Local Governance
Globally:
LEGAL FRAMEWORKS
# Content

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>5</td>
</tr>
<tr>
<td>Scope and Content</td>
<td>7</td>
</tr>
<tr>
<td>Context and Enabling Factors</td>
<td>16</td>
</tr>
</tbody>
</table>
Acknowledgements

PRIA, as LogoLink’s regional partner for South Asia, is grateful to other regional partners: CBR, Uganda (East Africa), IDS, Sussex (UK), POLIS, Brazil (Latin America), IPD, Philippines (South East Asia) for providing it with the opportunity to learn and work on collaborative research on Legal Frameworks for Citizen Participation. Prepared for use by practitioners and researchers associated with local self-governance, this booklet is a product of global research.

We acknowledge the contributions and cooperation of different individuals and institutions in carrying out the collaborative research in 15 countries. These research findings have been synthesised in the report entitled, “Legal Frameworks For Citizen Participation: Synthesis Report” by Rosemary McGee, Nyangabyaki Bazaara, Jonathan Gaventa, Rose Nierras, Manoj Rai, Joel Rocamora, Nelson Saule Jr., Emma Williams and Sergio Zermeno. This report is published by LOGO Link, IDS, Sussex.

We are thankful for the tireless and timely efforts of individual researchers and contributors to the country case studies who helped LogoLink systematise the learning on Legal Frameworks of Local Governance. The aim here is to help others understand the intricacies of evolving local governments in different parts of the world.

We take this opportunity to thank our colleagues in PRIA for suggestions on how to shape these booklets in an easily understandable format. These booklets are a small beginning and we request our readers to provide their critical comments to help us improve upon our endeavours. The booklets in the series are

- Local Governance Globally: Legal Frameworks
- Local Governance Globally: Governments in Action
- Local Governance Globally: Issues to be addressed

Manoj Rai
PRIA, New Delhi

March 2004
LogoLink is a global learning initiative that has been set up with the aim of strengthening people’s participation in local governance. It is funded by the Ford Foundation’s Governance and Civil Society Programme and co-ordinated by the Institute of Development Studies (IDS) at the University of Sussex, together with four regional partners in East Africa, Latin America, South Asia and South-East Asia. LogoLink has partners from local governments and civil society in these four regions. PRIA is the regional partner for South Asia and coordinates LogoLink activities in the region. LogoLink provides a forum for exchange of ideas and research. It seeks to respond to needs expressed by individuals and organisations that are attempting to promote and deepen participatory practice at the local level, between governments and citizens.

Interaction between civil society and government is enabled in part by legal and policy frameworks. These frameworks help to define guidelines and areas of action, both singly and even in the form of joint actions of governance. Hence LogoLink’s interest in exploring these frameworks.

Legal Frameworks for Citizen Participation is a research project initiated by LogoLink with the aim of producing documents describing various legal and policy frameworks adopted by different governments. The documents are targeted at policy-makers and citizen representatives, and describe elements of these frameworks that enable citizen participation in local governance.

Due to the lack of systematic research in the area, LogoLink partners analysed legal frameworks in 15 different countries to come out with a comprehensive report. The project report presents the findings of country
and regional studies. It includes historical backgrounds and legal frameworks at the constitutional, national and local levels.

The report examines the increase in legislation and policy initiatives for citizen participation in the past two decades. Much of this has taken the form of constitution-making and decentralisation processes, often against a backdrop of transition from authoritarian to democratic governance regimes. But are legal frameworks sufficient to enable citizen participation?

The report presents the findings of the research, including the importance of context and identifies constraining and enabling factors that make a legal framework truly participatory.
This booklet discusses the definition of a legal framework in the context of local governance and its defining factors and environments, as a first step towards disseminating the knowledge gathered by the project researchers among all concerned.

Local governments are clearly one of the nation’s fundamental democratic institutions. Inclusive and effective democratic processes can most readily be achieved at the local level through participatory, transparent management of public resources and joint community development projects.

Defining Legal Frameworks

Legal frameworks are laws and policies at multiple levels—national, regional and local—that operate interdependently and together can be considered to constitute an overall ‘framework’ within which citizen and government action takes place. National laws and constitutions provide a backdrop by establishing rights, freedoms and entitlements, and decentralisation legislation – all of which shape what happens at the local level.

