Dialogic Democracy, Feminist Theory, and Women's Participation in Constitution-Making

Susan H. Williams[1]

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As the Director of the Center for Constitutional Democracy, I was involved in the constitutional

amendment process in Liberia that ended last year. Although the process occupied several years, it

ended without producing any amendments. In this paper, I will reflect on what can be learned from the

experience in Liberia about the issue of women's participation in constitution making. I will use the

lessons I draw from this experience to generate a more general theoretical model for thinking about

women's participation in constitution-making, based on a feminist-inspired understanding of dialogic

democracy. I believe that this model can be useful as a heuristic in designing constitution-making

processes in a wide range of countries, and can help us to organize and systematize our more country-

specific insights.

The feminist, dialogic approach I will offer highlights a several important ideas. First, the goal of

a system of participation in constitution making is not simple aggregation of interests; it is to create a

process of dialogue in which all voices contribute to the ultimate outcome. This goal not only requires

the participation of women, it also requires that we design the types of processes that will encourage all

of the participants to approach the task with an openness to the dialogue. Second, no single form of

participation or dialogue is going to be sufficient. Every actual dialogue suffers from defects that

interfere with its ability to serve as a good mechanism for the expression of women's voices. As a result,

we should not be looking for a single model of some ideal (or even best practical) way of structuring

participation. Instead, we should be looking at the process of constitution-making as a system and trying

to design it so that it includes a wide range of participatory mechanisms in which the defects of one

mechanism can be offset by the strengths of another. And, in thinking about this system, we need to

keep in mind that it is not enough to ensure that women are present when the dialogue is taking place;

we need to be attentive to the power dynamics that determine who is heard within dialogic venues and

not just to the power dynamics that determine who is there. Third, we need to reimagine the meaning

of representation in order to provide real voice for women. No constitutional process, however

participatory, will include all of the women within a country: some form of representation is a necessary

mechanism for communicating women's perspectives within the constitutional process. But the

traditional view of representation as based on an agent/principal relationship is insufficient to provide

the kinds of representation women need. Seeing representation as a more dynamic and creative role –

indeed, as multiple different roles -- will help us to design processes that give women a real voice in the

creation of their constitutions.

I.   Liberia

    A.   Background

Liberia is a West African country of about 3.4 million people.[2] While it was never technically a

colony of another country, it experienced many of the same dynamics, with the important, (but

unfortunately not transformative) difference that the colonizers were also Black. The modern nation

traces its founding to the arrival of settlers who were freed American slaves repatriated to Africa by a

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[2] See Liberia Institute of Statistic and Geo-Information Services, 2008 National Population and Housing Census Final Report, at http://lisgis.net/page_info.php?&7d5f44532cbfc489b8db9e12e44eb820=MzQy (last checked on 8/21/15). The US State Departments website, which was updated 2012, puts the population at 3.8 million. See US Department of State website at http://www.state.gov/outofdate/bgn/liberia/196485.htm (last checked on 8/21/15).

private organization.[3] The descendants of these settlers, who are referred to as "Americo-Liberians,"

form about 5% of the population of Liberia, but they still constitute a dominant class in terms of

education, income, and political power.[4] The remaining 95% of Liberians are the descendants of

indigenous peoples who occupied this territory when the settlers arrived. They belong to dozens of

different ethnic or tribal groups, speaking different languages and having different customs. While most

Liberians are Christians, there are substantial minorities who are Muslim (particularly the Mandingo,

concentrated in the north of the country) and many who still practice traditional forms of animism. [5]

The formal legal system in Liberia is based on the American model and includes separation of powers,

presidentialism, and judicial review.

Liberia suffered a devastating civil war that raged from 1989 to 2003.[6] During this period,

perhaps as much as 10% of the population was killed, with many more suffering injury, dismemberment,

and rape.[7] The infrastructure of the country was destroyed: roads, power systems, educational systems.

And much of the pre-existing social structure was undermined: IDPs moved to new areas, leaving clan

and tribal structures behind; elders were killed or their authority destroyed by the many young men

with guns; large numbers of children became soldiers, losing the guidance of their families and any

chance at an education.[8] The level of disruption of pre-existing social structures is hard to overstate.

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[3] See Quentin Outram, Liberia: Roots and Fruit of the Emergency, 20(1) Third World Quarterly 163-73, 163 (1999). The nature of this category – "Americo-Liberian" – is complicated. It is not simply a matter of ancestry, although that is its foundation. It is possible for people to shift from indigenous to Americo-Liberian based on their life experiences. For example, some indigenous families send their children to be raised in Americo-Liberian households in the capitol. These children get a better education and are exposed to the culture of the elite class and they may, as adults, identify (and be identified by others) as Americo-Liberian. The relative fluidity of the category does not, however, alter the fact that it carries substantial social consequences.
[4] See US Department of State at http://www.state.gov/outofdate/bgn/liberia/196485.htm (last checked 8/21/15)
[5] See Gwendolyn Heaner, Religion law and human rights in post-conflict Liberia, 8(2) Afr. Hum. Rts. L.J 458, 473-474(2008) (estimating 40% Christian, 20% Muslim, and 40% animist); U.S Department State at http://www.state.gov/outofdate/bgn/liberia/196485.htm (" Christians 85%, Muslims 12%, others 1.5, No religion 1.5%")
[6] See Amos Sawyer, Beyond Plunder: Toward Democratic Governance in Liberia 47-48 (2005)
[7] See id. at 43; Outram, supra n.3 at 163.
[8] See Sawyer, supra n. 6 at 43-49.

