

Constituent Process and Constituent Assembly: the making of constitutions through the larger involvement of citizens

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ABSTRACT – Until recent times, democratic constitutions were generally the product of a ‘constituent assembly’. More recently, this mode of functioning of the constituent power has been challenged by new forms of its exercise on the basis of ‘participatory democracy’ schemes whereby ordinary citizens are encouraged to take part, within the ‘public space’, in the taking of public decisions. This kind of procedure, which first emerged mainly in the legislative and administrative sphere, is now increasingly frequent also in the creation of new constitutions, or in cases of amendments which bring major changes to the original text. Recent experiences show that there may be a close complementarity between the classic notion of ‘constituent assembly’ and a new concept of the ‘participatory constituent process’ which could accompany it. This paper takes advantage of the light cast by some recent cases in order to reflect on what effects are more likely to derive from constitutions which are written or amended in a participatory manner; that is, in terms of procedural construction, legitimacy, and outputs. The paper’s main findings suggest that the idea and practice of participatory constituent processes can be seen as a way to give citizens a greater sense of ‘ownership’ of their constitutions, thus challenging the present situation in which that relation seems increasingly affected by the general perception of a legitimacy crisis in representative democracy. Similarly, such constituent processes seem to offer added value in terms of content elaboration and other outputs, although such conclusions are not always generalizable.

SUMMARY: 1. Introduction – 2. The invention of the constituent assembly and the complex process behind it. Some participatory constituent processes. – 3. The constituent assembly as a component of representative democracy and its deficiencies. – 4. The participatory process in creation or change of the constitution. – 5. Stages of the procedure. Successes and failures – 6. Practical advantages and problems – 7. The participatory process and innovation of the content of constitutions: some highlights – 8. Conclusions.

1. Introduction

This paper examines under what conditions it is possible and convenient, especially in terms of legitimacy and output, to draft and approve the constitution of a democratic country or its major changes through a participatory

process whose purpose is to complement the traditional procedure conducted by a constituent assembly. The answers to the questions raised will be positive from both a theoretical and practical point of view. They will reinforce a stance that has recently emerged and is being supported by a considerable body of doctrine, as well as by some international documents, and above all by many experiences throughout the world in which the participatory constituent process accompanies the functioning of the constituent assembly. The best examples are those concerning cases of recent constitutions in Africa, Latin America and Asia, which are considered below. But some cases are also present in 'stabilized' Western democracies. A specific issue to address is whether such a form of constituent process favours new contents within a constitution, in particular the provision of participatory devices in development of the administrative procedures of the state's normal activity. The latter, starting from the 1925 Austrian Administrative Law and the US 1946 Administrative Procedure Act (APA), has become an increasingly frequent condition independently of constitutional reforms. This trend is demonstrated by a fast-growing and extensive literature on citizens' participation in public policies and administrative procedures, as well as by practices which, in many countries, have been recently extended to lawmaking processes (see Oxford pro Bono public, 2011), as presently testified both by more formalized experiments, as in the case of the Finnish legislation on off-road traffic (Aitamurto et al., 2013), and by more radical bottom-up schemes, such as the Sunflower Movement in Taiwan, which led to the still ongoing process of building the law-frame for the operating conditions of global players like Uber or Airb&b (Roubini and Tashea, 2014; Tang, 2016). As this trend has spread worldwide, it has also produced interesting political supra-national recommendations for adopting more participatory lawmaking schemes, like those on E-legislation processes issued by the Council of Europe Committee of Ministers (2009).

2. The invention of the constituent assembly and the complex process behind it. Some participatory constituent processes

Undoubtedly, one of the most striking conquests of Western civilization is the invention of the institution usually termed 'constituent assembly'. Such a pivotal gear of constitutional engineering (Elkins, 2011) was conceived almost simultaneously by the American and the French revolutions of the eighteenth century. From that century onwards, many constitutions continued to be granted by the respective crown, but – generally speaking – the democratic regimes were built and shaped by constituent assemblies.

The process of structuring and empowering constituent assemblies allows citizens to exercise their power over the foundations of their civil life, a new regime, or even important changes in an upheld constitution. In this type of procedure the constitution is attributed to what can be termed – to use Hart's (2003) expressions – an “act of completion” or “a final act of closure” (eventually ratified by a referendum) which concludes a social contract and frequently marks the settlement of a conflict within a country.

But behind the acts of the constituent assembly and the constitution itself there lies a complex and often long ‘process’ generally described as a phase of ‘transition’. In fact, even if constitutions are legally considered the product of that body, they are the result of an extremely complex political and legal process composed of many different actions and authors. This becomes clear upon examining the case of the *Weimarer Republik* (1919), as well as the Constitution of the first Republic of Spain (1935), the Italian Constitution of 1948 (U. Allegretti 2014), or the *Grundgesetz* of the Federal Republic of Germany (1949; Frotscher and B. Pieroth 2011); and more recently those of Greece (1974), Portugal (1975) and Spain (1978; Ruiz Robledo 2011).