Importance of Decentralisation

Decentralisation is a key word. By bringing the elected government closer to the citizenry, decentralisation allows the community to participate more in local affairs, gain experience in democratic practice, and hold local leaders increasingly accountable for decisions affecting their lives. With decentralisation, local decisions can be tailored to local needs to improve service delivery and thereby increase the legitimacy of the democratic system.
The Decentralisation Equation

We can identify three sides to decentralisation: financial, administrative, and political. When combined—that is when sufficient financial resources, administrative responsibilities, and political autonomy are all transferred to the local level together—decentralisation tends to be strongest. In the current debate on decentralisation, however, not all three sides are equal. This is mainly because decentralisation acts and laws often do not transfer significant legislative powers to local governments. Questions about representation, responsiveness, and accountability are often ignored.

An important aspect then is the holding of local level elections. It is the nature of the local electoral system—most of which can be fairly easily identified—that can tell us a great deal about the strength and likely long-term consequences of a decentralisation programme and its potential impact on democracy not only at the local level, but nationwide. Few decentralisation initiatives have managed to engage local communities in effective, ‘bottom-up’ planning mechanisms.

Some Important Aspects

1. Size/Capacity

In many countries, local governments at the same nominal level may vary considerably in their size or capacities. It is useful to have the legal/
regulatory system recognise significant difference in management capacities by a classification of local government within levels. Policies and strategies to address these differences may then be coherently considered.

2. Financial Management

Local governments should have the ability to borrow when they have the capacity to repay. For moral reasons, every effort must be made to promote the perspective that local government loans are internal obligations of local governments and not of higher levels of government unless specifically stated otherwise. The legal and regulatory framework can support this message by specifying the conditions under which local governments may borrow, the limits of those borrowings, the reporting requirements for debt and debt service and the penalties for violating the rules.

3. Service Delivery Options

Local government laws have not always anticipated the options, including private participation and managed competition, that may be pursued in the delivery of local public services. As a consequence legal barriers may inappropriately restrain the ability of local authorities to select the most desirable options for the delivery of decentralised services. Inappropriate barriers and constraints should be avoided or corrected in the design and detailing of the legal and regulatory framework for decentralisation.

4. Public Access to Information

Voting democracy is often considered as satisfying the conditions for citizen participation and voice in the design of decentralised systems, but in practice this may not be sufficient. Meaningful participation requires that citizens be informed and that their voices have impact where consequences are immediate. The legal/regulatory system needs to provide for, at minimum, full, timely and easily accessible public disclosure of resource allocation decisions.
<table>
<thead>
<tr>
<th>Enabling Features of Legal Frameworks</th>
<th>Constraining Features of Legal Frameworks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promulgated in response to demand from below and with citizen inputs.</td>
<td>Imposed from above without groundswell of popular demand, and overly inspired by prevalent international discourses and tendencies to the neglect of homegrown discourses and in-country or regional aspirations and sources of inspiration.</td>
</tr>
<tr>
<td>Seeks to strengthen and improve institutions of representative democracy by better representation of those with least voice, better quality of representation and performance, and by complementing with mechanisms of participatory democracy.</td>
<td>Seeks only to make the institutions of representative democracy work better, not to challenge these or extend governance relationships beyond them.</td>
</tr>
<tr>
<td>Recognises people and civil society organisations as citizens with rights, including the right to participate in governance and auxiliary rights.</td>
<td>Treats people and civil society organisations as relatively passive subjects, to be engaged with only in non-binding consultations at a relatively late stage of decision-making.</td>
</tr>
<tr>
<td>Builds in accountability measures that ensure representatives can be recalled and government actors held to account for poor performance.</td>
<td>No accountability measures, or measures that are impracticable in real-life situations.</td>
</tr>
</tbody>
</table>
5. Accountability

Terms of office for local political leaders are closely related to issues of authority and accountability. The detailed design of authority, powers, accountability systems and procedures must be related to local circumstances, including issues which may range from cultural traditions to the state of accounting and auditing systems.