After peace talks created an interim government to end the war, elections were held and, in 2005, Liberia elected the first woman head of state in Africa, Ellen Johnson-Sirleaf.[9] She was reelected in 2011.[10] Since she took office, Liberia has experienced some real progress on its deep problems, including some improvement in infrastructure, much foreign investment, and some increase in economic opportunity. At the same time, there is wide-spread corruption (including in the President's administration) and continuing poverty, low levels of education, and little access to health care. The limited progress made was, moreover, halted (or, in some cases, even reversed) by the Ebola crisis. And President Sirleaf's handling of that crisis – which included quarantines and the imposition of martial law – was widely regarded as problematic. People in Liberia are very frustrated with what they see as the slow rate of improvement in their lives.

Gender inequality is a constant throughout the history of Liberia: pre-war, during the conflict, and in the time since democratic government was restored. Women in Liberia are much more likely to be illiterate than men (about 60% illiteracy for women, compared to 30% for men),[11] they are poorer than men, and they occupy few positions of power in government or business. While the President has appointed a number of women in the executive branch (almost 1/3 at some levels),[12] less than 11% of the legislators are women.[13] The vast majority of Liberian women work in the informal sector, as agricultural workers or market traders, and are, as a result, extremely vulnerable economically. Half of

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[9] See Jacqui Bauer, Women and the 2005 Election in Liberia, 47(2) Journal of Modern African Studies 193 (2009).
[10] Because the Constitution includes a two-term limit for the Presidency, there will be a new President after the election in October of 2017.
[11] See H.E. President Ellen Johnson Sirleaf Annual Message to the Third Session of the 53rd National Legislature of the Republic of Liberia January (2014) at http://www.emansion.gov.lr/doc/FINAL_ANNUAL_MESSAGE_2014.pdf (page 28)
[12] See Government of Liberia, National Review Report on Beijing +20, 10 (2014)(" with cabinet of 22 members, 6 are women, which is 31.8%; Deputy Ministers are 85, which is 29.1%)
[13] See Women in National Parliaments, Interparliamentary Union website at http://www.ipu.org/wmn-e/classif.htm (last checked 9/25/15).

all Liberian women become pregnant before the age of 18.[14] And there is an epidemic of rape in Liberia:

it is the most prevalent violent crime – even with the massive underreporting – and a majority of the

victims are under 18 years old. [15] In the customary law system (which is where the vast majority of non-

criminal disputes are settled), [16] there is both de jure and de facto gender discrimination. Customary law

for many groups in Liberia allows polygamy[17] and tends to treat rape and partner abuse with leniency.[18]

It allows marriage for young girls [19] and, for many groups, includes FGM.[20] Traditionally, women were

seen as property and had no right to inherit from their deceased husbands; indeed, they were expected

to marry his brother.[21] Daughters do not inherit from their fathers. On divorce, children are understood

as belonging to the father.[22] Women cannot be chiefs in most of the groups and are discouraged from

speaking in public at all in some of them.[23] In short, in both the formal legal system and the culture

more generally, Liberian women are systematically disempowered.

       B.   The Amendment Process

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[14] See UNFPA Leads War On Teenage Pregnancy In Liberia, Sengbeh's weblog at
https://sengbeh.wordpress.com/2013/07/12/unfpa-leads-war-on-teenage-pregnancy-in-liberia/ (quoting a UNFPA official)

[15] See Facts About Rape in Liberia, UNMIL at
http://unmil.unmissions.org/Portals/unmil/Facts%20About%20Rape%20in%20Liberia.pdf

[16] See Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options, United States Institute for Peace Report 4 (November 5, 2009) (hereinafter Looking for Justice).

[17] See Felicia Coleman, Gender equality and the rule of law in Liberia: statutory law, customary law, and the status of women in Constituting Equality: Gender Equality and Comparative Constitutional Law 195, 197 (Susan H. Williams, ed.) (Cambridge University Press 2009)

[18] See Compton, supra n. at 65.

[19] See Heaner, supra n. at 472-474"("Marriage age of consent was 12 years in rural areas and 16 in urban.")

[20] The overall rate of FGM for women ages 15 to 49 is almost 50%, but the percentages drop in the younger cohort. See Country Profile: FGM in Liberia at 9 (produced by 28TooMany, December 2014) at
http://www.refworld.org/pdfid/54bcdf574.pdf (last checked 8/21/15)

[21] See Heaner, supra n. at 472-474

[22] See Coleman, supra n. 17 at .

[23] For an interesting analysis of traditional forms of female leadership in Liberia and the barriers to it, see Filomena Chioma Steady, Women and Leadership in West Africa: Mothering the Nation and Humanizing the State 99-160 (Palgrave MacMillan 2011).

When she ran for her first term, President Sirleaf promised to reform the Constitution of Liberia. The current Constitution was adopted in 1984. While the drafting committee at the time worked hard to include public participation and to create a stable constitutional democracy, their efforts were derailed by the interference of Samuel Doe, the perpetrator of a coup who appointed himself President and rewrote important aspects of the proposed constitution. The basic structures of government follow the American model: a Presidential system with a bicameral legislature and a Supreme Court with the power of judicial review. But the current Constitution has many problems, ranging from an outdated vision of rights to a lack of guarantees for local government.