Within all these processes, the main authors are, or are thought to be, the political parties (e.g. historians have named Italy “the Republic of the parties” because they were the protagonists in the Constituent Assembly and in prior negotiations). In the age of mass parties, in particular during the twentieth century, participation in politics by ordinary citizens was channeled through the structure and action of the political parties, conceived as *the* intermediaries between society and public institutions. Until the end of the last century, any reference to citizens’ participation was clearly and almost exclusively understood as participation through the action of political parties.

The situation started to change in the last decade of the twentieth century, when the fast-spreading process of formal democratization of several countries around the globe intertwined with a severe crisis of political legitimacy in various consolidated democracies, and even in several of the newly-established democratic regimes (Norris, 2011). Since then, the loss of confidence in the capacities of mediation and in the representativeness of political parties, together with the growing demand for more direct protagonism by citizens and social organizations worldwide, has generated frequent, although scattered, experiments aimed to involve citizens in constitutional changes.

Different types of relations between constituent assemblies and spaces dedicated to crowdsourcing processes have been adopted in different

situations, without a clear pattern which could explain the specificities of the solutions chosen. Cited in what follows are some examples that can somehow be considered representative of different families of recent concrete experiences.

In some respects, the Brazilian Constitution of 1988 represented a special case, and a path-breaker in relation to the traditional mainstream view on how a new democratic Magna Carta should be conceived. It is a well-known example of a text that arose not only from the negotiations among political parties and within the Constituent Congress but was also shaped by the direct influence of a wide range of social organizations, such as trade unions, the *Sem Terra [Landless Workers Movement]* and many Catholic groups, among them the highly active *Comunidades de base*. Today, the Constitution's contents strongly reflect proposals put forward by several of these groups (do Carmo 1986; Comparato 1986). It can therefore be counted among the 'participatory' constitutions, and possibly even be considered a prototype of that category. More than 12 million signatures were collected and presented to the Constituent Assembly to support amendments during the discussion of the Constitution project.

If Brazil can be seen as a precocious example of a participatory constitution-making process able to produce a sustainable constitution, other simultaneous, but less well-known, early cases are documented. For example, in 1988 Uganda began a constitution-making process open to people's suggestions which culminated in the Constitution of 1996, while in 1986 the Nicaraguan National Assembly had already invited citizens to comment on the draft of a new constitution. In the latter case, some 100,000 citizens took part in the various public meetings organized for the purpose, forwarding more than 4,300 suggestions to the Assembly.

Since the early 1980s, Canada has represented another forerunner of the new constitutionalism. Its especial interest, in the case of the proposed secession of Québec, consists in an important judicial decision of the Canadian Supreme Court (1998) which recognized that the Canadian Constitution conferred "a right to initiate constitutional change on each participant", even if the advice did not produce an immediate practical effect. Recently, Canada has added further reasons of interest because of the innovations pursued by two of its Provinces, that of British Columbia (2003) and Ontario (2007), both engaged in testing a special procedure centred on the use of citizens' assemblies to propose electoral reforms. This could lead to innovative contents imagined as unlikely to be introduced by traditional lawmakers too intertwined with traditional benefices and privileges conceded by the existing regulations. It should be clarified that

these two cases are not explicitly related to new forms of constitution-making. However – although limited to an important portion of the constitutional system, i.e. electoral reform – they closely relate to it. From this perspective, the fact that the British Columbia reform ended in a setback, because in the final referendum the law obtained the relative majority of votes (57 %) but did not receive the high percentage required by law (60%), is in our view only a side issue.

In the African continent, an interesting case is that of Eritrea (certainly not an outstanding example of democratic government), which between 1994 and 1997 engaged in a campaign of constitutional education and consultation (see Hart 2003, who classified the case of Eritrea in the category of “conversational constitutionalism”).

A distinctive case warranting especial mention occurred in 1996 during creation of the constitution of the new South Africa. This significant constitution was the outcome of long and difficult negotiations between the black and white communities in the country. Negotiations were officially opened in 1989-1990 and developed in special forums: the Codesa convention and the Multi-Party Negotiating Process (MPNP). This stage may be considered a ‘pre-constituent phase’. It was characterized by negotiations through which political parties and other citizens’ organizations confronted the government of the Republic of South Africa when it was still ruled almost exclusively by the white minority.

The true constitution-making process that followed this pre-constituent phase was undoubtedly more ‘diluted’ in that it took the form of a two-phase process. In the first phase, an “Interim Constitution” was approved (end of 1993) in the MPNP. It consisted of 251 articles and was accompanied by 34 “Constitutional principles” serving as a guide for the final Constitution, which was expected to be developed and approved by a Constituent Assembly after being ‘certificated’ in two steps by a Constitutional Court created by the same Interim Constitution. The second phase (1994-1996) was centred on the work of an elected Constituent Assembly. However, in parallel, a complex “Public Participation Programme” was implemented to accompany and support the shaping of the constitutional draft. This Programme, in a preliminary stage, led to 2 million “submissions” to the Constituent Assembly and, in a secondary stage (after a draft had been drawn up by the Assembly), to 250,000 more precise submissions (Orrù 1998; Ebrahim 1998; Federico 2009).