What goes into legal frameworks

Strengthening Involvement

A review of legal frameworks revealed that a wide range of approaches had been adopted to change patterns of involvement in local governance.

1. **Strengthening and improvement of institutions of representative democracy by making them more representative**

   India’s 73rd and 74th Constitutional Amendments, passed in 1992, brought into existence a third, local tier of government with a wide democratic base. Provisions contained in the 73rd Amendment opened up spaces for the political participation of women and marginalised
Issues of Content

Four sets of issues that are essentially the purview of legal frameworks for citizen participation were identified as:

1. **Strengthening involvement** — who is involved in local governance?
2. **Enhancing citizen participation** — what local governments do in terms of fostering or allowing citizen involvement?
3. **Support structures** — which enabling structures need to be put in place and maintained so that these things can be done?
4. **Resources** — which resources are needed?

Caste groups in these *panchayati raj* institutions. In Uganda, meanwhile, the 1995 Constitution provides for minority representation at a national level. Article 78 guarantees one parliamentary seat per district for women and allows Parliament to provide representation for people with disabilities, youth and other disadvantaged groups. The constitution also stipulates that one-third of councillors at all levels must be women. This has had the immediate effect of introducing 10,000 women into a local government system that had previously been dominated by men.

1. **Strengthening and improving of representative democracy by enhancing the quality of representation**

   This approach enables citizens to hold their representatives accountable for their performance. Many measures designed to improve the quality of representative democracy are, in essence, accountability mechanisms. For example, Uganda and the Philippines both have procedures for citizens’ recall of elected representatives.

1. **Complementing representative democracy with more direct forms of citizen participation in governance**

   Examples are citizen assemblies (gram
sabhas) in India and in Indonesia, or the development of relationships between advocacy or lobbying organisations and government actors, such as is seen in the North and some southern countries over areas of public concern such as environmental issues.

1. More outreach by government actors into civil society spaces and processes

For example, through the holding of public audiences and consultations of the kind recommended by many of the northern governments we surveyed. This too complements the structures of representative democracy, but cannot be counted as promoting direct citizen participation in all cases because the outreach often takes the form of information provision and consultation from government to public rather than of joint deliberation and decision-making.

Enhancing Citizen Participation

1. Forms of joint action between government and civil society actors in governance tasks, for example, local-level planning processes

In the Philippines, the 1991 Local Government Code requires citizen participation at all levels of local government through the local development councils. While there are no corresponding bodies for participation at the national level, the Code also requires all national agencies of government to first consult with local governments on all national programmes and projects to be implemented in their localities. In Brazil, the Organic Law of Municipalities provides for a participatory planning system. This planning process is closely linked
to the production of the municipal budget. But, in all of these cases research found that legislation alone was insufficient: the legal opportunities for joint action in areas such as local planning had to be accepted and implemented by officials, and complemented by citizen understanding and motivation, in order for the initiative to work.

1 Another area of local government activity for which some legal frameworks offer provisions is that of accountability

This implies legal frameworks for holding government to account over performance as distinct from the accountability of elected representatives. For example, in Bolivia, the 1994 Law of Popular Participation established citizens’ oversight committees in each municipality. Among other things, these are empowered to freeze municipal budgets if actual budget execution departs from planned execution.

1 Some legal provisions are hybrids, taking up some of the forms of representative democracy and applying them in the complementary arena of direct democracy. Examples of this are the municipal health, education and youth councils throughout Brazil, and the participatory budget initiative introduced by some Brazilian states — most famously, Porto Alegre.

1 A key role spelt out for local government actors in some legal frameworks is that of allowing or actively enabling citizens’ participation in making decisions which have traditionally been the business of government, or in some cases — whether explicitly or implicitly — government with donor and creditor agencies.

1 Obligations in respect of transparency and information provision are placed on governments by many legal frameworks. In some cases these are promoted as citizens’ rights in themselves; in others, they are seen as vital pre-conditions for informed, useful participation and/or as necessary, for reasons of consistency, in a framework which promotes more open governance. The degree to which they are promoted, and probably still more the degree to which they are met, varies.
Support Structures

1. **Provision of adequate information**

A vast range of mechanisms for information transmission are in operation, from passive means such as the establishment of government websites in countries with high information technology capacity to active means using far lower technology in less technologically advanced countries.