Probably the most important defect of the current Constitution is that it gives the President so much power, in so many ways, that politics in Liberia revolves entirely around the presidency. This situation makes it impossible for real political parties to form around policy issues: parties are little more than temporary vehicles for the presidential ambitions of particular persons. The President's power also means that the other branches of government are much less significant and their independence is compromised by their vulnerability to presidential interference. Finally, this centralization of power limits the potential for local democracy. The power of this office pervasively distorts politics in Liberia and keeps it in a patronage model of government.

Although it took her until her second term, in 2012, President Sirleaf finally initiated a constitutional review. I have been involved in this process since the beginning, in the capacity of advisor to the Constitution Review Committee and the Law Reform Commission of Liberia. This process was flawed in many ways. The Constitution Review Committee had a rocky start politically and did not manage to carry out many of the hoped-for projects related to public education, public consultation, and drafting of proposals. But there were some public consultations and women's groups were active in the consultations in the capital, Monrovia. In the rural areas, although women attended many of the meetings, little was done to ensure their actual participation. Given the strong cultural restrictions on

women speaking in public in many of these areas, there was a consequent lack of participation by women outside the capital. As a result, the primary input from women in this process came from women who were active in gender-based CSOs in Monrovia. [24]

With support from the Ministry for Gender, the Law Reform Commission, the CRC, and UNWomen, these women's organizations mobilized to make sure that women's concerns were heard during the process. There were four events specifically devoted to educating women about constitutional issues and determining their priorities for constitutional reform, one sponsored by each of the agencies mentioned above. At the first of these events, organized by the LRC and which I facilitated, the participants discussed the concrete issues in women's lives that they wanted to address and explored a range of constitutional mechanisms that might help with those issues, including rights provisions, electoral gender quotas, and constitutional language relating to customary law systems. At the last of these events, organized by the Ministry for Gender, the women's groups represented drew up a list of issues they wanted to see on the amendment agenda. Their priorities included making the language of the Constitution gender neutral, creating a gender quota for all branches of government, adding provisions concerning the rights of children to the Constitution, and adding protection for common law marriage to the Constitution. The women's groups formed alliances with both youth groups and CSOs representing the disabled and they worked together on some issues (for example, proposing that quotas should include the disabled as well as women).

This first stage of consultation was halted by the arrival of the Ebola crisis. For about a year, no public assemblies were possible and many government offices were not functioning. Once the Ebola crisis had abated, the President decided to reopen the constitutional review by convening a National

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[24] Interestingly, the other group of women who were active in the process were the women working with the Traditional Council, a governmental organization created to represent the interests of chiefs and their constituents.

Constitutional Convention in March of 2015 to discuss the issues that had been identified by the

Constitution Review Committee. The Committee produced a document summarizing the issues they had

heard from the public in the earlier meetings. [25] A version of this list of issues was circulated to the

participants in the Convention. These participants were chosen by the President rather than elected.

They had no power to make binding decisions: their role was simply to advise the President on which

proposed amendments to send to the Legislature. The President attempted to create a body that

represented many of the segments of Liberian society: the Convention included representatives from

women's organizations, youth organizations, religious bodies, traditional tribal bodies, academics,

national and local government officials, and many other sectoral representatives. But the particular

persons chosen had no democratic warrant from the public.

Several of the issues raised by the women's groups were on the agenda for discussion at this

meeting. The meeting deteriorated, however, when some of the participants moved to add new issues

to the agenda, particularly the proposal that the Constitution should be amended to state that Liberia is

a Christian nation. There is a significant Muslim minority in Liberia, which was vocal and eloquent in its

opposition to this proposal. Some of the women delegates to the convention supported the Christian

nation proposal. The result of this controversy was that the Convention deteriorated into a symbolic

contest. Nonetheless, the Convention voted on a number of proposals and their recommendations were

forwarded to the President. The recommendations included several of the issues on the women's

agenda, including a guarantee of political representation for women, gender neutral language in the

Constitution, protection for the rights of the disabled, a provision including the age of marriage for girls

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[25] Unfortunately, this document is much less useful than it could have been. The Committee had no empirically reliable method for determining which issues were of concern to the majority of people. It also had neither the expertise nor the inclination to provide any analysis of these issues in terms of their impact on the major challenges facing Liberia (i.e. would they actually help) or the types of constitutional choices they might entail (i.e. what would be required to address them). As a result, the summary is a rather haphazard and subjective catalogue of issues raised by the public with no analysis. Report of the Constitution Review Committee Covering the Period August 30, 2012 to March 1, 2015 on file with the author.

as 18, a guarantee of equal economic and social opportunities for women, protection for the inheritance rights of women in traditional marriages, and giving constitutional status to customary law. The proposal on recognition for common law marriages was defeated at the Convention due to conflict between women's advocates, who wanted this recognition, and some other women, who saw it as a threat to marriage. The President then wrote her own comments on those proposals – endorsing some, opposing others, and recommending that still others be dealt with through statutory change rather than constitutional amendment. Her comments were sent to the Legislature, along with proposed constitutional language for the amendments she endorsed.[26]

Under the current Constitution, everything that happened up to that point was simply advisory to the Legislature. The amendment process formally begins with a proposal in the Legislature, which had at that point just reconvened to consider whether to make such a proposal and, if so, what to include. All of the participation by women up to that point was, therefore, in fora with no power to actually affect the amendment process. Women had a limited role in the legislative process because only 10% of the Senate and 11% of the House of Representatives were women.