3. The constituent assembly as a component of representative democracy and its deficiencies

Constituent assemblies are usually regarded as the top tier of representative democracy. They issue from a popular direct or indirect election and are formed by people's representatives who exert their mandate with freedom. In this kind of democracy, which is common in modern times (in contrast to the prevailing direct character of Athenian democracy), legislative and administrative powers are entrusted to bodies stemming directly or indirectly from a popular election.

The creation of a constitution and the ordinary conduct of state life is therefore homogenous: the nature of what we call 'the state' or 'the institutions' corresponds to the general pattern of representative democracy, where the elected authorities are supported by a complex structure of administrative and technical bureaucracy, so that the state becomes a complex system of institutions articulated in relation to one another.

We may claim that representative democracy holds the monopoly in the majority of the Western countries, and that through its replication it has become the dominant approach globally. Although its tie with the life of society is evident, the two do not coincide: representation is the artifice (as aptly pointed out by Pierre Rosanvallon, 2009) that allows the elected body to be considered the expression of the people.

In fact, the largest conception of modern society is the 'public space' more ample and more vital than the mere circle of public institutions and their acts, given that institutions are only one part of the life of a society (Habermas 1962, 1992). 'Civil society' may be the suitable name for the other major actors in the public space, forming a context that, when developed, fosters a rich presence of economic players: trade unions, organizations of workers, employers, and other professionals, as well as cultural, religious, women's, youth and disabled groups and communities, non-governmental organizations (NGOs) and other types of associations. All of these are actors that orientate a society and are able to interact with public institutions.

Thus, participation in electoral processes and in the activities of political parties, although necessary and valuable, rapidly appeared insufficient to civil society as its unique form of participation and democracy. This is furthermore evident when, in the second half of the twentieth century, political parties gradually came directly to occupy almost all the state's power, including routine administration tasks. Representative democracy started to be considered

inadequate. Especially in a large number of countries of post-colonial experience or exposed to acute conflicts, the representative role of parties and the effectiveness of representative institutions started to be strongly challenged. In such situations, ordinary citizens were therefore torn between inertia – the pure delegation of power to the elected persons and to their charismatic power – and rebellion against the state, as individuals or as members of unions and movements, thus producing strong tension between inhabitants and institutions.

Various forms of participation by civil society in public decisions were subsequently developed, either by devices of direct democracy (especially referenda) or through the greater decentralization of power to local authorities; but also via the lobbying exerted by economic groups which configured models of so-called pluralistic (or corporate) democracy, or through civic movements and spontaneous citizens' mobilizations in public meetings and demonstrations and forms of self-management. A more permanent relation between political/administrative institutions and local inhabitants was consolidated through *ad hoc* committees on public affairs and the participation of associations and other society groupings in some specific public bodies, while participation of stakeholders in administrative and regulatory procedures was complemented through consultation with society representatives by public institutions, etc. (U. Allegretti 2011).

Whilst all these devices of social dialogue had a specific value, it was at the end of the twentieth century, and after multiple unsuccessful attempts, that new forms of active public participation in political proceedings were put to the test. These allowed ordinary people, separately or jointly with their organized associations, to take part in deliberations through discussion on many institutional activities, while final decision-making generally remained a prerogative of elected officials. In this regard, it is necessary to distinguish 'participatory democracy' in its distinctive sense from other forms of participation, and above all from simple consultative processes and referenda. The latter may be seen as clumsy ways to involve people in public affairs whereby they just say 'yes' or 'no' to a particular decision (Landemore, 2015). Instead, participatory democracy is intended to be a more genuinely 'deliberative' range of tools enabling a richer interchange of arguments (in the sense of classic Greek philosophers and historians) between participants and the institutions.

This approach has been most successfully adopted? by some original models of 'participatory budgeting', such as the one started in 1989 in the Brazilian metropolis of Porto Alegre (G Allegretti, 2003). The approach has been

replicated by many municipal and local authorities and by a limited number of regions (Sintomer et al., 2014), while only very recently governments like those of Scotland and Portugal have started to propose experiments referred to the national state level. Undoubtedly, participatory schemes at central state level have been more rare: as in the case of the '*débat public*' on public infrastructures in France, where a deliberative process in the public space must precede the decisions of public administrations. Through procedures of this kind, a superior dialogue between state and society has been made possible, which in its turn has opened the way to numerous experiments all over the world.

Among the multiple goals of such procedures are the following: assuring the influence of citizens? on decision-making while incorporating their opinions? and interests (some viewpoints are otherwise not easily perceived by the administration, given the lack of proper evaluation by technicians and the bureaucracy of the public authorities); neutralizing the potentially improper interests of administrative bodies and their components; allowing the better legitimization of institutional decisions and of the administrative body itself; attempting to ensure that the output of the process corresponds more closely to the viewpoint of the society.

4. The participatory process in creation or change of the constitution

In this frame of development of citizens participation, the work and the vote of a constituent assembly – to create a new constitution or make major changes to an existing one – is the final step of a procedure in which people, called to express their opinion on the content of the constitution, are primary legal actors along with the assembly; and approval of the constitution has to be considered a legal process or a dynamic juridical procedure, rather than an isolated act of legal production.

