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How Participatory Constitution Building Processes Affect the Quality of Democracy

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Abrak Saati
Department of Political Science
Umeå University
**ABSTRACT**

Public participation in constitution building processes has been advanced as a standard operational measure, in post-conflict contexts, when states undergo regime change from non-democratic rule and during other periods of institutional crisis or reform. This is the case regardless of the scope of the constitution making activity - be it a complete overhaul of the pre-existing constitution and the creation of an entirely new document or a more incremental approach to the endeavour. Ordinary citizens, civil society organizations and local non-governmental organizations are now sitting in the front seat doing the steering, whereas domestic as well as international legal experts and national political elites serve to properly incorporate and endorse the opinions of the people in the final constitution. Top-down constitution making has been replaced by bottom-up constitution building. This is at least the idealistic idea. Indeed, public participation in constitution building processes is gaining ground because of the perceived beneficial effects that it causes; scholars in this vein of research, and practitioners alike, are confident that it will have positive effects on the state of democracy subsequent the venture. Yet, hitherto there has been no research that actually sets out to study this argument; hence, the question of how public participation affects the subsequent quality of democracy in states that have undergone such processes remains unanswered. This settles the need for research in this specific area, which is the contribution that my dissertation hopes to make for which the specifics will be presented in this paper.
Introduction

Participatory constitution building – what is it?

“How the constitution is made, as well as what it 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)

During the past twenty-five years, half of the existing national constitutions have been written or re-written (Hart 2003; 2). Parallel to this development, the procedures that precede arriving at a final constitutional document has gained increased attention particularly so in post-conflict states and in states transitioning from authoritarian rule. Members of the international community and national actors have increasingly recognized that constitution building can be an important factor when it comes to bringing about peace, political stability, political equality and sustainable democracy (Samuels 2009; Ghai & Galli 2006). The constitution defined as the supreme law of the land, a political doctrine that stipulates the “rules of the game” and establishes the institutional order, but also as a social and economic contract between the government and the citizenry is indeed a fundamental text that transcends mere juridical significance to also convey the shared values and aspirations of the people (Hart 2003). Writing a new constitution in addition to being an ideologically and emotionally charged exercise, is also fundamental due to the character of the document and its bearing on all other aspects of public, and to some extent also private, life. Political constitutions are in the words of Roger Congleton “the enduring legal and institutional setting in which ordinary day-to-day and year-to-year public and private decisions are made” (Congleton 2003; xiv). To establish such a fundamental institutional order is all the more crucial in post-conflict states since the existing institutional infrastructure has likely been shattered during the course of the conflict. In order for former adversaries to be able to transfer conflicting issues from the battlefield to a democratic arena where grievances are handled through articulation rather than violence, the predictability in the realm of politics that a constitutional order assures must be secured (Reilly 2001).

The significant increase in constitutional activity has served to reignite the scholarly debate on constitution making as well as encouraged a re-evaluation of best practices for constitution building (Moehler 2006; 277). Constitution making as the “hour of the lawyers” (Arato 2000; 229) 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. Hence, a new trend that values ordinary citizens as the prime agenda setters and decision makers has emerged;
participatory constitution building, a trend that also emphasises constitution building as a process rather than an “event”¹ (Moehler 2006; 275, Hart 2003; 12).

The meaning of public participation in constitution building, and the practical employment of such an approach, is constantly being broadened to include various methods of involving the citizenry in the process; before the writing phase, during drafting, and after the constitution is promulgated and implemented. New strategies for engaging the population may include organizing public hearings during which constitutional submissions are gathered, arranging constitutional education programs, organizing popular referendums for electing constitution making bodies, arranging media campaigns for the purpose of keeping the public informed about the process, and many other strategies (Hart 2003; 2-7).

Scholars and practitioners call attention to a number of reasons for more public participation and less elite control during a constitution building process (see for example; Widner 2005; Widner 2008; Ghai & Galli 2006; Hart 2003; Samuels 2006; Samuels 2009; Moehler 2006). Firstly, public participation has been recognized to be closely linked to values of democracy and legitimacy. Supporters of a participatory approach frequently stress two aspects; that a constitution can only reflect democratic values if it has been produced during such circumstances, and that a constitution cannot be written for the people without input from the people whom are bound by its jurisdiction; it will simply lack legitimacy (Hart 2003; Samuels 2009; Samuels 2006; Widner 2008; Moehler 2006; Ghai & Galli 2006). In essence; for the document to be respected by the citizenry and survive implementation it must be based on the views, values and aspirations of the same (Hart 2003; Samuels 2009; Ghai & Galli 2006; Moehler 2006). Holding of public engagement until the last stages of the process and limiting public input to a “yes” or “no” vote on an already drafted and elite deliberated constitution is questioned as a legitimate democratic procedure (Samuels 2009). Moreover, public participation in the process is believed to educate people in democratic values and broaden the democratic polity as it offers previously excluded groups an opportunity to have their voices and values considered (Ghai & Galli 2006; 14, Samuels 2006; 8, Widner 2005). In other words, the process is seen as an exercise in democracy and as a way of supporting the growth of a democratic political culture in a society (Hart 2003; 12, Moehler 2006; 276-278). Proponents also emphasise that a participatory approach builds much needed social capital

¹ Increased scholarly attention has also resulted in a distinction between “constitution building” and “constitution making”. Constitution building is taken to mean all phases included in reaching the stage of having a written constitution and enforcing it. Constitution making is defined as the actual making, i.e. writing, of the constitution and thus reflects a very specific period of the constitution building process (Ghai & Galli 2006; 13).
especially in war torn societies since ownership induces a sense of influence and trust (Widner 2005; 506).

