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Public participation in constitution building processes; what does it mean?

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Abstract

Public participation in constitution building processes particularly in the aftermath of violent conflict and when states transit from authoritarian rule is being forcefully advanced by influential actors in the world community; this since there is a belief that participation will lead to better democratic levels subsequent the process. Indeed, our instincts tell us that public participation is something good, and that it ought to have a positive impact on the state of democracy. Yet, this hypothesis has not been empirically validated. However, in order to be able to study and analyse this proposition, what “participation” actually means must firstly be established. What does it mean to “participate” in the context of building a constitution? In this paper I discuss how participation can be understood and how the concept can be operationalized to suit a constitution building context. To date, twenty “participatory” constitution building processes have been carried out in post-conflict contexts, during transitions from authoritarian rule or during other periods of institutional crisis. In this paper I engage in the operationalization of the concept of participation inductively; a classification schedule of participation has been developed while analysing the twenty cases of participatory constitution building processes. The proposed classification schedule illustrates great differences between various participatory processes and demonstrates that such processes are not homogenous in character. By operationalizing the concept such as proposed in this paper, the cut-off points between these variations are made clearer; something that has been missing from present research. I tentatively conclude that who the main instigators (the so called “drivers”) of constitutional reform are has an effect on all procedural choices during the course of the process which has strong implications as to the nature and extent of public participation. When external actors are the leading drivers of the process it seems as if public participation is kept at a minimum level, whereas the possibility for participation is better when civil society organizations or a combination of various national actors are pushing the constitutional agenda.
Introduction

“How the constitution is made, as well as what is says, matters. Process has become equally as important as the content of the final document for the legitimacy of a new constitution”

(Hart 2003; 1)

States that transit from conflict to peace or from authoritarian to civilian rule often need to develop new constitutions in order to address and come to terms with past grievances. During the past two decades it has become an international norm that the process of developing a constitution in such contexts be participatory, that is, that the public should be allowed to have a say during the process of drafting the document. Indeed, public participation in such processes is being advanced quite forcefully by scholars as well as practitioners not to mention by numerous influential international and national organizations, such as the United Nations and the United States Institute of Peace (USIP). This recommendation on behalf of the propagators finds it source in a hypothesised assumption that the people’s involvement will provide for better democratic performance subsequent the process – more participation, in other words, is assumed to improve the state of democracy. Interestingly however, this proposition or rather “intuition” as a prominent scholar in the field has called it (Widner 2008: 1514), has not yet been empirically validated. Furthermore there is no research to date that has attempted to compare countries that have undergone participatory constitution building processes in order to see to what extent, if at all, the proposition has relevance. Some assertions from experienced individuals in this field give expression to the hypothesis currently in circulation. Michele Brandt, constitutional consultant with vast experience working with constitutional processes in East Timor and Afghanistan has stated that:

“Although there are not yet agreed upon benchmarks for assessing a process or the constitution it produces, this report underscores the importance of a nationally led, transparent, participatory and inclusive process because they have the potential to...lay a foundation for more democratic practices, a culture of rule of law and ongoing participation in decisionmaking”.

(brandt 2005: 1)

Kirsti Samuels, former legal advisor to the United Nations Development Programme, offering legal expertise to the Somali constitution building process has said:

“One opportunity for societal dialogue that arises in most UN managed peace-building is the adoption of a participatory constitution-making process. It is increasingly recognized that how constitutions are made, particularly following civil conflict or authoritarian rule, impacts the resulting state and its transition to democracy”.

(Samuels 2006: 5)

In 2009, Tom Ginsburg, Zachary Elkins & Justin Blount published an article in the Annual Review of Law and Social Science, in which the authors set out to survey present research on constitution-making and review various claims concerning different forms of constitution-making processes. They too seem to have reacted to current speculations concerning such processes and their consequent impact, stating:

“Many of us likely suspect that the conditions and rules under which founders write, deliberate and ratify will be consequential. We just cannot say with any authority how they matter or to what extent”.

(Ginsburg, Elkins & Blount 2009: 202)
Alicia Bannon, J.D., just as Ginsburg et al., brings attention to the fact that although many researchers and practitioners advance public participation and deliberation as premium methods through which constitutions ought to be produced, there is little research that actually studies why such processes matter. Bannon states:

“Despite this extensive theoretical literature, there is a dearth of “carefully targeted case studies” on constitution-drafting processes, as well as a surprising lack of scholarly analysis of why particular constitution-writing processes succeed or fail”.

(Bannon 2007: 1827-28)

The overarching belief, that the process of building a constitution first of all matters, that it second of all ought to be participatory and thirdly, that such participation has a positive effect on democratic performance has resulted in a normative shift when it comes to the making of constitutions. Constitution building as a domain strictly reserved for political elites has been challenged, and in the words of Andrew Arato (2000: 229), constitution making as the “hour of the lawyers” is no longer accepted as the standard procedure through which constitutions come into existence, at least not if public ownership of the document is sought after. Thus, based on the supposition of the benefits of public participation, international organizations, regional organizations and individual states are at the moment being encouraged to provide financial, logistical and technical support to enable public participation in constitution building in countries where basic laws are going to be reformed without having any certain knowledge about the perceived benefits of such participation.

When having a closer look at the literature in this specific field two tendencies are revealed: the first is that countries that have included some element of public participation, however minimal, in their respective constitution building processes have been labelled by the research as well as the international community as cases of “participatory constitution building processes”. This indicates that the term “participation” is used in a very wide sense since there is no acknowledgement of the fact that various participatory processes differ substantially when compared to each other. I will return to, and present these cases momentarily. Second, which is inherently coupled to the previous observation, participation although encouraged and perceived to produce beneficial effects, presently lacks definition in a constitution building context. What does it actually mean to “participate” in the context of building a constitution? This lack of conceptual clarity may very well explain why there is no research that attempts to measure the effects of participation in constitution building processes in relation to the level of democracy – the notion of participation has simply not been operationalized to suit a constitution building context.

As indicated at the very outset of this paper, this study is concerned with participatory constitution building processes that have taken place in post-conflict contexts and during transitions from authoritarian to civilian rule. It will additionally consider participatory processes that have taken place during some other period of institutional crisis or reform. To focus on these types of cases is again motivated by the hypothesis currently in circuit – that participatory processes during such circumstances will lead to better democratic levels subsequent the venture. To date, twenty states have carried out participatory programs when making their respective constitutions. This study considers all of these twenty cases. These are: Afghanistan, Albania, Bolivia, Brazil, Fiji, Thailand¹, Uganda, Zimbabwe², Kenya, Nigeria, South Africa, Rwanda, Nicaragua, Iraq, Guatemala, Ethiopia, Eritrea, East Timor,

¹ The Thai process that resulted in the 1997 constitution
² The Zimbabwean process (also participatory) that is currently under way is not considered in this study as it has not yet been finalized. It is the participatory process that was finalized through a popular referendum in 1999 that is considered here.
Colombia and Kosovo. It shall be brought to attention that cases of participatory constitution building processes that presently ongoing, as for example the Nepalese case and the current Zimbabwean case, are not included in this study.