Discussion on this topic has recently increased due to the growing number of cases around the world of the creation of new states and the radical transformations taking place within existing countries, as well as the aftermaths of civil and international violent conflicts. According to numerous scholars acting in international agencies (like UNDP) and think-tanks (like the United States Institute of Peace – USIP, the International Institute for Democracy and Electoral Assistance - IDEA, and Democracy Reporting International based in Berlin), the period 1986-2015 was characterized by a significant number of

cases of new constitutions drafted and approved through citizens' participation practices. Benomar (in 2003) listed 14 cases, while Kritz – in the same year – recorded 17. A particularly conspicuous analysis is that by V. Hart 2003, who states: "In a changing world, constitutional practice is also changing. Twenty-first century constitutionalism is redefining the long tradition of expert Constitution making and bringing it into the sphere of democratic participation". Nevertheless, some important cases in which the United Nations has provided assistance for constitution-making in post-conflict situations (i.e. Cambodia, Afghanistan and East Timor) have not involved a qualified approach to participatory processes, as demonstrated by a detailed report (Brandt 2005). Undoubtedly, in broad terms, the call for participation by people and peoples (especially in the frequent case of pluri-national states) has become a crucial aspect of many constituent processes. Despite some perplexities in the recent literature, we consider that a participatory constituent-making process is not only a possibility but in many cases a necessity, i.e. a natural and convenient way to create the final enactment of a constitution. In fact, the construction of arenas of social dialogue around a constitution guarantees a specific harmony between popular sovereignty and its exercise in the stage of its elementary use: that is to say, in the creation of its supreme expression.

One might even say that the deliberation on a constitution which could make it the product of a participatory procedure is still more justified than in any legislative and administrative act, given that the constitution expresses the fundamental principles ruling the life of a people, its choices, its moral and material goals, and the foundations of its entire life. This view is the more advanced product of the reflection on constitutional theory that began with distinguished German authors in the 1930s (U. Allegretti 2014). Moreover, people's feelings of 'ownership' of the constitutional order may reinforce the value of the constitution. In fact, not only does the constitution's legitimacy increase, but a process of this kind could constitute a solid basis for its implementation in the real life of the country.

Recently, some examples of participatory constitution-making in 'stabilized' democracies have announced the possibility of extending this type of procedure from new democracies and countries in transition to the Western world, including the European Union and Canada (for Québec, for instance, see the Report of the Organizing Committee of the Estates General, 2003, while for Australia see Levy 2010).

Today, moreover, this approach has some international legal foundations (Hart 2003): for example, article 25 of the United Nations International Covenant on

Civil and Political Rights (which was established in 1966 but entered into force in 1976) and, if subjected to a progressive reading, the general concept of article 21 of the UN Declaration on Human Rights (1948) which prescribes that, “[e]very citizen shall have the right or the opportunity to take part in the conduct of public affairs directly or through freely chosen representatives”.

Following this trend, the UN Committee on Human Rights (UNCHR) in its ruling *Marshall v. Canada* (1991), and later in its General Comment on the above-quoted article 25, stated that “citizens also participate directly in the conduct of public affairs when they choose or change their constitution” (of course providing that these forms of participation can be allowed to choose any specific constitutional system).

Recently, a review of the literature examining recent and complicated constituent processes in Egypt (in the aftermath of the uprising that began in 2011) concluded that: “the literature on constitution making suggests that participatory constitution making is the ideal form as well as an emerging norm in the international law” (Maboudy and Nady 2012).

5. Stages of the procedure. Successes and failures

The observations and the proposals originating from concrete cases help to imagine and structure different stages which could profitably characterize a process of participatory constitution-making. Such recommendations have even been clearly formalized into “stages”, with special regard to Southern countries, in SICM, 2001.

According to this literature, a correct process should begin with a preparatory stage of agreement on constitution-making principles (fundamental goals, institutions), which approximately corresponds to the work of Québec’s Organizing Committee of the Estates General on the Reform of Democratic Institutions. It should then continue through information and education programmes on what a constitution is and its principal contents. This stage includes illustration (sometimes “village by village”, as in the case of some African countries), of the need for and significance of a constitution in the everyday lives of citizens. For example, in the case of a historically democratic institution like the Canadian Province of Québec, a large number of town hall meetings were organized in numerous cities and districts of the province.

The subsequent stages can be described as the formation of a body for constitutional dialogue and of a national commission for the constitution-making (perhaps with the involvement of experts in legal writing), followed by the elaboration and adoption of a draft constitution by an elected constituent assembly, and a potential subsequent referenda. Similarly, the Canadian experiments in citizens' assemblies for the reform of electoral laws have suggested to some authors (Rose 2009) a four-phase process consisting of: (1) selection of the members of the convention; (2) an important 'learning phase'; (3) public consultation; (4) final deliberation.