If the legislature had decided to propose any amendments, those amendments would have needed to pass by a 2/3 vote of both houses of the legislature in order to move forward. Under the current Constitution, the amendment process requires a one year period of public education and discussion after the positive vote in the legislature. Then a public referendum must be held. If any of the proposed amendments are ratified by 2/3 of the registered voters, then they become part of the Constitution. [27] Because of the need for a public referendum, the political elite in Liberia was unanimous

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[26] See President's Letter to the Speaker of the House of Representatives, dated August 11, 2015, on file with the author.
[27] See Constitution of the Republic of Liberia, Chap. XII, Art. 91.

in believing that the number of proposed amendments had to be kept small, in order not to confuse or overwhelm the electorate.

As a result, it is likely that any amendment process will generate no more than a handful of proposed amendments. Given the political climate in Liberia, the most likely proposals in the recent process (or any process in the near future) are amendments which would reduce the terms of office for the President (from 6 years to 4), Senators (from 9 years to 6), and Representatives (from 6 years to 4). There are some very controversial issues that could also end up on the ballot at some point, including a provision relating to dual citizenship and the Christian nation issue. Finally, there are also proposals related to strengthening local democracy by allowing County Superintendents to be elected rather than appointed by the President, as they are currently, and to create elected local legislative bodies. Unfortunately, none of the other issues related to reducing the power of the presidency were still on the agenda by the end of this process.

But among the list of things the President sent to the legislature was a constitutional gender quota, which would apply to all branches of the government. The quota issue was a priority for the women's organizations and it has been on the political agenda in Liberia for a long time. There was an ineffective quota in the first election after the peace process and there have been unsuccessful attempts to pass legislation creating a quota since then. During this recent amendment process, the quota was considered as a possible constitutional requirement. The leadership of the Senate and the Minister of Gender came to Indiana to work with us on this proposal in September of 2015 and we finalized both the language for a proposed amendment and the statutes necessary to implement it. The President Pro Tempore of the Senate, who is a man, is a very strong supporter of the quota in particular and women's rights in general. Had the legislature taken up the list of amendments, there was a real chance that these leaders could have gotten the quota approved by the legislature. There would still have been a

very significant question, however, whether the quota could have achieved approval in the public referendum that would have followed.

But we never got to find out how the quota would have fared in the referendum, because the legislature refused to consider or vote on the President's list of proposed amendments at all. The reasons for this refusal are fundamentally political. First, the legislators resented the President intruding herself into the amendment process, which they regarded as confided to the legislature under the current Constitution. They thought that any amendment proposals should start with them, rather than being suggested by the President. The legislators also were unwilling to consider amendments so late in the current President's administration – and so close to the next Presidential election. I heard frequent references to the amendment proposals as an effort by the President to weaken her office just as she was about to leave it. They saw this both as unfair ("pulling up the ladder behind her") and as reducing the power of an office many of them aspire to hold after the next election. As a result, the amendment process came to a halt in early 2016 and politics in Liberia has been focused on the next presidential election ever since.

C. Lessons

There are a number of lessons to be drawn from the experience of this amendment process in Liberia.

1. Women need to have a significant voice in actual decision making bodies, not just in public comment processes.

One of the problems in Liberia is that women's voices would have been at their weakest precisely at the point at which decisions could actually be made about the amendments: in the legislature. There was a real effort to ensure that women were part of much of the public dialogue process – in meetings in Monrovia and in the convention -- but these parts of the process had no

decision making authority. If women's participation is to be meaningful, it must be included in all stages of the amendment process, particularly those stages where actual decisions will be made.

2.   A broad cross-section of women need to be heard, not just one subset.

While some women had significant input into this amendment process, many other groups of women did not. The women who are active in CSOs in Monrovia are systematically different from the women in the villages in the hinterland, in terms of education, economic status, connection to traditional culture, and often also in terms of whether they are Americo-Liberian or Indigenous. These are differences that matter enormously in terms of people's perspectives on many of the issues facing Liberia. A small number of traditional women did have significant input, but these women were members of the Traditional Council and, as such, they had an interest in supporting the power of the chiefs. They are less likely to raise the concerns and desires for change that may be felt by other women living under the traditional institutions. In short, one important demographic that was underrepresented was traditional women who care about the customary systems but would like to see some changes in them. A system of participation needs to be designed specifically to assure that women from all different groups and with all different perspectives are heard.

3.   Presence does not equal participation.

Just because women are present does not mean that women are heard. In many settings, social mores and cultural patterns assure either that women will not speak or that they will not be listened to. As Angela Banks has pointed out in her distinction between external and internal inclusion, allowing people to participate is not the same as ensuring that their participation is meaningful.[28] In Liberia, the risk of public meetings in rural areas is that they will be dominated by the chiefs and big men. Special

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[28] See Angela M. Banks, Expanding Participation in Constitution Making: Challenges and Opportunities, 49 William & Mary L. Rev. 1043, 1062 (2008).

care is necessary to avoid this, such as holding women-only meetings, assuring that there are women leading the meetings, and structuring meetings in ways that prevent a small group of participants from monopolizing the conversation (e.g. small group exercises). Our Center designed a public consultation process for the CRC that included such safeguards, but, for political reasons, it was never implemented. Without such attention to the details of public meetings, the voices of women will be marginalized even if they are present in significant numbers.

4. Women need a chance to deliberate together and reach some consensus before presenting their views to other participants.

One of the successes of the Liberian process was that the women's organizations had the opportunity, through a series of educational and organizational meetings, to develop a concrete list of proposals on behalf of women. This allowed them to be more effective in the later stages of the process by focusing their advocacy on those issues. I believe that the gender quota proposal survived to the penultimate stage – despite some strong opposition – because it was part of this list and benefitted from this focus.