This introduction leads to the, by now anticipated, purpose of my dissertation project which is to analyse to what extent there is a relationship between participatory constitution building processes and better democratic levels. The purpose as such makes the notion and conceptualization of “participation” central to the entire study. The term needs to be defined and operationalized before the relationship between participation in such processes and the level of democracy can be explored. In the present paper I aim to address this challenge. The purpose is to propose a classification schedule that covers different forms of participation in constitution building processes so that not all forms of its practice are fused into one single definition of the concept.

The concept of participation

What does it mean to participate?

As has been established above, when it comes to differentiating participatory constitution building processes into a classification schedule based on the extent and nature of public participation in such processes there is no previous research to lean on. In order to address the aim of this paper it is at this juncture necessary to sort out what is actually meant by “participation”. What does it mean to “participate”? And more specifically, what does the concept imply when applied to a context of constitution building?

It is useful to reiterate the hypothesis currently in circuit; the more participation in the constitution building process, the better the consequent level of democracy. The phrasing as such could arguably lead one to believe that “more participation” is simply an issue of quantity – defined by the number of individuals and civil society organizations that have participated in the process, the number of public hearings that have been held and the number of received constitutional submissions. Evidently though, such aspects do not reveal whether or not, and to what extent, participation has had an effect on those who are in charge of the actual constitution writing. In this study the concept of participation entails the degree of influence participants have over decisions being made.

To approach the notion of participation in this specific manner is not unique per se; Carole Pateman and Sherry R. Arnstein, both distinguished scholars in the field of participatory democracy, also conceptualize participation as an idea inherently coupled with influence. Additionally they recognize that there are many ways that people can be invited to participate in various decision making procedures without having the power to influence final decisions. In their respective works, Pateman and Arnstein have also found it necessary to develop classification schedules that cover different forms of participation in order to avoid a singular perception of what participation implies. Pateman’s taxonomy was originally developed for the purpose of classifying various forms of participation in the industrial sphere. With the help of French, Israel and Aas (1960), Pateman attempts to nail down what participation actually implies and as her point of departure establishes that participation must first and foremost involve participation in something (Pateman 1970: 68). This baseline definition consequently disqualifies the term “participation” in circumstances where people are merely informed about decisions that will affect their work/life without having the possibility to influence such decisions. Situations as these rather exemplify what Pateman calls “pseudo participation”. In
addition to this first category of participation she also adds two other types of participation; “partial participation” and “full participation” in which a progression of influence is envisioned. Key components that according to Pateman contribute to convert “participation” into influence include relevant information and final authority over decisions being made (1970: 68-70). These aspects correspond quite well to Arnstein’s classification schedule which was originally developed to address citizen participation in the field of urban planning (Arnstein 1969). On the lowest rungs of her eight ladder typology “participation” is nothing but an empty ritual; participants engage in the act of participation without exerting any influence on decisions being made. Communication between authorities on the one hand and participants on the other hand runs in a one way direction with the arrow pointing from the former to the latter. Participation is in essence an issue of keeping the participants informed rather than allowing actual influence. Moving up on the ladder, the middle rungs constitute forms of participation in which participants have been allowed to voice their opinions, which suggests that lines of communication at least run both ways. Still, these instances do not transform into influence since power holders are not required to take the views of the participants as their point of reference when they make the final decisions. On the final steps of the ladder Arnstein defines forms of participation that allow participants to actually have a say, be listened to and influence how programs will be implemented.

The contributions of Pateman and Arnstein are clearly valuable, particularly as they inspire thoughts on how a classification schedule can be structured in which the degree of influence is made the key component making cases move up or down the scale/ladder. However, their respective categorizations remain quite unclear as to what exactly makes specific instances of participation to be categorized as pseudo/partial/full participation or on any one of the eight different rungs of the ladder. In essence; where and on what exact premises do the cut-off points occur? How is influence translated into the scaling? All we know is that the idea of a progression in the schedule implies that participants have more influence in cases of “full participation” than in cases of “partial participation” and in cases that are on the eight rung of the participation ladder than in cases that are on the fourth rung. The lack of theoretical clarity on how participation translates into influence further demonstrates the need to address this issue by developing a new typology, one that is specific for a constitution building context.

**Participation in a constitution building context**

When studying the twenty individual cases in detail, four variables have been identified by means of which the degree of public participation in the constitution building process can be measured. These are: 1) the drivers of the process (who are the instigators?), 2) the forms of communication (how does communication between the public and decision makers occur?), 3) the degree of inclusion (are all individuals and groups in society allowed to participate in the process?), and 4) the question of final authority (who has the final say over the constitution?) Each of these variables will now be elaborated thoroughly after which I will discuss how each of them may be converted into numerical ratings that illustrate low to high levels of public participation.

Since cases will be placed into the classification schedule based on how they reflect these variables it is necessary to elaborate each of them individually.
1) The drivers of the process

Outside actors

When referring to the drivers of the constitution building process, there are a variety of different actors that can be the main instigators. Indeed, when studying the cases it soon becomes clear that these actors are by no means a homogenous group across all twenty cases. An initial relevant distinction is to separate the actors into “insiders” and “outsiders”; insiders representing national actors, outsiders representing international actors, regional actors or individual states that exert influence over the process. In a policy paper specifically concerned with external support to constitution making, International IDEA concludes that:

“External engagement depends on the capacity of external actors to exert influence and the openness of national actors to accepting influence. External actors cannot succeed in their support goals if they do not succeed in first gaining access to decision makers and then building confidence. Influence in this context is understood to mean the ability to work together with national actors to identify, set and achieve specific support- or assistance-related outcomes with respect to the constitution building process”.

(International IDEA 2011: 12)

It must be noted that in the excerpt above international involvement is construed as being supportive, indicating that national actors, “insiders”, are the ones in charge over the process. This is however not always the case when outsiders are involved. From this follows further distinctions concerning outside involvement. External actors that engage in constitution building endeavors can be distinguished into three separate types:

1. External actors that influence the constitutional content,
2. External actors that guide the constitutional process,
3. External actors who perform preparatory work so that the constitution building process becomes a possible option (by offering technical, logistical and financial assistance)

Among these three types of external actors, the last type represents actors who are the least invasive in their efforts. The first category of external actors, those who engage in the actual drafting of the constitution are on the other hand the most intrusive type of actors, followed by the second category of outsiders who are concerned with guiding the process of the constitution building exercise. Although the first and second types of outsiders through their actions obstruct sole responsibility over domestic political activities from the government in which the process is taking place, these types of external actors may still hold supportive intent. However though, even if the intentions of such actors are benign, involvements of this nature risks turning outsiders to the main drivers of the process and simultaneously turn insiders into passengers with a subordinate role in comparison to their international counterparts. The role of international actors versus national actors in constitution building makes a distinction between two common terms in the peace-building literature crucial to discuss at this stage. The difference between state-building and nation-building needs to be clarified as there is a point to be made concerning whether or not outsiders can be helpful in assisting with the former but ought to refrain from engaging in the latter (Bogdandy et al. 2005: 580-588).
State-building, nation-building and the role of outside actors

In contexts of state failure when public institutions are no longer able to provide citizens with public goods, state-building activities serve to establish or re-establish public structures so that basic public services can be delivered (Bogdandy et al. 2005: 580). Successful state-building has a legitimizing effect on the very existence of the state as a result. Although international actors ought to be cautious when attempting to assist in any state-building activity – since there is always a possibility that insiders will perceive such help as too intrusive and in direct violation of the country’s sovereign status – assisting national actors to install state institutions is a separate matter from actually dictating how those institutions in the next step are to provide the public goods that they are set up to deliver.