As is easy to imagine, not all the recent processes of constitution-making satisfy these ideal requisites of sequential organization. For example, a process valuable as a participatory procedure like the Tunisian one has been marked by a visible lack of information campaigns. Hence, the whole procedure, although assisted by several international agencies, was not performed on the basis of a regularly organized participatory scheme because the key phase of the participatory process was a "Dialogue National" only possible due to the bottom-up intervention of a quartet of civil associations (Abbate 2014) which were awarded the 2015 Nobel Peace Prize for their "decisive contribution to the building of a pluralistic democracy in Tunisia".

The overall procedure of participatory constitution-making can, in general, be described as an incremental one (Landemore, 2015), given that the core of the procedure is 'deliberation': that is to say, a process of discussion of the different opinions not from an 'aggregative' point of view, but in terms of a space in which every participant expounds reasons supporting his or her own argument. As exposed by an Australian author (Levy, 2010), deliberation can be considered as consisting of two distinct phases: the true discussion of the topic, and the determination of the decision (even if the final decision is generally reserved to a representative body, for example the constituent assembly).

Given the fundamental need to guarantee the inclusion of a large diversity of people, the most difficult aspect of any procedure is choosing the best method(s) of outreach to assure the inclusion of persons different in gender, age, social and ethnic origin, economic and educational status, etc.. To guarantee such variety, techniques of random selection can be used, as well as layered proceedings; but various experiences prove that none of these methods perfectly fulfil this requisite of inclusiveness. For example, despite attempts based on sortition, in the Organisation Committee of Québec as well as in Ireland and Iceland (Olafsson, 2014) the majority of members belonged to higher or middle social classes.

The literature on participatory constitution-making generally highlights two central factors in the above-mentioned procedure and its steps: the need for a precise organizational design process, and the time necessary to implement it. In fact, many of the stages mentioned above appear to be necessary, particularly the period of 'transition' and the 'interim arrangements' among different parties and citizens' organizations in the pre-constituent period. In fact, they have generally proved to be decisive in the success of constituent assemblies.

Nevertheless, each context suggests different solutions for implementing (or reducing the weight of) the various points of the optimal scheme. For instance, in the case of Iceland, which after a severe financial and political crisis in 2007-2008 sought to replace the provisional Constitution of 1944, the result of independence from Denmark and of the events of the Second World War (Landemore 2015), the steps adopted were the following: (1) at the beginning of the process, after the 'Pots and Pan revolution' (the crowdsourcing event which opened the constituent process), there was a first National Forum of around 1,500 randomly selected individuals (2009), organized by an informal group, which discussed in an one-day exercise the values and priorities of a new constitution. Then (2) a Constitutional Committee appointed by the Parliament as the beginning of an official process of constitution-making organized a still randomly-selected second National Forum of 950 members (2010), accompanied by a rich exercise of 'virtual' participation by a high ICT-equipped team, in order to establish convergent viewpoints for the new constitution. Thereafter, (3) a very controversial election of a citizens-based Constituent Assembly was held, which appointed a restricted body of 25 members called the 'Constitutional Council' and responsible for redacting the draft of the Constitution in three to four months. This (4) was followed by a non-binding national referendum on the draft (2012) which raised an array of controversial issues (the voters were half of the citizens, the votes in favour were cast by 2/3 of the voters). After approval by the Parliament, according to the Constitution still in force, the draft had to undergo a second approval by a newly-elected Parliament. This obligation led to a cul-de-sac, because the new sovereign Parliament elected in 2013, which had a quite different composition from the previous one, set the proposal aside (Gylfason 2013; U. Allegretti 2013, Olafsson 2014). As in the case of British Columbia's electoral reform (Fung et al., 2011), so in the Icelandic case the 'antibodies?' created by representative democracy institutions to generate a certain degree of *demophobia* and dominate the participatory procedure somehow managed to block its capacity to impact on reality (G. Allegretti, 2016).

A more distinctive process has been, quite recently, the Irish reform of part of the Constitution (2012-2015). Eight specific issues for amending the Constitution in force were discussed by a so-called “Constitutional Convention”, a mixed body of 100 members – among them 66 randomly selected citizens, and elected politicians of different parties, including some in Northern Ireland – who discussed the various issues and proposed solutions. The Parliament of Ireland had to respond to the proposals, but was free to call a binding referendum on each issue. Up to now, it decided to call just two referenda (the most controversial one being that on same-sex marriage).

Nevertheless, from a practical viewpoint, and observing the cases on which information in Western languages has been circulating, it emerges that applying participatory methods to the creation of a new constitution or the amendment of the one still in force is not an easy task, and failure is a conjunctural possibility for every experiment.

The literature and experience have made clear some pre-requisites for a participatory procedure and highlighted that it is particularly useful after acute conflicts like civil and international wars. There are, however, differing opinions on whether participatory constitutionalism may aid or hinder cases in which the conflict (war above all) is ongoing or has recently ended.

Cases such as Bosnia and Herzegovina, Iraq, Afghanistan, Rwanda, and other countries offer different possibilities for analysis on this point. In fact, although successful processes exist, there are also cases of failures.

More important remarks can be made as regards pluri-national and pluri-cultural contexts. In these cases, the usefulness of dialogue, preparatory agreements, and debate before the constituent assembly appears to be stronger. This is why, even in a stabilized democracy like Canada, it has been proposed (Rose 2009) that in a country characterized by multiple nationalities – English, French, aboriginal and immigrants – a new constitution might be approved by a participatory method.