1. **Capacity building in terms of the right skills to take advantage of participation avenues**

In the highly evolved and differentiated civil society of the Philippines, a prime role of NGOs is to providing training to community-based organisations and groups of the public on how to engage with government actors. NGOs also provide training to local government actors on how to engage with civil society.

1. **Financial support**

This is crucial as participation costs money. Aspects of this are also discussed in the next point.

Resources

1. **Some legal frameworks establish criteria and regulations for resource allocation across the various levels of government and for revenue-raising by the various levels**

The great majority of transfers from the centre tend to come earmarked for particular sectors, activities or destinations, to ensure that local government has enough funding to fulfil its obligations as service provider, contractor or regulator.

1. **Resource allocation patterns show a heavy bias towards financing local governments’ service delivery obligations and not enough on resourcing the establishment and maintenance of functional interfaces with citizens**

This suggests weak understanding of the connections between resource issues and the quantity, quality and impact of citizen participation in local governance.
Citizens’ participation does not happen on its own. There is no laboratory where experiments can be carried out in neutral environments, so that ideal structures, organisations and procedures can be identified. Although it is tempting to try to identify an ideal model for citizens’ participation, such a model can only ever be a reference point, not a template, for real-life situations. This is because real-life processes happen in specific contexts that help to shape them. By context, we mean here: everything that surrounds and influences legal frameworks for citizens’ participation, that cannot be influenced directly and that impacts either positively or negatively on the process.

**Context and Enabling Factors**

<table>
<thead>
<tr>
<th>Enabling Characteristics of Context</th>
<th>Constraining Characteristics of Context</th>
</tr>
</thead>
<tbody>
<tr>
<td>As well as disposition and commitment from above to participation, a strong demand from citizens and civil society actors below, which implies a relatively mature and strong—or strengthening—civil society.</td>
<td>Weak, immature or inexperienced civil society and government with weak commitment to participation in local governance.</td>
</tr>
<tr>
<td>Advanced process of political, administrative and fiscal decentralisation.</td>
<td>State–civil society relations marked by mutual mistrust and lack of familiarity, as in immediate wake of authoritarian regime.</td>
</tr>
<tr>
<td>Discourses of participation, Gover-</td>
<td>Discourses of participation, Gover-</td>
</tr>
</tbody>
</table>

16
nance, decentralisation and democracy locally derived, or if from elsewhere, strongly appropriated and adapted to national setting.

Existence of progressive political Parties with their roots in Democratisation movements and/or social movements and strong commitment to internal representativeness and transparency, and to participatory democracy.

A culture of ‘bureaucratic hygiene’, openness and transparency, including information disclosure policy and measures of active disclosure.

Other laws and policies that are supportive of, or at least consistent with, participation legislation.

Ongoing momentum for and Commitment to movement along the spectrum from elite towards participatory democracy.

Opportunities for experimentation, adaptation and innovation within and outside the spaces provided by legal framework, by state and non-state actors.

nance, decentralisation and Democracy borrowed wholesale with no Attempt to translate and adapt for the National context.

No political parties (as in ‘no-party’ states) or limited freedom for political opposition parties, which tends to favour conservatism and preclude pressure on government for change of a progressive sort.

A culture of corruption and/or lack of transparency, which generate resistance to opening up governance processes to scrutiny or interference.

Contradictions between participation legislation and other laws and policies, or incomplete legislation leading to ambiguities and stalemates in implementation.

Political transition (e.g. from authoritarian regime to elite democracy) seen by government and/or civil society as finite process, now concluded; conformity with status quo.

No spaces for experimentation or innovation, through excessively tight and restrictive framework.
Research indicates that citizens’ participation in local governance is more successful if the people already have a ‘participatory culture’. By this is meant a tradition of valuing and stimulating people’s participation in collective affairs. Such a cultural trait is described as a contextual factor because it is impossible to influence within a reasonable period of time.