The increase of civil wars in societies with deep-seated ethnic and/or religious divisions also serves to explain the practice of participatory constitution building processes in post-conflict situations. It has been brought to attention that participation in constitution building can serve to reconcile conflicting communities. By including all segments of the population in the process, previously marginalized groups as well as former adversaries will be provided an opportunity to collectively address past grievances and structural inequities at the root of the conflict (Ghai & Galli 2006; 13). Thus, it is suggested that reconciliation may be facilitated by means of conversation and deliberation in the context of building a new constitution (Hart 2003; 3, Samuels 2006; 5-6).

Lastly, in light of recent foreign involvement in constitution making processes where those pushing the constitutional agenda have not been national citizens; the need for public ownership over the constitutional document has become all the more clear. Such unsuccessful engagements by international actors, particularly in post-conflict states, have indeed put their authority as the main “constitution builders” into question, requiring a re-evaluation of the role of internationals in such delicate matters as writing political constitutions (Samuels 2006; Ghai & Galli 2006; Miller 2010).

There exists no uniform and practical manual that sets out to guide domestic and international constitution builders when they go about initiating a participatory constitution building process. As the focus is on the process, there are no instructions concerning specific provisions that ought to be reflected in the content of the constitution either – although there is an implicit understanding that a democratic process will yield a democratic content. This can be contrasted to specific constitutional recommendations, particularly for divided societies, as provided by the consociational democracy model elaborated by Arend Lijphart (1969), and the integrative model associated foremost with Donald Horowitz (1985). Rather, a participatory constitution building process may take many different forms which makes sequencing of events important, not to mention decisive, in identifying to what degree “participatory” a participatory process actually is (Widner 2005; 505). For example, it is relevant to consider at which phase of the process the public are invited to engage as this may vary extensively from case to case. It can be as early as during the pre-constitutional phase when negotiations have only just been initiated and the agenda is staring to take form, or
during the constitution-making phase when the draft is being prepared, or perhaps not until it is time for a final referendum. The public may be included both before and after the draft has been prepared, or only before or only after. They may be included all the way from the beginning, but not allowed to vote on the final constitution. The sequencing of public education also matters, if at all included. Have the public received education on constitutional matters before or after public hearings? (Widner 2005) Clearly the procedural variance is considerable. Consequently, a number of constitution building processes may be considered participatory but differ extensively in comparison to each other (Hart 2003; 11).

The transition from conflict to peace and to democratic governance, and in the longer perspective democratic consolidation, is not only cumbersome but also lengthy. In cases of protracted conflicts that have lasted for many years, war and norms coupled to war have become normalized. For these norms to change, passage of time is essential as is sufficient time set aside for the constitution building process (Samuels 2006; 5). In the words of Vivien Hart (2003; 11) “only a considerable commitment of time and resources will make genuine public participation possible”. The time aspect also has bearing for the above mentioned sequencing of procedures; not enough time might lead to rationalization in the sequencing, leaving out certain steps of the process entirely, or leaving out public engagement during certain phases.

To sum up; participatory constitution building has been advanced as a standard operational measure (at least from a normative perspective) due to the processes perceived contribution to the enhancement of democracy, increased legitimacy of the document and possibility for reconciling former adversaries.

Disposition of the paper

In this paper I will outline my thoughts related to my dissertation project. The chapters will proceed as follows; an initial brief section will give an idea of the character of previous research within this specific field which leads up to the identified research problem and purpose of the dissertation. The paper continues with a chapter that theoretically situates the hypothesis under investigation after which a methodological chapter follows.
Previous research

Previous research within this particular field of state building has been mainly descriptive and focused to single case studies (Bannon 2007; 1828). This trend has been further characterized by the South African case receiving considerable scholarly attention in comparison to other countries which too have undertaken a participatory process when making their constitutions (see for example; Haysom 2001; Ibrahim 2001; Jagwanth 2000; Maphai 1999; Mbete-Kgositsile 2001). The focus on South Africa is undeniably understandable. The country’s constitution building process of 1994-1996 was indeed a remarkable exercise in far reaching public participation both in terms of number of people engaged in the process, and in terms of innovative ways of engaging the citizenry. Consequently, South Africa has successfully established itself as an international point of reference when it comes to successful constitution building; thus continued scholarly attention is justified (Ibrahim 2001; 155, Hart 2003; 7). Moreover, as nearly fifteen years have passed since the adoption of the final constitution it is interesting, not to mention relevant, to continue studying the South African case since valuable lessons that may be related to the constitution building process are perhaps only now starting to reveal themselves.

With all this said and the relevance and importance of studying the South African experience acknowledged, research design that focuses on single case study analysis has left this research field without systematic comparisons between countries that have undertaken a participatory process when making their constitutions (Ginsburg et al. 2009).

Among scholars particularly engaged in this vein of state building research, there are widespread assumptions concerning participatory constitution building processes and their effects. In 2005 Michele Brandt, constitutional consultant with vast experience from constitutional processes in East Timor and Afghanistan, wrote in a report for the United Nations Development Programme:

“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...” and counts: “lay a foundation for more democratic practices, a culture of rule of law and ongoing participation in decision-making”.

(Brandt 2005; 1)

Prominent scholar in the field, Professor Jennifer Widner has said:

“Our instincts tell us that the process [of constitution building] makes a difference”.

(Widner 2008; 1514)
Late Professor Vivien Hart who was concerned with the role of constitution building in reconciling former adversaries in the aftermath of violent conflict has said:

“In a significant change, it is now widely assumed that whatever the axes of conflict, the constitutional outcome will be more sustainable if those who experienced past injustices are involved in creating new solutions”.

(Hart 2010; 21)

Dr. Kirsti Samuels, former legal advisor of the UNDP supporting constitution-making in Somalia has stated that:

“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)

Tom Ginsburg, Zachary Elkins & Justin Blount have stated:

“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 brings attention to the fact that although many researchers and practitioners advance public participation and deliberation as a premium method through which constitutions ought to be produced, there is little research that actually studies why such processes matter. She 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; 1827-1828).