In this regard, South Africa is a precocious and leading example. However, more recent examples can be taken from Bolivia (Constitution of 2008) and Ecuador (2010). As underlined by Santos (2010), in both those countries the initiative originated from a complex assortment of indigenous and peasant organizations and the entire process, in both constituent assemblies, was permanently followed by these groups, which provided continuous contributions. This approach assured, for the first time, the active role of communities

historically marginalized in the life of those countries. In both cases, several social organizations interacted with the powerful majority party and the equally powerful presidents in power, and encountered strong opposition in both states. In Bolivia, victory was obtained despite the threat of secession by the richest part of the country. Finally, in both countries the success of the constitutional project was made possible by a compromise between the various players mentioned, and it produced two constitutions which represent the foundations for a pluri-national and a pluri-cultural state, furthermore characterized by a legal pluralism (U. Allegretti 2013).

Observation of other cases attests to the clear risk of failure of some processes. Whilst Iceland (2013), as we have already seen, and Romania (2014) have recently evidenced that this risk exists in Western contexts, the case of Kenya (2004) is an interesting example of failure in the developing world.

In Kenya, the rapid growth (that started in around 1992) of religious groups and other civil society organizations critical of the authoritarian government's transformation of the Independence Constitution of 1963 culminated in 1998 in recognition of public participation as the driving principle which could structure the review of the constitution. However, it was only after a tortuous process that, in 2003-2004, a Draft Constitution was put forward for public deliberation by the "National Constitutional Conference", including representatives of civil society along with parliamentary and political party representatives. Moreover, Constituency Forums of local elected leaders promoted discussions on reform and facilitated consultations with the residents in the constituencies. Nevertheless, the Proposed New Constitution failed to be approved, first being blocked by a judgment of the courts and finally being rejected by a referendum.

But the Kenyan constitution-making process was launched again in 2008, after the explosion of post-presidential election violence in 2007. Among other bodies, a Committee of Experts was established with the task of proposing a draft constitution after receiving more than 12,000 submissions from the public. This body was also responsible for organizing regional hearings on the most contentious issues. Subsequently, the committee undertook a civic education programme, which was "sporadic rather than sustained" (Ndegwa et al., 2012) and frequently overshadowed by the onset of campaigns orchestrated by politicians seeking to sway opinion in the run-up to a referendum that would conclude the process following the parliamentary decision on the draft. As a final result of the process, the referendum held in 2010 approved the new constitution by an overwhelming vote.

In Romania, in 2014, the project to reform the 1991 Constitution, already revised in 2003, was conceived mainly in order to address the major institutional problems that had become apparent over the years. As in other cases, in Romania the necessity of a popular deliberating process was asserted by political elites and radical social progressive movements, ultimately resulting in participation especially centred on wealthy and highly-educated social groups (Gherghina and Miscoiu 2014). The ultimate abandonment of the draft discussed through direct involvement of citizens in delivering suggestions (especially through ICTs canals) was due to external conjunctural factors mainly related to political disagreements and early political elections. However, as Gherghina and Miscoiu (2014) observe, the Romanian process satisfied the requirements of a genuinely deliberative (and, we may say, participatory) process in a state characterized by “weak civil society and low civic engagement”, resulting in a procedure “unprecedented in any domain of civic involvement in Romania”, so that it can serve as a basis for further developments in the future.

These experiences may be considered fruitful in terms of lessons learned. They show that the conditions for success in drafting a constitution through a participatory method appear to be multiple and often unpredictable. Due to the multitude of contexts – as is also the case of participatory procedures in legislative and administrative proceedings – a plurality of channels and methods of dialogue (e.g. face-to-face meetings, virtual methods via Internet etc.) must be considered, as recognized among others by Brandt 2005. One could say that there is a particular method for each specific case, and perhaps no method is universally suited to all contexts.

Nevertheless, some general conditions are (or should be) common to all cases. Once again, the South African example offers a good paradigm. A campaign of advertising and information through the various media channels about the meaning and content of a democratic constitution (that is to say, about major political, ethnic, economic, ethical and religious problems); public meetings for further discussion across the entire county; touring in every village; national hearing programmes and the possibility of submissions to the Assembly: these steps should be taken at the preliminary stage and upon proposal of the draft by the Assembly, and together they form the general pre-requisites of all participatory processes.

Undoubtedly, another necessary condition for success is the positive attitude of political parties and representative institutions. Both cases of failure in Iceland and in Romania were due to political quarrels and, more generally, to the

attitude of political parties. Other important actors may also have a decisive role in the success (or failure) of this process, as in Iceland, where the owners of fishing banks were frightened by the draft declaration on the nation's ownership of natural resources.

6. *Practical advantages and problems*

From a general point of view, the predominant advantage of participatory procedures applied to constitution-making is the possibility for different ideas circulating in a society to feed into the process. When the minds and hearts of people penetrate the legal order, a commitment to the nation and to the different communities within the nation can be more easily created, thereby rendering the idea of 'public ownership' of the constitution stronger in the people or in the different peoples living in the same territory or state (International IDEA 2009; CCD 2009; both specially referring to the Nepalese case).