Context proves to be a critical determinant of the legal frameworks in place today and of how far they enable or constrain citizen participation, as was overwhelmingly validated by the case studies. History, politics, socio-cultural structures, economics and the configuration of social actors stand out as major influences.

**Historical Context**

The historical contexts in which legal frameworks for participation emerge shape them in two principal ways. Firstly, in most countries of Asia, Africa and Latin America, colonial history and the governance patterns established in the aftermath of independence shape the laws themselves and the spaces they provide.

A second vital aspect of historical context is the extent to which legal frameworks for participation appear as a consequence of demand from below, or as a consequence of implantation from above. For example, in most Latin American countries social movements rooted in opposition to dictatorships provided the initial momentum for much legislation on participation, but there are variations within that region in terms of where the demand came from.

**Actor Context**

The range of actors that play a significant role in the adoption and implementation of legal frameworks for citizen participation goes beyond the obvious two: government and civil society. Besides these two already complex groups, two more actor groups emerged as having an important, if less central, role: international donor and creditor agencies, and political parties, classified by some as part of civil society but by others as distinct and belonging to ‘political society’. Each of the groups of actors matters in two respects: firstly, in the sense that one or all of them can have an active role in securing the adoption of legal frameworks for participation; and
secondly, in the sense that frameworks, once put in place, are only brought to life by actors using them. Across countries, different groups of actors have contributed to different degrees to the adoption—and in some cases (for example, Brazil) the actual formulation—of legal frameworks.

Where civil society actors have participated in formulating legal frameworks, this can be seen as a form of citizen participation in non-local (national, federal or state level) governance which serves to facilitate citizen participation in local governance. How different groups use the legal framework is intimately connected to other contextual factors considered above; in particular, whether or not they were instrumental in securing its adoption and, in the case of civil society organisations, whether they themselves have developed as a challenging counter-balance to government (as in much of Latin America, some of South-East Asia and South Asia) or have been ‘developed’ by more powerful actors — governments and donors — to fill a perceived gap in the governance structure. The ability of civil society actors to exploit legal frameworks is also contingent on what status the legal

Participation as a right?
The governments of both Switzerland and Finland have a constitutional obligation to encourage citizen participation in local governance. Both countries interpret participation as a right, and seek to promote it as well as simply legislating to allow it. In the UK and New Zealand, meanwhile, both governments actively promote information provision and consultation, but no more intensive forms of engagement. The UK’s 1999 Local Government Act refers to local councils ‘duty to consult’, and similar language is used in New Zealand’s 2002 Local Government Act.

Contrasting civil society positions are found in Indonesia and the Philippines. In Indonesia, civil society is only just confronting the challenges of participating in local governance and is still unsure how to make the most of legalised opportunities. In the Philippines, however, an experienced, highly sophisticated and adaptable civil society exploits legal spaces and holds government to account in myriad ways over the many provisions for participation that exist. The maximisation of opportunities for participation in local government processes are directly linked to claims made by these citizen groups.

19
framework confers on them: whether or not it casts them as actors with a legal right (or even a responsibility) to participate.

Political parties also merit discussion. Many of the countries looked at over the course of this study have adopted or experimented with policies to make political parties more representative of their constituencies. For example, the UK’s Labour Party came to power in 1997 with a policy of quotas for female Members of Parliament. In Nepal, Article 114 of the Constitution requires that at least 5 per cent of the candidates in a party seeking election be women.

**Regime Context**

Closely related to historical and actor context, or indeed perhaps just an alternative way of presenting it, is the issue of regime type. For the purpose of understanding the scope and effectiveness of citizen participation in local governance, countries can be approximately classified according to their degree of authoritarian or democratic character. Roughly speaking, three types can be distinguished:

1. **Authoritarian regimes**: Absence of institutions of representative democracy or effective civil and political rights or freedoms.

1. **Elite democracy (or electoral democracy)**: Formal institutions of representative democracy and civil and political rights exist, but limits to effective citizen participation prevail.

1. **Participatory democracy**: Representative democracy plus legally mandated forms of direct democracy and citizen participation in accountability mechanisms for appointed and elected officials.
Towards Sustainable Participation

Legal frameworks need to ensure that participatory processes need to be sustainable, as well as successful in the short-term. This applies both to the aim of the initiative as a whole, (for example slum upgrading or improved housing) and to its participatory aspect. What then, are the indicators, measures and other important aspects of sustainability?