And taking the state of democracy as their entry point, Linz and Stepan state;

“A neglected aspect of democratic transition and consolidation concerns the comparative analysis of the context in which constitutional formulas are adopted and retained”.

(Linz & Stepan 1996: 81)

The purpose of referring to these statements is to illustrate the common understanding in the literature concerning the presumed effects of participatory constitution building processes, and to show that there is an astonishing lack of research investigating these arguments. Though the importance of process linked to outcome has been hypothetically established, there is yet no systematic and comparative research that analyses how, meaning what it is in the process, that makes a difference, and in relation to what it makes a difference. The closest
attempt of systematic comparisons within this body of research has been attempted by Hyden & Venter (2001). In their edited volume “Constitution-Making and Democratization in Africa” four African countries that have undergone participatory constitution building processes are described – the emphasis being on descriptions of the processes rather than on a “process-outcome” analysis. Furthermore, previous research makes no distinction between various ways of engaging the public in a participatory process – rather any and all engagement is labelled as “participatory constitution building” which is problematic since there are considerable differences of public participation when studying the individual cases closer.

**Research problem**

As conveyed in the introduction, an inclusive, transparent and publically available constitution building process holds the promise of many merits. Values such as increased legitimacy, an improved knowledge about the political system, an avenue towards reconciliation, a sense of ownership over the document, etc. has made governments in post-conflict countries and in states transforming from non-democratic rule eager to be associated with such a procedural approach. By using the constitution building endeavour in itself as an exercise in democracy, incumbent governments have realized that there is much to gain; not only will the process yield high levels of legitimacy with the domestic public, but the country will also gain international recognition as a state that values the opinions of its people and a truly democratic process. However, when studying a number of states that have engaged in participatory constitution building processes it becomes clear that “public participation”, as defined and finally procedurally employed, varies greatly from one context to another. Since there is no uniform, pre-designed set of standards when it comes to the design of a participatory constitution building process, there are as many ways of attempting the endeavour as there are cases. Not all participatory constitution building process are alike and hitherto there has been no analytical distinction between these various participatory approaches and the consequences of them. This naturally leads to the purpose of the dissertation.

**Purpose**

This dissertation sets out to study how participatory constitution building processes matter; and how they matter in relation to the quality of democracy. To be very precise, the problem
is attacked through following hypothesis: *the more participation in the constitution building process, the better the quality of democracy*. The dissertation will consider cases of participatory constitution building processes that have taken place in post-conflict states, when the process has taken place during a transformation from non-democratic rule, and when the process has been instigated during some other period of institutional crisis or reform.

**Theory**

The aim of this chapter is twofold. The first is to provide a theoretical foundation which clearly situates the underlying argument as described in the hypothesis above: “the more participation in the constitution building process, the better the quality of democracy”. The chapter thus serves to illustrate the theoretical schools of thought that proponents of participatory constitution building processes derive their inspiration from when advancing their arguments. The chapter will follow as such; an initial section that covers theories on democratization. The second section of the chapter is devoted to Robert Putnam’s theory on social capital which is followed by a section on historical institutionalism. The chapter then continues to consider participatory democratic theory and deliberative democratic theory, the two theoretic strands that in combination with historical institutionalism and the theory on social capital capture the essence of why participation matters. The second aim of the chapter is to discuss and conceptualize democracy in order for the term to be defined and operationalized; this will be done in the fourth and fifth sections of the chapter.

**Theories on democratization**

In an introduction to a theoretical chapter that deals with terms such as democracy and democratization, it is essential to firstly settle the distinction between these two concepts. Democracy is a state that characterizes a country, whereas democratization is a process. In the words of Lauri Karvonen (1997; 11): “Democracy is the goal, democratization is the road that leads to that goal”.

Scholars who are engaged with queries concerning the conditions under which individual countries democratize can roughly be divided into two schools of thought. Either a structural argument is advanced as the prime motivator for democratization or a process/actor oriented

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2 In accordance with Miller (2010; 656), this study agrees that the term “post-conflict” can cause confusion since conflicts do not usually abruptly end, rather states transition from conflicts. In this study, a “post-conflict” context is thus taken to mean such a transitioning environment.
perception (Santesson-Wilson 1998; 214). Modernization theory provides a good example of a structural theory and has through the academic contribution of primarily Seymour Martin Lipset gained much attention. In very broad terms, the central finding in Lipset’s seminal study “Some Social Requisites of Democracy: Economic Development and Political Legitimacy” is that economic development has structural effects on societies that are absolutely essential for states to be able to begin a democratization process (Lipset 1959). In contrast, transition theory, as an example of a process/actor oriented theoretical approach, acknowledges that socioeconomic structures may matter, but emphasizes that it is dynamic and self-enforcing developments within such structures that will decide how democratization is shaped. In a nutshell; the features of the transition from a non-democratic to a democratic regime will determine the future democratization process as well as the prospects for democratic consolidation (Karvonen 1997; 75-76). Transition theorists also consider the institutional set-up that the country is transitioning from as significant for the prospects of democratization (Linz & Stepan 1996; 38-54).

Modernization and transition theory alike thus explain democratization as processes sprung from domestic circumstances. However, there are also democratization theories that seek to explain democratization processes as consequences of external, meaning international and global, conditions (Hydén 1998; 18-24). Such an external, yet at the same time structural take, is globalization theory. As states are not immune from outside influences, globalization, especially economic liberalization, ought to impact democratization in individual countries (Karvonen 1997; 108). Another external, but on the other hand process/actor oriented theory, concerns the role of individual countries and international or regional organizations and their contribution in steering other states towards democratization processes through various incentives (Karvonen 1997; 112-113).