Furthermore, evidence from many concrete cases suggests that a participatory process allows for better awareness, among the members of the Constituent Assembly, of the needs and ideas of the people. To be cited in this regard are multiple examples of traditional constitutional, legislative and administrative proceedings that do not take account of important elements of civil life. Participatory processes therefore allow these elements to be brought to public attention.

As for other cases of participatory democratic innovations, to be stressed is that not all proposals are accepted by the decision-making body or the constituent assembly (nor could they be all accepted, given the fact that their variety includes numerous irreconcilable and opposed measures).

However, there are many examples of their effective influence. One of the clearest examples is provided by the Brazilian Constitution of 1988 (Herkenhoff 1996), where the intense participation of the *Movimento Nacional pela Reforma Urbana*, a highly pluralistic umbrella-entity, proposed the incorporation into the federal Constitution of a provision on the "right to the city", which was far more complex than the right to housing and the sum of other individual rights. Even if its goals were not completely fulfilled by the Constitution itself, but only later by the law entitled the Statute of the City (2001), it cannot be denied that the sociopolitical movement, which took place during that type of constituent process, determined new successes and influenced not only the constitution but also the juridical framework which tried to implement its principles (see Saule jr and Uzzo, 2009, among the numerous studies on urban reform in Brazil).

Also to be emphasised is the extent to which in many countries, like South Africa, Tunisia or Rwanda, the specific attention paid during the constitutional process to the promotion of women's participation has been decisive in assuring them non-discrimination provisions within the constitutional texts. The inclusion of women in the constituent process appears to be particularly important in countries where discrimination against them is strongest (Hart 2003). It is quite obvious that freedom of speech and assembly, a certain amount of previous conditions of social inclusion and of literacy, and personal security, are necessary prerequisites for a genuine participation process.

Whilst the existence of an advanced and vital civil society (as in Brazil and South Africa) is another clear precondition for the success of participatory constitution-making processes, it should be added that an indispensable condition for such success is the positive attitude of the political parties and of the representative institutions. Both cases of failure in Iceland and Romania were due to political quarrels and more generally to the negative attitude of political parties towards the participatory process.

Cases of true manipulation are obviously not impossible even in a setting of self-declared attention to participatory procedures. In the case of Zimbabwe, for example, despite the 7,000 written submissions received by the commission established to produce a draft constitution and 4,000 meetings nationwide, president Mugabe and his party members were able completely to ignore the suggestions delivered by citizens.

7. – The participatory process and innovation of the contents of constitutions: some highlights

If, in view of the aforementioned reasons, participatory constitution-making can be recognized as having value *per se*, one pivotal outcome of this procedure is or should be the content itself of the constitution. Most or all of the participatory process of constitution-building consists in advocating, and effectively binding, implementation of the constitution within the society to advancements such as equality, social rights, harmony of different viewpoints on moral, religious and cultural matters. Fung (2011) terms this attention to ultimate goals "consequentialism", opposing it to "deontological" views of participation, which are satisfied by enlarging the democratic debate, considering it worthwhile *per se* independently from other deeper objectives that it can pursue.

It is undoubtedly important that innovation and the historical experience of a country could survive in the cases of new constitutions. The historical heritage continues to be largely followed in the context of political organization, as evidenced by the case of the proposal of a new Icelandic constitution in which the traditional form of substantial parliamentary governance remained dominant. In Ecuador and Bolivia, too, permanencies are apparent in the preference for a presidential government, which – in both cases – was not challenged by the new constitutions.

Despite such continuities, in some contexts unforeseen contents have emerged from participatory experiments in constitution-making. In South Africa, for example, completely new objectives arose from the participatory processes, retro-inspiring the entire constitution. In Bolivia and Ecuador, three revolutionary features characterized the constitutional innovation. The first (1) was a new conception of the state, declared to be *pluri-national*, through equal recognition of the country's diverse ancient indigenous cultures (*pluri-cultural* principle). Consequently (2), the constitution introduced the principle of *legal pluralism* applied to the different parts of the population. Third, (3) the rights of Nature, described as the great "Pacha Mama" (using the indigenous expression, which is another radical innovation of the constitutional writing) were proclaimed, and Nature was conceived as a *subject of law*. Such elements highlight that participatorily-written constitutions can be meeting spaces of different civilizations (of European origin and indigenous peoples with their "epistemology of the South", as described in Santos, 2010). One of the most important consequences of this is a new conception of human rights. In fact, the latter appear to be conceived in a collective, and not only traditionally individualistic, perspective, which therefore sees the subjects of these rights as threefold: individuals, communities, and nature (Pacari, a Quechan lawyer, 2014). These are all protagonists of participation in the governing and administrative processes.

At the same time, the centrality of gender equality appears to be another key feature of many constitutions which have privileged the creation of participatory spaces during their process of writing or amendment. In this regard, the Tunisian case, referring to a prevalent Muslim context, is one of the most interesting, because it is indubitable that the gender issue was a very important factor in the entire process of transition (Abbate 2015).