The Liberian experience also demonstrates the dangers of a lack of such prior deliberation. The issue of recognition for common law marriages was raised at the convention and a substantial number of women delegates opposed it. These women saw the proposal as a threat to the institution of marriage because it would have extended certain rights to people who live together for a significant period of time even if they have not been formally married under either state or customary law. But this proposal was supported by the women who had had the opportunity to discuss and consider it in advance because it would have helped the many women in Liberia who are not formally married and are left with nothing when their partner abandons them. Had there been more of an opportunity for discussion beforehand, there is a good chance that the women who opposed the proposal might have

been persuaded to support it. But, because the issue came up in the polarized and dysfunctional setting of the Convention, the women delegates were divided by it. It is, of course, not possible to anticipate and discuss everything in advance, but these two examples indicate that it is an advantage to do as much of it as possible.

5. Women can take advantage of political opportunities created for completely unrelated reasons and use them to push their concerns to the forefront.

There is an argument that the single most important constitutional reform for Liberia is to reduce the power of the President. It is likely that this one issue is more significant to avoiding a return to civil war than any other. But – aside from one element relating to eliminating Presidential power to appoint County Supervisors – this issue did not survive the process and was eliminated from the agenda. There are a number of reasons for this, but the primary one is political: President Sirleaf is about to finish her last term and the political class is unwilling to limit the power of the office since they are all hoping to be the next president. This is, of course, a good example of the way in which this overpowerful office distorts political life in Liberia. And, had President Sirleaf begun this process during her first term rather than her second, there is a chance this political obstacle might have been avoided. But, by the time the process reached the legislature, there was such strong opposition to any significant reduction in Presidential power that it was not even on the list for discussion.

This situation is a tragedy for Liberia, but it is also an opportunity for women to get their number one issue – the quota – on the agenda. If presidential power had been debated, given the need to focus on a small number of amendments, it is likely that no one would pay attention to the quota issue. Since presidential power was off the table, there was space and attention for this other, also very controversial issue. This was an opportunity and the advocates for women's interests made good use of it.

6. Allies within the power structure are crucial.

Much of the success of women's organizations in achieving prominence for their issues was due to the assistance of powerful allies within the government structure. In particular, the Gender Minister, the Law Reform Commission, and the President Pro Tempore of the Senate were crucial in supporting women's participation in the amendment process. The Law Reform Commission organized one of the early meetings about gender equality issues in the amendment process and also organized a trip to Indiana by the Senators and Gender Minister to work out the details of a quota plan. The Gender Minister organized the meeting at which the women's organizations developed their list of priorities for constitutional reform and she has kept those issues in the public eye throughout the process. And the President Pro Tempore of the Senate attempted to get the quota issue serious consideration in the legislature. Recruiting such allies and having a place for them within the process of representing women's interests is important to successful participation.

It would certainly be possible to take this brief list of lessons and apply some of them to other constitution making processes in other countries. Certainly, some of the lessons – such as the need for women to have an opportunity for deliberation in their own communities before bringing their agenda to the larger process – would have obvious applications in other country's processes. Other lessons, however – such as taking advantage of political opportunities that are unrelated to women's issues – might be harder to generalize from one country's experience to another. In order to make the lessons as useful as possible across a wide range of contexts, it is helpful to take a step back and think about a more general framework for designing constitution making processes that will provide women with meaningful participation. The next section offers such a framework. In the final section of the paper, I will connect this framework back to the experience in Liberia.

II.   A feminist dialogic model for women's participation in constitution making

A. Deliberative democracy and feminist theory

There is a large literature on deliberative democracy and many different strands within this school. I will be relying on a particular form of this theory that is deeply influenced by feminist thought. Deliberative democracy theorists in general argue that democracy should not be understood as a mechanism for aggregating the pre-existing preferences of citizens, but rather as a mechanism for citizens to reason together about social choices.[29] This reasoning process is intended to have both epistemic advantages (i.e. it will reach better policy results) and ethical advantages (i.e. it promotes equal respect among citizens.) [30]

This school of democratic theory has some important resonances with feminist theory. The focus on persuasion and cooperation rather than simple majority dominance, the recognition that preferences (and values) are formed in relationships with others, and the openness to thinking in terms of "we" rather than "I" all connect to ideas in feminist theory concerning maternal thinking, [31] women's forms of reasoning, [32] and the ways in which gender identity affects the formation of a bounded sense of self. [33] To put it simply: many women may find a deliberative system more congenial than a competitive or aggregative one. But feminists have been critical of deliberative democracy on at least two grounds.

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[29] Some versions of deliberative democracy focus on the common good as the goal of this reasoning, see Cass Sunstein, while others focus more on the process itself as the goal, see Seyla Benhabib. I intend to leave this question open, although part of the feminist critique has been directed at the dangers of thinking we can find a "common good" under conditions of difference and hierarchy.

[30] See Jane Mansbridge, et al. "A Systemic Approach to Deliberative Democracy," in Deliberative Systems: Deliberative Democracy at the Large Scale 1, 11-12 (John Parkinson and Jane Mansbridge, eds.)(Cambridge University Press 2012) (the authors include a third, democratic goal, which I have omitted here because I think it is implicit in the ethical goal.)

[31] See Sara Ruddick, Maternal Thinking, 6 Feminist Studies (Summer 1980); Virginia Held, Mothering versus Contract, in Beyond Self-Interest (Jane Mansbridge, ed.) (University of Chicago Press 1980).