Theory of social capital

Thus far structural theories, process oriented theories, external and internal explanations to democratization have been considered. Institutional explanations, then? Do institutions matter in this respect? Robert Putnam’s theory concerning social capital is relevant to consider in this context. And since participatory constitution building processes are believed to advance the growth of social capital in especially war torn states, the theory is relevant for the dissertation at hand and thus deserves to be more comprehensively covered.
In his influential study “Making Democracy Work: Civic Traditions in Modern Italy” (1993), Putnam reaches interesting results that have relevance for other contexts than the immediate studied Italian setting. His central conclusion; that strong civic traditions explain government efficacy, is a finding that holds significance for democratization theory at large even though his actual focus does not concern democratization per se (Hydén 1998; 19-20, Karvonen 1997). The differences in government efficacy that Putnam is able to identify between the northern and southern provinces of Italy are to some extent, but not fully, explained by formal institutional and socioeconomic accounts. This encourages a deeper investigation of sociocultural explanations at which point the density of civil society organizations, their strength and their regional spread in the country are mapped out. It turns out that strong civil society organizations are present in the northern provinces of Italy, the same provinces that display government efficacy – in the southern provinces of the country where government efficacy is low; the presence of civil society organizations is absent as well. What is it about civil society organizations that produce beneficial effects on politics? It is within the framework of this question that Putnam develops his theory on social capital. His argument is that social capital exists in nations or regions that are characterized by a feeling of trust and reciprocity amongst their citizens. Such sentiments are in turn nurtured in civil society organizations and reinforced; hence a virtuous cycle is created that generates social capital. The main point is that people who engage with each other in many different social contexts get accustomed to developing strong norms, acceptable behavior (according to those norms) as well as conveying their expectations on each other in constructive ways. Furthermore, engagement in civil society organizations promotes a sense of trustworthiness due to the constant flow of information. This in turn makes it possible for all individuals engaged in the organization to have reliable information about each other’s interests, reducing uncertainty and rumor spreading (Putnam 1993; 173-174). On the whole, horizontal networks benefit social capital in ways that vertical networks simply cannot do due their very vertical structure. The asymmetrical power relations that arise in such structures do not produce social capital since the core ingredients trust and reciprocity are not of equal concern for both parties.

Putnam’s study also illustrates that generating social capital is a long term process. Civic traditions that encourage such capital to develop had been instigated in the northern parts of Italy nearly a thousand years back in history whereas they had never been able to take root in the south. This is a key finding that also reveals deterministic tendencies of the theory. What does this imply for states that are not accustomed to horizontal networking? Are they trapped
in a vicious cycle of distrust and stagnation? The study of decentralized governments in Italy showed that changing formal institutions can change political practice. Tendencies such as more effective government in relation to the previous centralized system was detected in the south as well which means that those regions were indeed affected by institutional change, but were not able to take full advantage of the benefits of decentralization due to weak civic traditions (Putnam 1993; 183-185). One of the main arguments of the study is that it is indeed worthwhile to encourage horizontal bonds to take root because of the positive long term effects.

**Historical institutionalism**

Putnam’s insights concerning virtuous cycles and long term effects of institutional choices inevitably steers one into the theoretical domain of historical institutionalism. If path-dependency is a political reality, the choices/processes undertaken directly after a critical juncture in a state’s history become crucial (Pierson & Skocpol 2002; 700). Although the theory leaves leeway for a certain extent of flexibility in such a “given” pattern, it nevertheless asserts that the range of possibilities for diverging too extensively from a course of development is constrained by the decisions that have been made during the formative period of the institution in question (Peters 1999; 64-65). Obviously, what defines a “formative period”, “a crucial moment”, “a decisive juncture”, etc. in a country’s history may be debated, but instances such as the termination of violent conflict or regime change from a non-democratic government must qualify as such defining moments. This implies that the design of a constitution building process, meaning the institutions that are installed for the purposes of making decisions, will have long term effects stretching beyond the immediate exercise. Very specific aspects such as timing and sequencing of institutional arrangements will matter greatly with a long perspective in mind (Pierson & Skocpol 2002; 700). Hence, the significance of making well informed and thoroughly thought through decisions at the moment of initiating a constitution building process cannot be stressed with too much emphasis. If during such a decisive moment, institutions are installed that are inclusive for all individuals regardless of political party affiliation, ethnicity, religious belief and other potential cross-cutting societal divisions, the country in question will increase its chances of building much needed social capital by steering itself on a “virtuous” path. Likewise, if such an opportunity is either mismanaged due to incompetence or deliberately misused by political or other elites in society, if institutions are installed that serve to fragment and exclude the
polity from exercising influence over the constitution building process, the country may steer itself on a vicious path with possible long term destructive consequences.

**Participatory democratic theory**

Participatory constitution building and the ideas that such processes are sprung from are not surprisingly to a large extent theoretically anchored in participatory democratic theory. Participatory theorists advance a number of merits that participatory democracy serves to enhance; merits that resonate well with the arguments put forward by Ghai & Galli, Widner and Samuels as outlined in the introductory chapter of this paper. The principal rationale for participatory democracy is its educational role. According to Rousseau a participatory process develops responsible and politically aware citizens who recognize that cooperating with other members of society will in the long, and possibly short, run be beneficial for his/her own immediate private interests (Rousseau 1994; 9-12, 42-43). “Educational”, as depicted by Rousseau, thus refers to participatory democracy better equipping individuals to learn how to work together with others, adjust and reflect upon their own wishes and concerns vis-à-vis other members of society. In doing so, in performing this “exercise” other educational merits follow. Participation enhances self-confidence, hence it also has a positive psychological effect. Moreover, participation makes people feel that they actually can affect politics which encourages them to want to learn more about the formal procedures of the political game and participate in decision making further. This self-enforcing tendency of participatory democracy has been echoed by Carole Pateman who captures the point well when stating:

> Once the participatory system is established, and this is a point of major importance, it becomes self-sustaining because the very qualities that are required of individual citizens if the system is to work successfully are those that the process of participation itself develops and fosters; the more the individual citizen participates the better able he is to do so