In contexts of nation failure where not only state institutions have collapsed but the social fabric that holds a nation together has also deteriorated additional measures than building or re-building state structures are necessary. Instances of nation failure are more prevalent in multiethnic or multi-religious communities in which ethnic, religious or ethno-religious groups direct their allegiance to their own community exclusively with negative consequences for a sense of common identity or a common culture between groups. The more severe nation failure in a given state, the higher the likelihood of community groups wishing to break away from the state and form nation states of their own. Thus, in order to come to terms with nation failure, nation-building is essential. Nation-building in turn is concerned with creating the “glue”, sort of speak, that holds these various community groups together in a sense of common identity, common goals, common values, common aspirations, etc. Bogdandy et al. define nation-building as:

“...the most common form of a process of collective identity formation with a view to legitimatizing public power within a given territory. This is an essentially indigenous process which often not only projects a meaningful future but also draws on existing traditions, institutions, and customs, redefining them as national characteristics in order to support the nation’s claim to sovereignty and uniqueness. A successful nation-building process produces a cultural projection of the nation containing a certain set of assumptions, values and beliefs which function as the legitimizing foundation of a state structure”.

(Bogdandy et al. 2005: 586)

Nation-building as conceptualized by Bogdandy et al. bears strong resemblance to what Ghai & Galli (2006: 7) call the formation of a “political community”. Democracy cannot be enforced if there is no political community, and the establishment of a political community is one of the main tasks of a constitution, making democracy, the political community and the constitution three closely related concepts. A political community does not necessitate a culturally or linguistically homogenous population, but it does imply a community of people who have agreed to live together (Ghai & Galli 2006: 7). True, as Bogdandy et al. have already brought our attention to, that reaching such agreement may be more difficult in failed states where many different ethnic or religious groups reside, but it is possible to imagine that the prospects for establishing a political community are enhanced if people are encouraged to assemble for the purpose of formulating common visions and aspirations. Undoubtedly, the concept of participatory constitution building fits quite well into all of this, and it should by now also be evident that constitution building is to some extent a state-building activity, but also to a considerable extent a nation-building exercise during which the possibility to construct a political community reveals itself (Benomar 2004: 88, Bogdandy et al. 2005: 596, Hart 2010:20). And as such, as the indigenous process that it is, international actors cannot and thus should not engage in areas of constitution making that are nation-building in character however benign and supportive the intent of those outsiders may be. Even
international involvement under UN auspices that is generally thought of as a legitimate form of outside intervention is questionable and can be construed as an intrusive act by national actors (Bogdandy et al. 2005: 588).

**Outside actors and imposed timeframes**

A time aspect is also relevant to bring into the discussion when reflecting on external involvement in constitution building processes. One might think it superfluous to even have to state that state-building, not to mention nation-building, are time consuming activities that do not simply “happen” overnight. Superfluous it is not, rather the opposite. As former Special Advisor of the Secretary General of the United Nations, Lakhdar Brahimi, repeatedly returns to in his 2007 report “State-building in crisis and post-conflict countries”, constitution making is a time consuming task, it is a political rather than technical task, and as such it must be allowed to take time and it must be actuated and continuously stimulated by national actors (Brahimi 2007: 9).

This is not to say that international actors, mainly the UN, should not provide assistance to post-conflict state-building. Brahimi, just as Bogdandy et al., emphasises the difference between nation-building and state-building activities saying that the latter is justified for the international community to support whereas the former is not, basically because “nations cannot be built, especially not by foreigners descending on a country for a short period of time” (Brahimi 2007: 5). Actually, state-building understood as “building effective systems and institutions of government” in post-conflict states is exactly what “we” the outsiders ought to be preoccupied with (Brahimi 2007: 5). By organizing state-building activities so that insiders are the agenda setters whereas the role of outsiders is to assist in realizing that agenda, attaining a stable peace stands a stronger chance than if roles of insiders versus outsiders are reversed. This might be conceived of as rehashing old truths and repeating clichés, yet it seems as these facts constantly need to be revisited as apparently the chain of command seems to frequently point from outsiders to insiders rather than the other way around. After all, international assistance/presence is an activity that has an expiry date and therefore it lies in the interest of all parties that the outsiders spend time supporting state structures and engaging national elites and the citizenry in decision-making so that the insiders are well prepared to run their own affairs when the day comes to for the outsiders to leave the country (Brahimi 2007: 5-6). Yet, the ascendance of international actors to post-conflict states and states that are transitioning from authoritarian to civilian rule challenges these ideas that, based on past experiences, should by now be considered common knowledge.

The reason why outside involvement almost by default implies imposed timeframes on a constitution building process is really not mysterious. It flows from the fact that international actors, especially if such actors are international or regional organizations, have a specific amount of funding that is to be spent within a specific period of time (International IDEA 2011: 16). Time pressure is however not conducive to constitution building, not during any circumstances and particularly not when broad based public participation is sought after. Even if constitution making is taking place during “normal” circumstances (not after war or during a shift from authoritarian rule) or by “traditional” methods (by lawyers and political elites), it should not be rushed as it may lead to a final document filled with contradictory provisions. Legal consistency is of course essential for legal security which is in turn important in all societies, but perhaps even more so in post-conflict states in which certain ethnic, religious or linguistic groups have been previously mistreated. It is undeniably of utmost importance that such groups are able to fully trust that the new political and social order is based on just,
reliable and coherent provisions. If they on the other hand do not have faith in the impartiality of the system it cannot be expected that they will adhere to the principles in the constitution either. Thus, it is somewhat ironic, and even more so unfortunate, that international involvement runs the risk of creating an uncertain rule of law situation when the whole purpose of the outsider is to help to create a constitution that ensures the rule of law.

Naturally then, as briefly hinted above, public participation in constitution building requires that even more time is set aside for the process than during other circumstances when the inclusion of the people is not inquired. The most obvious reason explaining why public involvement automatically equals a lengthier constitution building process is surely because of the share number of people involved. Needless to say, to write a constitution based on the input of 10-20 experts will take a shorter amount of time than when the same exercise sets out to include an entire society. Secondly, it must be kept in mind that these constitution building processes often take place in countries that are either entirely or vaguely familiar with the concept of constitutionalism and its practice or associate having a constitution with domination and oppression based on past experiences. To foster knowledge about constitutionalism, what it entails, how it can contribute to democratization and how it involves more than having a document called the “constitution” is in turn an ambitious exercise that, again, requires sufficient time and resources. Constitutional skills cannot be “infused” into the citizen body as if it was a medicine with immediate effect. In order for people to fully comprehend what it means to have a constitutional order and how a constitution can be organized, carefully targeted constitutional education programs must be designed and made available for people across all geographical areas of a country. This is not however as easy and straightforward as it may seem. Again, the special circumstances of many of these states must be kept in mind. To design such education programs may require some imaginary thinking since it is not uncommon that a majority of the population are illiterate – thus, additional measures than traditional methods for education (for example, written materials in forms of brochures, pamphlets and newspaper articles) are likely necessary.

