government's political commitment is muted.<sup>78</sup> From a legal perspective, the improper exercise of softer sources

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<sup>73</sup>*Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999), para. 112.

<sup>74</sup>See also Jelle But, Demy Jongkind and Wim Voermans, 'Direct democracy in the constitution: good or bad for democracy?' (2023) 11 *The Theory and Practice of Legislation* 1, 52-82.

<sup>75</sup>Also, Alison Ritter et al., 'Improving drug policy: The potential of broader democratic participation' (2018) 55 *International Journal of Drug Policy* 1, 1 and Steven Wheatley, (2002) 51(2) *International & Comparative Law Quarterly*.

<sup>76</sup>Anssi Keinänen et al., *Liikenne- ja viestintäministeriön lainvalmistelun kehittämishanke [The development of legislative drafting in the Ministry of Transport and Communications]* (LVM/772/11/2018, 11 April 2019) 56 <<http://urn.fi/URN:ISBN:978-952-243-569-9>>.

<sup>77</sup>Luigi Bobbio, 'Designing Effective Public Participation' (2019) 38(1) *Policy and Society*, 52, 41-57; Antonia-Evangelia Christopoulou, (2022) 28(2) *European Public Law* 261-62.

<sup>78</sup>Claire A Dunlop et al., 'The Institutional Grammar Tool meets the Narrative Policy Framework: Narrating Institutional Statements in Consultation' (2021) 7(S2) *EPA* 365, 384.

of law may raise concerns about legitimacy. Consequently, there may also be a demand for enhanced procedural and judicial oversight of these processes.<sup>79</sup>

## 5. Conclusions

In national law-making, the government is the driving force behind legislative proposals. Law-making serves as a tool for policy measures enacted by elected political decision-makers, with the prevailing political agenda ultimately holding the authority to legislate. Nevertheless, the shift towards citizen participation in democratic theory has altered the understanding of democracy towards direct engagement opportunities alongside representative democracy, signalling a departure from conventional models of governance. Essential to this shift is the recognition of the need for impactful methods for individuals to share their perspectives and influence decision-making processes. In essence, the participatory turn seeks to democratise governance by empowering those affected by policies to actively participate in shaping policy outcomes, thereby also addressing any democratic deficit. At the heart of this participatory ethos lies the acknowledgment of the central role of participatory rights. These rights form the bedrock of democratic legitimacy, ensuring that governance is receptive to the needs and aims of the people.<sup>80</sup>

In this article, we have demonstrated the constitutional grounds for including people affected by legislation in the law-making process as a legal duty of the public power. Our argument coincides with the shift towards a participatory understanding of democracy and draws not only on the national constitutional framework but also on states' international obligations. The constitutional basis for inclusion is both substantive and procedural. The substantive dimension is linked to substantive democracy characterised by Fox, highlighting the intertwined nature of inclusion with the core values of European constitutional law and the human rights norms regulating the rights of individuals. The procedural aspect

<sup>79</sup>Also, Deirdre Curtin, Herwig Hofmann, & Joana Mendes, (2013) 19(1) *European Law Journal*; Ittai Bar-Siman-Tov, 'The Role of Courts in Improving the Legislative Process' (2015) 3(3) *The Theory and Practice of Legislation*, 295-313; Zsolt Szabo, 'Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses' (2023) 9(1) *Constitutional Review*, 1-27; Hanna Hämäläinen and Janne Salminen, (2024) 122(2) *Lakimies*, 221.

<sup>80</sup>*E.g.* Archon Fung, 'Varieties of Participation in Complex Governance' (2006) 66 *Public Administration Review* 66-75. On the democratic legitimacy, see Jānis Pleps, in Jānis Rozenfelds et al. (eds), *The Quality of Legal Acts and its Importance in Contemporary Legal Space* (University of Latvia Press 2012) 33; Fritz Wilhelm Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Kronberg, 1975); Vivien Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'' (2013) 61(1) *Political Studies* 2-22; José Nederhand and Jurian Edelenbos, 'Legitimate Public Participation: A Q Methodology on the Views of Politicians' (2023) 83(3) *Public Administration Review* 532, 522-36.

corresponds to procedural rationality, which aims to ensure legal certainty (the legal certainty argument). Moreover, said inclusion reinforces the legislature's right to information and thus plays a vital role in upholding representative democracy.

Participation is regulated in several human rights conventions and other international obligations. The specific human rights treaties underline individuals' possibility to influence matters that affect them, although tensions remain concerning equal opportunities for participation, particularly among marginalised groups. The analysis of the general right to public participation under Article 25 of the International Covenant on Civil and Political Rights indicates that although the provision recognises forms of direct participation, its specific content is ambiguous, thus its ability to serve solely as the basis for a legal obligation for inclusion remains unsettled. Nevertheless, it is evident that the provision does not encompass only representative forms of participation. The better regulation guidelines, as softer sources of law, clarify the requirements established by legislation in the context of law-making. At the EU level, the question is straightforward as the regulation on participation is not only clearer but also binding in its nature. Of course, if there is any national legislation on participation, the normative basis becomes even clearer at a national level.

Law-making is both a political and legal practice. The democratic decision-making system is inherently connected to the law, as constituting and structuring the political processes is one of the functions of a constitution.<sup>81</sup> In a constitutional democracy, even the legislature and its political processes must adhere to constitutional safeguards and institutional mechanisms.<sup>82</sup> The principle of the rule of law and the protection of human rights not only constitute the justification and basis for the exercise of power but also set significant limits on it. In legal terms, when defining the right to participate in law-making, it is insufficient to merely examine the content of participatory rights and the conception of democracy they reflect. On the contrary, when forming the rationale for the right to participate in law-making one must also consider the constitutional requirements regarding participation established by the rule of law principle, as well as the modern form of participatory democracy, as constitutional principles.

Thus, from a constitutional perspective, *inclusion in law-making is a matter of binding law*. Therefore, while we acknowledge the political nature of law-making with respect to the content of future legislation, we also emphasise how the awareness of the normative nature of the procedural frames structuring law-making to be highly significant with respect to

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<sup>81</sup>Jan Komárek, 'Freedom and Power of European Constitutional Scholarship' (2021) 17(3) *European Constitutional Law Review* 422, 426; Kaarlo Tuori, *Critical Legal Positivism*. (Ashgate Publishing, 2002) 134–38.

<sup>82</sup>*Tiema Drinóczi*, (2024) 12(3) *The Theory and Practice of Legislation* 281, 315.

constitutional law. This more profound acceptance of the constitutional obligations behind better regulation guidelines strengthens their binding force. The state's duty to promote the involvement of people affected by legislation imposes a duty on authorities to provide meaningful opportunities for engagement. However, it is crucial to note that participation only grants an opportunity to express opinions and seek to influence decision-making; it does not, however, guarantee that every view will be incorporated into a future law. Ultimately, the balancing of different interests is a nonetheless very political process.

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