(Pateman 1970; 25)

Moreover, participation creates a sense of belonging among members of a community with psychological effects on an aggregated community level as well as on an individual level (Pateman 1970; 25-27). Thirdly, participatory democrats are concerned with broadening the democratic polity and making it possible for all segments of the population to engage in decision making (Bexell et al. 2010; 84). Participatory democracy, according to the theory, counteracts marginalization and combats systematic exclusion from the realm of politics by offering all societal groups a voice in decision making procedures (Nylen & Dodd 2003; 28). Thoughts on widening the political constituency naturally lead to queries that deal with how
such broad based participation can manifest itself. Participatory democracy is by no means a uniform operational procedure when translated into political practice; specific measures thus have implications for the educational, psychological and democratizing ambitions of the approach. Pateman suggests that the merits of participatory democracy depend on whether or not participants actually have real influence over decisions. The very fact that the form of participation can vary to large extents has made Pateman develop three separate distinctions of the term: pseudo participation, partial participation and full participation. The three categories also cover the participatory “span” between individuals having no influence at all over decisions to having power to determine the outcome of decisions (Pateman 1970; 70-72). At this early stage of my dissertation project I am using these categories as a source of inspiration when it comes to operationalizing the independent variables of the study, which I will return to in the methodological chapter.

**Deliberative democratic theory**

Deliberative democratic theory is experiencing somewhat of a renaissance as it is has evolved from merely a theoretical concept to a working theory. In making this transition, its basic principles are currently being implemented in a number of research fields (Chambers 2003; 307). Undeniably, some of the central principles of participatory constitution building fit firmly within the deliberative democratic theoretical framework which will become clear on the following pages.

Even though deliberative democracy is a familiar concept to political science researchers, “deliberation” and its distinctiveness in comparison to “ordinary talk”, negotiations and bargaining is not always entirely clear. Chambers attempts a general definition that captures the essence of the concept:

“...deliberation is debate and discussion aimed at producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants. Although consensus need not be the ultimate aim of deliberation, and participants are expected to pursue their interests, an overarching interest in the legitimacy of outcomes ideally characterizes deliberation”.

(Chambers 203; 309)

Deliberative theorists whom are particularly interested in how a working theory of deliberation can be applied in the field of public law argue that by establishing a relationship between the public and the legislative authority through means of communicative processes rather than the voting booth, legitimacy of the legislative framework will be secured.
Habermas (2001; 772) goes further by asserting that the content of a constitution, the rights and obligations stated therein, and its perceived legitimacy is dependent on equally entitled participants engaging in the making of the constitution. However, one should bear in mind that deliberative democracy is difficult to realize even when conditions are favourable not to mention in contexts where countries are only just returning to peace after violent conflict or transforming from military to civilian rule. The challenge is further compounded in societies that are culturally/ethnically/religiously divided as “equally entitled participants” in a deliberative democracy as envisioned by Habermas may be an elusive ideal during such circumstances. A well-ordered political sphere in which all social groups can deliberate on an equal footing can be difficult to establish as minority and social groups that have previously been excluded from the political arena are not likely to have an equal influence in the democratic process (Chambers 2003; 321-322). These challenges are equally relevant for a participatory constitution building process. “The people” who are the prime agenda setters and drivers behind the constitutional agenda must be disaggregated into the various sub-groups that actually make up the population, and the fact that deliberations will be effected by power relations between groups needs to be taken into consideration (Noël 2006; 433). With these challenges in mind it is relevant to place participatory constitution building processes in the larger context of a representative democratic governing structure. The fact of the matter is that proponents of participatory processes, and deliberative theorists alike, rarely suggest that deliberative democracy should substitute representative democracy, but rather be valued as a compliment to it which serves to democratize democracy further (Chambers 2003; 308).

**Conceptualizing democracy**

**Democracy – a dichotomous or graded concept?**

This study considers constitutions as essential building blocks of democracy and tests the hypothesis “the more participation in the constitution building process, the better the quality of democracy”. Therefore it is necessary to theorize the concepts of democracy and “quality democracy”. However, these concepts must be placed in the context of a broader discussion pertaining to the very conceptualization of democracy as a dichotomous or a graded term. Hence, the following section firstly serves to illustrate this discussion and secondly situate the dissertation in relation to it.
The scholarly discussion concerning conceptualizations and the consequent measurement of democracy as an “either/or” concept, or rather conceiving and measuring democracy in terms of gradations, is sharp. Sartori (1987, 1991) is one of many prominent democratic theorists who advocates a dichotomous approach to the concept and explicates his line of argument by referring to the terms *contraries* and *contradictories*. Whereas there is room for middle ground positions and “in between” cases when referring to contrary concepts – for example; big versus small, there is, per definition, no such space when referring to concepts that are contradictory – for example; alive versus dead. According to Sartori, democracy versus non-democracy constitutes such a contradictory and can thus not be conceptualized or measured in accordance to various grades (Sartori 1987; 182-184, Sartori 1991). A potential drawback of such a rigid stance concerning democratic status, brought to attention by Collier & Adcock (1999; 541-545), is that so called cut-points that determine dichotomies will likely change over time due to evolving theoretical understandings and new empirical evidence; how we define democracy today differs from how democracy was conceptualized forty years ago, and how democracy is conceptualized twenty years from now may differ from broad based understandings of the term today. Sartori is however joined by numerous other scholars that propose dichotomous conceptualizations of democracy. For example, Prezeworski et al. define a democratic state as a governmental structure in which “governmental offices are filled as a consequence of elections” – a rather minimalistic interpretation of democracy (Prezeworski et al. 1996; 50). Any failure on part of the state to deliver on this specific account automatically disqualifies it as a democracy; there are no “in between” cases. Prezeworski and his collaborators even write of categorizations of borderline cases in accordance with various grades of democracy as “ludacris” (Prezeworski et al. 1996; 52). In sharp contrast, Elkins (2000; 293-294) and Bollen & Jackman (1989; 616-619) claim that traces of democracy may be found in what Prezeworski et al. define as “non-democracies”, making it relevant and necessary to acknowledge varying levels of democracy. The basic line of argument among these scholars is that “democracy” is an inherently continuous concept that cannot be grasped in an “either/or” format. Consequently it is misleading to attempt to classify a country as either a clear-cut “democratic state” or a definite “non-democratic state”, since countries can demonstrate some democratic principles but fail to deliver on others. Bollen & Jackman (1989; 612) exemplify this point well by making reference to Mexico, Argentina and Sri Lanka; “Are democratic practices entirely absent from Mexican politics? Does the return of elections to Argentina mean that it is a full-fledged democracy? Does the suppression of the Tamil separatist movement in Sri Lanka assign the country to the non-
democratic rank?” They conclude their discussion on the topic of conceptualizing democracy as a dichotomous concept or as a continuous one by stating that; “Democracy is always a matter of degree” and should thus be understood as a property that particular regimes demonstrate to various extents (Bollen & Jackman 1989; 618).