Constitutional education programs will certainly be designed differently in different countries, but two commonalities are a fact: to design a constitutional education program is a time consuming activity; to implement a constitutional education program on a country wide basis is a time consuming activity. In light of all aspects that have been enumerated here; aspects that make it necessary to devote sufficient time for the building of the constitution, international involvement becomes something of a predicament. Despite benign intent and supportive objectives, the mandate of international actors can be formed in such a way that their involvement becomes detrimental to the process. Inflexible standards that demand the execution of certain state (and nation)-building efforts within a specific time period is a prime example of such a negative consequence of external participation. Additional concerns follow when the constitution building process is forced to be finalized within a given couple of days or months. During hectic circumstances it is almost inevitable that international actors enforce their standards of “best practice”, both in reference to procedural issues as well as issues dealing with the content of the constitution since there is simply no time to listen to the opinions of national elites and even less so the views of the people.

Before proceeding to the other group of drivers, the “insiders”, it is useful to quickly review the discussion thus far and connect the dots by briefly revisiting the three types of outsiders that were described on page 6. Based on the descriptions that have been made concerning various forms and extents of international involvement in constitution building processes one could say that the first and second types of outsiders are undeniably engaging in nation-
building activities whereas the third type, external actors that mainly provide technical, logistical and financial assistance, can be considered to perform some sort of state-building activity in terms of helping to build or rebuild public institutions so that national actors themselves can decide the specific functioning’s of such institutions.

**Inside actors**

By now we have learned that external drivers of a constitution building process, the so called “outsiders”, are not a homogenous group of actors. There are various kinds of outsiders and external actors may also have varying mandates depending on who they are – international organization, regional organization, group of states, individual state, etc. In an equal manner, when one observes and concludes that the drivers of a particular constitution building process are inside actors it is not obvious who exactly those drivers are and furthermore it is not clear how/if they try to include the people in the process. Even though there are many examples of cases in which national actors have taken the lead in formulating the agenda for constitution building this does not by default imply that the people have had an active role in the process – although one may instinctively believe so. Thus, the “insiders” are similarly to the outsiders a heterogeneous group of people and organizations that also, as in the case of the outsiders, have different goals and purposes that motivate their pursuit for constitutional reform. Of course, based on these varying goals and purposes, the extent to which inside actors seek public input in the constitution building process will also differ.

When observing the individual cases included in this study one can begin to differentiate the various internal actors and understand who the main drivers of the processes were. Sometimes we will see that it is political elites from the ruling party who are the instigators and other times it is civil society organizations that are the main drivers of reform. In yet other cases where the process is taking place in a country transforming from military to civilian rule or from authoritarian rule we may see that it is members from the military branch who are the main drivers of the process. There are also cases in which all of the above gather and together agree that the time has come for reforms; political elites from the ruling party, military elites, parties in the opposition and civil society organizations. Again, as just mentioned – the extent and type of public participation in the constitution building process will depend on which one/ones of these insiders that is responsible for pushing the constitutional agenda. Accordingly, in cases where the main drivers are political or military elites, it is the choices that these actors make that settles whether or not, to which extent and with what degree of influence the public shall be invited to participate in the process. In instances where the initiators and drivers behind the process are domestic civil society organization we can with high certainty expect that those actors will do their best to secure public participation in the process. Whether or not their ambitions are realized is however determined by the political situation in the specific country and is also dependent on the relationship between such organizations vis-à-vis the ruling elite.

Based on the preceding discussion, it is possible to summarize this section of the paper by acknowledging that constitution building processes can become endeavours that include a host of different actors with overlapping and sometimes diverging interests. We know that constitution building is both a state-building and nation-building task which makes the involvement of international actors difficult as they can be helpful in assisting with the former but ought to refrain from engaging in the latter simply because nation-building per definition cannot be enforced by international actors. At the same time it is probably a more realistic stance to grant and accept a certain amount of outside involvement in participatory
constitution building processes although the research community and practitioners alike wish to stress the importance of local ownership (International IDEA 2011: 12). Local ownership and the involvement of outside actors need not automatically negate each other however, rather local ownership which is turn vital for building a political community, can be assured if outsiders accept to undertake a certain kind of role in the process, perhaps limiting their involvement to supportive state-building activities and contributions in terms of logistic and technical advice. One should bear in mind that constitution-making is a sensitive activity that speaks to the very heart of what it means to be a sovereign state. Accordingly, it is fair to ask how independent a country really is if it has not by itself guided the process that leads to it adopting a constitution, or; how sovereign is a country that obeys by a constitution written by outside actors? Likewise the role of various inside actors in the constitution building process needs to be inquired so that the role that such actors grant the public can be assessed. After all, what does local ownership over the constitution really mean? It must mean more than national elites formulating the document and enforcing it. True local ownership implies involving the people when the constitution is being made; whether or not such input is sought after depends on who the main inside driver is.

2) The forms of communication

Who the main drivers of the constitution building process are will have an impact on the extent and nature of public participation in the process. The previous section was concerned with sorting out various types of drivers from each other and discussing how inside actors and outside actors as the main instigators can affect the nature of public participation in the process differently. In this section of the paper attention will be focused to the second variable that has consequences for how people can participate in the process, namely how the constitution building process is communicated to the public. If people are going to be able to participate in the constitution building process, the lines and forms of communication between those who are the drivers of the process and the population becomes essential. People simply cannot participate if there are no channels for participation (Hart 2003: 1). Consequently, one can uncover the motive of the drivers of the process by scrutinizing how they have formed the lines of communication. If lines of communication are open and formed such that they provide opportunities for citizens to comment constitutional suggestions by those who are tasked with writing the constitution, there is reason to believe that power-holders are at least interested in listening to the views of the people. If lines of communication on the other hand are almost shut it would be fair to assume that power-holders are not interested in, and therefore do not provide opportunities for, the public to participate.

Palm & Windahl have constructed a basic model that illustrates the most common factors in a communication process. The model serves the purpose of structuring this part of the paper quite well, and is presented in the figure below:

*Figure 1: Components in a communication process*

Sender → Message → Medium → Receiver → Effect → Feedback → Sender  
(From Palm & Windahl 1989: 9)

The model illustrates how a sender sends a message through a selected medium to one or many receivers. The message subsequently causes some sort of effect among the receivers who are then able to respond to the message in the form of providing the sender with feedback.
In a constitution building context, the communication process as demonstrated in the figure above would translate to the driver/drivers of the process sending a message to the public, perhaps through radio broadcasting, television or the newspapers that a constitution building process is going to take place. If constitutional education programs are going to be launched throughout the country this information will likely also be provided at this juncture in addition to other relevant information surrounding the process. For example, the message can state that within a two month period a draft constitution will be circulated on a countrywide basis for the people to see, or it can state that views from the public will form the content of the draft constitution. However, it is the next couple of steps in the communication process that become crucial if participation is actually going to convert to public influence. If public participation is taken to mean influence over the content of the constitution we would expect that the drivers of the process have also provided the constitution building process with channels for the public to comment and give feedback on proposed constitutional provisions. To be concise; it is the arrow pointing from “effect” to “feedback” and then to “sender” that tells us if it is a matter of informing the public about the constitution building process or a matter of communicating with them on issues surrounding the whole process.