[32] See Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982); Mary Field Belenky, et al., Women's Ways of Knowing: The Development of Self, Voice, and Mind (1987).

[33] See Nancy Chodorow, The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender (1978)

First, the idea of "deliberation" can be understood in a narrow way that privileges the forms of reasoning most closely associated with white men. Deliberation can be seen as excluding emotion and relying on traditional forms of logic rather than alternative forms of expression such as story-telling. In this form, the focus on deliberation can make it difficult for women, people of color, working class people and others to be full participants in the process. [34] Opening up the forms of communication envisioned, to include many of the types traditionally excluded from scientific reasoning, leads to a weakening of the epistemic claims for this model. [35] At the same time, it strengthens the ethical and democratic claims because it represents greater respect for differences. Since I believe that the epistemic claims need re-evaluation in any event, [36] I will follow Iris Marion Young's usage and refer to "dialogic" rather than to "deliberative" democracy as a way of capturing this broadened view of the communication involved.

Second, feminist theorists have highlighted the ways in which power imbalances inevitably disrupt the free and equal discourse on which this model of democracy relies. As Jane Mansbridge describes it, there has been a "feminist enterprise of unmasking, and guarding against, subtle forms of domination."[37] For example, if women are more likely to keep their own wants indefinite, as a strategy for avoiding conflict,[38] then part of the process must be devoted to helping people articulate their interests and desires, rather than assuming that they already know them. [39] And, if subordinated people are likely to be more silent and less honest when members of the dominant group are in the room,

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[34] For this critique, see Iris Marion Young, Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy 60-66 (Princeton University Press 1997).

[35] Cf. Seyla Benhabib (arguing for a continued focus on reason)

[36] See Susan H. Williams, Truth, Autonomy and Speech: Feminist Theory and the First Amendment (NYU Press 2004).

[37] Jane Mansbridge, Feminism and Democracy, in Feminism and Politics 148, 153 (Anne Phillips, ed.) (Oxford University Press 1998).

[38] Or even to define their wants in terms of other people's needs and desires, see Robin West, The Hedonic Lives of Women (on "giving selves").

[39] Id. at 152.

some of this process of self-exploration needs to take place in the relatively safer spaces possible within their own groups: for example, the "counterpublics" that Nancy Fraser has explored. [40] Thus, feminist versions of dialogic democracy focus on the need to be vigilant against insidious forms of domination that distort the dialogue and remind us never to be confident that we have completely vanquished them. [41]

B. Applying feminist dialogic democracy to constitution making

In thinking about applying a dialogic democracy approach to constitution making, two issues arise. The first is the problem of scale and the second is the understanding of representation. The response to these two issues requires some development of the model in particular directions. To deal with the large, nationwide scale of constitution making, the dialogic model must move toward a systems approach. To deal with the need for representation, the dialogic model must broaden and multiply the concepts of a representative. Both of these developments help the model to account for the lessons learned in Liberia. They also open up its potential to address women's participation in other, disparate settings. This section will lay out each of these issues – of scale and representation – and the developments of the theory necessary to deal with them.

1. Scale

The first issue is one of scale. Dialogic models tend to work best – and be most often used – in relatively small settings, such as juries, citizen advisory panels, and the like. In such settings, it is possible to reliably produce the kind of sustained, personal interaction that leads people to reconsider their needs and values and think together about a problem. And there has been much empirical

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[40] Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy in Habermas and the Public Sphere at 123(Craig Calhoun, ed.) (MIT Press 1992)

[41] See Susan Williams, Equality, Representation and Challenge to Hierarchy: Justifying Electoral Quotas for Women in Constituting Equality: Gender Equality and Comparative Constitutional Law 153 (Susan H. Williams, ed.) (Cambridge University Press 2009)

evidence gathered about the kinds of dialogic structures and practices that help with that project. [42]

Meaningful dialogue may become less possible, however, as the size of the group increases beyond a

certain point. So how is such an approach useful in dealing with the project of making a constitution, a

project which should ideally include all or most of the citizens in a nation?

No one dialogic body will work on a scale like this, so it becomes necessary to think instead

about a dialogic system: an interlocking network of multiple spaces for dialogue in which the different

parts relate to each other and all contribute to the outcome. In their book, *Deliberative Systems*, Jane

Mansbridge and her co-authors outline this type of approach. They suggest that a systems approach has

many advantages over trying to find a single, ideal model for deliberation. First, each public arena or

institution where dialogue will take place will have its own strengths and weaknesses: having multiple

locations allows the strengths of one venue to make up for the deficiencies of another. [43] In addition, a

systemic model allows for these different forms of dialogue to be integrated so that they all contribute

to the outcome and provides the opportunity to build checks and balances into the system. Finally, a

systemic model allows for dynamism: the specific elements and their relationships may change over

time without disrupting the whole system. [44] Thus, when dialogic democracy is seen as composed of a

system of interlocking publics, it can address problems or projects at the level of a nation with greater

resiliency and effectiveness than any one form of deliberation would afford.