At this juncture it is also relevant to keep in mind that all cases of constitution building processes that will be studied in the dissertation represent countries that are transforming from one context to another – from conflict, from some type of non-democratic regime, and from an institutional crisis. Viewing the transformations that the countries are going through as open-ended processes rather than deterministic transitions that by default have an ultimate, and fixed end-goal makes a discussion regarding their democratic performance more fruitful if the term is acknowledged as a continuous concept (Gans-Morse 2004; 337-338, Lijphart 2008; 89-90, Elkins 2000, Bollen & Jackman 1989; 617-619). The various, within the political science community, broadly agreed upon features of a democratic state that will be presented in the next section must be understood in the context that has just been discussed. The political institutions and procedures that ought to be found in a state for it to be regarded as a democracy must be weighed against each other and also, particularly in relation to the criteria for a quality democracy, conceived of as continuous variables.

**Democracy & quality democracy**

The first feature of a democratic state is that it assures universal adult suffrage. Constitutional guaranteed universal adult suffrage and the right to vote provides the basis for legitimate and democratically elected governing bodies. In representative democracies this right constitutes the most fundamental method by which the citizenry can participate and influence the governing of their country (Choe 2003; 9). Secondly, a democratic state must hold recurring, free, competitive and fair elections. Thirdly, it must have more than one serious political party. A variety of political parties in a representative democracy is particularly important from an accountability perspective. Simply put; it is through elections that the public can “reward” or “punish” political parties by giving them renewed confidence or voting them out of office (Bäck 2003; 66-67). With this said, for the electorate to even be able to exercise such an accountability instrument, there needs to be more than one serious political party in the country (Bäck 2003). Lastly, a criterion which is inherently coupled with fundamental freedoms such as freedom of expression and freedom of the media, namely that a democratic state provides alternative ways for political parties to reach the electorate with information.
and thus also allows open political campaigning (Diamond & Morlino 2004; 20-21). The four criteria can be summarized into one definition: electoral democracy. It shall be emphasised that a democratic political order also requires that the people, or their political representatives, have authored the laws which they are obliged to comply with – these may not have been imposed by others who themselves are not required to obey by those laws (Dahl 1989; 108). This also means that a country in which significant decision making authority resides in the hands of an unelected power, as for example an international actor/organization, cannot be considered an electoral democracy (Freedom House 2008).

A quality democracy is captured by adding to the basic features of an electoral democracy the functioning’s and status of the rule of law (Diamond & Morlino 2004; Karvonen 2003; 16-19). In the words of Diamond and Morlino: “the rule of law is the base upon which every other dimension of democratic quality rests” (2004; 23). An overall understanding of democratic rule of law implies the existence of a legal system that defends the political rights and procedures of democracy, maintains the citizenry’s civil rights and secures horizontal accountability between branches of government (O’Donnell 1999; 31). Hence, the rule of law concept can, similarly to “electoral democracy”, be classified in specific categories so that a clear understanding of a quality democracy is made possible, and its assessment achievable. A state which secures democratic rule of law firstly ensures ethnic, cultural, religious and other minority groups equal political rights. Secondly, it guarantees civil rights in the form of allowing religious institutions, indigenous communities and ethnic groups the right to practice their faith and customs and express themselves in the public and the private. These two categories of rights are more substantive in nature than the first three criteria for an electoral democracy which are mostly concerned with rules and practices. It becomes clear that the rule of law criteria go further than the four criteria for an electoral democracy as they indicate whether or not fundamental rights are upheld by state institutions vis-à-vis citizens and social groups in an equal manner (Diamond & Morlino 2004; 22-27; Karvonen 2003; 16-19). Lastly, democratic rule of law implies an independent judiciary which is free from interference from the executive branch of government and other political, economic and religious influences. An independent judiciary constitutes one of the fundaments of democracy and is vital for valid separation of powers between governmental branches and for the sake of ensuring checks and balances in the system. Only when the judicial branch of government is allowed to work without interference from illegitimate influences can it assure
that the rights of the people are respected in an equal and unbiased manner (Gordon & Bruce 2007; 6-7; Karvonen 2003; 17).