Information versus communication

The difference between information and communication is a relevant distinction which deserves further attention. To speak to someone is very different from speaking with someone. Among the twenty cases of participatory constitution building processes included in this study, there are cases in which the drivers of the process have constructed the process such that the line of communication runs in a one way direction – from power-holders to the people – without any possibility for the latter to comment on the information that is being conveyed to them. The last two stages in the communication process in figure 1 are thus entirely missing; there is no possibility for feedback to the sender. Since the flow of information only runs from senders to receivers, this form of relationship with the public is apparently undemocratic in character (Palm & Windahl 1989: 13). In certain cases it is also possible to imagine that the “effect” component in the communication chain will be affected if the ambition of the drivers of the process is merely to inform the people about the process. During such circumstances it is not unlikely that constitutional education programs are left out of the process which ought to have an effect on the possible reactions and feedbacks one could imagine that people would have if they had the opportunity to benefit from such education programs. In instances like these, the process is practically carried out as if it were an information campaign with the sole purpose of exactly that; keeping the people informed. Nothing more than information of course signals that there is no public influence over the constitutional document and that “public participation” is merely used as a catch phrase by the drivers of the process. Nevertheless, as pointed out by Arnstein, information is perhaps the first step towards reaching public participation – but without any additional measures information alone does not suffice to achieve participation and particularly not so when participation is taken to mean influence (Arnstein 1969).

If information understood as “speaking to” the people is conceived as a rather undemocratic method for engaging with the citizenry, communication is generally considered to be a more democratic method as it allows the lines of communication to run both ways. Communication is in other words understood as “speaking with” the people, and implies that all of the individual parts in the communication process as visualized in figure 1 are present; people are effected by the message that has been sent to them by the drivers of the process and they are also able to provide feedback on the content of that message. It is also possible that drivers of
the process state that they seek consultation with the people on the constitutional document. Undeniably, the term “consultation” has a very positive denotation and instinctively leads one to believe that “to consult” the public is taking it even a step further than to “communicate with” the public, however this need not be the case (Arnstein 1969). Although to communicate with the people is a more democratic form of interaction than to just inform them about events, communication per se says very little about the degree of actual influence that participants have over decisions. The same holds true when power-holders officially say that their aim is to “consult” the public (Arnstein 1969). As long as those in power are not required to incorporate the feedback of the people into the constitution, the people have not really exerted any influence on the final document and have, to put it frankly only “participated in participation” as expressed by Arnstein (1969). Thus, which Palm & Windahl also emphasise, one should not be misled to believe that a two-way communication model is automatically more democratic than a one way model (Palm & Windahl 1989: 14). It might so happen that those who are sending the message (the drivers of the process in this case) are opening up channels for feedback from the people only for the purpose of creating a sense of meaningful participation and influence. If this is the case, the two-way model would arguably be more devious than when simply informing the people about the process and not even pretending to be interested in their comments (Palm & Windahl 1989:14)

Feedforward

A good indicator of whether or not the drivers of the process are genuinely interested to learn about, and incorporate, the concerns of the citizens is if they not only value the feedback they are given, but that they also take proactive measures early on when communicating with the public by putting into practice what has come to be termed as “feedforward”. The idea of feedforward is actually quite elementary for communication strategies and has to do with “getting to know your audience” sort of speak. If one want to get his or her message across, he or she is well advised to get to know the people on the other end of the communication line (Palm & Windahl 1989).

As has been previously mentioned, in many of the countries where participatory constitution building processes have taken place a large portion of the people are illiterate and in addition vaguely, if at all, familiar with the concept of constitutionalism. To learn about the specific needs of the people that are at a later stage going to participate in the building of the constitution and to figure out how the message of constitutionalism can be conveyed in various ways to different segments of the population is an important task. Therefore, designing well targeted constitutional education programs that help people recognize the point of having a democratic constitution and understand how they can be a part of forming that document is an excellent example of feedforward put into practice. Again, there is of course no guarantee that drivers of the process that have implemented feedforward strategies will without doubt include feedback from the people when writing the constitution. Nevertheless, it would be fair to assume that drivers who are concerned with feedforward procedures are likely to also value feedback more so than drivers who do not have any feedforward strategies.

3) The degree of inclusion

The third variable that has an effect on public participation in the constitution building process deals with the issue of inclusion. Just as this study understands participation as an act that must materialize into influence, it also believes that in order for a participatory
constitution building process to be considered truly participatory it must also be fully inclusive. This means that participation should not be limited to certain groups and individuals, that participation on the contrary should be open to a diversity of different actors and interests that are normally not represented when constitutional documents are in the making. These can include previously marginalized groups as for example indigenous populations, women, minority populations and the poor (Hart 2010: 20). As Jamal Benomar, UN diplomat with vast experience working with peace-building and post-conflict issues, point out; all stakeholders should be allowed to have their opinions heard regardless of their position – be they former or current persons with political power or be they “ordinary” citizens (Benomar 2004: 84, 88).

To ensure the inclusion of powerful players is crucial since their participation will increase the prospects for long term peace in the country. If such elites are precluded from expressing their views when the new rules of the political game are being constructed, spoiler behaviour among these will likely follow as a consequence. Thus, constitution building processes can serve an important function that contributes to the longevity of peaceful circumstances. As expressed by a workshop participant in a joint IDEA, USIP and Bobst Center arrangement in 2007: “a successful process is transformational; it converts the spoilers” (Proceedings Workshop on Constitution Building Processes 2007: 8). For this transformation to occur however, all major players must be included in the process.

To include all segments of the general population is equally important, most of all because it serves to assure the legitimacy of the constitution and because it creates a sense of ownership over the document which is necessary in order for it to survive implementation (Benomar 2004: 88). Although full inclusion is envisioned to be beneficial for these reasons and also for ensuring the equal participation of all individuals and groups, it is not always realized in contexts of constitution building.

In the aftermath of violent conflict and also during transitions from authoritarian and military rule, it is not uncommon that former troublemakers are excluded from taking part in the making of the new constitution (Benomar 2004: 84). Their exclusion almost always follows as a consequence of their actions during the course of the war/period of rule. It is indeed rather common that warlords, military elites and heads of guerrilla movements have perpetrated heinous acts towards the civilian population during the years of war or during the era of autocratic or military rule. During such circumstances it might be almost inconceivable for people as well as for international actors to endorse the participation of individuals and groups that have been responsible for causing the country so much devastation. Many would perceive it highly controversial to allow these actors to have their opinions valued when the new governing structures of the state is being discussed and written. To handle situations like these is of course a daunting task for the drivers of the process which also tests their ability to balance short term interests with long term objectives. To try to accommodate public opinion by categorically excluding all actors that have engaged in dubious or downright terrible acts might be the initial reaction, it might also seem as the most rational way of procedure: shutting out agitators and simultaneously gaining the respect of the people. This course of action can however have severe repercussions. As Benomar (2004: 84) suggests after having studied 19 cases of constitution building in post-conflict states, it is advisable to be a bit pragmatic when dealing with the quandary of how to deal with past human rights violators. Not to include key stakeholders, even if they have committed awful actions, might jeopardize the possibility of long term peace. Consequently their inclusion is worth aiming for.
There are also examples of constitution building processes when the undertaking takes place during a situation when former leaders have not voluntarily left governing power, when warlords have not accepted defeat and when military leaders continue to clutch on to control. During such conditions, the question of inclusion in the process might not always be whether or not these individuals or groups are allowed to participate, but rather if they want to participate. When converting this specific variable to reflect different dimensions of participation, the decisive factor will nevertheless be whether or not all segments of the population and all groups have been allowed to participate. That certain groups, elites, etc., have voluntarily decided not to participate is of course problematic from a legitimacy perspective, but for the purposes of developing a scale to fit a classification schedule of participation it is more important to know if everyone was allowed to participate or not. Of course, as was discussed in the previous section when dealing with matters of communication, inclusion per se does not equal influence. Just because all segments of the population have been permitted to participate does not mean that their participation has been allowed to have any effect on decision makers. Nevertheless, to include all individuals and groups in the process is a necessary step towards genuine participation.