2. Representation

The second issue concerns representation. The traditional understanding of representation sees

the representative as the agent of the citizen. The assumption is that direct participation would be the

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[42] See, e.g., Mansbridge, Feminism and Democracy, supra n. at 151 (on the important role played by trained leaders in ensuring that all members are heard.)
[43] Deliberative Systems, supra n. at 3.
[44] Id. at 4-5.

best way for a citizen to register his or her views, but, where that is not possible for practical reasons,

representation is a second-best alternative. The goal, then, is for the representative to bring the

constituent's pre-existing preferences to bear on the decision making process. Sometimes this is

understood in terms of a "promissory" model: the representative promises to deliver on certain issues

and the citizen votes for the representative whose promises match the citizen's own interests or

values.[45]

This understanding of representation has recently come under fire from both empirical and

theoretical directions. Empirically, it seems that the traditional model has an extremely limited capacity

to explain actual political behavior. In fact, representatives and citizens both often understand this

relationship in a number of different ways. Jane Mansbridge has identified three alternative models:

anticipatory (where representatives act not on a prior promise but on their prediction about what voters

at the next election will support), gyroscopic (in which voters choose representatives whose own

internal moral and policy commitments will lead them to act on the voter's values and interests), and

surrogate representation (in which a representative feels obligations to represent people who are not

technically part of his or her constituency). [46] Nadia Urbinati argues for representation as advocacy:

where representatives are engaged in a process of advocating for the views of a particular group. [47] And

Melissa Williams has adopted the model of representation as mediation. She uses the experience of

marginalized groups to illustrate the need for representatives to mediate in several different ways: (1) to

mediate the dynamics of legislative decision-making by providing voice for citizens; (2) to mediate the

relationship between the representative and the constituent by establishing trust; and (3) to mediate

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[45] See Jane Mansbridge, Rethinking Representation, 97 Am. Pol. Sci. Rev. 515, 515 (Nov. 2003). On this model, it should not matter whether women are represented by other women or by men; all that matters is that the representative has made a commitment to promote the views that women want promoted and carries through on that commitment. See Anne Phillips, The Politics of Presence (1995).
[46] See id. at 515.
[47] Nadia Urbinati, Representation as Advocacy, 28(6) Pol. Theory 758 9Dec. 2000).

the basis for aggregating citizens into representable constituencies by using memory to create the groups represented.[48] While these alternative models have many differences, they share a connection to dialogic democracy: they all require a process of active and continuous communication between representative and citizen involving much more than a simple election. Indeed, these models require an ongoing dialogue in which identity, interests, preferences, values and goals – far from being fixed or given -- are all shaped in the relationship between representative and citizen.[49] And they endorse the idea that multiple forms of representation may be necessary to adequately capture the views and perspectives of all citizens.[50]

Once this dialogic element is added to the conception of representation, it becomes plain that the process of representation, far from being a second-best, may have inherent value. Through the necessity of this dialogue, representation makes room for deliberation. [51] It reduces the likelihood of the deterioration that sometimes accompanies direct democracy, when a group is simply swept away by the emotions generated by conflict over some issue. Representation, when it includes this dialogic element, may be an important mechanism for encouraging and structuring the dialogue that is necessary to this form of democracy.

3. The application to constitution making

The systemic approach to deliberative democracy and the rethinking of representation in the current political theory literature are addressed to governance within an existing system rather than to the process of constitution making. But my argument here is that their insights apply in the constitution

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[48] Melissa Williams,Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation, (Princeton University Press 1998).
[49] See Iris Marion Young, Inclusion and Democracy (Oxford University Press 2000)
[50] See James Bohman, Representation in the Deliberative System, in Deliberative Systems at 74.
[51] See Urbinati, supra n. at 760; John Parkinson, Democratizing Deliberative Systems in Deliberative Systems, supra n. at 151, 164 ("responsiveness as a matter of mutual co-creation of perspectives and problems between citizens and representatives.")

making context as well. A dialogic model for participation – as opposed to a preference aggregation

model – is better for understanding the requirements for a successful constitution making process.

Perhaps even more than in the case of ordinary policy making, writing a constitution must be a process

in which people listen carefully to each other and search for answers together. An orientation toward

this project – rather than an orientation to promote the interests or preferences of one's own group

regardless of the impact on others – is crucial to the success of a constitution, both in terms of the

substance of the document that will be produced and in terms of the legitimacy of the project.

Applying the dialogic approach to constitution making requires, however, a systemic vision. No

one dialogic process, no matter how inclusive or democratic, will be sufficient for guaranteeing women's

participation in constitution making. Local public meetings have their strengths and weaknesses, as do

constituent assemblies (however constituted), as do legislatures, as do the technological innovations of

recent years (e.g. crowd-sourcing constitutions). No one of these mechanisms is ever sufficient to assure

that women have had a meaningful voice in constitution making. The challenge is to design a

constitution making process that works as a system to provide real participation for women (and all

others.)

Moreover, in order to design such a system, we need to provide for these multiple forms of

representation. Women, in particular, need the new forms of representation that are made manifest by

a more dialogic vision of democracy because the traditional form of representation is especially

inadequate for a group with their characteristics. First, women are a group that often includes inchoate

and conflicting interests, so they will sometimes fail to have a clear and consistent sense of their

interests that would allow them to choose an agent based on them. They will, on the contrary, need an

opportunity to work with each other and with their representative to think through what their interests

are in many cases (i.e. they may need representatives who are advocates or mediators). Second, women

are not geographically concentrated and so the traditional vision of a representative as having a

geographical constituency will often fail to provide them with adequate representation (i.e. they may often need surrogate representation). And third, women suffer from historical and continuing forms of disadvantage that will make it difficult for them to compete with other, more privileged social groups for the attention and commitment of a representative (i.e. they may need gyroscopic representation). Thus, the newer models of representation are necessary to provide adequate representation for women. Moreover, no one form of representation – not even any one of the new forms – will adequately capture the range and depth of women's perspectives. The hope is that, by combining multiple forms of representation, and carefully balancing them, we can create a system which, as a whole, provides for women's meaningful participation.