1. adapting the legal framework to accommodate citizens’ participation enhances its sustainability. For instance, Bolivian laws on popular participation helped to institutionalise municipal decentralisation and participation.

1. the institutionalisation of the participatory process significantly enhances sustainability. There are many examples of this.

1. “Time-frame”, a long-term perspective for planning and implementation generally favours sustainability. In such cases, sustainability and success correlate highly.

1. where participating citizens have a stake in the continued success of the initiative, this enhances sustainability. This is likely, for example, where an initiative contributes to their economic well-being

1. If citizens’ participation helps local politicians, they are more likely to support its continuance

1. integrating an initiative into existing local governance enhances its sustainability. For example, it makes it harder to destroy if a new political party takes power.

1. It is worth investing in the establishment of networks between citizens, their organisations and the municipality. Such networks tend to develop a life of their own that strengthens citizen involvement in municipal affairs, even after a particular initiative has ended

1. Finally, a very practical point: citizens’
willingness to pay taxes is often a good indicator of sustainability. This is especially so where tax payment morale was low before an initiative began. If citizens perceive their participation in local governance to be worthwhile, they will also tend to perceive this governance as legitimate, and feel better about paying for it.

A large number of developing and transitional countries have embarked on some form of decentralisation programmes. This trend is coupled with a growing interest in the role of civil society and the private sector as partners to governments in seeking new ways of service delivery. The practice of decentralisation has so far produced cases of both success and failure. In many instances, the slow pace of implementation and organisation of decentralisation reforms have frustrated the promise of increased efficiency, of more effective popular participation and greater private sector contributions. Innovative approaches and further analysis of concepts and experiences, are therefore necessary to understand fully the potential outcomes of different local government systems in public service delivery and in private sector development. These include:

1. Participatory planning
2. Citizen education and awareness building
3. Training and sensitising local officials
4. Advocacy, alliances and collaboration
5. Participatory budgeting
6. Promoting accountability of elected officials to citizens

The purpose of the strengthened local governance and decentralisation activity is to enhance the participation of the people in the local democratic process and to improve the capacity of local governments to respond to constituent needs. The principal objectives of the activity are:

1. to expand and better define the roles and authorities of local governments;
2. to improve the capacity of local governments to deliver services;
3. for local governments to better identify appropriate funding alternatives; and
4. to increase transparency and citizen participation in local decision-making.
It however, became clear through the research that in some cases the operational provisions regulating how laws and policies get enacted, and the supportive guidance issued by governments to accompany them and enhance the chances of successful implementation, are as important as the laws and policies themselves. The balance between the promulgation of laws and the production of supportive operational guidelines seems to be partly a product of legislative and policy tradition in a given country or region. The following example contrasts the Latin American emphasis on laws concerning citizen participation with the approach found in most of the northern countries we covered, which tends to make more use of policies and guidance.

More or less legalistic approaches:
Latin American cases contrasted with northern cases

Laws proliferate in Latin American countries, whereas in the North, governments seem to address issues such as citizen participation through guidance and, at most, policies rather than through laws.

In Brazil, there are five federal laws relating specifically or closely to citizen participation—one of them effectively a law of urban citizen participation. In Bolivia, there are four national laws which relate closely—one of them the Law of Popular Participation. In Mexico DF, there is a Participation Law. In Chile, the Constitutional Organic Law of Municipalities includes several ordinances on citizen participation and on consultative councils.

By way of contrast, in the UK there are two Local Government Acts (1999 and 2000) which relate to, but do not centre on, participation, and a plethora of policies, initiatives and guidelines. These include the Best Value Scheme, the Comprehensive Performance Assessment, the New Deal for Communities and the Local Strategic Partnership initiative. There have also been supporting white papers, guidelines and select committee reports. The potential advantages of this more flexible legal framework include the possibility that local authorities will have more room to innovate. The disadvantages include the fact that much is left to local authorities’ discretion and interpretation rather than unambiguously laid down by law.