4) The question of final authority

“There is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process”.

(Arnstein 1969: 216)

The possibility for the public to exert influence over the constitutional document is inherently coupled with the rules of procedure for the constitution building process and ultimately relates to the question of final authority (Hart 2003: 9). To be able to affect the outcome of the process, as stated by Arnstein above, one needs to be in a position of power; and power of course equals influence. Thus, relevant aspects to take into consideration when studying the nature of public participation in the twenty cases included here, but also when studying future cases, are the rules of procedure of the processes and the matter of final authority over the constitutional document. It is in fact rather peculiar that existing literature in this field rarely, if at all, discusses the relationship between public participation and the issue of final authority; who has the final say? What does it mean to have a transparent constitution building process, to open the communication lines to run both ways, to allow for feedback and install mechanisms for feedforward, if ultimate power is not vested in the hands of the people? Seeing how public participation in constitution building processes is being praised and given prominence to by influential international organizations, it is high time to also discuss how, and if, public participation translates to power and influence by granting the people final authority over the constitutional document.

As has been brought to attention earlier, participatory constitution building processes can be, and are, implemented in many different ways. Just a few examples: there are processes that are seemingly democratic in which the drivers have provided constitutional education programs and included the people from the nascent stages of the exercise, yet final authority over the content of the constitution has been vested in the hands of an executive appointed committee that does not need to regard the views of the people. Other processes are similar to the one just described but there is an additional step that assures public influence, namely that of a popular referendum. There are other processes that have been open and inclusive, where constitutional education programs have been launched throughout a country and where people have taken the opportunity to participate seriously. A popularly elected constitution making body has subsequently been guided by the submissions of the people when writing the
constitution but yet another institution, for example a senate or a cabinet, has had the authority to alter and re-write the work of the constitution making body. The amended constitution has then been put up for a popular referendum which signals that ultimate decision making power has been vested in the hands of the people after all. There are other cases in which the people have been asked to provide feedback on an already prepared draft and where the constitution making body is required to be guided by the feedback when continuing its work with the document so as to assure public influence. And there are yet other cases in which public participation has merely been taken to mean the act of voting on an already prepared constitution by elites without any previous input by the people (Hart 2003: 7).

When it comes to voting as a specific instrument for public participation, a few additional comments are in order. Voting, for a constitution-making body or on the final document, is easy to discard as a valid method for public participation if participation is understood to hold deeper meaning than to just convey one’s opinion through a “yes” or a “no” vote on a “political package” of constitutional provisions expressed by political parties (Ginsburg et al. 2009: 200-208). However, in the words of Hart:

“Despite their limitations, however, elections remain at the very heart of conceptions of democracy. The vote is powerful for its history and symbolism, and electoral participation in constitution making is the most concrete indicator of accessibility”.

(Hart 2010: 32-33)

If approval by referendum is in addition decisive, it is after all a manifestation of public influence and power which is relevant to consider, although one might find it desirable to include the public at an earlier stage of the process. At the end of the day it should be kept in mind that regardless of which route those who are in charge of forming the rules of procedure for the process chose, there is always a risk that even the most well-designed process is “captured” by the drivers once/if realizing that the new constitutional order might jeopardize their position as power-holders (Bannon 2007: 1850).

When it comes to forming the rules of procedure it is also interesting to notice how lines of authority can produce what has been referred to as “upstream constraints” and “downstream constraints” among those involved in the constitution building process. When the rules of procedure are made clear and communicated, it is possible to imagine that those who are involved in the early stages of the process will act in a certain way because they can ahead of time anticipate the reactions of those who will become involved at the later stages of the process. Thus it is not at all impossible to imagine that a constitution building process in which final authority lies in the hands of the people will bring about a certain attitude and behaviour among the drivers of the process at the very outset of the exercise. It would for example seem unlikely for such actors to propose constitutional provisions that they already beforehand expect that people will reject in a popular referendum, and consequently it would seem rational to refrain from even including clauses that might be conceived as controversial (Ginsburg et al. 2009: 204). A public referendum is of course a prime example of such a downstream constraint on power-holders.

Public participation without influence – is it all in vain?

In this context, when referring to the rules of procedure, discussing final authority and relating these aspects to public influence in the constitution building process it also valuable to reflect and discuss the possible benefits of public participation even if participation does not imply final authority. When people have participated in the building of their constitution but not
been allowed to have the final say when it comes to the content of the constitution, have their participation been completely in vain? Even though this study holds that participation without influence resembles an empty ritual, there is still reason to believe that participation even during such circumstances can have positive implications for democratization. Debra Moehler’s (2008) study of the Ugandan constitution building process yields some interesting findings on this particular matter.

Moehler’s extensive study of the participatory constitution building process in Uganda shows that individuals who participated actively in the process became more knowledgeable about the political system, developed a preference for participation, for tolerance and for individual rights. Even when controlling for reciprocal effects and confounding factors, the empirical evidence shows that actively engaged citizens became more democratic and politically conscious than inactive citizens (Moehler 2008: 183). At the same time, and this is perhaps the most interesting result, citizens who actively engaged in participation were also noted to develop an increased level of institutional distrust. This, as Moehler (2008: 183) also brings attention to, runs counter to what participatory theorists assert, but does it necessary need to be detrimental for democratization?

The initial reaction is inevitably to assume that a low level of institutional trust among members of society does not benefit democratization, rather the opposite. Institutional distrust can be feared to induce a sense of hopelessness among citizens, making them disinterested to engage in politics which by default counteracts democratization. Moehler found that the act of participation familiarized active Ugandan citizens with the political system of their country and also educated them on what it means to have political and civil rights, which in turn made people aware of what they could fairly expect government to provide. Consequently, upon realizing a disjunction between what they ought to be provided but were not, distrust against the ruling elite developed. The sense of mistrust in conjunction with their newly acquired skills on what a constitution is, what it implies, how it defends individuals rights, groups rights, political and civil rights has turned the participatory citizens into something resembling an informal “ombudsman” institution, keeping a close eye on government leaders and making sure that they respect, defend and uphold the rights of Ugandans (Moehler 2008: 185-187). In this manner and quite contradictory one may think, yet positive from a democratization aspect, public participation in the constitution building process in the words of Moehler: “…contributed to the erosion of trust precisely by making citizens more democratic and more knowledgeable” (2008: 183).