III.   What the model tells us about the lessons in Liberia

The lessons learned in Liberia are best understood through the framework of this feminist dialogic approach. Both the successes and the failures of the Liberian experience are captured by this model. Moreover, the model suggests some concrete mechanisms for designing future amendment processes in Liberia in order to be more successful.

First, many of the strengths and weaknesses of the Liberian process concern its ability to provide a dialogic forum for women. For example, one of the primary weaknesses of the recent process was that, because of the lack of women in the legislature, women's voices were missing in the stage of the amendment process where decisions could finally be made. The process in the legislature was a dialogue that lacked both necessary information (the epistemic goal) and necessary legitimacy (the moral goal) because it lacked women. Another weakness was the failure to structure the Convention in such a way as to encourage real deliberation rather than political grandstanding. If true dialogue is the goal, there is a need for trained facilitators and for procedures and practices that open the participants to hearing each other and discourage them from hardening their positions. The failures of the

Convention were failures of dialogue. On the other hand, one of the strengths of the process was the provision of opportunities for women to reflect on and formulate their interests and priorities in relatively safe fora before presenting them to the National Convention. These counterpublics had a very positive effect on the ability of women to promote their agenda. Thinking about the overall process as a dialogic one helps to explain why these aspects are significant.

A systemic approach is also helpful in thinking about the experience in Liberia. The systemic approach requires that we register the weakness of each dialogic mechanism and try to compensate for it elsewhere in the system. So, if educated women in the capital were the primary ones heard in the official fora organized by the government agencies and UNWomen, then it was necessary to go out into the counties to hear from women with different perspectives. And, if women were not speaking up in the mixed gatherings in the counties, then it was necessary to think about ways of structuring those meetings so as to facilitate the participation of marginalized groups (including youth and the disabled, as well as women.) A feminist dialogic focus asks us to take seriously the internal barriers that keep many of those present from fully participating. A systemic focus makes it clear that we don't necessarily need to have one venue that works perfectly for all groups; we can have multiple venues as long as everyone has a real chance to participate.

But the systemic focus also calls our attention to the need to ensure that these various venues for dialogue have a real impact on the outcome: the different parts of the system must check and balance each other. A systems approach allows for deliberation or dialogue in settings which make authoritative decisions and also in ones that don't: it is important to have both formal and informal arenas for dialogue which are not directly part of the decision process. [52] At the same time, it is necessary to ensure that the dialogue in all of these venues affects the outcome, particularly if we are

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[52] Id. at 9.

relying on those venues to correct the dialogic defects in later (perhaps more authoritative) fora. Indeed, the different aspects of the system should act as checks and balances on each other, which is only possible if the less formal venues are, nonetheless, powerful enough to constrain the choices of the more formal ones. One of the ways to do this is to create a public consultation process that has sufficient empirical robustness to generate data about what different groups of people want or care about. That data, if made public, can then have a constraining effect on decision makers later in the process. The process that our Center designed for the CRC was intended to provide this sort of data. In the absence of such data, it is unlikely that the earlier (less formal) parts of the process will have a significant impact on the later (more formal) ones.

The dynamism of the systems approach also helps us to think about the lesson in Liberia about the usefulness of capitalizing on political opportunities that are presented by factors independent of women's actions or interests (such as the political reasons for the failure to address presidential power in this amendment process.) One of the reasons that women were able to make use of this opportunity is because the system of dialogue surrounding the amendment process was fluid and allowed issues to be debated in a variety of venues, with different topics rising to the top of the agenda at different times. If the agenda had been locked in too early, this would not have been possible. While the uncertainty about the exact nature and timing of the process may have had other costs, this flexibility is an advantage and worth preserving in future amendment processes.

Finally, the issue of representation helps us to understand a number of the issues raised in Liberia. First, the representatives chosen by the President for the Convention were a failure to take seriously the need for a continuing dialogic relationship between the citizens and representatives. The point is not that they had to be elected, but they had to come to the Convention in a way that reinforced their connection to their constituents rather than simply as the individuals chosen by the President. The focus on representation also helps us to understand the roles, not only of the leaders of

women's groups, but also of some of the elite allies of those groups in Liberia. The Minister of Gender has played a critical role as both mediator and advocate in this process. The President Pro Tempore of the Senate is acting as a surrogate representative (for women throughout the country, rather than only in his County) and also as a traditional representative (taking the previously expressed wishes of a constituency to the legislature). These models of representation open up ways of recruiting powerful allies who do not stand in the traditional role of a political representative. Focusing on these models might lead us to think about other ways to structure participation so as to facilitate the formation of such representatives.

In conclusion, the practical lessons learned in Liberia point to the usefulness of a framework for women's participation based on a feminist version of a systemic, dialogic democracy theory with a broad vision of representation. This framework requires us to look at the constitution making process as a system for promoting dialogue. We need to see the system as a whole and to try to design a variety of venues for participation which work together to create effective opportunities for women's participation. In coming up with this design, we need to provide for a range of forms of representation and the dialogic connections necessary to make them work. This approach will help keep us attuned to the many ways in which dialogue can fail and the need to be vigilant against the reassertion of hierarchy. At the same time, it offers a hope of real participation for women in one of the most fundamental of social decisions: the adoption or amendment of a constitution.