In the case of Iceland, the question of nature was at the centre of tentative work on the new participatorily-written constitution: the right to a healthy environment, and safeguarding it in an under-populated country. One can ask whether such

factors would be so central in a traditionally-written Magna Carta. In fact, the idea of the public ownership of natural resources, as well as the right to information and other important features, were introduced by the conclusions of the National Forum.

Moreover, in cases such as Bolivia and Ecuador (although not significantly in the Icelandic draft) the participatory process of the new constitutions led to the establishment of a larger number of innovative norms that induced the inclusion of participatory processes in the conduct of many sectors of public policies and administration (at least 35 in Ecuador and 20 in Bolivia, as calculated by U. Allegretti 2013). It is expected that participatory forms of administration will be introduced into the organization of the health services, the education sector, and the organization of public assistance; and general principles are foreseen in the organization of power.

For a good example, one can again refer to the Brazilian case. The success of urban reform in Brazil required over ten years of implementation and continuous pressure by the "*Forum Nacional de Reforma urbana*", which was formed during the constituent process of 1986-1988 and consolidated in its aftermath. The law entitled "*Estatuto da cidade*", which represents implementation of the chapter of the Constitution on urban reform ("*Da politica urbana*"), was approved only in 2001, but it can be considered an important result of the participation carried out within the federal constitution process.

In this light, to be emphasised is that a constitution, even a participatory one, is just a tool in the hands of the people. Although its effects are not automatic, they can provide successful feedbacks when the constitution creates a widespread collective awareness of its goals and its prerogatives. The latter is possibly an effect easier to achieve when a participatory approach extends and deepens the relation that citizens are able to create with such a fundamental legal foundational document.

8. Conclusions.

The examples reviewed in the previous sections are often prominent and formalized. Are they part of a trend that may become generalized in the future? An answer to the question is impossible. As observed by V. Hart (2003), "ironically, older nations in the western liberal tradition from which such calls have come have not often themselves extended the idea of democratic governance to constitution-making". This was approximately true for the

situation at the beginning of this century, but it is not so now, as at least seven stabilized democracies (British Columbia, Ontario, Québec, Australia, Iceland, Romania and Ireland) have experimented with this kind of process. This is not a comparatively large number, but it is equally imprecise to say (Landemore 2015) that the Icelandic crowdsourcing experiment has the “pedigree of the first participatory constitution in the world” as frequently claimed by careless observers.

However, it is possible – at theoretical level – to argue that the creation of a true ‘public space’ may be at the origin of participatory constituent processes. They do not substitute the institution of the constituent assembly, but they can exist alongside or be complementary to it. The growing complexity of contemporary societies makes this kind of approach to the creation of a constitution and to constitutional amendments fit and useful. When a constitution is to be adapted to different nations and cultures, including different legal traditions, it seems ‘natural’ to proceed with procedures more complex than those previously adopted as the mainstream tools.

In these cases, obviously, the main problems will concern the capacity to stimulate majorities and minorities to interact in the process. This perspective is important, considering that constituent assemblies usually tend to homogenize diversities rather than support the safeguarding of diverse identities of peoples.

If a world subject to growing globalization is bound to become a more highly pluralistic, and not a more homogenous, complex, it would be wise to have arenas and resources able to process and reflect this complexity by assigning the possibility of intervention to all society’s components.

Of course, as shown in the above review, not all these processes are successful, neither in a procedural sense nor in their substantial outputs (in many cases due to political conjunctures or to the ‘antibodies’ created by representative institutions in order to protect their primacy and autonomy).

However, it can be concluded that the idea and practice of a ‘*participatory constitutional process*’ may be more fit for purpose today than the exclusive use of the ‘*constituent assembly*’. We can define this mode of constitution-making by using the term, introduced by Hart, of ‘*new constitutionalism*’. This idea and its practice may be the way to give the peoples of post-colonial territories and Western countries a greater sense of ‘ownership’ of their constitutions. Currently in many states, including Italy, it seems that people have missed or risk missing such opportunities.

Thus, a participatory constitutional process should not replace the role of the constituent assembly; rather, it should precede its election and accompany its functioning and deliberations. The constituent assembly will not lose its substantial role as the framework for the debate among the different political parties nor as the ultimate decision-making body. However, collaboration with the general public will enrich the debate and the motives of the decision-making itself, as well as influence the proposals of the political parties and control – *inter alia* – the advantages that bureaucratic and technical staff can sometimes gain when they are left isolated in the discussion of certain topics.

For new constitutions in post-conflict countries and multinational states, the role of participation is more necessary than in stabilized situations because of the lack of information and the awareness of people (or of the different peoples forming a unitary or a federal state). Of course, there are many conditions, examined in section 5 which must be fulfilled to obtain reliable results.

The greater participation of citizens in the conception of constitutional values and norms is not merely a theoretical progress (which of course would be important *per se*); it is also a practical advantage, given that – as already noted – it is likely to affect the progressive contents of constitutions. It also offers political, social and cultural actors the possibility to participate in legislative and administrative proceedings and obtain positive results, albeit after inevitable struggles against regressive or conservative forces.

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