The study of the Ugandan constitution building process indicates that public participation in the process has the potential to cause beneficial effects even if public participation does not imply citizens having final authority over the content of the constitutional document. If the process is open, if it integrates constitutional education programs and is constructed so that people are able to communicate with elites who are responsible for the actual constitution writing, the constitution building process can be seen as an exercise in democracy. This “exercise” in turn helps the country to democratize further. As far as actual influence is concerned Moehler’s study also illustrates that the knowledge that participants have acquired by being actively engaged in the process, indirectly puts them in a position of power vis-à-vis their government leaders. Thus, the people are exerting influence on those in charge of making decision, albeit in the aftermath of the process.

Before proceeding to the next section of the paper in which the classification schedule of public participation in constitution building processes will be outlined, a quick recapitulation
is in place. At the outset of this paper it was established that “participation”, if genuine, must imply influence over decisions being made. It was also said that when studying the twenty individual cases of participatory constitution building processes four variables have been identified by means of which the degree of public participation in the constitution building process can be measured. The four variables which have been discussed on previous pages are; 1) the drivers of the process, 2) the forms of communication, 3) the degree of inclusion, and 4) the question of final authority. In the next section I will discuss how each of these can be converted into numerical ratings that illustrate low to high levels of public participation in constitution building processes. This will then form the basis for a classification schedule as illustrated below. The schedule will be filled out in accordance with the numerical ratings at the end of the next section of this paper.

Figure 2: Classification schedule of public participation in constitution building processes

<table>
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<th>Variables</th>
<th>1</th>
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<td>Cases</td>
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Converting the variables

As mentioned earlier when Pateman’s and Arns tein’s respective classification schedules of participation were discussed, existing categorizations of various forms of participation fall short of telling us where and why specific cut-off point occur that distinguish one form of participation from another. The aim of this paper is to propose a classification schedule of different forms of participation that specifically suits a constitution building context – the reasoning behind using numerical ratings is to make such cut-off points clearer. It should be brought to attention that the study has engaged in the making of the schedule through an inductive approach while analysing the empirical material. Thus, by studying the twenty cases of participatory constitution building processes it has been possible to identify a number of different constellations/forms that each of the variables take. This will be explained in greater detail shortly. Also, as will be explained and discussed in the following, the span between ratings (for example 1-5) will not be exactly the same on each of the four variables, but it does not need to be either since the aim is to make a qualitative assessment of the state of public participation in a given constitution building process once the figures have been filled out on each of the four variables.

Converting variable 1

When it comes to the first variable, the drivers of the process, the twenty cases reveal five different configurations:

1. External actors that control the entire process, including writing the constitution
2. External actors that guide the constitutional process yet with inside actors doing the actual constitution writing themselves
3. National elites (political or military elites)
4. Civil society organizations
5. Political elites from the ruling party, military elites, political parties in the opposition and civil society organizations

By observing the cases it is possible to see that the degree to which the public are able to participate depends on who is pushing for constitutional reform, i.e. depends on which one of
the five configurations above that is pushing for change. It is also possible to clearly discern a progression as to the extent of public participation from the first configuration (1) to the last (5). This signifies that in cases where the drivers of the process are external actors that control the entire process, there is less public participation in comparison to cases where the drivers of the process are for example civil society organizations. Seeing how there are five configurations of this specific variable, it is suitable to use a numerical rating ranging from 1-5 when converting this variable with 1 representing the least amount of public participation and 5 the highest amount of public participation.

Converting variable 2

As to the second variable, the forms of communication, the twenty cases exhibit one of the following four different ways of communication between power-holders and the public.

1. A one-way model of communication
2. A two-way model of communication
3. A two-way model of communication with feedforward strategies
4. Consultation

Just as the configurations of the previous variable outlined above, the different variants of the forms of communication (1-4) also illustrate a progression as to the extent of public participation with 1 representing the least amount of public participation and 4 the highest amount of public participation.

As to the first approach, a one-way model of communication, the drivers of the process are mainly interested in keeping the people informed about the constitution building process without allowing participation that results in influence. Public participation is merely a façade that serves to create a sense of participation. When implementing this approach as a method of communication, there are no channels for the public to provide feedback to the senders (strictly a case of information) and even if channels have been installed for feedback, power-holders are not forced to incorporate the feedback into the constitutional document.

Concerning the second approach, a two-way model of communication, by observing the cases in the study one can see that this form of communication also has a very limited impact as to the degree of influence that the people’s participation is allowed to have on the constitution. By studying the cases it is also possible to detect a pattern that reveal how limited timeframes for the constitution building process seem to be a contributing factor explaining why feedback from the people has not affected decision-makers. In other words; although a two-way model for communication has been installed, a hectic schedule (among other factors) has basically circumvented feedback from the people.

Moving on to the third approach, a two-way model of communication with feedforward strategies, these cases exhibit drivers of the process who seem to be interested in gathering and listening to the opinions of the people. To this end various mechanism are installed during the course of the constitution building process that firstly aim to enable the people’s participation, and secondly make possible their feedback. Such mechanisms are forms of feedforward strategies such as constitutional education programs as well as making the two-way model of communication an actual practise that is not hamstrunged by time pressure.
The fourth and final approach, consultation, in many aspects resembles the just described third approach with the two-way model of communication as a main feature. However, in cases where it is a matter of “consultation”, the scope and comprehensiveness of the communication strategy distinguishes it from all of the previous approaches. In these cases, the communication process has also installed mechanisms for systematically reviewing the feedbacks of the people, civil society organizations and NGO’s in order to be able to gather additional information from them/these as to specific suggestions, recommendations, etc. Constitutional education programs have been carried out in the country and made accessible for people living on the countryside as well as in urban areas. The programs have also been designed such that individuals with varying degrees of previous knowledge about the concept of constitutionalism can benefit from them. This last point also involves making these programs available in all spoken languages in the country. Innovative ways of both communicating and designing education programs is also characteristic for the fourth approach. The use of internet, radio broadcasts, television shows, talk lines, songs, plays, etc. are employed for these purposes.

Converting variable 3

When it comes to the third variable, the degree of inclusion, converting it to a numerical rating is a more straightforward procedure than was the case with the previous two variables. After having studied the cases, it makes sense to convert the variable to range from 0-1 with 0 illustrating that the process has not been fully inclusive, that there have been individuals and/or groups that have been banned from participation, and 1 implying that the process has been fully inclusive – all segments of the population have been allowed to participate.

Converting variable 4

The last variable, the question of final authority, is converted to numerical ratings ranging from 1-3 which alike the previous three variables illustrates a progression as to the extent of public participation with 1 representing the least amount of public participation and 3 the highest amount of public participation. When observing the twenty cases it is possible to differentiate the following variants when it comes to this variable:

1. Final authority vested in the hands of an appointed body, or an executive body
2. Final authority indirectly vested in the hands of the people (for example a popularly elected Constitutional Assembly)
3. Final authority directly vested in the hands of the people (through a popular referendum)

Limitations of the proposed classification of participation

Since the main issue with already existing typologies and classifications of participation is that they do not clearly demonstrate the exact defining characteristics that determine why and how cases are categorized as instances of more or less participation, the purpose of the foregoing section has been to address this very issue by being as clear as possible regarding this matter. Although the operationalization of the four different variables as presented above is an attempt to fill a knowledge gap existent in present research in this specific area, it is of course not flawless. While attempting to be as thorough as possible when converting the variables, operationalizing them, it is nevertheless also worthwhile to keep in mind that each of the twenty cases is unique in the circumstances that led up to the constitution building
process and in the exact procedures that were employed during the course of it; consequently some of the cases are not easy to numerical rate and place in the schedule. Also, there are undoubtedly additional factors that influence whether or not and to what extent people are able to participate in the building of their constitution, and the purpose of the dissertation project is to at a later stage conduct one or two in depth case studies in which additional factors that might enable or restrict participation will be studied much closer. But for the purposes of structuring material from a larger sample of cases, the four variables that have been discussed so far suffice. After having studied the twenty cases of participatory constitution building processes, the schedule below has been filled out according to how the cases reflect each of the four variables.