**Measuring the quality of democracy**

As has been illustrated on previous pages, there is a theoretical assumption concerning the connection between the extent of public participation in constitution building processes and the subsequent quality of democracy in the concerned state. In fulfilling the purpose of the study an analysis of the quality of democracy in the cases under examination will be carried out. To be absolutely clear, the quality of democracy will be measured by investigating the seven criteria; 1) the exercise of universal adult suffrage; 2) the existence of political pluralism; 3) the exercise of recurring free, competitive and fair elections; 4) the existence and observance of freedom of expression and freedom of the media; 5) the observance of granting ethnic, cultural, religious and other minority groups equal political rights; 6) the observance of granting civil rights in terms of allowing religious institutions, indigenous communities and ethnic groups the right to practice their faith and customs and express themselves in the public and the private; 7) the observance of an independent judiciary. This approach of assessing the quality of democracy corresponds to the theoretical definition of the concept and finds support in similar research (Karvonen 2003; Samuels 2005; Diamond & Morlino 2004), which in turn strengthens the validity of the measurements and consequently the validity of the entire study (King et al. 1994; 25). Of course one should be cautious to claim that this conceptualization of a quality democracy is all encompassing or definite, but for the purposes of the dissertation at hand, the stated purpose, and based of similar prior research, it is considered suitable and justified.

**Research Design**

The dissertation will be presented in the form of three papers. In the following my thoughts related to the first of these will be elaborated.

In order to be able to fulfill the purpose of the thesis and stay committed to studying a larger set of cases with the aim of drawing some general conclusions concerning participatory constitution building processes and their effect on the quality of democracy, a comparative study of all identified participatory constitution building processes in contexts as defined in

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3 At the moment the focus of, and the methodological approach to, the first and second paper have been decided, the final paper and its direction is however still undecided.
the *Purpose* will be executed in the first paper. Before explicating the specifics of the first paper it is necessary to situate the dissertation at hand as an example of a middle range study, distinct from large-N, quantitative, extensive studies versus, small-N, qualitative, intensive studies.

Most researchers within the social sciences have either directly or indirectly experienced what is sometimes described as an insurmountable gulf of divergence between quantitative, large-N studies, and qualitative, small-N studies. This is not the right place to give an account of the possible advantages and drawbacks of each of these methodological approaches; regardless, at the end of the day, it is the purpose and research questions that will steer the individual researcher in the direction of a quantitative or qualitative method. This dissertation will deal with a number of cases which is neither very small, nor very large – something that sets it apart from the majority of studies of comparative politics (Ragin 2000; 25-26). The frequency rate for researchers conducting large-N studies (more than fifty cases) and small-N studies (one, two or three cases) is high, whereas studies focusing on ten to twenty cases are few (Ragin 2000; 25).

*Paper I: How participatory constitution building processes affect the quality of democracy*[^4]

As stated on foregoing pages; systematic comparisons between different participatory constitution building processes has not yet been done within this field of research and is thus what this dissertation sets out to do. The first step in reaching this aim, which corresponds to the purpose of the study, is to carry out such a systematic comparison and categorize all identified cases in relation to how the participatory process actually manifested itself. This will reveal how much participation a participatory process in reality permitted and will allow for comparison between the cases. As previously mentioned, there are countless innovative design options available for those initiating a participatory constitution building process. The design choice finally chosen by constitution builders will to some extent depend on financial and organizational resources, but will also mirror how much participation one truly seeks. A few clarifying examples are useful in order to convey the spectra of process design options and will also illustrate how Carole Pateman’s three categories of participation can potentially be used when classifying the processes in the first paper.

A very open and inclusive process could be designed in such a way that the people vote for a *Constitutional Assembly* that is not only constituted by political parties but in which seats

[^4]: Tentative title of paper I.
have also been reserved for civil society organizations. The Constitutional Assembly decides procedures for making public education on constitutional matters available for all citizens. Once education has been provided Constitutional Commissions travel the country and gather the people’s opinions and report these to the Constitutional Assembly which according to their rules of procedure must take these opinions in consideration when writing the constitution. Parallel to gathering opinions a media campaign is launched which has the dual purpose of keeping citizens up to date about the process as well as informing them about ways to engage and convey their opinions to the Constitutional Commissions. The constitution is then written by the Constitutional Assembly after which it is widely distributed to the public in all major languages spoken in the country – this is done for the purpose of validating the document. If the constitution does not mirror the opinions of the people, corrections are made to the document after which it is put up for a public referendum where it will be either accepted or rejected. This design process can be considered as an instance of “full participation” as theorized by Carole Pateman. An example of lesser inclusion could be a process that replicates the first step of the process just described but that does not provide for public education nor makes the process transparent by making it available through various media channels. When it comes to Constitutional Commissions traveling the country they are thus gathering opinions from people that may very well not even be familiar with the concept of constitutionalism. The constitution is then written by the Constitutional Assembly and then voted for in the national legislature of the country. This design process in turn may be considered as an example of Pateman’s category “partial participation”. Finally, on the very end of the continuum, a process that is merely disguised under the banner of “participation” might be designed in the following way: A president appoints an executive committee that will write the constitution. The people vote for a Constitutional Assembly, however it only serves as a forum for discussion and has no real influence over the document. The Constitutional Assembly shares its opinions with the executive committee which is free to decide whether or not it will consider the input. In the end it is the president that has final authority over the content of the constitution. This design process exemplifies Pateman’s category “pseudo participation”.

When the differences in participation have been identified and categorized, the quality of democracy will be measured in each of the cases. Even though, since public participation in constitution building, is a relatively new phenomenon implying that there are not enough cases in order to conduct a comparative statistical analysis, there is a sufficient amount in
order to provide a “tour de horizon” and convey patterns and probabilities concerning the outcomes of these processes on the quality of democracy – making the comparative method the most appropriate choice (della Porta 2008; 200-202).