**Figure 3: Classification schedule of public participation in constitution building processes, with cases**

<table>
<thead>
<tr>
<th>Variables</th>
<th>1</th>
<th>2</th>
<th>3</th>
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<tbody>
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<td>4</td>
<td>1</td>
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<td>3</td>
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<tr>
<td>Brazil</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>2</td>
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<td>Colombia</td>
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<td>East Timor</td>
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<tr>
<td>South Africa</td>
<td>3</td>
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**Tentative conclusions**

The schedule above illustrates that participatory constitution building processes are not homogenous procedures across all cases. By understanding how the four variables, 1) the drivers of the process, 2) the forms of communication, 3) the degree of inclusion, and 4) the question of final authority, have been operationalized, we can quite clearly see that the cases demonstrate varying degrees and characters of participation. Albania, for example, stands out from all other cases as a case of participatory constitution building in which the term “participation” has genuinely transformed into influence – we can see that the country scores the highest possible ranking on all four variables, whereas Afghanistan and Kosovo for

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3 The constitution was rejected in a popular referendum in 1999
4 The constitution was rejected in a popular referendum in 2005
5 The constitution was rejected in a popular referendum in 2000
example, demonstrate participatory constitution building processes in which participation has not converted into any actual influence. As said; the differences as to the extent of participation are quite substantial between the cases.

Having assigned numerical ratings to all of the cases, it is of course interesting to analyze to what extent, if at all, any patterns emerge in the material; to see if the variables seem to relate to each other. When studying the schedule a bit closer, it is possible to see some commonalities that can indicate something resembling a pattern. For example it is interesting to note that a low rating on the first variable, the drivers of the process, seems to influence the other three variables as well towards a low rating. Afghanistan, East Timor, Iraq, Kosovo, Nigeria, Ethiopia, Fiji and Nicaragua are good examples of this tendency. As far as this specific variable is concerned it is likewise notable that all cases in which there has been substantial international involvement in the constitution building processes, public participation has been kept at a minimum level (Afghanistan, Kosovo, East Timor & Iraq). This might very well be related to the earlier discussion concerning international actors and imposed time frames on the process – a tight schedule reduces the possibility for developing carefully designed communication strategies to optimize public participation in the process, and a tight schedule might also make it impossible to make time to organize a final referendum on the draft constitution as well, rather the final say resides in the hands of a Constitutional Assembly (Iraq being the exception, where a referendum was held). It is also of note that two (out of four) of the cases in which certain groups have not been allowed to participate in the process (variable 3) are also cases in which international involvement has been considerable; Iraq and Afghanistan, where former member of Saddam Hussein’s Ba’ath Party were banned in the former case and the Taliban in the latter. Of course it is difficult to say with any certainty if there is any relationship as to these occurrences, but based on the preceding discussion concerning the weigh-off between ensuring long term peace on the one hand and gaining the respect of the people by shutting out former trouble makers on the other hand, international actors might perceive it necessary to somehow earn the trust of the people by excluding agitators.

It is also interesting to observe that there might be some form of relation between the first variable, the drivers of the process, and the fourth variable, the question of final authority, as cases that have a high ranking on the first variable also score the highest possible ranking (3) on the fourth variable. Albania, Guatemala, Kenya and Zimbabwe display this tendency. Perhaps a homegrown process where the main drivers consist of national actors in various combinations, where time is not as scarce as in cases where international actors are involved, also makes it possible and even more so desirable from a public influence perspective, to arrange a popular referendum as the last stage of participation. On the other hand, in the few cases (Fiji, Ethiopia & Nigeria) that have scored the lowest ranking (1) on the fourth variable, national elites have been the drivers of the process and these elites have also restricted all forms of communication (variable 2) making it impossible for people to participate in any meaningful way. Evidently, while using the rhetoric of participation, national elites in these cases have not pursued public influence but rather been interested in securing (maintaining) their own power-base.

Lastly, one can see that cases in which the forms of communication have been thoroughly elaborated, cases that have the highest possible ranking (4) on this variable (variable 2), also have a high ranking on the first variable, the drivers of the process – these have been either national elites, civil society organizations or political elites from the ruling party, military elites, political parties in the opposition and civil society organizations. Albania, Brazil,
Eritrea and South Africa demonstrate this tendency. This propensity can perhaps substantiate the earlier discussion concerning the genuine ambitions of the drivers of the process when it comes to opening the process for public participation. Drivers of the process that are sincerely interested in involving the people and gathering their opinions also make sure to arrange the forms of communication with the public to run in a two-way direction, to adapt the process to fit the needs of the people based on their previous knowledge about constitutionalism, to make participation in various languages an alternative and to make feedback along the course of the process possible rather than to limit participation to merely passing a “yes” or a “no” vote in a final referendum.

Overall, it seems as if the first variable, the drivers of the process, is the most important variable; it appears that who the drivers of the process are has an impact on all of the other variables and consequently has the most bearing on the extent of public participation in the constitution building process, although the case of Colombia departs from this general pattern. Perhaps this is not a very surprising finding since the drivers of the process are likely to have a strong voice when designing the rules of procedure for the process (which incorporates the other three variables), but there is nevertheless a point to be made about how those who instigate the process and push the constitutional agenda also have the power to decide if, and if so how, public participation will be an integral part of the process.

The way ahead

After having discussed the concept of participation, what it entails in a constitution building context and problematized existing classifications and typologies of participation in the participatory democracy literature, a classification schedule of participation in constitution building processes has been proposed in this paper. This forms the first part of the dissertation project, an essential and necessary first step that must precede the next stage of the study; to analyze to what extent there is a relationship between participatory constitution building processes and better democratic levels. In order to be able to organize the second part of the project it is useful to cluster the twenty cases into a number of categories. Seeing how the drivers of the process, variable 1, seems to be the most important variable; the variable that appears to effect the remaining three variables and therefore has the strongest impact on the nature of participation, it can be useful to organize these categories on the basis of how the individual cases score on this first variable. Colombia, again, being an exception since its high score (4) on the first variable is not followed by high scores on the other three variables as well. When clustering the cases accordingly, five categories appear which (preliminary) can be called: false participation, symbolic participation, limited participation, consultative participation and maximal participation. These categories are presented below (page 24).

At the next stage of the research process it will be very interesting to study whether or not democratic performance differs among the cluster of cases. If the hypothesis currently in circuit bears testimony to the truth, we could fairly expect that cases of false participation and symbolic participation demonstrate poorer democratic status than cases of for example consultative participation. This however remains to be seen, and lies outside the scope of this paper.
Figure 4: Categories of public participation in constitution building processes

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