Referring to concepts such as “patterns”, “probabilities” and “outcomes” naturally also leads us to the terms “causality” and “causal inference” which do not, generally, sit well with social scientists (King et al. 1994; 75-76). Nonetheless, one should call things by their rightful name, however uncomfortable; and the fact of the matter is that this study assumes that a certain type of participatory process will result in a certain type of democracy; that a certain procedure will result in a certain outcome. This in turn virtually necessitates a method that settles the logic of independent/dependent variables which is a central argument for employing the comparative method in the current study (Karvonen 2003; 14-15, King et al. 1994; 77). This implies that the dissertation upholds a firm and established distinction between the independent variables (the various participatory constitution building processes) from the dependent variables (the quality of democracy and the criterions for this concept). In accordance with a number of scholars, this study completely agrees with the importance of upholding this distinction for the sake of achieving a stringent and systematic analysis (King, et al. 1994; Esaiasson, et al. 2004; Karvonen 2003; Lindvert & Schierenbeck; 2008; Landman 2000). The comparative method will be of great merit in this respect as it will guide the systematic and disciplined collection of the same information, according to the predefined and operationalized criteria of the dependent variable, across all cases of the study (King, et al. 1994; 45, Spencer et al. 2003; 211). For the sake of making it even clearer let us again recall Pateman’s distinctions. “Full participation”, “partial participation” and “pseudo participation” in fact represent the independent variables, which in essence “compete” with each other in explaining the outcome; the quality of democracy (Ragin 2000; 33). It must be stressed that all distinct parts of a process, as exemplified above, will be treated as a configuration for which the quality of democracy will subsequently be measured. In other words; the study will not analyse how each of the distinctive parts affect the quality of democracy (how a Constitutional Assembly affects the quality of democracy isolated from how Constitutional Commissions affects the quality of democracy, isolated from how a public referendum affects the quality of democracy, etc.) – rather the entire procedure is treated as a configuration. Of course, it is worth emphasising that this study is aware of the fact that absolute certainty concerning causal inference can never be achieved within the social sciences – however, this should not deter one from attempting as such a method might at least be successful in
detecting patterns and probabilities. In the words of King, Keohane and Verba (1994; 76) “…we should draw causal inferences where they seem appropriate but also provide the reader with the best and most honest estimate of the uncertainty of that inference”.

Case selection

Since the principal requirement of the independent variable is public participation in constitution building processes and the aim of the dissertation is to provide systematic comparisons between a large set of cases, the first study includes all identified cases where a participatory constitution building process has been implemented.5 In other words, the objective is to include all known existing cases for the purpose of illustrating the broad variety of ways to engage in participatory constitution building endeavours; 1) during conflict or in post-conflict contexts, 2) during transition from a non-democratic regime, and 3) during some other period of institutional crisis or reform. The case selection has partly been drawn from the categorization of situations leading up to the constitution building process by Miller (2010; 607-610), partly by the categorization of Samuels (2005) and partly by my own investigations. The cases listed in table 1 illustrate states that have used a participatory constitution building process.

Table 1: Categorization of cases based on circumstances leading to the constitution building process6

<table>
<thead>
<tr>
<th>During conflict or transition from conflict</th>
<th>Transformation from non-democratic regime</th>
<th>Other period of institutional crisis or reform</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>Albania</td>
<td>Bolivia</td>
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<tr>
<td>Bougainville</td>
<td>Kenya</td>
<td>Brazil</td>
</tr>
<tr>
<td>Colombia (1991)</td>
<td>Kosovo</td>
<td>Fiji</td>
</tr>
<tr>
<td>East Timor</td>
<td>Nigeria</td>
<td>Thailand (1997)</td>
</tr>
<tr>
<td>Eritrea</td>
<td>South Africa</td>
<td>Uganda</td>
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<td>Guatemala</td>
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<td>Iraq</td>
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<td>Nicaragua</td>
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<td>Rwanda</td>
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<tr>
<td>Somalia</td>
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</tbody>
</table>

5 Participatory constitution building processes that are ongoing are excluded from the study; this explains why the Nepalese process as well as the current Zimbabwean process are not considered.
6 The cases are placed in the table where they fit best. However, this does not mean that they exclusively only fit into one of above categories. For example the East Timorese constitution building process was instigated after a violent conflict, but it was also during a transition from a non-democratic regime, the same holds true for Afghanistan. The three categories of circumstances leading up to the constitution building process are drawn from Millers work (2010; 606).
The empirical indications from the first paper will guide the selection of cases for case study analysis in the second paper. As variance in relation to the independent variable is essential, cases will be selected in order to represent participatory processes that have produced different levels of democracy. By studying a smaller number of cases that demonstrate this variation in terms of the quality of democracy, even though they all have implemented a participatory process, it will be possible to distinguish the specific features in the process that have generated these varying levels.

Material

Constitutional documents, bylaws and peace accords of the respective countries will be a significant source of information when establishing whether or not formal rights are constitutionally guaranteed. Of course, constitutional protection of rights does not always mirror political reality making it essential to include sources that capture this dimension and the actual observance of these constitutional principles. “Freedom of the World” and “Freedom of the Press” individual country reports by Freedom House will be a valuable resource. The fact that their definition of “freedom” corresponds to that of a “quality democracy” as defined and operationalized for the purposes of the dissertation at hand (Karvonen 2003; 17), will make these reports relevant material throughout the empirical research. The unique and comprehensive resources provided by the organization has been perceived to hold great validity and reliability by the political science research community which has made the organization’s reports frequently cited among political science scholars (Karvonen 2003; 18). Of course, other resources will also be valuable both for the purpose of securing/scrutinizing the accuracy of before mentioned reports as well as for filling gaps (among others Human Rights Watch reports, Institute on Religion and Public Policy, International Bar Association’s Human Rights Institute and International Crisis Group).

In order to be able to classify various ways of implementing a participatory constitution building process as an instance of pseudo participation, partial participation or full participation, the collection of data will be focused to reports from constitutional commissions, constituent assemblies, national conferences, interim-constitutions in which the procedures for making the constitution has been established, etc. for each of the cases under investigation. When all cases have been investigated it will be possible to group the cases into Pateman’s three categories of participation. There is a considerable amount of single case
studies that have focused on descriptions of individual constitution building processes which will be useful in this respect.
BIBLIOGRAPHY


